HIERARCHY IN INTERNATIONAL LAW

The Place of Human Rights

Edited by Erika de Wet and Jure Vidmar

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Erika De Wet and Jure Vidmar

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It is our intention that the book is current as of 25 July 2011.

Erika de Wet and Jure Vidmar

Pretoria and Oxford, August 2011 **(p. vi)**

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List of Abbreviations

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- AB

  Appellate Body (World Trade Organization)
- ACHR

  American Convention on Human Rights
- ADB

  African Development Bank
- ASR

  Articles on State Responsibility
- ATCA

  Alien Torts Claims Act
- BIT

  Bilateral Investment Treaty
- CA

  Court of Appeal (United Kingdom)
- CAT

  United Nations Committee Against Torture
- CEDAW

Convention on the Elimination of All Forms of Discrimination Against Women

- CFI

  Court of First Instance (European Communities)
- CITES

  Convention on International Trade in Endangered Species
- CKGR

  Central Kgalagadi Game Reserve
- CRC

  Convention on the Rights of the Child
- DSU

  Dispute Settlement Understanding
- EC

  European Community/Communities
- ECHR

  European Convention on Human Rights
- ECtHR

  European Court of Human Rights
- ECJ

  Court of Justice of the European Communities/Union
- ECOSOC

  Economic and Social Council
- ECR

  European Court Reports
- ESA

  European Space Agency
- ESC Committee

  Committee on Economic, Social and Cultural Rights
- EU

European Union

- FAO

  Food and Agriculture Organization
- FSIA

  Foreign State Immunity Act
- FTA

  Free Trade Agreement
- GAOR

  General Assembly Official Records
- GATS

  General Agreement on Trade in Services
- GATT

  General Agreement on Tariffs and Trade
- GC

  Grand Chamber
- GSP

  General System of Preferences
- HC

  High Court (United Kingdom)
- HL

  House of Lords (United Kingdom)
- HM

  Her Majesty
- HRC

  Human Rights Committee
- IACHR

  Inter-American Commission on Human Rights **(p. xxx)**
- IACtHR

  Inter-American Court of Human Rights

- ICC

  International Criminal Court
- ICCPR

  International Covenant on Civil and Political Rights
- ICESCR

  International Covenant on Economic, Social and Cultural Rights
- ICJ

  International Court of Justice
- ICSID

  International Centre for Settlement of Investment Disputes
- ICTR

  International Criminal Tribunal for Rwanda
- ICTY

  International Criminal Tribunal for the former Yugoslavia
- IDI

  Institut de droit international
- ILC

  International Law Commission
- ILDC

  International Law in Domestic Courts
- ILO

  International Labour Organization
- ILOAT

  International Labour Organization Administrative Tribunal
- ILRM

  Irish Law Reports Monthly
- IO

  International Organization
- IOC

International Olive Council

- IPRs

  Intellectual Property Rights

- MEA

  Multilateral Environmental Agreement

- MFN

  Most-Favoured Nation

- NAFTA

  North American Free Trade Agreement

- NATO

  North Atlantic Treaty Organization

- NEMA

  National Environmental Management Act

- NGO

  Non-governmental Organization

- NJ

  Nederlandse Jurisprudentie (Dutch Law Reports)

- OAU

  Organization of African Unity

- OIC

  Organization of Islamic Conference

- OMPI

  Organisation des Modjahedines du peuple d'Iran

- PCIJ

  Permanent Court of International Justice

- RdC

  Recueil des Cours de l'Academie

- RIAA

  Reports of International Arbitral Awards

- RJD

  Reports of Judgments and Decisions
- RTA

  Regional Trade Agreement
- SC

  Supreme Court (United Kingdom)
- SCR

  Security Council Resolution
- SCSL

  Special Court for Sierra Leone
- S Ct

  Supreme Court (The Netherlands)
- SIA

  State Immunity Act
- SOFA

  Status of Forces Agreement
- STL

  Special Tribunal for Lebanon
- TRIPs

  Agreement on Trade-Related Aspects of Intellectual Property Rights
- TVPA

  Torture Victim Protection Act **(p. xxxi)**
- UDHR

  Universal Declaration of Human Rights
- UK

  United Kingdom
- UN

  United Nations
- UNAT

United Nations Appeals Tribunal

- UNC

  United Nations Charter

- UNCIO

  United Nations Conference on International Organization

- UNCITRAL

  United Nations Commission on International Trade Law

- UNCSI

  United Nations Convention on Jurisdictional Immunities of States and Their Property

- UNDT

  United Nations Dispute Tribunal

- UNESCO

  United Nations Educational, Scientific and Cultural Organization

- UNFICYP

  United Nations Peacekeeping Force in Cyprus

- US

  United States

- VCLT

  Vienna Convention on the Law of Treaties

- WHO

  World Health Organization

- WTO

  World Trade Organization **(p. xxxii)**

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Introduction

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1. Background and purpose

Domestic legal systems are hierarchical.[1] Some norms are of a constitutional nature and thus hierarchically superior to ordinary ones.[2] The specific norms that are thereby given a higher hierarchical standing depend on the value system of a certain constitutional polity.[3] Domestic legal systems also feature a comprehensive judicial system, the task of which is to enforce and interpret legal norms as well as resolve conflicts between them.[4]

International law has traditionally been regarded as a horizontal system of legal norms.[5] Moreover, the function of the judiciary in the international legal order, which lacks a centralized system of enforcement, is limited in comparison to the domestic level. Not only does this imply that the enforcement of international law remains a decentralized process, but also that the international legal order lacks a judicial mechanism for consistent interpretation and resolution of norm conflicts.

A norm conflict in international law can be understood in a narrow or a broad sense. A narrow definition of norm conflict describes those situations where giving effect to one international obligation unavoidably leads to the breach of another obligation or right.[6] A broad definition of norm conflict refers to situations where **(p. 2)** compliance with an obligation under international law does not necessarily lead to a breach of another norm—which can give rise to either a right or an obligation—but rather to its limitation, or even a limitation of all the rights and/or obligations at stake.[7] Broad conflicts can often be resolved through harmonious interpretation, by means of

which the different rights and/or obligations are balanced against one another.[8] This type of balancingis sometimes also referred to as regime interaction. In addition, some authors argue that conflicts which can be resolved through interpretation are only apparent conflicts, as opposed to genuine ones. In other words, they regard as genuine only those conflicts which remain irresolvable despite attempts to apply methods of harmonious interpretation.[9] It should be noted that the editors of this book regard the notion of an apparent conflict as a synonym for broad conflict.

This book examines norm conflicts between human rights obligations and other areas of international law, as well as how such conflicts are dealt with by judicial organs. Judicial practice indicates that conflicts tend to arise between human rights obligations and certain other categories of international obligations, particularly immunities; extradition and refoulement; collective security; trade and investment; and environmental law. Sometimes conflict also arises *between* different human rights obligations This can be described as an intra-regime conflict.

The book considers, in particular, whether judicial organs tend to resolve norm conflicts in a manner that favours human rights obligations. If this were the case, it would lend support to the doctrinal argument which submits that the international legal order is moving towards a vertical legal system, with human rights at its apex.[10] Evidence of a human rights-based hierarchy would, for example, be present where a court (in the case of a narrow normative conflict) gave preference to a human rights obligation while not giving effect to another international obligation, despite the **(p. 3)** fact that the latter constituted *lex posterior* (*lex posterior derogat legi priori*) or *lex specialis* (*lex specialis derogat legi generali*). Similarly, a human rights-based hierarchy could be evidenced where a court resolved a broad norm conflict through a human rights-friendly interpretation that resulted in a considerable limitation of the scope of the conflicting right or obligation arising under another norm of international law.

Doctrinally, the idea of hierarchical supremacy may find support in the concept of peremptory norms, or *jus cogens*. The special, ie peremptory, character of these norms suggests that they are not just ordinary norms.[11] Indeed, Article 53 of the Vienna Convention on the Law of Treaties (VCLT) defines *jus cogens* as a norm of ‘general international law [which is] accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be

modified only by a subsequent norm of general international law having the same character'.[12]

This definition reflects the idea that the peremptory law is not just ordinary law from which states are allowed to derogate or out of which they may contract. The concept, however, invokes several difficult questions, including how the peremptory norm is identified and the scope of the peremptory norms.[13] Moreover, as Dinah Shelton argues: 'The concept of *jus cogens* has been invoked largely outside its original context in the law of treaties and with only limited impact.'[14]

Indeed, the norms of *jus cogens* are frequently invoked as hierarchically superior law by litigators in judicial proceedings, but courts have been reluctant to accept the wide interpretation of hierarchical superiority of the norms of this character.[15] For example, it is not generally accepted that the prohibition of torture would lift the immunity of a state or of an individual responsible for an alleged act of torture. This book will thus, inter alia, consider judicial practice in regard to the understanding of and the limits to the idea of *jus cogens* as being hierarchically superior law.

There is some ambiguity as to exactly which norms have acquired peremptory character. However, of the commonly accepted ones, the vast majority belong to the body of human rights law.[16] This may suggest that at least certain human rights are part of hierarchically superior law. Even so, several problems are associated with the concept of hierarchically superior norms in international law. As Crawford puts it:

> **(p. 4)** Part of the problem has been the mistaken belief that the invocation of a norm as hierarchically superior or more fundamental avoids the need to deal with issues of its scope and application. International law is a system: treaties may contradict each other, but the function of lawyers is to seek a resolution of conflicts, not simply to display them. Even fundamental norms have to be applied in the context of the legal system as a whole. For example, there is a difference between jurisdiction and substance, a difference between legal interest to raise an issue…and the substantive consequences that should follow from a breach.[17]

This book departs from the premise that the case law of domestic, regional, supranational, and international courts can shed significant light on these issues. They can illustrate the extent to which particular norms are acknowledged as being hierarchically superior in the international legal

order, as well as the extent to which such a privileged status contributes to the resolution of norm conflicts. In a decentralized international legal system, the resolution of norm conflicts in international law is not an exclusive prerogative of international courts. Conceptually, non-international courts are not excluded from the role of developers of international law. Indeed, Article 38(1)(d) of the Statute of the International Court of Justice (ICJ) specifies judicial decisions as a subsidiary source of international law.[18] It is noteworthy that this is not qualified as '*international* judicial decisions', but judicial decisions in general. The formulation thus also covers domestic and regional judicial bodies.

Moreover, domestic courts are organs of states, and their practice counts as state practice, which is relevant for the development of norms of customary international law.[19] In the absence of a fully fledged centralized judiciary within the international legal order, domestic and regional courts increasingly play a key role in the enforcement and balancing of various international obligations in an era where international regulation of various issues has become commonplace.

This particular focus on the role of judicial bodies in determining the scope of a human rights-based hierarchy in international law, as well as its impact on norm conflict resolution, is of significant added value because it constitutes the first comprehensive, cross-cutting study of its kind. Other existing studies of this type tend to focus on only one particular inter-regime conflict, such as those between immunities and human rights, or trade or investment obligations and human rights.[20] This book also has a unique inductive approach that draws heavily on the practice of international, regional, and domestic courts. This focus on the practice of courts **(p. 5)** significantly complements existing studies which primarily concentrate on the doctrinal debate pertaining to hierarchy in international law.

2. Methodology

The methodology reflects an emphasis on the role of domestic courts and international (functional) tribunals in balancing human rights obligations against other norms under international law. As mentioned above, these include, in particular, obligations in the areas of immunities; extradition and refoulement; international peace and security; trade and investment; and environmental law. A survey of databases, including the more than 800 decisions already published in the *Oxford Reports on International Law in Domestic Courts/ILDC Online*,[21] indicates that these areas have generated

the most jurisprudence in relation to norm conflicts in public international law.[22]

The case law relevant for this book includes that of international, internationalized and supranational regional courts and tribunals (including criminal and arbitral), international quasi-judicial bodies, and domestic courts. International and supranational jurisprudence not only supplement or serve as contrast to that of domestic courts, but can also provide for pivotal case law which is followed by domestic courts. International jurisprudence is therefore capable of setting the foundations of a doctrine which is subsequently developed by domestic courts. Where centralized regional human rights jurisprudence exists, domestic and other judicial bodies in the region may—despite their broader or different functional mandate—be more likely to adopt the human rights preference. Seminal decisions of human rights courts in the area under discussion will therefore also be taken into account.

Especially important for this book are the decisions of judicial bodies other than human rights bodies, including domestic courts. This relates to the fact that the paradigm within which these judicial bodies operate makes them a particularly relevant indicator for determining the hierarchical relationship between human rights and other international obligations. Whereas it may be expected that the particular functional paradigm of international human rights bodies such as the European Court of Human Rights or the United Nations Human Rights Committee could result in attributing a higher status to human rights obligations vis-à-vis other international obligations, the same could not necessarily be said of other international judicial bodies or national courts. Other international judicial bodies have a different functional emphasis from human rights bodies, while national courts for their part function within a much broader paradigm. If these judicial bodies were **(p. 6)** nonetheless consistently to allow (certain) international human rights obligations to trump other international norms in case of conflict, this would be evidence of an increasingly general recognition of the hierarchically superior status of the international human rights standards, as well as the values underpinning them.

The substantive chapters further devote close scrutiny to the techniques which courts and other judicial bodies deploy when engaging in norm conflict resolution. First, it is possible that courts and other judicial bodies would prefer to circumvent norm conflicts entirely, and therefore neither resolve the conflict in question, nor address the issue of a potential human rights

hierarchy.[23] In other instances it would be possible to avoid open conflict by means of harmonious interpretation that would limit either one or all of the rights and/or obligations at issue, but without complete frustration of any of them. The more even-handed the balancing act of the court, the less likely it would be that it regarded any one of the norms in question as hierarchically superior to the others.

Moreover, even in instances where a particular norm conflict is resolved in favour of a human rights obligation, this would not necessarily be evidence of its hierarchical superiority within international law. In some instances courts may merely be resorting to classic conflict rules that were not intended to establish a norm hierarchy. For example, the principles of *lex posterior* and *lex specialis* do not connote any particular substantive superiority of the obligation that prevails.

The authors of the following chapters will examine the extent to which judicial practice distinguishes between the application of such conflict rules (also contained in Article 30 of the VCLT of 1969) and a norm hierarchy pertaining to the nature of the human rights obligation at stake. This also implies a consideration of whether, and to what extent, the conflict rules themselves could under certain circumstances be indicative of the hierarchical quality of a particular obligation. For example, it is debatable whether Article 103 of the United Nations Charter constitutes a conflict rule, or whether it elevates obligations pertaining to international peace and security to a hierarchically superior level.[24]

In those instances where courts do indeed resolve a norm conflict on the basis of the special nature or status of the human rights norm in question, it is also important to examine whether the court is basing its judgment on human rights guaranteed in the domestic legal order, a regional (human rights) treaty, an international (universal) human rights treaty, or any combination of these. This question is relevant for determining the legitimacy of a human rights-based hierarchy in international law. Legitimacy in this sense refers to whether the norm hierarchy is underpinned by truly universal values that are representative of the different domestic legal orders on which it is impacting.[25]

Where a domestic or regional court resolves the norm conflict on the basis of the hierarchical standing of human rights in a particular domestic or regional legal order, the human rights hierarchy in question will most likely not be able to claim universal legitimacy, unless it can be shown to overlap in terms of substance with **(p. 7)** those values concretized in universal human rights

instruments. The practice of regional and domestic courts around the world can serve as a tangible manifestation of such an overlap. If their treatment of norm conflicts were to reveal a consistent pattern of recognition of the normative superiority of (some) international human rights norms which are, inter alia, recognized in universal human rights treaties, it would reflect a cross-cutting underlying consensus about the importance of the values underpinning these norms.

This also leads to the question of whether domestic or regional courts are the legitimate authority to decide on the issues of norm hierarchy in international law, as they are by definition likely to apply the domestic or regional value system when reaching their decisions. The issue of legitimacy of domestic courts also comes up in relation to judicial review of Security Council resolutions adopted under Chapter VII of the UN Charter. The question arises whether a domestic court would be a legitimate authority to pronounce that the Security Council has violated a hierarchically superior norm in the international legal order.

Finally, it is worth noting that the book will avoid the division of states and societies along liberal/non-liberal and Western/non-Western lines. In the absence of clear and objective criteria, such divisions are often a product of stereotypes and self-image. For example, would references to the jurisprudence of the courts of Latin America, South Africa, and new members of the European Union be considered jurisprudence of Western and liberal states? How about case law from Croatia, Serbia, Turkey, and Ukraine, to name a few other potentially disputable examples? The answers to these questions would be inherently subjective and not uniform. The categories liberal/non-liberal and Western/non-Western are not necessarily homogenous. The practice of the courts and societal values in the so-called liberal and Western states can differ, as can the practice of the courts and societal values of the so-called non-liberal and non-Western states. After all, *Judge v Canada* was about extradition from Canada to the United States,[26] both of which are considered to be liberal and Western states, but have very different views about the death penalty.

At the same time, it may well be that the case law which most prominently upholds hierarchical supremacy of human rights norms within international law comes from Europe and North America. At least in Europe, this may be the consequence of the strong role of supranational courts. It is therefore much more useful to categorize states on the basis of whether they are part

of a broader regional legal system, rather than a subjective determination of whether they belong to the liberal and/or Western legal tradition.

In sum, the authors of the respective substantive chapters will be guided by five questions:

1. Are the inter-regime norm conflicts of a narrow or a broad nature, or can both types of conflict be identified? Can intra-regime norm conflicts (amongst human rights norms themselves) also be identified? **(p. 8)**
2. Do judicial decisions resolve the norm conflicts by means of acknowledging a hierarchy of norms? If so, is it possible to determine that the values underpinning a particular norm, such as a *jus cogens* obligation, play a decisive role?
3. If not, do judicial bodies resolve the norm conflicts through means of conflict avoidance techniques? If so, which ones?
4. If not, do judicial bodies resolve the norm conflicts through classic conflict rules, such as *lex posterior* or *lex specialis*?
5. What is or should be the role of international human rights standards in the resolution of norm conflicts in the particular sub-area of international law in question?

3. Chapter overview

The overarching chapter is written by Jure Vidmar. The contribution examines the notion of a hierarchical international legal order whereby (certain) human rights norms are elevated to a hierarchically superior level. Although international law has developed as a horizontal system of norms, the notion of hierarchically superior norms is not new. The idea is most prominently reflected in the concept of *jus cogens*, which may be described as a substantive hierarchy in international law. Since most of the generally accepted *jus cogens* norms are of a human rights nature, a strong argument can be made that at least certain human rights could be put at the top of the pyramid of international legal norms.

Yet Vidmar shows that it is questionable whether the *jus cogens*-based substantive norm hierarchy is more than theoretical. Because of the rather narrow interpretation of the scope of *jus cogens* norms in judicial practice, narrow conflicts with norms of this character are very unlikely to emerge in reality. This problem is more thoroughly explored in subsequent substantive

chapters, with references to the case law of various courts and judicial bodies. Moreover, the overarching contribution questions whether the concept of hierarchy in international law should be associated exclusively with *jus cogens*. In this vein, Vidmar discusses other possible instances of hierarchy. Among these are obligations *erga omnes* and Article 103 of the UN Charter. The latter may be reflective of institutional hierarchy in international law.

The overarching chapter is followed by the first substantive contribution, written by Antonios Tzanakopoulos. His chapter is concerned with the conflict between human rights and measures adopted by the UN Security Council. When the Security Council imposes binding obligations through decisions adopted under Chapter VII of the UN Charter, it may impact on internationally protected human rights and the corresponding obligations of UN member states to respect those rights. Member states are then faced with potentially conflicting obligations. The contribution surveys the respective position of Security Council measures and human rights obligations in the (emergent) normative hierarchy of international law. Tzanakopoulos identifies the nature of normative conflicts that arise under **(p. 9)** obligations created by the Security Council and analyses state practice in order to establish whether Article 103 of the UN Charter is a conflict or a hierarchy rule, and whether human rights obligations are subordinate to Security Council measures.

Riccardo Pavoni discusses conflicts between human rights and immunities of states and international organizations. Drawing on extensive judicial practice, Pavoni argues that the relationship between human rights and the immunities of states and international organizations may be conceptualized as a tension between competing rules which can be resolved by means of interpretation and accommodation, or circumvented through conflict avoidance techniques. The contribution particularly advocates an ‘alternative-remedies test’ as a reasonable balance between the values and interests underlying the competing rules at stake. Pavoni takes the position that *jus cogens* may well play a role as an important consideration to be taken into account in this balancing process. Moreover, he argues that current and evolving practice in this field lends support to the emergence of a de facto human rights-based normative hierarchy in international law. This contribution is lengthier than the others: this is due to the breadth of the topic (which covers both the immunity of states and international organizations) as well as the vast amount of available case law.

The contribution by Philippa Webb is concerned with immunities of state officials and considers the norm conflicts that arise when a state official is accused of serious human rights violations in the court of another state. In such a situation, the human rights norm militates in favour of holding individuals accountable for violations, regardless of their position. However, there is also the norm underpinning the law on immunity, which favours respecting sovereign equality and ensuring the effective performance of individuals who act on behalf of states.

The contribution draws on the case law of various domestic and international jurisdictions, ranging from the famous *Arrest Warrant* judgment (ICJ) and *Pinochet (No 3)* (United Kingdom) to recent cases from courts in Asia, Latin America, Africa, Europe, and the United States. It identifies the general circumstances in which courts decide that human rights prevail over immunities, and vice versa. In so doing, the contribution reveals the various conflict avoidance techniques employed by judges, including the making of distinctions between procedure and substance, and between civil and criminal proceedings. Webb ultimately points out the inconsistent treatment of the concept of *jus cogens* and questions whether the case law really indicates the emergence of a human rights-based hierarchy within this particular area of international law.

The contribution by Harmen van der Wilt turns to the conflict between human rights and extradition law. This kind of conflict emerges whenever the requested person faces a real risk that his or her fundamental rights will be violated after he or she has been extradited. Although human rights do not generally prevail over obligations stemming from extradition treaties, supranational human rights bodies and domestic courts tend to agree that obligations to extradite should yield to substantiated concerns that the requested person would probably be tortured in the requesting state. However, Van der Wilt shows that courts apply several avoidance **(p. 10)** techniques in order to reconcile the conflicting obligations. Indeed, courts have invoked the principle of confidence or the rule of non-inquiry to sustain their reluctance to assess the requesting state's human rights record.

Moreover, Van der Wilt argues that the concept of assurances in the law governing extradition may also be seen as a conflict avoidance technique. In this vein, the contribution shows that assurances by the requesting state that human rights will be observed, or properly remedied whenever infringed, tend to alleviate initial extradition concerns of the requested states. Further, the high thresholds of evidence that are required may impede the requested

person from convincing the courts that his or her life or physical integrity is at peril in the requesting state. According to Van der Wilt, the application of such techniques entails a certain risk, as it may obscure the fact that a risk of flagrant human rights violations is sometimes imminent and real.

Geoff Gilbert discusses the conflict between human rights and expulsion in the context of international refugee law and considers the constraints placed upon states by international human rights law with respect to their right to control entry and deportation. While human rights bodies regularly reiterate the right of states to control who can enter and reside in their territory, the Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol apparently provide an international exception. For states parties, there is an obligation not to refoule a person who qualifies as a refugee.

Nonetheless, this constraint on states' sovereign powers gives rise to several issues pertaining to hierarchies and regime interaction. For example, there is no treaty body established by the 1951 Convention to determine the rights of the applicant for refugee status where the state seeks to deny them, so questions about the meaning of the treaty are determined in national courts. Moreover, the 1951 Convention provides for a status for persons in international law and for exclusion of persons from that status. It is not a human rights regime for all persons forcibly displaced across an international border. Instead, it protects those falling within the definition of a refugee, and that definition has an exclusion clause for those not worthy of protection (see Articles 1F and 33.2 of the Refugee Convention). In interpreting the exclusion clauses, the contribution takes into account other relevant international treaties that provide guarantees against deportation, such as international human rights law. Gilbert argues that there arises regime interaction between these various international instruments, while a clear human rights hierarchy is not yet emerging.

The chapter by Dinah Shelton examines the jurisprudence of domestic and international courts dealing with the tensions between obligations pertaining to human rights and environmental protection. Environmental protection requires controlling human activities that unsustainably use natural resources, disrupt natural processes, or pollute the air, water, and soil upon which life depends. Like many other types of governmental regulation, measures of environmental protection almost inevitably restrict the scope of individual freedom to act, as well as have the potential to limit the enjoyment of human rights guaranteed by international or domestic law. This may result in norm conflicts between, on the one **(p. 11)** hand,

legislation designed to protect nature and, on the other, constitutional or treaty-based human rights, especially those concerning property rights, indigenous peoples, and freedom of movement.

Shelton illustrates, however, that the various concerns are not intrinsically incompatible, because environmental law is also concerned with human well-being. Indeed, environmental protection may reinforce or even be a prerequisite to the enjoyment of other rights. In some instances these linkages have led courts to imply new environmental rights and incorporate governmental obligations to protect the environment within existing civil, political, economic, and social rights. In other instances states and international institutions have recognized explicitly the right to a safe and healthy environment itself as a human right. However, when such a right is included in the catalogue of protected rights, conflicts may still arise between measures to ensure it and the guarantees inherent in other rights. Resolving these conflicts may, in turn, imply the recognition of a hierarchy amongst human rights guarantees.

The contribution by Susan Karamanian is concerned with conflicts between human rights and investment law. She argues that the instances of (supposed) conflicts is on the rise, particularly given the wide range of institutions that are authorized to resolve disputes which could implicate both human rights and investment. The rubric, however, has rarely caused courts or arbitral tribunals to opt for one norm—say the right to life—at the complete expense of foreign investment. The contribution shows that in cases of conflict, the dispute resolution body has plenty of legal tools to help redefine the debate to avoid the conflict in the first instance.

For example, in an arbitration between an investor and a foreign state, the tribunal could acknowledge that the claimant's challenge to a state regulation has human rights consequences, but then rule in favour of the state without using human rights arguments to support the conclusion. Even if the debate cannot be reshaped, various interpretive techniques have been used to accommodate all relevant norms. These techniques concern principles such as balance and proportionality. The contribution traces the interpretive guidelines which help minimize conflict between human rights and investment norms. Karamanian advocates a disciplined approach that defines how human rights norms can be used in the investment context in a way that is consistent with relevant treaties and true to well-recognized practices.

Andreas Ziegler and Bertram Boie explore the field of (potential) norm conflicts between international trade law, in particular World Trade Organization (WTO) law, and human rights law. The case law relevant to this kind of conflict is still emerging, as a result of which the patterns as to how court decisions (regularly) resolve emerging norm conflicts between the two fields of law are difficult to establish. However, amongst those decisions that are identified, Ziegler and Boie show that courts largely avoid acknowledging a hierarchy of norms, or resolve conflicts by means of classic conflict avoidance techniques. Domestic courts seem, first, to consider whether the separate treaty regimes for different areas of international law are directly applicable and, to the extent that they are directly applicable, to treat them as separate from one another. **(p. 12)** The review of the debate concerning trade versus human rights before courts explains why the debate has, for the time being, remained rather abstract. In addition, it illustrates where areas of more concrete interaction between human rights norms and trade principles are likely to emerge in the future. The contribution argues that the interaction between international trade law and human rights law has various dimensions and is not limited to areas of conflict. Two areas of trade regulation that have an important human rights dimension in particular are trade in services and trade-related intellectual property rights. Although the doctrinal debate tends to focus on discrepancies and contradictions, these areas of trade law and human rights law can also play a mutually supportive role. This is illustrated by current discussions about freedom of expression, the role of the internet, and commitments in trade in services.

The concluding chapter is written by the editors, Erika de Wet and Jure Vidmar. It draws some cross-cutting conclusions based on the analyses of judicial practice in the substantive chapters. The editors assess whether, and to what extent, human rights norms are given preference in situations of conflict with norms pertaining to other areas of international law, and whether such preference (to the extent that it does occur) is the result of a norm hierarchy in international law. In so doing they also illuminate the techniques that courts engage in so as to avoid norm conflicts and how this affects the scope of human rights obligations, notably those that qualify as peremptory norms of international law. In addition, the editors draw some brief and cautious conclusions about the legitimacy of the role of (domestic) courts in developing a norm hierarchy in international law.

Notes:

(1.) See H Kelsen, *General Theory of Law and State* (Russell and Russell, New York 1961) 115, arguing that national law is not a system of 'coordinated norms', operating side by side on the same level, 'but a hierarchy of different level of norms'.

(2.) Ibid 124.

(3.) See D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 291.

(4.) Kelsen (n 1) 154 argues: 'The higher norm, the statute or a norm of customary law, determines…the creation and the contents of the lower norm…The lower norm belongs, together with the higher norm, to the same legal order only insofar as the former corresponds to the latter. But, who shall decide whether the lower norm corresponds to the higher, whether the individual norm of the judicial decision corresponds to the general norms of statutory and customary law? Only an organ that has to apply the higher norm can form such a decision.'

(5.) See PM Dupuy, *Droit International Public* (9th edn Dalloz, Paris 2008) 14–16.

(6.) See CW Jenks, 'Conflict of Law-Making Treaties' (1953) 30 BYIL 401, 401. H Kelsen, 'Derogation' in RA Newman et al (eds), *Essays in Jurisprudence in Honor of Roscoe Pound* (Indianapolis, American Society of Legal History 1962) 339–61; J Mus, 'Conflicts between Treaties in International Law' (1998) 25 Netherlands ILR 210. See also HLA Hart, *The Concept of Law* (Clarendon Press, Oxford 1961) 78, 79. The essence of the norms at issue is that they prescribe or forbid certain behaviour. Those addressed by the norms in question are required to act in a certain way or abstain from certain actions. A conflict of norms then occurs if compliance with one norm results in a violation of the other.

(7.) For a discussion see, inter alia, M Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 *Journal of Conflict and Security Law* 459; M Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke JICL 69, 71–2; E Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17 EJIL 395; J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge 2003) 176.

(8.) See R Wolfrum and N Matz, ‘The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity’ (2000) 4 Max Planck YBUNL 474, stressing that interpretation can only be employed to resolve conflicts if the respective colliding provisions are unclear and vague. Where states parties to an agreement wilfully establish provisions that collide with other agreements and express their intention in clear and unambiguous wording, the conflict cannot be resolved by interpretation. See also G van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2007) 135 ff, demonstrating that the broad language of bilateral and multilateral investment treaties facilitates (re-)interpretation of the scope of investment treaty standards in a manner that provides strong human rights protection for investors.

(9.) M Milanović, ‘Norm Conflicts, International Humanitarian Law, and Human Rights’ in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP, Oxford 2011) 102.

Cf also Mus (n 6) 211, who uses the term ‘figurative conflict’ to describe a conflict between treaty obligations that can be resolved through application of a derogation rule (ie conflict rule). See further Chapter 3 and Chapter 5 below.

(10.) For a discussion, see E de Wet, ‘The International Constitutional Order’ (2006) 55 ICLQ 51–76; see also Chapter 2 below.

(11.) For references to the concept of ‘fundamental norms’ see, eg, P Tavernier, ‘L'identification des règles fondamentales, un problème résolu?’ in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff, Leiden 2006) 2–5. See also S Kadelbach, ‘Jus Cogens, Obligations Erga Omnes and other Rules—The Identification of Fundamental Norms’ ibid 21–6. For an overview of the peremptory norms, see M Byers, ‘Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules’ (1997) 66 *Nordic Journal of International Law* 211, 213–19.

(12.) VCLT (1969), Art 53.

(13.) See Chapter 2.

(14.) Shelton (n 3) 305.

(15.) This is especially the case when immunities under international law are challenged in domestic courts. For more see Chapters 4 and 5.

(16.) For the list of most commonly accepted norms of *jus cogens* see ILC Articles on State Responsibility, Commentary to Art 40, paras 4 and 5.

(17.) J Crawford, *The Creation of States in International Law* (2nd edn OUP, Oxford 2006) 103.

(18.) ICJ Statute, Art 38(1)(d).

(19.) See, eg, A Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5 Chinese JIL 301, 304, giving the example of the ICJ which has 'referred to domestic judgments as State practice in determining customary law on immunities in the Arrest Warrant case'.

(20.) The study undertaken by M Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009), examining the issue of inter-regime conflict briefly in the chapter by T Rensmann, 'Impact on the Immunity of States and their Officials' ibid 151. For studies on intra-regime conflicts, see E Brems (ed), *Conflicts Between Fundamental Rights* (Antwerpen, Intersentia 2008); L Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (OUP, Oxford 2007).

(21.) See the database at http://www.oxfordlawreports.com (last accessed 30 July 2011).

(22.) The inductive approach, based on case law, is also the reason why the relationship between international humanitarian law and international human rights law is not covered in this volume. This relationship has attracted significant attention in academic writings. For a very recent work addressing this issue see Ben-Naftali (n 9).

(23.) See Chapter 3.

(24.) See Mus (n 6) 216; see also Chapters 2 and 3.

(25.) See De Wet (n 10) 71.

(26.) See Chapter 6.

Hierarchy in International Law: The Place of Human Rights
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Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System

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Abstract and Keywords

This chapter examines the notion of a hierarchical international legal order whereby (certain) human rights norms are elevated to a hierarchically superior level. Although international law has developed as a horizontal system of norms, the notion of hierarchically superior norms is not new. The idea is most prominently reflected in the concept of jus cogens, which may be described as a substantive hierarchy in international law. Since most of the generally-accepted jus cogens norms are of a human a rights nature, a strong argument can be made that at least certain human rights could be put at the top of the pyramid of international legal norms. The chapter, however, shows that it is questionable whether the jus cogens-based substantive norm hierarchy is more than theoretical. Because of the rather narrow interpretation of the scope of jus cogens norms in judicial practice, narrow conflicts with norms of this character are very unlikely to emerge in practice. The chapter further questions whether the concept of hierarchy in international law should be associated exclusively with jus cogens. Other possible instances of hierarchy include obligations erga omnes and Article 103 of the UN Charter.

Keywords: hierarchy of norms, jus cogens, obligations erga omnes, Article 103

1. Introduction

In domestic legal systems, a hierarchy between norms is a matter of constitutional regulation.[1] International law, however, has developed as

a system of horizontal rules which are binding only if states in some way agree to be bound by them.[2] In a horizontal system of legal norms, no legal obligation is prima facie capable of trumping another obligation.

Some concepts in international law nevertheless suggest the existence of obligations which cannot give way to other obligations. Moreover, some norms of international law may well be binding even without state consent. Although the debate on international constitutionalism and normative hierarchy in international law has developed relatively recently, academic writings have long been using qualifiers such as ‘peremptory’ or ‘fundamental’ in relation to certain norms.[3]

The peremptory and/or fundamental character of such a norm suggests that it is not just an ordinary norm. And if it is not just an ordinary norm, it should be superior to ordinary norms. In turn, some sort of normative hierarchy should exist in international law. Yet it remains controversial what qualities elevate a norm to a **(p. 14)** hierarchically superior level and how this superiority is manifested in situations of conflict with hierarchically inferior norms.[4]

It is known from domestic constitutions that a normative hierarchical order is underpinned by the value system of a certain constitutional polity.[5] An international normative hierarchical order would therefore require the existence of an international value system, which would justify the existence of superior norms.

The concepts of obligations *erga omnes* and norms *jus cogens* are exemplary reflections of the international value system. They manifest a strong sense of international community, which is ‘glued together’ by the international value system.[6] Indeed, the two concepts adopt the premise that certain norms and obligations are offundamental importance, so that their violations do not only concern a potentially injured state but the ‘international community as a whole’.[7] Thus, international law does embrace the concept of the international value system. It remains questionable whether the international value system thereby also supports the concept of hierarchically superior norms of an international constitutional character.

It is generally accepted that the value-underpinned concept of *jus cogens* is, in principle, a reflection of normative hierarchy in international law.[8] However, do these norms really have a hierarchically superior character? Are they capable of operating vertically and beyond the context of Article 53 of the Vienna Convention on the Law of Treaties (VCLT)? If so, where

are the limits of their superiority? If not, is the debate on international constitutionalism misplaced and is the hierarchical superiority of *jus cogens* a simple matter of international treaty law? Moreover, is it possible to stretch the normative hierarchy and norms of international constitutional character beyond *jus cogens*? If so, how can one identify hierarchically superior norms? This chapter tries to answer these questions with references to both doctrine and judicial practice.

Section 2 outlines the sense of an international community with shared values in the era of the Charter of the United Nations (UN Charter). It argues that the idea of an international community and the existence of an international value system features prominently in the UN Charter and in the concepts of obligations *erga omnes* and norms of *jus cogens*. The UN Charter, with its Article 103, and the concept of *jus cogens* may also be said to add a hierarchical dimension into the system of international legal norms. Yet Article 103 of the UN Charter may also be interpreted as a simple rule of precedence. The section further argues that obligations *erga omnes* are not generally accepted as a reflection of normative hierarchy **(p. 15)** in international law, but the values underpinning these obligations may well also underpin hierarchically superior norms.

Section 3 considers the question of whether normative hierarchy in international law can be extended beyond *jus cogens* and beyond the situations of norm conflicts envisaged in Article 53 of the VCLT.[9] It is argued that while Article 53 may be said to apply outside of treaty law, it is questionable whether norm conflicts in the sense of Article 53 are at all possible within customary international law. The section further argues that the law of state responsibility extends the operation of *jus cogens* beyond Article 53 and beyond the narrow definition of a norm conflict. In turn, it considers whether the superior hierarchical status of some norms can be asserted even in the absence of a norm conflict.

Section 4 is concerned with the problem of a narrow definition of the scope of the peremptory norms. It argues that if the normative scope is interpreted narrowly, conflict with a peremptory norm beyond the Article 53 definition will be virtually always avoided. Although human rights norms in contemporary international law are no longer to be interpreted as only creating ‘negative obligations’, ie the duty of a state to abstain from a certain action, it may well be that the peremptory character of certain norms is limited to such a narrow interpretation of the scope of obligations. The section further argues that a wider interpretation of the hierarchically

superior norms might not always be desirable, as it may undermine the stability of the international community of states and of international relations.

2. The international community and its value system in international law

After the end of the Second World War, the international institutional system was designed anew. The new design not only led to the codification of new rules of international law, but it also changed the fundaments of the international legal system. As one writer put it: ‘If we move from the post-1919 world order to the post-1945 order, the picture…is one of societal values shaping, informing and regulating the operation of a complex set of institutions, within a system framed by legal instruments of foundational significance.’[10]

Although it was still a state-centric system, mechanisms were developed which constrained powers of states to act independently on both the domestic and international planes. The underlying rationale of the constraints on states’ power was the interests of **(p. 16)** the international community. Although the understanding of the notion of ‘international community’ remained that of the international community of states, the protected interest was no longer necessarily only that of sovereign states. Indeed, in the UN Charter era we are in the process ‘of determining whether [the international community] knows of values other than the sovereign identities of its individual members’,[11] ie states.

This section argues that the UN Charter notably embraced the idea of the international community, with shared values and common interests. This is further developed by the concepts of obligations *erga omnes* and norms of *jus cogens* character. The latter concept is also generally accepted as a manifestation of normative hierarchy in international law.

2.1 The UN Charter system and the community interest

The opening words of the UN Charter are ‘we the peoples’; not ‘we the states’ or ‘we the countries’. Although the institutional design of the UN Charter nevertheless remained state-centric, this was an announcement of a diminishing importance of sovereign states in the international legal system. The preamble to the UN Charter also made a reference to the experience of the war which ‘brought untold sorrow to mankind’.[12] This may be seen as

an acknowledgement of the existence of interests and values shared by all human beings, reaching beyond the self-interest of sovereign states.

The institutional design of the UN Charter rests on the sense of an international community and of the common interest and values of this community. Robert McCorquodale argues that '[w]hile the international legal system is not limited to the process operating within the UN system, the UN Charter is the centre of an international "constitutional order"?'.[13] The UN Charter may be thus said to reflect the value system of the international constitutional polity.

It is not only the universality of the UN membership and multilateralism which reflect the sense of international community in the UN Charter; it is also the substantive component of the Charter in which the universal value system is reflected. Erika de Wet argues that

> [t]he international value system is closely linked to the UN Charter, as the latter's connecting role is not only structural but also substantive in nature. In addition to providing a structural linkage of the different communities through universal State membership, the UN Charter also inspires those norms that articulate fundamental values of the international community.[14]

This subsection now turns to Chapter VII and to Article 103 of the UN Charter. An argument will be made that they both reflect a strong sense of international community and provide for mechanisms of enforcement of the community's **(p. 17)** interest. It will also be argued that Article 103 may be reflective of one type of hierarchy in international law, yet this hierarchy is of a limited nature. The limitations are illustrated by situations in which the Security Council acts under Chapter VII and where its action may be held to be ultra vires.

2.1.1 The international community and Chapter VII powers

The concept of the interests of the international community is reflected in Chapter VII of the UN Charter. The Security Council is empowered to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression'[15] and, in order to bring such a situation to an end, take measures which are legally binding on all states. The preserving of international peace and security is thus considered to be of such importance that the Security Council, acting on behalf of the entire international

community, can severely limit the sovereign powers of states domestically and internationally. Furthermore, the Security Council is even empowered to authorize the use of force as a matter of exception to the general prohibition in Article 2(4) of the UN Charter.[16] Chapter VII of the UN Charter thus allows the Security Council to override some of the classical tenets of international law in the interests of the international community and its fundamental values.

Practice of the Security Council shows that the concept of international peace and security is interpreted widely. Indeed, not only have traditional threats to use force or actual use of force in international relations fallen within this category, but also gross and systematic human rights violations within one state's borders.[17] The concept of international peace and security from the UN Charter has been used to protect groups and individuals against their own states and to strip the abusive state of the protection of the principle of territorial integrity. This development may be seen as an acknowledgement of the special status of human rights in contemporary international law. Indeed, even in the absence of a traditional threat to peace and security, gross and systematic violations of certain human rights may be understood as such a threat.

It is notable that the Security Council has acted under Chapter VII of the UN Charter even in situations of breaches of human rights of non-peremptory character. For example, when the Security Council acted under Chapter VII in respect of the Taliban government of Afghanistan, the inequality of women was invoked as one of the reasons for establishing the existence of a threat to international peace and security.[18] State practice shows that full equality of women in all segments of life has not become reality in all states and societies. As a result, it is questionable whether this is a tenet of the international value system.[19] One could argue that the **(p. 18)** response of the Security Council shows that, at least, severe inequality of women is incompatible with the international value system. Perhaps the prohibition of discrimination based on gender could be seen as a developing fundamental tenet of the international value system, which may in the future even become a norm of peremptory character.[20]

The Security Council has also developed practices which either indirectly or directly limit the rights of groups and individuals, whereby the interest of the international community overrides not only the sovereignty of states but also the rights of individuals.[21] The Security Council, thus, has powers to limit the rights of groups or individuals for the benefit of the international

community as a whole. In so doing, the Security Council needs to strike a balance between the interests of international peace and security (which is understood broadly) and human rights. These issues will be discussed in the following chapters.

2.1.2 Article 103 of the UN Charter

Another element which stresses the special community importance of the UN Charter is its Article 103, which 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.’[22]

Article 103 has thus elevated the UN Charter to the status of a superior international treaty. Although the reference to ‘any other agreement’ and the drafting history of the Charter may suggest that its superiority is limited to treaty law, it can be argued that international law has evolved since then and the superiority can also be extended to obligations arising under customary international law.[23] If Article 103 is not interpreted in this way, even the superiority of the UN Charter over other treaty obligations would be fraught with difficulty. Many obligations arising under multilateral treaties also arise under customary law, and the superiority of the UN Charter only in relation to obligations created by treaties would thus, in many instances, remain without actual effect. Indeed, the same or similar obligation could also exist under customary law, yet it would not be trumped by the contradicting obligation arising under the UN Charter. An interpretation that **(p. 19)** Article 103 only concerns treaty obligations would therefore seem to be contrary to the object and purpose of the UN Charter. What would the actual effect be of the priority of obligations under it, if states could, in many instances, invoke customary law in order to avoid a contrary obligation arising under the Charter?

Article 103 is a provision which establishes a hierarchy among sources of international law. However, according to its wording, Article 103 does not elevate any particular norms to a hierarchically superior status, but only obligations arising under a specific treaty—the UN Charter. Such a hierarchy is thus not substantive but perhaps only institutional.[24] Furthermore, Article 103 does not invalidate an obligation contradicting the Charter, but rather suspends the duty of a state to fulfil such an obligation. The Report of the Study Group of the International Law Commission (ILC) on Fragmentation of International Law has called Article 103 ‘a means for securing that

Charter obligations can be performed effectively and not [a means for] abolishing other treaty regimes'.[25] In this view, Article 103 is seen as a rule of precedence, and not as an expression of normative hierarchy in the constitutional sense.[26]

The opposite interpretation is also possible. In *Al-Jedda*, before the House of Lords, Lord Bingham of Cornhill argued that in the context of Chapter VII of the UN Charter, 'article 103 should not…be given a narrow, contract-based, meaning. The importance of maintaining peace and security in the world can scarcely be exaggerated.'[27] It could be argued that Lord Bingham thus suggested that Article 103, in combination with Article 25[28] and Chapter VII, also has an important substantive value. Hence, the hierarchy stemming from Article 103 might not only be institutional but also substantive—originating in the concern for international peace and security.[29]

In *Nada*, the Swiss Federal Supreme Court had to decide on a conflict between an obligation arising under the UN Security Council's Chapter VII resolution and an obligation arising under the European Convention on Human Rights (ECHR). The court relied on Article 103 of the UN Charter, stating that the obligation under the Chapter VII resolution takes precedence. In so doing, the court interpreted the operation of Article 103 as an 'effect of normative hierarchy in international law'.[30]

(p. 20) One possible interpretation could be that when compliance with Chapter VII resolutions is in question, Article 103 elevates concern for international peace and security to the hierarchically superior level. It is questionable whether the reference to normative hierarchy in *Nada* is more than an *obiter dictum*. What seems to have been relevant for the merits of the case was the application of Article 103, while the fact that the court, at the same time, saw Article 103 as an expression of normative hierarchy is not of primary importance to the merits. Moreover, it also needs to be noted that the court's reasoning in *Nada* was controversial and it may well be that the Swiss Federal Supreme Court was all too willing to accept the automatic primacy of obligations created by the UN Security Council.[31]

It is generally accepted that limits on Article 103 of the UN Charter exist, so the Charter-based hierarchy is not absolute. Such limits are especially notable in relation to the UN Security Council's Chapter VII powers. In conjunction with Articles 25 and 103 of the UN Charter, states would need to carry out any kind of obligation created by the Security Council under Chapter VII. Yet it is generally accepted that this is not so and that when acting under Chapter VII, the Security Council must not act ultra vires.[32]

Indeed, Chapter VII of the UN Charter does not give the Security Council a carte blanche to demand from states to do whatever it wishes, in theory even to commit genocide. It remains questionable how and by whom an act ultra vires is to be determined.

In his separate opinion in the provisional measures phase of *Bosnia Genocide*, Judge ad hoc Elihu Lauterpacht argued that the International Court of Justice (ICJ), 'as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation'.[33] Moreover, it can be said that when the Security Council creates an obligation to violate *jus cogens*, the Council has acted ultra vires. In this context Judge ad hoc Lauterpacht argued:

> The concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and jus cogens. Indeed, one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent.[34]

According to Lauterpacht, *jus cogens* is hierarchically superior law and therefore trumps a Chapter VII resolution. **(p. 21)**

There is some evidence that even domestic courts have found themselves competent to review Chapter VII resolutions in order to determine whether the Security Council has acted ultra vires.[35] While domestic judicial review may be an important safeguard against violations of human rights, the practice may also be problematic, as it could lead to states (more precisely their courts) deciding on whether they would implement binding Security Council resolutions. Even if domestic courts were only empowered to review the compatibility of Security Council resolutions with *jus cogens*, this would not solve the problem. Indeed, when reviewing the resolutions, different courts would not necessarily have unitary views on the normative content and scope of the peremptory norms.

It could be argued that when the Security Council creates an obligation which is incompatible with *jus cogens*, two hierarchies collide—the institutional

hierarchy stemming from the UN Charter, and the substantive hierarchy based on *jus cogens*,[36] whereby the one based on *jus cogens* prevails. This is also the understanding which follows from *Nada*, where the Swiss Federal Supreme Court held that the Security Council was bound by *jus cogens*.[37] The problem is, however, that in so doing the Swiss Federal Supreme Court held that the Security Council is bound *only* by *jus cogens*.[38] A critical argument has been made in this regard:

> By declaring that the Security Council was only bound by *ius cogens* and that, by virtue of Article 103 of the UN Charter, obligations under the UN Charter, including binding Security Council resolutions, prevailed over all other rules of national and international law, the Federal Supreme Court imputed an enormous abundance of power to the Security Council which could hardly be justified. This result is even less appropriate as the role of the Security Council at present is not the same as it was when the UN Charter was drafted. The Security Council is no longer merely reacting to certain situations concerning mainly states or regions, but is evolving into a world legislator. This new role necessitates corresponding control mechanisms.[39]

It is thus arguable that the application of Article 103 will not be suspended only and exclusively when the Security Council creates an obligation to violate *jus cogens*. In *Al-Jedda*, for example, Lord Brown of Eaton-Under-Heywood upheld the primacy of an obligation created under the UN Charter over Article 5(1) of the ECHR (the right to liberty and security of person). However, in so doing he noted that '[n]o such reasoning, of course, would apply in the case of capital **(p. 22)** punishment'.[40] While it is not accepted by the international community of states as a whole that the prohibition of the death penalty has a *jus cogens* status, the prohibition doubtlessly reflects a strong regional value in some parts of the world, including Europe. The prohibition of the death penalty could be one example where the so-called regional *jus cogens* takes precedence over an obligation created under the UN Charter. When regional values are applied to disobey the Security Council it becomes questionable where domestic courts should draw the line in order not to make every obligation arising under the UN Charter subject to compliance with domestic law, which is underpinned by the value system of a certain constitutional polity.

Even when *jus cogens* prevails over Article 103, it might be possible to explain this effect in the context of the Vienna Convention on the Law of

Treaties rather than by resorting to the normative hierarchy theory. Despite its special nature, the UN Charter is ‘only’ a treaty and, according to Article 53 of the VCLT, must not create obligations conflicting with *jus cogens*.[41] While no provision in the UN Charter creates an explicit obligation to violate *jus cogens*, it is possible that such an obligation would be created by the Security Council when it acts under Chapter VII of the Charter.[42] In this case Article 53 does not void the UN Charter but only the obligation arising under the Security Council's resolution, which draws its authority from the UN Charter.

In response, one could make an obvious objection that if voidance of Security Council resolutions violating *jus cogens* were ascribed to Article 53, the Vienna Convention would be applied retroactively. The VCLT indeed entered into force at a later date than the UN Charter. But, as argued above, the issue here is not voidance of either the UN Charter itself or one of its particular provisions. What is at issue is voidance of an obligation which was subsequently created, in accordance with the procedures foreseen by the UN Charter. While the UN Charter dates back to 1945, an obligation created by the Security Council in 2010 dates back to 2010. Article 53 of the VCLT in this case voids an obligation dating back to 2010, and not an obligation dating back to 1945.

This subsection has shown that the UN Charter reflects a strong sense of an international community with shared values and interests. Chapter VII of the UN Charter created a tool for the enforcement of the community interest over state interest, and even over rights of groups and individuals. Article 103 affirms the special importance of the Charter by giving priority to the obligations arising under it. But it remains questionable whether Article 103 is an expression of normative hierarchy or a mere rule of precedence. It is, however, generally accepted that Article 103, in combination with Article 25 of the UN Charter, cannot be invoked in order to justify a violation of a peremptory norm. **(p. 23)**

2.2 The international community as a whole

2.2.1 *Obligations* erga omnes

In the well-known *obiter dictum* in the *Barcelona Traction* case, the ICJ stated that certain obligations are ‘the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.’*?[43] Following

this logic, when certain obligations are breached, it is not a single state but the international community of states as a whole that is injured. As argued in the Report of the Study Group of the International Law Commission on Fragmentation of International Law:

> If a State is responsible for torturing its own citizens, no single State suffers any direct harm. Apart from the individual or individuals directly concerned, any harm attributed to anyone else is purely notional, that is, constructed on the basis of the assumption that such action violates some values or interests of 'all,' or…[of] the 'international community as a whole'.[44]

The concept invokes several difficult questions. For the purpose of this chapter the most relevant questions are: (1) how are obligations *erga omnes* identified; and (2) what are the effects of these norms within the entire international legal system? The first question touches upon the underpinning of the obligations, while the second question, inter alia, deals with the possibility that they are indicative of a normative hierarchy.

One possible explanation is that all non-bilateral obligations have an *erga omnes* character.[45] This interpretation clearly ignores the reference to the 'importance of the rights involved' from the *Barcelona Traction* dictum. In this context it would appear that 'importance' is a value-loaded term. And since it comes in hand with the 'international community as a whole', the values must be those of the entire international community of states. Maurizio Ragazzi concludes that these obligations have two important components: 'the moral content' and the 'required degree of support by the international community'.[46]

While the concept of obligations *erga omnes* appears to be premised on the assumption of the existence of an international value system, existing on the level of the international community of states, this value system has not been unveiled. In order to identify the obligations *erga omnes*, most commentators refer to the jurisprudence of the ICJ, which is, in its capacity as the 'World Court', capable of reflecting on universal values in its judgments.

The ICJ has generally made pronouncements on the degree to which obligations *erga omnes* overlap with norms *jus cogens*.[47] While all *jus cogens* norms, by **(p. 24)** definition, have an *erga omnes* effect,[48] it is generally accepted that obligations *erga omnes* are a wider concept than *jus cogens*. Indeed, not all obligations *erga omnes* rest on *jus cogens* norms.[49] It remains unclear exactly which obligations *erga omnes* do not overlap with *jus cogens*. Christian Tams thus concludes that '*[e]rga omnes* outside *jus cogens* is likely

to remain uncharted territory until States begin to invoke the concept more commonly in formalised proceedings'.[50]

It is not only the list of *erga omnes* obligations which remains unclear, but also the value system behind these obligations. When arguing that an obligation is of particular importance for the international community as a whole, the ICJ has only given circular references to the norms and principles of international law. In *East Timor*, for example, the Court accepted the *erga omnes* character of the right of self-determination by arguing that self-determination was 'one of the essential principles of contemporary international law'.[51] One could say that the Court thus defined 'importance' (used in *Barcelona Traction*) as something which is 'essential' (used in *East Timor*). This still does not explain why some principles are more essential (or important) than others, so that they are the concern of the 'international community as a whole', while others are not.

The answer cannot be found in positive law alone. What is obviously in the background is the special ethical character of the obligations involved. As Ragazzi has put it, the obligations *erga omnes* identified by the ICJ reflect 'an exceptionless [sic] moral norm (or moral absolute) prohibiting an act which, in moral terms, is intrinsically evil (*malum in se*)'.[52] Ragazzi then continues arguing that obligations *erga omnes* are binding not only because states agree that they are, but even more importantly 'because nobody can claim exceptions from moral absolutes'.[53]

In essence, the concept of obligations *erga omnes* evidently has an extra-legal—ethical—underpinning. However, this does not undermine the legal quality of obligations *erga omnes*, 'unless one is willing to take a "short-sighted" view of rigid separation between law and morals, or adheres to an "archaic creed of legal positivism"…such as that which was a contributory factor to the preservation of the system of apartheid'.[54]

While obligations *erga omnes* are obviously not only a matter of positive law, it is illusory to expect that the ICJ would ever engage in a philosophical debate to determine which obligations of a particularly strong ethical underpinning enjoy a special character in international law. As the ICJ held in the second phase of the *South West Africa* case:

> [The ICJ] is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through

> and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.[55]

(p. 25) It may be that domestic courts are more likely to engage in such discussions. The problem, however, is that domestic courts are likely to reflect on domestic constitutional values rather than universal ones.

Although the concept of obligations *erga omnes* is value loaded, it is not generally accepted that it would be indicative of a normative hierarchy in international law. As argued in the Report of the Study Group of the International Law Commission on Fragmentation of International Law:

> A norm which is creative of obligations *erga omnes* is owed to the 'international community as a whole' and all States —irrespective of their particular interest in the matter—are entitled to invoke State responsibility in case of breach. The *erga omnes* nature of an obligation, however, indicates no clear superiority of that obligation over other obligations. Although in practice norms recognized as having an *erga omnes* validity set up undoubtedly important obligations, this importance does not translate into a hierarchical superiority…[56]

In sum, the obligations *erga omnes* are indicative of the existence of an international community with a shared value system. Although the theory suggests that obligations *erga omnes*, which are reflective of the international value system, can be extended beyond *jus cogens*, their entire scope remains unclear. Obligations *erga omnes* represent a legal means of enforcement of the international value system. As far as they overlap with norms *jus cogens*, the former may be seen as an enforcement mechanism of the latter. It is not generally accepted that obligations *erga omnes* are an expression of normative hierarchy in international law. The norms of *jus cogens* give a different account.

2.2.2 *Norms of* jus cogens

The concept of *jus cogens* was invoked by a number of writers even in the pre-Second World War era,[57] but gained more prominence after it was mentioned in the Vienna Convention of 1969. It is now generally accepted that *jus cogens* is a part of positive law.[58] Article 53 of the VCLT, inter alia, provides that 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole'.[59] The concept of peremptory norms thus also rests on the

presumption of the existence of an international community of states with shared values. A peremptory norm may be said to be subject to a ‘double acceptance’ by the international community of states as a whole: the acceptance of the content of the norm, and the acceptance of its special, ie peremptory, character. **(p. 26)**

While acceptance of the content of the norm in state practice and *opinio juris* is required for the creation of ordinary customary norms, acceptance of the special character implies a particular importance of peremptory norms. The special character of the peremptory norms is rooted in the universally accepted strong ethical underpinning of these norms.[60] While the international value system is difficult to define, the peremptory norms may be seen as at least its minimum threshold.[61]

When universal acceptance is concerned, the concept of peremptory norms leads to an interesting paradox. The idea of peremptory norms originates in the Roman law concept of *jus strictum* (strict law), as opposed to *jus dispositivum* (voluntary law).[62] It is paradoxical that the peremptory norms require acceptance by the international community of states as a whole, while the very concept of non-voluntary law suggests that a norm can be binding on a state even without its consent.[63]

It would therefore appear that the peremptory norms are not subject to traditional international law-making. The strong ethical underpinning of the peremptory norms may be able to compensate for deficiencies in universal acceptance of these norms, either at the level of normative content or at the level of peremptory character. Three examples are especially instructive: (1) The right to the freedom from torture is certainly supported by strong *opinio juris*, but at the same time by relatively weak state practice. Despite that, the freedom from torture is not only codified in international human rights treaties but also has a parallel life in customary international law. Furthermore, there is little doubt that freedom from torture has a *jus cogens* status.[64] (2) Apartheid South Africa claimed that it was a persistent objector to the prohibition of racial discrimination. Such a contention was universally rejected on the basis of the argument that unlike ordinary customary law, peremptory law does not allow for persistent objector's status.[65] (3) France initially claimed that it had never consented to the entire concept of *jus cogens*.[66] Again, this argument was not accepted and France is bound to peremptory norms, both in terms of substance and character, regardless of the lack of consent.[67] **(p. 27)** These examples suggest that when peremptory norms are in question, international law-making does not follow its usual

path. Traditionally, no state could be bound by a norm non-voluntarily. International treaty-making is consensual. Consent is also presupposed in international custom, where escape from an unwanted obligation is possible through persistent objector's status or by opting out of a customary obligation by a treaty. However, where peremptory norms are concerned, norms can be binding on a state not only without its consent but also despite the state's explicit opposition.

The question is how one can reconcile the requirement for a peremptory norm to be accepted as such by the international community of states as a whole and the fact that peremptory norms, in terms of both content and character, can obviously be imposed on states. The probable answer is that these norms reflect the minimum threshold of the international value system,[68] which is capable of overriding even the classical idea of international law as 'voluntary law'. As McCorquodale argues, 'some human rights create legal obligations on a state irrespective of whether it has ratified a particular treaty, either because the human right is part of customary international law and so binding on all states or by virtue of a rule of *jus cogens*, which no state can derogate from or evade by contrary practice'.[69]

While the concept of *jus cogens* can override the idea of international law as being a voluntary legal system, it is questionable to what degree it can also override the idea of international law as being a horizontal system of rules.

The International Criminal Tribunal for the former Yugoslavia (ICTY) made an exemplary connection between the value system, *jus cogens*, and normative hierarchy in international law. In *Furundzija*, the court stated: 'Because of the importance of the values [which the prohibition of torture] protects, this principle has evolved into a peremptory norm of *jus cogens*, that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules.'[70]

The hierarchical superiority of the peremptory norms is also pointed out in the Report of the Study Group of the International Law Commission on Fragmentation of International Law: '[W]hat the concept of *jus cogens* encapsulates is a rule of hierarchy *senso strictu*, [unlike Article 103 of the UN Charter] not simply a rule of precedence. Hence, the result of conflicts between treaties and *jus cogens* is that the former shall not be non-applicable, but wholly void, giving rise to no legal consequences whatsoever.'[71]

One can thus accept the proposition that the concept of peremptory norms cannot exist without some sort of a hierarchy among international legal norms.[72] It remains questionable what the scope is of normative hierarchy in international law and whether it can be limited strictly to *jus cogens* norms. **(p. 28)**

This subsection demonstrates that peremptory norms are value loaded, have a strong ethical underpinning, and reflect the minimum threshold of the international value system. The concept of peremptory norms changes the traditional paradigm of international law as consensual, voluntary law, as it introduces a set of norms which can be legally binding on states even in the absence of their consent. Moreover, the notion of peremptory norms transforms international law from a horizontal system of rules to a vertical one, whereby some norms are considered to be hierarchically superior to others. However, it remains unclear how this hierarchical superiority of some norms is manifested and whether it is limited to *jus cogens*. These questions will be discussed in the following section.

3. The scope and manner of the application of *jus cogens* norms

Article 53 of the Vienna Convention foresees the operation of *jus cogens* in the context of treaty law and in the context of norm conflicts. The fact that *jus cogens* appeared unequivocally for the first time in the treaty law context should not be interpreted as an affirmation of *jus cogens* as being an exclusively treaty law concept. Indeed, the reference to ‘peremptory norms of general international law’[73] suggests that *jus cogens* is an animal that lives outside of treaty law but can bite within treaty law.

What is thus debatable is not whether *jus cogens* is exclusively a treaty law concept, but how it operates outside of treaty law, whether it operates in a hierarchical fashion, ie vertically, and whether its operation is limited to norm conflicts. Moreover, when certain norms or obligations are elevated to a higher hierarchical status, is this always a consequence of the operation of *jus cogens*? This section shows that norm conflicts in the sense of Article 53 are very unlikely under customary law. But the law of state responsibility shows that peremptory norms can also operate outside of the situations of norm conflicts in the sense of Article 53.

3.1 *Jus cogens* and conflicts under treaty law

The concept of peremptory norms in treaty law illustrates well the change in the traditional nature of international law as a system of rules created by state consent. Indeed, according to Article 53, states are free to create mutual obligations only as long as they do not create an obligation to violate *jus cogens*. And while in *inter se* relations states are free to conclude treaties by way of which they opt out of 'ordinary' customary obligations, Article 53 prevents them from opting out of *jus cogens*.

States A and B, therefore, cannot conclude a treaty under which they would agree on how they would invade and partition state C and oblige themselves to institutionalize apartheid as a form of internal policy. Article 53 would void such **(p. 29)** a treaty, and is a clear example of limits on the states' freedom to enter into legal obligations of their choice.

The fact that treaty obligations can only be created as long as they do not offend against certain 'special' norms is a clear indicator of a hierarchy in international law. The underlying principle is similar to that of domestic constitutional systems, where an ordinary law creates legal obligations only as long as those obligations are compatible with those deriving from the constitution. In domestic legal systems, an ordinary law cannot opt out of a constitutional provision. An obligation deriving from a constitution can only be modified by a subsequent change at a constitutional level. The same logic is employed in Article 53 of the VCLT, which provides that a peremptory norm 'can be modified only by a subsequent norm of general international law having the same character'.[74] The operation of *jus cogens* in treaty law is therefore an indication of a hierarchical, constitutional, nature of international law.[75] The situation is, however, much less clear when customary international law is in question.

3.2 *Jus cogens* and conflicts under customary international law

While a treaty obligation can be created virtually instantly, a customary obligation is developed over time. Uniform state practice and *opinio juris* are required. While it is conceivable that a treaty could create an obligation to violate *jus cogens*, it seems to be impossible, by definition, that a customary rule would develop which would create an obligation to violate *jus cogens* in an analogous fashion as foreseen by Article 53 of the VCLT. It would appear that the existence of a peremptory norm would prevent the creation of a contrary obligation. For example, it is very unlikely that a customary rule

would develop that would demand aggression, torture, genocide, slavery, or apartheid. The conclusion of a treaty that created such obligations is, at least theoretically, possible.

Under customary international law it would appear that there can be no direct norm conflicts with *jus cogens*, but rather with *obligations created by a breach* of a peremptory norm. This is not the same as a conflict with a peremptory norm. For example, customary law governing immunities may prevent the trial of a torturer and/or compensation of torture victims.[76] But this is not the same as an obligation to torture (which could be created by a treaty). In order to have a real conflict, a peremptory norm would need to create an obligation to put torturers on trial or to compensate the torture victims. It is not generally accepted that peremptory norms of this kind exist or that a violation of a peremptory norm creates an absolute 'ancillary right' to a court.[77]

Thus, under customary international law, a direct norm conflict in the sense of Article 53 of the VCLT is unlikely to arise. However, it will be argued at a later point **(p. 30)** in this chapter that norm conflicts with the peremptory norms may not always be conceived narrowly, in such a way that, for example, the prohibition of torture could only clash with an obligation to torture. This chapter now turns to the operation of *jus cogens* in situations other than those of norm conflicts envisaged by Article 53 of the Vienna Convention. It will be considered whether the concept of peremptory norms in such situations can also be seen as an implication of a normative hierarchy.

3.3 Beyond the classical norm conflict: state responsibility

Commentary to Article 26 of the ILC Articles on State Responsibility draws a difference between the operation of *jus cogens* in the context of Article 53 of the Vienna Convention and in the context of the law of state responsibility.[78] After recalling the norm conflict situations with peremptory norms in the sense of Article 53,[79] the Commentary goes on to argue:

> Where there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail [as a matter of operation of Article 53]. The processes of interpretation and application should resolve such questions without any need to resort to the secondary rules of State responsibility.[80]

According to the Commentary, norm conflicts with peremptory norms in the sense of Article 53 are not a matter of the law of state responsibility. It may thus be said that the law of state responsibility takes the concept of peremptory norms out of the Vienna Convention and treaty law context. And it may well be that the law of state responsibility also acknowledges that peremptory norms can operate in the absence of a norm conflict. Indeed, such an interpretation may well follow from Articles 40 and 41 of the ILC Articles on State Responsibility.

According to Article 40, a serious breach of a peremptory norm incurs state responsibility, while Article 41 deals with the situation after the breach. A breach of a peremptory norm creates an obligation for all states to cooperate in order to put to an end an unlawful situation created by a breach of a peremptory norm[81] and not to recognize the situations created by such a breach as lawful.[82] As stated in the Commentary to Article 41, such an obligation is owed *erga omnes*.[83]

The ILC Articles on State Responsibility thus adopt the view that breaches of *jus cogens* are a matter of concern for the international community as a whole and, consequently, create obligations for all states and not only for the one responsible **(p. 31)** for the breach. This is another acknowledgement of the importance of protecting the international value system which underpins the concept of peremptory norms.

Moreover, Article 40 as well as the Commentary to this Article follow the logic of the Commentary to Article 26 and make no reference to a norm conflict. Instead, Article 40(2) defines a serious breach of an obligation arising under a peremptory norm as ‘a gross or systematic failure by the responsible State to fulfil the obligation’.[84] The concept of *jus cogens* in the law of state responsibility does not invalidate any legal obligation, but makes a state responsible whenever it is involved in a serious breach of *jus cogens*. Article 40 is not concerned with the question of whether a state breached *jus cogens* because it followed another obligation, either real or perceived, or simply in pursuance of its policies.

Article 41 deals with the consequences of a breach of a peremptory norm. Even this article assumes the operation of *jus cogens* outside of the norm conflict situations. Of particular significance is Article 41(2), which provides: ‘No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.’[85] The reference to ‘non-recognition’ brings immediate association with the body of international law governing the creation and

recognition of states and illegal territorial situations. This focus is also adopted in the Commentary to Article 41(2):

> The obligation [of non-recognition] applies to 'situations' created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through denial of the right of self-determination of peoples. It not only refers to formal recognition of these situations, but also prohibits acts which would imply such recognition.[86]

The Commentary further uses the examples of Manchukuo, Namibia, Southern Rhodesia, the South African Homelands, the Turkish Republic of Northern Cyprus, and Kuwait in order to prove general acceptance of an *erga omnes* obligation to withhold recognition when an effective territorial situation is created illegally, in breach of *jus cogens*. These are strong indications that Article 41 was drafted specifically with illegal territorial situations in mind.

Two observations can be made at this point. First, if the illegality of a state creation is attributed to the operation of *jus cogens*, norms of the latter character must operate in the absence of a norm conflict. Indeed, under contemporary international law there exists no 'right to statehood' and no 'obligation to grant recognition'. Therefore, when a breach of a peremptory norm determines illegality of a state creation, *jus cogens* can assert no hierarchy over other norms or obligations.

Secondly, in the context of illegal state creation or territorial occupation, normally only a few *jus cogens* norms can be relevant. As Talmon argues, claims to statehood or territory usually do not 'arise from acts of genocide, torture or slavery…'.[87] **(p. 32)** But they do arise from situations of illegal use of force, denial of the right of self-determination, and/or in pursuance of racial policies.[88]

Practice of states, the UN organs, and the international judicial bodies show that it is generally accepted that an illegally created effective territorial situation will result in the obligation to withhold recognition.[89] Illegality may indeed be determined by a breach of *jus cogens*, but there is much ambiguity associated with such an assertion. For example, breaches of the right of self-determination have triggered collective non-recognition,[90] yet it is controversial whether this right has a *jus cogens* character.[91]

Nevertheless, violation of the right of self-determination, racial discrimination, and illegal use of force make a state creation illegal, and

foreign states are no longer free to decide whether they would grant recognition. They must withhold it—this is an obligation they owe *erga omnes*.[92] Foreign states are thus limited in their freedom of action and such constraint could potentially fall within the extended definition of a norm conflict.[93] Even if one adopts a narrow definition of norm conflict, it is still possible to argue that the fact that violations of some norms result in the illegality of a state creation, while violations of other norms do not, may be an indicator of a special (hierarchical) standing of these norms.

In sum, the ILC Articles on State Responsibility extend the operation of *jus cogens* outside the situations of norm conflicts. In this context the peremptory norms are, strictly speaking, not hierarchically superior to any other norms. It is arguable that Articles 40 and 41, read together with Article 26, apply *jus cogens* outside the situations of norm conflicts because of the importance of values, which underpin the concept of peremptory norms.

This section shows that although the concept of hierarchically superior norms of *jus cogens* is not limited to treaty law, it is questionable what the effects are of *jus cogens* outside the situations of norm conflicts in the sense of Article 53 of the Vienna Convention. While direct conflicts with *jus cogens* are possible in treaty **(p. 33)** law, such conflicts are virtually impossible under customary international law. In the law of state responsibility, the applicability of *jus cogens* was accepted even in the absence of a norm conflict. Any violation of a peremptory norm creates obligations *erga omnes* opposable to all states. It is arguable that the peremptory norms in such situations assert no hierarchy over other norms, but instead uphold the international value system. Yet it remains doubtful whether international law will always be able to uphold the international value system encompassed in the concept of peremptory norms. This issue will be discussed below.

4. The scope of hierarchically superior norms

This section considers how far the peremptory character of a norm can reach. It argues that the operation of the peremptory character may be limited to the so-called ‘negative obligations’ of states. The international value system, encompassed in the peremptory norms, might nevertheless have a limited capability of elevating certain obligations to a hierarchically higher level and thus of stretching the normative hierarchy beyond the situations envisaged by Article 53 of the Vienna Convention. The system of normative hierarchy might thus be conceived on the international value system and not on the peremptory character of certain norms.

4.1 The limits on the operation of the peremptory character

An exemplary instance of a conflict with the international value system may be a situation in which there is a conflict with *effet utile* of *jus cogens* rather than with the peremptory norm itself. The conflict between torture and immunities may be particularly instructive in this regard: for example, the *Al-Adsani* case before the European Court of Human Rights (ECtHR). While the (narrow) majority decision, in principle, upheld Kuwait's claim to state immunity in this civil proceeding,[94] the dissenting judges proposed an extended interpretation of norm conflicts when violations of *jus cogens* are concerned. This view may be seen as a proposal for a fully fledged normative hierarchy in international law, whereby the peremptory pedigree of a norm operates at all subsequent levels and trumps all other norms. The dissenting judges argued:

> The acceptance…of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions…Due to the interplay of the *jus cogens* rule on the prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.[95]

(p. 34) Analysing this proposition, Andrew Clapham argues that '[t]he dissent suggests that there is no weighing exercise between access to court under the Convention and State immunity under customary international law. The dissent is clear that allegations of torture denude the law of State immunity of any legal effect. There is no question of weighing the importance to be attached to State immunity rules because they have lost any significance at all.'[96] However, this dissenting opinion is not the generally accepted interpretation of the scope of the *jus cogens*-based normative hierarchy in international law. As Clapham concludes:

> The unambiguous stance against any sort of immunity in the context of allegations of *jus cogens* violations has yet to be adopted by the highest judicial bodies around the world [yet] the argumentation is surely likely to be more and more influential as the rationale for State immunity is weighed against competing goals such as the protection of human dignity through human rights law.[97]

This chapter is not going to discuss possible different approaches in civil as opposed to criminal proceedings and, when immunities of individuals acting on behalf of states are concerned, possible different approaches in regard to current and former state officials. These issues will be addressed in subsequent chapters.[98] What is relevant here is that when immunity is in question, the conflict is no longer with, for example, the prohibition of torture itself.

In this context, De Wet discusses two civil cases, *Princz*[99] and *Distomo*,[100] where lower courts resorted to the so-called implied waiver of immunity doctrine. In essence, the underlying idea of this doctrine is that by breaching *jus cogens*, a state waives its sovereign immunity, applicable under customary international law. Such an interpretation was subsequently overruled by higher courts and the cases illustrate that the effects of the peremptory character of a norm are to be interpreted rather narrowly:

> [T]he *Princz* and *Distomo* Courts of First Instance…assumed that there…existed a conflict between the prohibition against torture and sovereign immunity. However, this would only be the case if the scope of the peremptory prohibition against torture included the obligation to grant torture victims the possibility to enforce their right to compensation. It is doubtful, however, whether this is indeed the case, as such a broad interpretation of the prohibition of torture is not supported by widespread and consistent state practice.[101]

(p. 35) The prevailing doctrine is that a breach of a peremptory norm is one thing, while addressing the consequences of such a breach is another.

4.2 Positive obligations and the scope of human rights norms

The interpretation that a norm conflict can only occur if a direct obligation exists to violate a hierarchically superior norm would require a narrow definition of the scope of the norms involved. Trends in international human rights law suggest that the scope of the human rights norms cannot be interpreted so narrowly.[102]

In order to accept that a norm conflict with, for example, the right to freedom from torture would only be possible if there was a norm on the other side which would lead to an obligation to torture, requires an understanding of civil and political rights as ‘negative rights’. According to this understanding, the nature of civil and political rights is such that it requires a state to abstain

from a certain action.[103] In this particular example, a state complies with the norm as long as it abstains from torture. However, it is generally accepted that the normative scope in international human rights law cannot be interpreted so narrowly and that the norm also invokes broader, ie positive, obligations on the side of a state.[104] The question, however, arises of how the concept of 'positive obligations' relates to the norms of *jus cogens*.

When peremptory norms are in question, there are two ways of looking at the problem of their scope. It may be that a peremptory norm is peremptory within its entire scope, yet the scope may be unclear and subject to some controversy. This understanding is implied in De Wet's interpretation of the core problem of the lower court's reasoning in *Princz*:

> [I]n the *Princz* decision, the reluctance of the Court of Appeal to grant overriding effect to the prohibition of torture over national legislation on sovereign immunity did not seem to result from a rejection of the hierarchical superior quality of the prohibition of torture as such. Instead, it was related to the limited *scope* of the peremptory prohibition, which would (not yet) include an obligation to grant torture victims the right to claim compensation.[105]

Another way of looking at this problem would be to go back to the dualism normative content/peremptory character, significant for the peremptory norms in their Article 53 definition.[106] One could argue that the normative scope of the underlying human rights norms may be wide and entail 'positive obligations', yet the **(p. 36)** peremptory character operates narrowly and entails only 'negative obligations'. As a consequence, when the prohibition of torture is in question, the 'ancillary right to a court' is not a matter of peremptory law and may be limited by other norms of international law. It is significant that in the relevant literature a peremptory character is commonly ascribed to the 'prohibition of torture', 'prohibition of genocide', 'prohibition of slavery', and 'prohibition of racial discrimination',[107] rather than to the underlying human rights which lead to these prohibitions. This could be another suggestion that the peremptory character of a norm is limited to the 'old fashioned' obligations of states to abstain from certain actions and does not extend to 'positive obligations'.[108]

It needs to be noted that a wider normative scope appears to have been taken in some situations. For example, it may be that extradition, or refoulement, is prohibited when the extradited/refouled person could be subjected to torture.[109] Significantly, the prohibition of torture is not limited

narrowly to prohibiting only the actual act of torture, but is interpreted more widely, in terms of not exposing an individual 'to the danger of torture or cruel, inhuman or degrading treatment or punishment'.[110] The peremptory norm can thus also be violated by a state which is not directly involved in torture but 'only' extradites or refoules to a real risk of torture.

The prohibition of torture, then, not only creates a narrow obligation of abstaining from torture, but also creates a positive obligation not to extradite or refoule.[111] On the other hand, it has been established that it does not create an obligation to waive immunity of torturers or to compensate the torture victims.[112] Thus, it may be said that the operation of the peremptory scope of the prohibition of torture is based on the underlying value that no one shall be tortured. While torture can be prevented by non-extradition and non-refoulement, it cannot be prevented—at least not directly—by criminal trials of torturers or by compensation orders in civil proceedings. Therefore, the positive obligation not to refoule or extradite to a real risk of torture can have a hierarchically superior status, but the obligation to address the consequences of the breach of a peremptory norm after the breach has already occurred is not elevated to this status.

(p. 37) What might be at issue is not that extradition or refoulement is prohibited by the peremptory character of the norm in question. It may instead be that extradition or refoulement is prohibited in order to protect the underlying value—that no one shall be tortured. This approach points out that the hierarchy in international law might not be about the legal effects of the peremptory character of certain norms. Instead, what is relevant are the values encompassed in this concept. As the Report of the Study Group of the International Law Commission on Fragmentation of International Law noted:

> Although it is customary to deal with hierarchy in international law in terms of *jus cogens* norms and *erga omnes* obligations, it is not clear that those are the only—or indeed the practically most relevant—cases…It may be that focus on the well-known Latin maxims has diverted attention from those more mundane types of relationships of importance.[113]

Notably, a wider interpretation of the normative scope was also adopted by the Human Rights Committee (HRC) in regard to the right to life, which is not universally perceived to be a norm of a peremptory character. In *Judge v Canada*, the HRC stated:

> For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its

> application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[114]

The HRC was willing to create two separate legal regimes, one governing abolitionist and one governing retentionist states. In the 'abolitionist regime', the right to life has a superior hierarchical status and its scope extends to a positive obligation of non-extradition. Nevertheless, this liberation of normative hierarchy from *jus cogens* and the extension to positive obligations is fraught with difficulty—the so-established system of normative hierarchy is not universal.

It may well be that normative hierarchy in international law does not only arise in situations of a direct conflict with a peremptory norm, whereby the conflict is interpreted in the narrow sense, so that the prohibition of torture could only conflict with an obligation to torture. In order for the underlying value of a peremptory norm to be protected, it has been accepted that states also have positive obligations. However, such positive obligations do not extend to the level of dealing with the consequences of a breach; they only arise when the prevention of a breach itself is concerned. This seems to be the interpretation of the scope of the peremptory norms that follows from the jurisprudence of various courts.

Indeed, the *effet utile* of *jus cogens* is limited and, for example, a breach of a peremptory norm does not create an ancillary peremptory right to a court. At the same time, it is very unlikely that an obligation to torture or to commit genocide would ever arise. In effect, if the normative scope is interpreted so narrowly, conflicts with peremptory norms simply do not arise and the limited *effet utile* of *jus* **(p. 38)** *cogens* prevents conflicts with peremptory norms. The narrow interpretation of the scope of peremptory norms in jurisprudence may well reflect the structure of the international (legal) system.

4.3 The international value system and the nature of the international community

When the international legal order is in question, the primary members of the community are states. Previous sections of this chapter have shown that the international value system might be a vague concept and is difficult to define, but the concept of peremptory norms may be seen as encompassing

its minimum threshold. The international legal system is also underpinned by the concept of state sovereignty, which reflects another fundamental value of the international community of states.

The tension between the international value system and state sovereignty is also reflected in the UN Charter, which provided foundations for the development of international human rights law and for the protection of international peace and security, even at the expense of state sovereignty. But it simultaneously built the principle of sovereign equality of states into the fundaments of the post-Second World War international legal order.[115]

If state-centrism and the sovereign equality of states remain such important considerations, it is questionable as to what kind of an international community exists beyond that of states and how well the international community is equipped to protect values other than that of the sovereign equality of states. As Kritsiotis has noted:

> Our 'international community' is 'deep' enough to have conceived of the idea of *jus cogens* but not deep enough to know what to do with it. It is caught in the perennial mire of something called *erga omnes* and continues to inch toward so-called crimes and offences against the 'international order'. That said, just how deep is the 'international community' that composed the 1948 United Nations Convention on the Prevention and Punishment of Genocide and stood back in 1994 when Rwanda was overtaken by the very murderous convulsions that the Convention was design to prevent. Just how deep is the commitment of this community to universal human rights, to disarmament and world peace, to economic and environmental justice, to the self-determination of all peoples?[116]

In other words, the international community has accepted that it has certain common values beyond those of protecting the sovereign equality of states, yet it **(p. 39)** does not know how to enforce or protect them without sacrificing too many tenets of state sovereignty.

The international law governing immunities is a good example of an area which rests on the principle of sovereign equality of states and on the maxim *par in parem non habet imperium*.[117] If the immunity of states and officials acting on behalf of states were lifted, this would seriously undermine the concept of the sovereign equality of states and thus also of the UN Charter system. Weighing the importance of sovereign immunity and other objectives

of international law have led to the distinction between acts *de jure imperii* and acts *de jure gestionis*.[118] Furthermore, when individuals act on behalf of states in their official capacity, domestic courts have shown different tendencies in recognizing the immunity in criminal as opposed to civil proceedings.[119] A distinction has also been established between former and present state officials.[120] However, if there are circumstances in which immunity will nevertheless always prevail, this means that the international value system is not always upheld at the normative level.

Indeed, the principles of sovereign equality and territorial integrity of states remain very important in contemporary international law. And, as Tomuschat argues, 'even the commission of a genocide does not push the responsible State into a legal no-man's land. Above all, it remains a State and as a State it keeps many of its rights.'[121]

This chapter has shown that the international value system is capable of limiting these values of state-centrism, but is not capable of trumping them entirely. Indeed, norms which are underpinned by the value of state sovereignty are still prominent in international law. When these norms clash with those reflecting the international value system encompassed in the concept of peremptory norms, some of the norms protecting state sovereignty will still prevail, unless the conflict can be accommodated within Article 53 of the Vienna Convention. As Tomuschat argues: 'A legal order that would permit genocide would deny the basic foundations of the values upon which the great bulk of the other rules is predicated.'[122] This could indeed render such a legal order illegitimate. However, as Tomuschat further argues:

> Sovereign equality and, in particular, the principle of non-use of force are of the same nature [ie they represent foundations of the post-1945 international legal order]. An international system deprived of these post-1945 features might still operate in some way or another. But it would have undergone deep qualitative change which the international community in its current composition seeks to ban to the greatest extent possible.[123]

Therefore, for the purpose of this chapter, it is important to stress that when human rights norms are unable to trump other norms of international law, one should not **(p. 40)** too easily proclaim the system of normative hierarchy to be toothless and illegitimate. The international legal system needs to be seen in a broader context. It is true that the principles of sovereign equality and territorial integrity of states are capable of shielding governments when

they abuse human rights. But they also protect less powerful states from interferences by more powerful ones.

In the context of enforcement of *jus cogens* and thus of the value system it encompasses, De Wet argues: '[T]he consensus has not yet progressed to a level where it would include an optimization of the efficient enforcement of *jus cogens*…Whether it is wise to strive for such a consensus would depend on the impact that it might have on international relations and international law in general.'[124] In relation to the example of the doctrine of 'implied waiver',[125] De Wet then concludes: '[I]t is possible that the destabilization resulting from the trumping of sovereign immunity by the peremptory prohibition of torture may outweigh the benefits to be gained from optimizing the *effet util* [sic] of the *jus cogens* norm.'[126]

Indeed, accepting that state A can arrest the head of state B means accepting that state A can effectively change the government of state B. This opens the door to political interferences into domestic affairs of foreign states. When sacrificing the norms resting on the principle of sovereign equality of states, one should be very cautious in order not to sacrifice too much. What is at stake is the stability of international relations and the principle of sovereign equality of states which is built into the UN Charter.

Thus, a legitimate reason may exist for an obligation resting on the international value system not to trump an obligation resting on the principle of sovereign equality of states. The stability of the international system is also in the interest of the international community as a whole in a broader definition, ie not limited to the interest of states. As this system to a great degree remains state-centric, this also means that not too much sovereign equality must be sacrificed in order to preserve stability. The following chapters will consider how judicial bodies strike this balance between the international value system and sovereign equality of states.

5. Conclusion

The international community is a community 'glued together' by the international value system.[127] This community accepts the existence of particularly important superior values. The international community is thus capable of being a constitutional polity, which can develop a legitimate hierarchical legal system. While it is undisputed that some norms of international law are hierarchically superior to others, the effects of a normative hierarchy appear to be limited. Some of the international legal

norms may be able to operate vertically, but it is questionable how deeply they can cut if the international value system remains shallow.[128]

(p. 41) The minimum threshold of the international value system is reflected in the norms of *jus cogens*. It remains unclear how far beyond *jus cogens* the international value system can be stretched. Moreover, normative hierarchy in international law also appears to come in hand with *jus cogens*, while the operation of the concept of *jus cogens* has not been entirely separated from the norm conflict definition, envisaged by Article 53 of the Vienna Convention. If hierarchically superior norms of international law were not able to operate beyond the norm conflict situations envisaged by Article 53, even the concepts of a normative hierarchy and international constitutionalism would seem to be of little value. Indeed, the hierarchical superiority of certain norms could be explained by simple recourse to the treaty law regime. There is some indication that a normative hierarchy in international law can operate beyond the strict Article 53 definition. The exact patterns of this operation remain to be determined.

Moreover, this chapter has shown that even in the UN Charter era, the international community remains a state-centric system. In this period state-centrism has faced several limitations, but has not been overcome. The international value system, which is concerned with the interests of actors other than states, poses a notable challenge to state-centrism. At the same time, state sovereignty and sovereign equality of states remain important cornerstones of the international legal order. They are capable of generating legal norms and obligations which cannot be easily trumped by other norms and obligations, even if they encompass the international value system.

It may be that when norm conflicts occur beyond Article 53 situations, in many instances norms upholding the sovereign equality of states will, for legitimate reasons, trump norms encompassing the international value system. It is thus possible that this pattern could elevate some of the norms generated by the principle of sovereign equality of states to a hierarchically superior level. This question will be addressed in the following chapters.

Notes:

(1.) See H Kelsen, *General Theory of Law and State* (Russell and Russell, New York 1961) 123–25. See also Chapter 1 (Introduction).

(2.) See PM Dupuy, *Droit International Public* (9th edn Dalloz, Paris 2008) 14–16. See also H Kelsen, *Reine Rechtslehre* (Franz Deuticke, Leipzig und Wien

1934) 129, arguing that international law consists of acts of states. However, according to Kelsen (n 1) 354, ‘it is the international community that, using the individual States as its organs, creates international law, just as it is the national community, the State, which by its organs creates national law’.

(3.) For an overview of the references to ‘fundamental norms’, see P Tavernier, ‘L'identification des règles fondamentales, un problème résolu?’ in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff, Leiden 2006) 2–5. See also S Kadelbach, ‘Jus Cogens, Obligations Erga Omnes and other Rules—The Identification of Fundamental Norms’ ibid 21–6. For an overview of the peremptory norms, see M Byers, ‘Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules’ (1997) 66 NJIL 211, 213–19.

(4.) Cf Kelsen (n 1) 154, arguing: ‘The higher norm…determines…the creation and the contents of the lower norm…The lower norm belongs, together with the higher norm, to the same legal order only insofar as the former corresponds to the latter.’ See also Chapter 1 (Introduction).

(5.) See D Shelton, ‘Normative Hierarchy in International Law’ (2006) 100 AJIL 291, 291.

(6.) Cf E de Wet, ‘The International Constitutional Order’ (2006) 55 ICLQ 51, 76.

(7.) See below n 56.

(8.) See International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission—Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682 (13 April 2006), para 365.

(9.) When discussing norm conflicts in the sense of Art 53 of the Vienna Convention, it is not suggested that *jus cogens* is merely a treaty law concept. What is meant here is that Art 53 deals with a direct conflict between an obligation under a peremptory norm on one side and an ‘ordinary’ obligation on the other (eg prohibition of torture versus an obligation to torture). Yet, as will be argued below, conflicts of this kind are relatively rare. The real question is whether the norm conflict can be

extended to the effects of a breach of a peremptory norm and thus beyond the Art 53 definition (which demands a direct conflict).

(10.) N White, 'The United Nations System: Conference, Contract of Constitutional Order?' (2000) 4 Singapore JICL 281, 290.

(11.) D Kritsiotis, 'Imagining the International Community' (2002) 13 EJIL 961, 967.

(12.) UN Charter, preamble, para 1.

(13.) R McCorquodale, 'An Inclusive International Legal System' (2004) 17 LJIL 477, 478.

(14.) De Wet (n 6) 57.

(15.) UN Charter, Art 39.

(16.) UN Charter, Art 42.

(17.) De Wet (n 6) 64.

(18.) See SC Res 1267 (15 October 1999), preamble, where the Security Council, when acting under Chapter VII, expressed 'deep concern over the continuing violations of international humanitarian law and of human rights, particularly discrimination against women and girls'.

(19.) Pellet argues: '[T]he condemnation of gender discrimination is still limited to certain parts of the World and certain circles, which prevents it to be considered as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".' A Pellet, 'Comments in Response to Christine Chinkin and in Defense of *Jus Cogens* as the Best Bastion against the Excesses of Fragmentation' (2006) 27 Finnish YBIL 83, 85.

(20.) Another way of looking at this question would be to adopt the reasoning of the Inter-American Court of Human Rights and treat the prohibition of discrimination of any kind (and not only on the base of race) as a peremptory norm of international law. In this context the Court argued: 'The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether

or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals.' Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion Requested by the United Mexican States, OC-18/03, Ser A, No 18 (17 September 2003), para 100. Yet it is questionable whether it is generally accepted that the peremptory character of the principle of non-discrimination can be extended beyond the prohibition of apartheid.

(21.) See Chapter 3 (Antonios Tzanakopoulos), section 3.1.

(22.) UN Charter, Art 103.

(23.) See M Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke JCIL 69, 78–9.

(24.) See C Chinkin, '*Jus Cogens*, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution' (2006) 27 Finnish YBIL 63, 63.

(25.) A/CN.4/L.682 (n 8) para 335.

(26.) See Chapter 3 (Antonios Tzanakopoulos), section 4.1.

(27.) *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58 (2008); 1 AC 332; ILDC 832 (UK 2007), para 34.

(28.) Art 25 of the UN Charter provides: 'The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.'

(29.) In this respect see also D Shelton, 'International Law and "Relative Normativity"' in M Evans, *International Law* (OUP, Oxford 2009) 159–85, 178, arguing that Art 103 may be seen as a 'supremacy clause' which 'has been taken to suggest that the aims and purposes of the United Nations —maintenance of peace and security and protection of human rights— constitute an international public order to which other treaty regimes and the international organizations giving effect to them must conform'.

(30.) *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Administrative Appeal Judgment, BGE 133 II 450, 1A 45/2007; ILDC 461 (CH 2007), 14 November 2007, para 6.2.

(31.) See n 39.

(32.) J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, Cambridge 2003) 285–90.

(33.) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Yugoslavia* (‘*Bosnia Genocide* case’), Request for the Indication of Provisional Measures, 14 April 1992, (1993) ICJ Rep 325, Separate Opinion of Judge ad hoc Lauterpacht, para 99.

(34.) Ibid para 100.

(35.) See Chapter 3 (Antonios Tzanakopoulos), section 3.1.

(36.) See below section 2.2.

(37.) The *Nada* case (n 30) para 7.

(38.) Compare the reasoning in *Al-Jedda* before the Court of Appeals, where Lord Justice Brooke noted that some recent academic writings suggest ‘that the Security Council no longer has the power to make resolutions that prevail over human rights obligations that fall short of constituting ius cogens’. Lord Justice Brooke then went on to argue that these ‘are not arguments that a national court can entertain’. *Al-Jedda* [2006] EWCA Civ 327, para 75.

(39.) *Oxford Reports on International Law*, International Law in Domestic Courts, the *Nada case* (n 30) Analysis, para 3.

(40.) *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58, (2008) 1 AC 332; ILDC 832 (UK 2007), para 152.

(41.) Cf Pellet (n 19) 86–7.

(42.) Cf n 34.

(43.) *Barcelona Traction, Light and Power Company Limited* (New Application, 1962), *Belgium v Spain*, Merits, Second phase, Judgment, (1970) ICJ Rep 3; ICGJ 152 (ICJ 1970) (‘the *Barcelona Traction* case’), 32, para 33.

(44.) A/CN.4/L.682 (n 8), para 393.

(45.) C Annacker, ‘The Legal Regime of Erga Omnes Obligations in International Law’ (1993) 46 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 131, 136.

(46.) M Ragazzi, *The Concept of International Obligations Erga Omnes* (Clarendon, Oxford 1997) 163.

(47.) For a survey of obligations for which the ICJ has established that they are of *erga omnes* character see C Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, Cambridge 2005) 117–18.

(48.) See De Wet (n 6) 61.???

(49.) Ibid.

(50.) Tams (n 47) 157.

(51.) *East Timor, Portugal v Australia*, Jurisdiction, Judgment, (1995) ICJ Rep 90; ICGJ 86 (ICJ 1995) ('the *East Timor* case'), para 29.

(52.) Ragazzi (n 46) 183.

(53.) Ibid.

(54.) Ibid 183–4.

(55.) *South West Africa, Second Phase, Ethiopia/Liberia v South Africa*, Judgment, (1966) ICJ Rep 6; ICGJ 158 (ICJ 1966), 34, para 49.

(56.) UN Doc A/CN.4/L.682 (n 8) para 380.

(57.) For a detailed account on the early writings on *jus cogens* see D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 297–9.

(58.) It needs to be noted that there are currently 111 states parties to the Vienna Convention. Many of its provisions are nevertheless binding on non-parties to the Convention via customary international law. Although some states have refrained from ratification precisely because of Art 53, there is little doubt that the article has customary international law status. Indeed, the status of permanent objector to *jus cogens* has not been accepted by the international community of states. Cf below nn 67 and 68.

(59.) VCLT, Art 53.

(60.) De Wet (n 6) 57.

(61.) S Sivakumaran, ‘Impact on the Structure of International Obligations’ in M Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009), 146.

(62.) See, eg, T Meron, ‘On a Hierarchy of International Human Rights’ (1986) 80 AJIL 1, 14.

(63.) The non-voluntary nature of *jus strictum* in contemporary international law is reflected in the word ‘peremptory’, which in an English dictionary describes something which allows for ‘no opportunity for denial or refusal’. See http://www.dictionary.com. In German literature, for example, the expression *zwingendes Völkerrecht* is in use, which translates as compelling, mandatory, or even coercive international law.

(64.) See R Garnett, ‘The Defence of State Immunity for Acts of Torture’ (1997) 18 Australian YBIL 97, making the following argument: ‘It may be argued…that the absolute nature of the conventional prohibitions, when coupled with the near universal *opinion juris* amongst states as to the illegality of the practice, may be a sufficient basis for concluding that torture is prohibited as a peremptory norm.’

(65.) Byers (n 3) 222.

(66.) Byers (n 3) 229. See also Shelton (n 29) (2009) 166.

(67.) See Pellet (n 19) 89, arguing: ‘Several decades have…been needed for the general acceptation of this concept [*jus cogens*]—and, among the pockets of resistance was…France but also, less anecdotally, the ICJ itself (both not being without any link…). Now the way has been cleared: Asterix has stopped its rearguard action against the notion.’

(68.) Cf n 62.

(69.) McCorquodale (n 13) 486.

(70.) *Prosecutor v Anto Furundzija*, Case No IT-95–17/1, Trial Chamber II, 260, para 153 (10 December 1998).

(71.) UN Doc A/CN.4/L.682 (n 8) para 365.

(72.) A Orakhelashvili, *Peremptory Norms in International Law* (OUP, Oxford 2006) 9.

(73.) VCLT, Art 53.

(74.) Ibid.

(75.) See Kelsen (n 1) 125, arguing that hierarchically higher constitutional law 'can negatively determine that the laws must not have a certain content'. The same can be said with regard to the concept of *jus cogens* in international law.

(76.) See Chapter 5 (Philippa Webb), section 3.2.

(77.) See Chapter 5 (Philippa Webb), section 3.2 and Chapter 4 (Riccardo Pavoni), section 4.1.

(78.) Art 26 of the ILC Articles on State Responsibility provides: 'Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.' Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd session (2001), UN Doc A/RES/56/83 (28 January 2002) ('the ILC Articles on State Responsibility') and the Commentary to Art 41: Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* (2001) ('the ILC Articles on State Responsibility, with Commentaries'), Vol II, Part II, Art 26.

(79.) Ibid Commentary to Art 26, para 1.

(80.) Ibid Commentary to Art 26, para 3.

(81.) ILC Articles on State Responsibility, Art 41(1).

(82.) Ibid Art 41(2).

(83.) Ibid Commentary to Art 41, para 11.

(84.) Ibid Art 40(2).

(85.) Ibid Art 41(2).

(86.) Ibid Commentary on Art 40, para 5.

(87.) S Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation Without Real Substance?' in C Tomuschat and JM

Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff, Leiden 2006) 107.

(88.) Talmon further argues: 'With regard to situations created by genocide, torture, crimes against humanity and other serious breaches of a *jus cogens* norm there is no practice of non-recognition on which to draw. This is not surprising as these situations, as a rule, do not automatically give rise to any legal consequences which are capable of being denied by other states.' Ibid 120.

(89.) See the following situations: The Turkish Republic of Northern Cyprus: SC Res 541 (18 November 1983); Southern Rhodesia: SC Res 202 (6 May 1965), SC Res 216 (12 November 1965), SC Res 217 (20 November 1965), SC Res 277 (18 March 1970); the South African Homelands: SC Res 402 (22 December 1976), SC Res 407 (25 May 1977); South West Africa (Namibia): *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, (1971) ICJ Rep 16; ICGJ 220 (ICJ 1971) ('the *Namibia* Advisory Opinion'), para 126; *Legal Consequences of a Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Rep 136; ICGJ 203 (ICJ 2004), 200, para 159.

(90.) See General Assembly and Security Council Resolutions quoted ibid.

(91.) Not even the Commentary to Art 40 makes a clear pronouncement on this question. Indeed, the Commentary to Art 40 enumerates a number of generally accepted *jus cogens* norms, but in relation to the right of self-determination it uses much more ambiguous wording: 'Finally, the obligation to respect the right of self-determination *deserves to be mentioned*', para 5 (emphasis added). The Commentary further makes a reference to the *East Timor* case before the ICJ, in which only an *erga omnes* but not *jus cogens* character of the right of self-determination was unequivocally affirmed.

(92.) See n 83.

(93.) See Chapter 1 (Introduction).

(94.) For a thorough analysis of *Al-Adsani* and the question of state immunity see E Bates, 'The Al-Adsani Case, State Immunity and the International Legal Prohibition of Torture' (2003) 3 HRLR 193.

(95.) *Al-Adsani v United Kingdom,* (2002) 34 EHRR 11, Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para 3.

(96.) A Clapham, 'The Jus Cogens Prohibition of Torture and the Importance of Sovereign State Immunity' in M Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international Liber Amicorum Lucius Caflisch* (Martinus Nijhoff, Leiden 2006) 151, 163.

(97.) Ibid 169.

(98.) See generally Chapter 5 (Philippa Webb) and Chapter 4 (Riccardo Pavoni).

(99.) See *Princz v Federal Republic of Germany,* 26 F.3d 239 (DC Cir 1994) (USA).

(100.) See the *Distomo Case,* Joint Constitutional Complaint, BVerfG, 2 BvR 1476/03; ILDC 390 (DE 2006).

(101.) E de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law' (2004) 15 EJIL 97, 107. For a counterargument see J Bergen, '*Princz v. The federal Republic of Germany:* Why the Courts Should Find that Violating Jus Cogens Norms Constitutes an Implied Waiver of Sovereign Immunity' (1999) 14 Connecticut JIL 169.

(102.) The fact that human rights norms lead to positive obligations does not mean that these obligations cannot be limited and subject to balancing with other norms of international law. However, what is at issue here are norms of *jus cogens* which are absolute and allow for no balancing. If it were accepted that human rights norms of the peremptory character enjoy this character within their entire scope, no balancing would be allowed, not even when it comes to positive obligations. It needs to be noted that the freedom of torture may be the only example of a peremptory norm which is capable of generating 'positive obligations' of a peremptory character (ie non-extradition and non-refoulement). The prohibition of genocide, for example, does not create an obligation to use force for the purpose of humanitarian intervention.

(103.) See, eg, C Tomuschat, *Human Rights: Between Idealism and Realism* (OUP, Oxford 2008) 52–4.

(104.) Ibid.

(105.) De Wet (n 101) 112 (italics in original).

(106.) See n 59.

(107.) See, eg, the ILC Articles on State Responsibility, Commentary to Art 40, paras 4 and 5.

(108.) Cf Ragazzi (n 46) 133, arguing that the four obligations *erga omnes,* identified by the ICJ in *Barcelona Traction,* 'relate to narrowly defined obligations (outlawing aggression rather than, more broadly, the illegal use of force; outlawing of genocide rather than, more broadly, crimes against humanity; protection from slavery rather than, more broadly, all kinds of unlawful restrictions on freedom; protection from racial discrimination rather than, more broadly, all kinds of discrimination)'. Ragazzi then concludes that the obligations *erga omnes* identified in *Barcelona Traction* 'are those of "obligations", or "duties", in the strict sense (i.e. what "one ought or ought not to do"), to the exclusion of other fundamental legal conceptions'. In the context of this argument it is not relevant that references here are made to obligations *erga omnes* and not to norms of *jus cogens*. Indeed, it is generally accepted that all of the obligations *erga omnes* identified in *Barcelona Traction* are on the flipside of *jus cogens*.

(109.) See HRC, General Comment 20, HRI/GEN/1/Rev.1 (1994), 30, para 9.

(110.) Ibid.

(111.) See Chapter 6 (Harmen van der Wilt), section 3.2. and Chapter 7 (Geoff Gilbert), section 3.1.

(112.) See n 76.

(113.) UN Doc A/CN.4/L.682 (n 8) para 407.

(114.) *Judge v Canada,* CCPR/C/78/D/829/1998 (13 August 2003), para 10.4.

(115.) UN Charter, Art 2(1) reads: 'The Organization is based on the principle of the sovereign equality of all its Members.'

Anne Peters argues that ‘non-intervention—not sovereignty—is constitutive for the international legal order’. A Peters, ‘Humanity as the A and Ω of Sovereignty’ (2009) 20 EJIL 513, 515. However, if this were the case, non-intervention should not be understood narrowly in the sense of the prohibition of the use of force. Indeed, the principle of sovereign equality of states is elaborated in the UN Charter and is broad enough to cover non-interference into domestic affairs of foreign states which are of non-military character.

(116.) Kritsiotis (n 11) 990–1.

(117.) See D Harris, *Cases and Materials on International Law* (Sweet & Maxwell, London 2004) 309.

(118.) See ibid 306.

(119.) See Chapter 5 (Philippa Webb), section 2.5.

(120.) Ibid section 2.1.

(121.) C Tomuschat, ‘Concluding Remarks’ in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff, Leiden 2006) 430.

(122.) Ibid 428.

(123.) Ibid 428.

(124.) De Wet (n 101) 120.

(125.) See n 101.

(126.) De Wet (n 101) 120.

(127.) Cf n 6.

(128.) Cf n 116.

Hierarchy in International Law: The Place of Human Rights

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Collective Security and Human Rights

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Abstract and Keywords

When the Security Council imposes binding obligations through decisions adopted under Chapter VII of the UN Charter it may impact on internationally protected human rights and the corresponding obligations of UN member states to respect these rights. Member states are then faced with potentially conflicting obligations. This chapter surveys the respective position of Security Council measures and human rights obligations in the (emergent) normative hierarchy of international law. It defines normative conflict and discusses state practice in order to establish whether Article 103 of the UN Charter is a conflict or a hierarchy rule and whether human rights obligations are subordinate to Security Council measures.

Keywords: norm conflict, apparent conflict, genuine conflict, normative hierarchy, human rights, Chapter VII, Article 103

1. Introduction

When acting under Chapter VII of the United Nations Charter, the Security Council makes law for the specific case. So said Kelsen in 1950.[1] Within Kelsen's positivist and highly formalist framework, this statement makes perfect sense: through concretization of an obligation that must be complied with in a particular instance, law is made for that particular instance. A judge also makes law for the specific case, when she interprets and applies a legal norm to a particular set of facts.[2] So, also, does the executive branch of government, when any minister or other official of the administration promulgates an administrative act. So much is not disputed in this chapter.

However, if the Security Council can make ‘law’—understood as above—for the specific case, how does this ‘law’ rank within any potential hierarchy of norms in international law? Is it subject to the UN Charter? If so, does it enjoy the ‘supremacy’ of Article 103 only when produced in accordance with the Charter? Perhaps it is even subject to general international law, including international obligations for the protection of human rights; or perhaps it is only subject to those international obligations that have achieved the status of *jus cogens,* precisely because of the operation of Article 103, seen as it is to supersede everything but *jus cogens*.

Clearly, when the Security Council ‘makes law’ through the imposition of binding measures in accordance with Article 41 of the UN Charter, it may impact on internationally protected human rights and the related obligations of member states to respect these rights. In fact, it has been seen to have done so on a number of occasions since its revitalization at the beginning of the 1990s: the sanctions on Iraq were widely claimed to have, at times, affected a number of basic rights, including **(p. 43)** the right to life, of the Iraqi population.[3] The sanctions against Libya were claimed to be in violation of freedom of religion and other basic rights.[4] The establishment of international criminal tribunals for the former Yugoslavia and Rwanda was challenged as constituting a violation of the right to a fair trial and internationally protected rights of accused persons.[5] Most recently, and most importantly, Security Council counter-terrorism regimes, established under Resolutions 1267 (1999) seq and 1373 (2001), have obligated member states totake wide-ranging measures, including the imposition of asset freezes and travel bans on individuals and legal entities, against which there is little, if any, possibility of recourse. These measures have been increasingly challenged as being in violation of the right of access to a court and the right to an effective remedy,[6] both accepted as inherent facets of the internationally protected right to a fair trial.[7]

In situations like these, the Security Council may be seen as acting in breach of the UN's international obligations, if it is accepted that the UN is bound by specific human rights obligations. The latter may be incumbent upon the UN either through ‘transcription’ via Articles 1(1), 1(3), 55, and 56 of the UN Charter, or independently on the basis of customary international law.[8] This breach could have the effect of rendering decisions of the Security Council invalid, at least according to part of the literature.[9] Still, given the lack of compulsory jurisdiction **(p. 44)** over the UN, a definitive determination of its responsibility by a disinterested third party is a virtual impossibility. As such, a strong presumption of legality of UN Security Council decisions ensures

that these produce their intended legal effects and are thus binding on UN member states.[10]

Member states are then faced with potentially conflicting obligations: those under Security Council binding decisions, and those under universal and regional human rights treaties and related customary international law on human rights protection. Which obligations are the member states to respect in such an instance? Can they freely choose to comply with one and incur responsibility for the other? This is the only possible outcome of an irresolvable normative conflict between rules at the same (hierarchical) level. Or is there an obligation which ranks higher than the other, in which case member states will have to disregard the lower-ranking obligation? It is the objective of this chapter to examine the relationship between human rights norms and binding measures imposed by the Security Council under Chapter VII of the Charter, and to seek to ascertain what is the hierarchical relationship between human rights obligations and obligations under Security Council measures in the context of collective security.

Accordingly, section 2 will define the concept of ‘normative conflict’ and will draw a rudimentary schematic of normative hierarchy as this is now accepted in mainstream scholarship. Section 3 will look at the position of Security Council measures and of human rights obligations within this schematic, but it will do so by adopting a practical perspective and by focusing on whether state practice, and in particular the practice of domestic courts, conforms with the mainstream understanding of hierarchy in international law and of the importance and impact of Article 103 of the UN Charter. Section 4 then presents an argument for the reinterpretation of Article 103, and for the rethinking of our understanding of the position of human rights in the international normative hierarchy in the light of practice. Section 5 concludes.

2. Normative conflict and normative hierarchy: a rudimentary schematic

Rules of hierarchy are sought and resorted to in order to resolve normative conflicts. When two rules of law, or two obligations, come into conflict with one another so that compliance with one will make compliance with the other impossible,[11] then **(p. 45)** a rule of hierarchy must be applied, in order to determine which of the two rules or obligations will take precedence over the other. Otherwise the conflict will be irresolvable, in the sense that a subject bound by the conflicting rules, in obeying one rule, will necessarily

have to violate the other and incur responsibility for it. Such a situation of irresolvable conflict, however, is not at all extravagant in international law, a legal system with a traditionally underdeveloped hierarchical structure where most rules rank at the same level. The subject here is free to choose which rule to obey and which to break. The price it will pay for its choice is to incur responsibility for the breach of the rule that was not conformed with.

There are many rules to resolve normative conflicts. Not all of them are rules of hierarchy properly so called, in the sense that they do not evidence the hierarchical or normative *superiority* of the rule or obligation that prevails in the particular instance. For example, the principle of the *lex specialis*[12] or—more to the point—of the *lex posterior* in its various potential incarnations (*lex posterior derogat legi priori*;[13] *lex posterior generalis non derogat legi priori speciali*) does not connote any particular substantive superiority of the rule that prevails.[14] It is merely a principle of occasional hierarchy,[15] which—if anything—proves that the rules in question are on the same hierarchical level: when two such rules come into conflict, the only way to resolve the impasse is to give precedence to the more recent one (temporal scope), or to the more special/specific one (material or personal scope).[16] Along these lines, **(p. 46)** the International Law Commission (ILC) distinguishes relations between 'general and special law' and between 'prior and subsequent law' from relations between 'laws at different hierarchical levels', ie the *lex specialis* and the *lex posterior* from the *lex superior*.[17]

In the law of treaties, the principle of *lex posterior* is not considered as establishing any sort of 'hierarchy' between the conflicting treaties.[18] The earlier and the subsequent rule are equal,[19] but provided that they have the same personal and material scope, the later rule prevails. Still the two remain equal, and it is only an 'occasional incident' that this later rule prevails. If, for example, the earlier rule happened to be a special rule, or if in another context the earlier rule is more special than a later but more general rule, the earlier rule will then prevail.[20] If the two rules do not have the same personal scope (the parties do not fully coincide) then neither prevails and if there is a conflict, a finding of breach (and subsequent engagement of responsibility) will be inevitable. Hence there is nothing inherently hierarchically superior in a rule that prevails on the basis of a principle of occasional hierarchy like the *lex posterior* or the *lex specialis* rule.[21] The priority that they grant to one rule over another is merely 'relative'.[22] This is why the rules of **(p. 47)** 'occasional hierarchy' can also—and perhaps more accurately—be seen as (and called) mere 'conflict rules'.[23]

Normative (or structural) hierarchy, however, as opposed to mere occasional hierarchy, denotes that neither the more recent nor the more specific rule will take precedence. Rather, the more important rule is the one to prevail.[24] Of course 'importance' is anything but obvious, if one tries to be objective. Rather, it lies in the eye of the beholder.[25] Precisely for this reason, domestic legal orders have sought to set out the importance of rules by positioning them on different levels of a pyramid. The most important (and usually most abstract) rules are laid down in the constitution, which rests at the apex, and all other rules are produced in accordance with the constitution at various levels. These must always be in harmony with the rules that are on superior levels. If this is not the case, then the superior rule prevails, even if it does not necessarily invalidate the recalcitrant inferior rule. As such, the substantive importance of the rules has been 'formalized' by their positioning at different levels in accordance with the method of their production (source).

In international law no such neat pyramidal scheme can readily be referred to. The substantive importance of rules has not been 'formalized', as in domestic legal systems, by reference to their source: all sources of international law are of equal legal value.[26] Only those rules which states have decided admit no derogation (without reference to their source), namely the rules of *jus cogens,* or the peremptory norms of international law, are widely accepted as superseding all other rules of international law with which they come into genuine conflict.[27] Rules of **(p. 48)** *jus cogens* make conflicting treaty provisions invalid;[28] their serious breach engages state responsibility in an aggravated manner, ie with special consequences;[29] and their breach cannot be justified by invocation of circumstances precluding wrongfulness.[30] Typically, however, only a very limited number of norms are universally accepted as constituting *jus cogens*.[31]

On the other hand, Article 103 of the UN Charter provides that UN member states' obligations under the Charter shall prevail over all their conflicting obligations 'under any other international agreement', should such a situation of conflict ever present itself. Notwithstanding the clear-cut wording of the provision, which makes it appear as a simple conflict rule limited to resolving normative conflicts between treaty obligations, many are quick to regard it as a rule of hierarchy, which establishes the superiority of Charter obligations over any conflicting international obligation of whatever source, except *jus cogens*.[32] Effectively, this transforms the Charter into a 'preferred source' of rules, formalizing the otherwise informal hierarchy and impacting the principle of equality of sources,[33] a principle which has been relied on

precisely in order to argue that Article 103 commands superiority of UN Charter obligations not only over treaties, but also over customary law.[34] Let this sweeping statement stand for the time being, however, in order to proceed. The question whether Article 103 is indeed a rule of hierarchy will be taken up again below.[35]

According to this schematic, one could sketch a provisional hierarchy of rules in international law with *jus cogens* at the apex of the pyramid, obligations under the UN Charter immediately below, and all other international obligations of whatever source below UN Charter obligations.[36] The bulk of international law thus ranks equally at the bottom of the pyramid. **(p. 49)**

3. Security Council measures and human rights in the international law pyramid

3.1 The perspective of member states

Given this (simplified) picture of the (on the other hand) rudimentary hierarchy of international norms, the question emerges where human rights would rank compared to Security Council binding measures under Chapter VII. From the perspective of member states and their obligations under general international law and the UN Charter, the picture is relatively clear: at the top is *jus cogens,* which prevails over everything else. Next come the UN Charter and the obligations under it, which include, by virtue of Article 25, the obligation to comply with Council decisions. And the rest of international law follows, all ranking at the same, default level of the *jus dispositivum,* ie of the rules that can be varied or derogated from by agreement.[37] Where are human rights obligations in this picture?

The answer to this question will necessarily depend on the particular right and the status it has attained. There is no doubt that some (if few) rights have attained the status of *jus cogens,* and thus supersede every other rule. If the UN Charter were to be found to allow derogations from them, it would become void and terminate.[38] So Security Council decisions must conform to the requirements of protection of these few rights that have attained the unique peremptory status. This (in part) has led some scholars to argue that almost every conceivable first-generation right has attained the status of *jus cogens*.[39] This is rather questionable, in particular with respect to rights allowing for derogations in times of emergency:[40] if anything, the Council only acts under Chapter VII in such times.[41] Derogable rights do retain a non-derogable hard core,[42] but it is difficult to construe any Council decision

as breaching that core, as much as it is to construe it as blatantly violating any other rule of *jus cogens.* Except in examples of the crudest type, one could not seriously entertain the thought of the Security Council expressly ordering the torture of suspected terrorists or their indefinite detention without possibility of review.[43]

From the perspective of member states, thus, their human rights obligations are subject to the whims of the Council, except for the few obligations that are generally accepted as constituting *jus cogens*. This is not a very satisfying, or indeed optimistic, picture. International protection of human rights is the fruit of many a long and arduous struggle of peoples, and to admit that the Council can so easily cast most of it aside is somewhat counter-intuitive. Still, it must always be kept in mind that there is no formalized hierarchical structure in international law—hierarchy **(p. 50)** relates to the substance of the rules, rather than to their source, and it is being developed through practice;[44] state practice, that is. It is thus state practice that one should resort to in order to determine the hierarchical position of human rights obligations with respect to Security Council decisions and the relevance and operation of Article 103.

Notwithstanding some decisions taken by significant numbers of states (acting within regional international organizations) to disobey Security Council sanctions during the 1990s,[45] the most potent recent reaction to Security Council measures comes from domestic courts[46]—a possibility that had been foreseen by some commentators at the beginning of the 2000s.[47] It should not be surprising that this is the case. A normative conflict is not usually evident on the face of two (potentially conflicting) provisions. Rather, it is in the practical application of the rules that a normative conflict will most frequently become evident, ie when a state will find itself unable to comply with two equally binding international obligations.[48] It is also not particularly surprising that such situations will mostly arise in the context of claims before domestic courts. There, a person either directly targeted or collaterally hit by Security Council measures may argue on the basis of rights granted to her under international (as well as domestic) law, which correspond of course to obligations incumbent on the state. The state will respond by arguing its obligation to comply with the Council measure. The court will thus be faced with a situation where two binding international obligations claim application and command possibly diverging results. In the presence of apparently conflicting rules, two are the possible alternatives: elimination of the conflict through interpretation that leads to harmonization;

or the establishment of a definite relationship between the conflicting rules, by which one will prevail over the other.[49]

3.1.1 Conflict avoidance v conflict acceptance (apparent v genuine conflict)

The first question that the domestic court will have to resolve is whether the conflict with which it is presented by the parties, as described above, is merely apparent or genuine. An apparent conflict can be 'interpreted away', without the need for a **(p. 51)** rule that will resolve it.[50] A genuine conflict, on the other hand, is one that cannot be avoided through interpretation, one that will require recourse to a conflict or hierarchy rule to be resolved —or that will be irresolvable. The analysis of domestic court jurisprudence could be categorized along these lines: courts that acknowledge a genuine conflict between the obligation under the UN Charter to comply with Council decisions and human rights obligations, and proceed to resolve it; and courts that, through various devices, manage to avoid the conflict, showing it— more or less credibly—to be apparent rather than real.

Given that there is, in international law as in all law, a strong presumption against normative conflict,[51] one would expect courts to exhaust the limits of interpretation in order to avoid a conflict. This is even more so if one accepts that courts have a general aversion to conflict, and a preference for deciding cases on the narrowest possible bases. If so, courts would prefer to decide a case, if possible, on a procedural rule or on the burden of proof, rather than on the application of hierarchy rules, which force them to favour one rule over another. However, there are many ways to go about avoiding normative conflict, while there is only one thing to do when accepting the conflict as genuine.

In *Al-Jedda,* the High Court,[52] the Court of Appeal,[53] and finally the House of Lords accepted that the conflict between the obligations imposed by Article 5(1) of the European Convention on Human Rights (ECHR) and the power granted by Security Council Resolution 1546 (2004) to intern individuals for imperative reasons of security was genuine.[54] In order to resolve it, these courts had to apply Article 103 of the UN Charter, which—as described above—gives priority to obligations (and rights) under the UN Charter over obligations (and rights) under any other international agreement, including the ECHR.[55] The same approach was adopted in principle by the European Court of First Instance in *Kadi,* which found that the provision under Community law must give way to compliance with Security Council decisions,[56] even though the case (on which further below) played out

differently in the end. This is in line with the finding of the International Court of Justice (ICJ) in the *Lockerbie* provisional measures that the obligations under a Security Council decision prima facie prevailed over any conflicting provisions in the 1971 Montreal Convention and rendered Libya's rights under the Convention not appropriate for interim protection.[57]

Effectively these instances confirm precisely that in the particular case of Security Council collective security measures being pitted against human rights, **(p. 52)** the acceptance of a conflict between the two as 'genuine', and provided that the right involved does not form part of *jus cogens,* will necessarily lead to the application of Article 103, which will in turn give priority to the Security Council measure. There is thus no reason to dwell further on 'genuine' conflict: the few cases where such genuine conflict has been acknowledged were resolved precisely as mainstream theory expects they should be: by application of Article 103. What is much more interesting is to delve into the various devices used by courts to avoid the conflict.

3.1.2 Circumventing Article 103 of the UN Charter

There are very few cases that acknowledge a conflict between obligations under Security Council decisions and obligations under human rights law as being genuine and proceed to resolve it on the basis of Article 103. In practice, courts will do anything to avoid the conflict and thus circumvent Article 103. This must have some bearing on the conceptualization of Article 103 as a mere conflict or a true hierarchy rule. But first it is necessary to survey the many avoidance techniques employed by courts.

This is not an easy task. Courts engage with potential conflict from a number of perspectives and attempt to avoid it by employing various techniques that cannot easily be grouped together. The reason for this is, first and foremost, that Security Council decisions do not always impose the same type of conduct. In fact sometimes they merely authorize conduct rather than impose it.[58] Here it may be that conduct which has been authorized conflicts with an obligation not to undertake that very same conduct which has been authorized. The decisive issue in such a case is determining what it is precisely that has been authorized—there is ample room for interpretation of the scope of authorizations, particularly when these are exhausted in the three magic words: 'all necessary means'.[59]

In most cases where Security Council decisions do impose obligations on member states, these obligations may be 'strict' or they may leave significant latitude to the member states as to their implementation. This is

a crucial distinction: when, for example, the Security Council demands that member states freeze the assets of a specific person, member state conduct is strictly conditioned by the Council decision. When it merely demands that states freeze the assets of those associated with terrorist activities, the state has a certain latitude as to the determination of specific individuals or legal entities falling within the scope of persons 'associated with terrorist activities'.[60]

(p. 53) Another reason why categorization is difficult relates to the arguments that applicants raise in court against the Security Council decision or, most usually, its domestic implementing measures. Applicants may attack state conduct allegedly in implementation of a Council decision in general,[61] or domestic implementing measures of Council decisions in particular, on the basis of international law, such as under the ECHR,[62] or the International Covenant on Civil and Political Rights (ICCPR),[63] on the basis of customary international law amounting to *jus cogens,*[64] on the basis of domestic law in combination with international law,[65] or on the basis of domestic law exclusively.[66] This to some extent will guide the approach of the court and will condition the avoidance technique that the court selects.

In the event, avoidance techniques used by courts in order to circumvent Article 103 can be distinguished on the following basis: if the court accepts that state conduct is conditioned (strictly imposed) by a Security Council resolution, and would be in genuine conflict with state obligations under domestic or international human rights, it may avoid expressly resolving the conflict by resorting to reviewing state conduct (and indirectly the Security Council resolution) as against an even higher rule, namely *jus cogens* (section 3.1.2.1). Otherwise, the court may employ interpretative methods to avoid the conflict, engaging in 'consistent' or 'harmonious' interpretation, which shows the various obligations under Security Council collective security measures on the one hand and human rights law on the other to be in harmony; this may be more or less convincing, and the interpretation more or less problematic or disputable (section 3.1.2.2). Finally, the court may avoid the conflict—or, in a way, 'resolve' it—by resorting to the hierarchy of norms under domestic law solely (section 3.1.2.3). **(p. 54)**

3.1.2.1 By recourse to an 'even higher' rule: jus cogens

In *Kadi* before the European Court of First Instance (CFI), the Court was faced with a potential conflict between the obligation to freeze Kadi's assets under Security Council decisions and the relevant European Community (EC) implementing measures, and obligations to respect certain fundamental

human rights, such as the right of access to a court, the right to an effective remedy (both aspects of the right to a fair trial), and the right to property, as they are guaranteed by the Community legal order, which the Court considered merely a partial legal order of international law.[67] The CFI denied that it had the power to review the attacked Community measures as against rights guaranteed by the Community legal order, because it accepted that the Community measures were strictly conditioned by the Security Council decisions: as such, any review of the 'domestic' measures would amount to review of Security Council measures for compliance with human rights guarantees under Community law.[68] Effectively, thus, the Court avoided finding a conflict between the two sets of obligations (to comply with Security Council decisions and to comply with human rights guarantees under Community law).[69] Had it not done so, it would have had to resolve the conflict on the basis of Article 103 and give primacy to the Security Council-imposed obligations.[70]

Still, the CFI went on to indirectly review the Security Council decisions for compliance with rules of *jus cogens,* the only set of rules it found hierarchically superior to decisions of the Security Council.[71] This review again led to a finding that there was no conflict between the Security Council decisions and the rules of *jus cogens* as to protection of the human rights invoked.[72] The rules of *jus cogens* as a standard of review allow ample room for avoiding normative conflict: this not just so because of the notorious difficulty (and disagreement) as to the qualification of certain rules as enjoying the unique status of *jus cogens,* but also because of the significant indeterminacy of norms at such a high level of abstraction.[73]

That latter point is exemplified in the Swiss Federal Tribunal's decision in *Nada,* a case very similar to *Kadi*. In that instance, the Swiss court followed the CFI's line of reasoning in *Kadi* almost to the point.[74] It merely disagreed on the scope of *jus cogens,* finding that the right to property and the aspects of the right to a fair trial invoked by the applicant did not belong to the corpus of peremptory norms.[75] It was in this way that the Swiss court avoided finding a conflict between obligations under Security Council decisions and *jus cogens*. **(p. 55)**

3.1.2.2 By recourse to consistent interpretation

The most common way out of acknowledging a conflict is by 'consistent' or 'harmonious' interpretation. The two rules that could potentially be in conflict with each other are interpreted in such a way as to be in harmony, and thus not to impose conduct that would be unlawful under either. To be sure, in a

number of instances this interpretative approach will not only successfully avoid the conflict, but will also be wholly convincing. If compliance with both apparently conflicting rules is shown to be possible through interpretation, the question of which one may supersede the other does not even arise.

One situation allowing room for interpretation, and thus avoidance of conflict, is that of Security Council authorizations. In order to determine what precisely has been authorized, and whether it conflicts with obligations incumbent on the state, a court will need to interpret the relevant Security Council decision and delimit the scope of the authorization. In *Al-Jedda,* the European Court of Human Rights (ECtHR) interpreted Security Council Resolution 1546 as not imposing an obligation on the UK to use measures of indefinite internment without charge and without judicial guarantees in Iraq, and thus found no conflict between the UK obligations stemming from its taking up of the Security Council authorization and its obligations under Article 5 of the European Convention.[76] The ECtHR explicitly adopted the approach of consistent interpretation in order to avoid the conflict:

> Against this background, the Court considers that, in interpreting [Security Council] resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights.[77] *In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations*.[78]

Another, broadly similar, situation, which allows ample room for interpretation, is when the obligations imposed by a Security Council decision do not strictly condition member state conduct, but allow certain discretion in their implementation. In such a situation, compliance with the obligations both under the Security Council decision and under human rights law is possible. For example, the obligation of states to freeze assets of individuals associated with terrorist activities imposed by Resolution 1373 (2001) does not require that any specific individuals or legal entities be subjected to the regime.[79] States have a free hand in determining or designating those that are to be sanctioned.[80] The obligation, thus, to freeze their assets does not conflict with obligations under international or domestic human rights law, say, guaranteeing the right of access to a court.[81] Any designation can be domestically challenged, and the release of a successful applicant from the asset freeze will not constitute a breach of the obligation under the

resolution: **(p. 56)** the successful applicant will not have been ‘associated with terrorist activities’ in the view of the designating state, and thus there will exist no obligation under the Security Council decision to freeze her assets.

This is precisely what the CFI found to be the case in *OMPI,*[82] while UK courts seem to have fully accepted this approach with respect to Resolution 1373.[83] In a similar case relating to an obligation imposed by Security Council Resolution 1737 (2006),[84] The Hague District Court found that whereas a strict obligation imposed by a Council decision would enjoy primacy by virtue of Article 103, the obligation imposed in the present instance was not strict, but left the state a margin of appreciation in its implementation.[85] It then, having avoided the conflict and the application of Article 103, went on to review the Dutch conduct for compliance with human rights guarantees under international and domestic law.[86]

With respect to strict obligations, the latitude that the court has in employing interpretation as a method for conflict avoidance is more circumscribed. This does not mean, of course, that no ‘consistent’ or ‘harmonious’ interpretation is possible. Dutch courts, for example, have avoided a conflict by finding that a measure taken by Dutch authorities (forced liquidation of a listed entity) was not imposed by Resolutions 1267 seq, even though these resolutions imposed other strict obligations.[87] Similarly, the Lahore High Court did not accept that preventive detention was an obligation imposed under the 1267 regime;[88] as such, there was no UN-imposed obligation with which human rights obligations would conflict.

In *R (M) (FC) v HM Treasury and two other actions,*[89] a committee of the House of Lords, while advising the House to refer to the European Court of Justice (ECJ) for a preliminary ruling,[90] went on to interpret Regulation (EC) 881/2002 implementing Resolution 1390 (2002), and in particular its paragraph 2(2). It found that the Treasury's particularly restrictive construction of the provision ‘is not required to give effect to the purpose of the [Resolution]’,[91] and ‘produces a disproportionate and oppressive result’.[92] In such a way the court would manage to avoid a potential conflict between obligations under the resolution and the regulation and obligations under (domestic or international) human rights law. In the event, the harmonious interpretation of the House of Lords was confirmed by the ECJ, which considered that the object and purpose of the resolution and the regulation did not support the Treasury's restrictive interpretation.[93]

However, in a number of cases, the interpretation of courts seems to be stretching the terms of the relevant Security Council decisions in order to avoid the **(p. 57)** conflict and thus the application of Article 103. Whether such interpretations are convincing or unconvincing may be a matter of debate, but the fact is that such instances evidence the courts' propensity for avoiding conflict and the application of Article 103 at considerable cost, namely the possibility that they will force the state to breach the terms of the relevant decision. If the Security Council does not agree with the interpretation of the court, it may well consider the state (that has complied with its court's decision) to be in breach of the relevant resolution and thus also of Article 25 of the UN Charter.

In *Bosphorus,* before the Irish High Court, the judge dismissed the interpretation of Security Council Resolution 820 (1993) offered by the chairman of the competent Sanctions Committee,[94] and proceeded to interpret it as not having meant to 'penalize, deter, or sanction' those peoples or states not having contributed to the tragic events in former Yugoslavia.[95] In this way the judge avoided a potential conflict between the obligation to impound Yugoslav-registered aircraft and the obligation to respect the right to property of the Turkish company that was merely leasing the aircraft. The ECJ later disagreed with the Irish judge's interpretation,[96] and this demonstrates that his interpretation was less than compelling: most probably, the Security Council would have disagreed as well.

In *Othman,* the English High Court 'read into' domestic and EC measures implementing Security Council Resolution 1333 (2000) an exemption to the freezing of assets if the latter would result in a situation where the individual's life or health would be at risk,[97] clearly in order to avoid an apparent conflict between the obligations under the resolution and the applicant's right to life. No such exemption was provided for under the 1267 regime at the time, and the judge had to resort to the 'law of humanity' and to the absurdity of needing to ask the Sanctions Committee for such an exemption, which could also not be granted speedily.[98] The interpretation was at the time technically problematic, even if it may seem reasonable. This is confirmed by the fact that the Security Council passed Resolution 1452 allowing for exemptions to the asset freeze as regards basic expenses only on 20 December 2002,[99] and then again requiring at least consent, if not outright approval, of the Sanctions Committee.[100] The High Court's decision had been delivered in November 2001, more than a year before Resolution 1452.

In *Abdelrazik,* the Canadian Federal Court was faced with the possibility that Canada's obligation to impose an asset freeze and travel ban under the 1267 regime on one of its nationals was in conflict with human rights obligations relating to the right to a fair trial and the freedom of movement under international and domestic law.[101] The Canadian court (like the English High Court in *Othman*) 'read into' the relevant Council decision, Resolution 1822 (2008), exceptions that would allow the applicant both to return to Canada (which Canada claimed was caught **(p. 58)** by the travel ban) and to receive money towards the ticket (which could be seen as in violation of the asset freeze).[102] In this way it avoided having to deal with a potential conflict between Security Council-imposed obligations and obligations under human rights law, which the state was trying to argue in order to benefit from the prevalence granted to the former by Article 103.

Thus many courts will make every effort to avoid the conflict through interpretation, but this interpretation may at times be stretched. There is a fine line that separates interpretation from amendment,[103] and since domestic courts cannot amend Security Council measures, that fine line becomes a fine line between interpretation and breach of the obligation to comply under Article 25 of the Charter. Still, courts will risk treading, and even crossing, that line, in order to avoid acknowledging a genuine conflict that would force them to apply Article 103.

3.1.2.3 By recourse to domestic law

In surveying the courts' attempts to avoid a conflict of norms and the application of Article 103 up to this point, no radical approach can be detected. Some treat the legal system as more or less unitary,[104] as the CFI and the Swiss Federal Tribunal did in *Kadi* and *Nada* respectively. In that, they avoid having to explicitly resolve a norm conflict by virtue of Article 103 through recourse to review against 'even higher' law, namely *jus cogens*. Others interpret the Security Council decisions as either allowing discretion, or not requiring the particular measure that the member state took in implementation of the decisions. As such, the domestic measure is isolated from the Council decision and thus the international legal system, and no issue of conflict of norms at the international level arises.

There are, however, instances where the conflict is unavoidable, no matter how much the court may wish to engage in 'imaginative' interpretation. It has been pointed out already that some of the interpretations resorted to by courts in order to avoid normative conflict could be seen as questionable, at least from the perspective of the Security Council. In the cases that will

be surveyed in this last subsection, a clean, radical, and explicit break is made in order to avoid the application of Article 103: the courts completely disengage the domestic measure under attack from its international source, the Security Council decision, and resolve any potential conflict with human rights norms under domestic conflict or hierarchy rules. In some cases, this rationale of turning to domestic law to avoid the application of Article 103 is almost boldly spelled out by the court.

In the *Kadi* case before the European Court of Justice, the Court quite obviously misinterpreted the Security Council decisions that Kadi should be subject **(p. 59)** to a travel ban and asset freeze: it held that the EC, in implementing that measure, was not limited in its choice of a 'model of implementation', as no such specific model was imposed by the resolutions.[105] One is left to wonder what 'model of implementation' the Community could have selected, when the obligation was one of result: Kadi's assets were to be frozen. Any 'model of implementation' that did not produce this result would be in breach of the resolution and would force the member states to breach their obligations under Article 25 of the UN Charter. In any event, this then allowed the Court to focus on the domestic measure, and resolve any conflict of obligations stemming from it with obligations stemming from human rights law on the basis of the domestic hierarchy of norms.[106]

The ECJ was followed—as was to be expected—by the CFI in subsequent cases.[107] In *Kadi II,* the CFI (now renamed as the 'General Court of the EU' after the entry into force of the Lisbon Treaty) 'grudgingly' applied the ECJ's *Kadi,*[108] despite setting out and acknowledging criticism of the ECJ judgment on precisely the points mentioned in the previous paragraph, among others:[109] it considered that the ECJ, sitting in Grand Chamber formation, obviously meant to establish certain principles in *Kadi,* and thus that it falls to the ECJ to reverse the precedent.[110]

But more importantly, a whole new line of cases emerged in the English courts, where the radical break from the international level in order to avoid Article 103 became more than evident. The *A, K, M, Q, G*[111] and *Hay*[112] cases before the English High Court and the Court of Appeal ended up in a joint appeal before the newly established UK Supreme Court.[113] In that line of cases, argument was almost exclusively under English law, and the main question the courts debated and answered was whether the UK implementing acts were ultra vires the UN Act 1946, by which Parliament allowed the executive to implement Security Council measures through

the adoption of administrative acts. The problem was the following: the impugned administrative acts were in conflict with fundamental human rights guaranteed in the domestic legal order. Unless the Parliament (which in the UK is sovereign) had given permission to the executive to abrogate fundamental rights, which it had not, an administrative act in conflict with fundamental rights guarantees would stand to be quashed.

(p. 60) At all stages of the two sets of proceedings, the applicants argued primarily under domestic law, and the courts also decided under domestic law. The reason for this was clear, and it was to avoid the House of Lords' *Al-Jedda* precedent (since the appeals were heard and decided before the ECtHR Grand Chamber handed down its own decision in *Al-Jedda*) and the application of Article 103. In *Hay,* before the High Court, the Treasury barrister contended that if the claimant were to argue under the ECHR, his argument would fail because of *Al-Jedda* and Article 103. What was the response of the judge? 'But in any event the claimant does not seek to advance such a claim and the point is *irrelevant*.'[114] Before the Supreme Court, only counsel for one of the appellants argued the ECHR, but did this in conceding that the House of Lords' *Al-Jedda* and the mainstream view on Article 103 was against him and inviting the court to reconsider.[115] (In the event, counsel was vindicated some one year and a half later before the ECtHR.) All the others argued under domestic law only. The Supreme Court did not, of course, reconsider the House of Lords' *Al-Jedda*. But as Lord Hope stated, this did not clarify the position with respect to rights enjoyed under domestic law.[116] Lord Rodger further made it clear that he was only concerned with domestic law rights, because any rights under the ECHR would be caught by Article 103.[117]

By disengaging the Security Council measure from the domestic measure, and reviewing the domestic measure under domestic law exclusively, these courts managed to avoid the otherwise inevitable application of Article 103. The statements by counsel (and by the judges) in *Hay* and *A, K et al* can be seen as a more or less explicit admission that the rationale behind resort to domestic law was precisely the wish to avoid the overriding effects of Article 103 on important human rights, such as the right of access to a court and the right to an effective remedy. A similar argument can be made on the basis of the ECJ's argumentation in *Kadi*.[118]

3.1.2.4 Interim conclusion

By way of a provisional conclusion, it becomes clear that, except in very few cases where Article 103 is applied to give precedence to Security Council

decisions over human rights obligations, courts will do almost anything to avoid having to resolve the conflict in this way. This is so even when they implicitly or explicitly accept that application of Article 103 would give precedence to the Security Council decision. Whether through 'harmonious' interpretation, or through radical 'dualism' or disengagement of the attacked domestic measures from the international measure, the courts will try to avoid the conflict altogether. To this, one could add cases where courts have been seen as adopting what seems as weak or absurd reasoning in order to avoid having to apply Article 103, as has been said of the decision of the ECtHR in *Behrami*.[119] It has thus been suggested that the ECtHR decided as it did in *Behrami* because it could not possibly accept that the 'constitutional instrument **(p. 61)** of European public order' that it holds the ECHR to be could be 'whisked away' by the 15-member Security Council; but at the same time, the Court was not ready to defy the Security Council openly.[120] Perhaps this was so in 2007, but it may be much more willing to defy the Council now, after the wave of defiance that hit the Council from domestic courts in the years following the House of Lords' *Al-Jedda* and its own *Behrami*.[121] Indeed, in its 2011 decision in *Al-Jedda,* the ECtHR avoided finding a conflict between the obligations under Security Council Resolution 1546 and under Article 5 of the ECHR by engaging in 'harmonious' interpretation, and thus did not have to apply Article 103 of the Charter. The *Nada* case, currently pending before its Grand Chamber, will force the Court to take a clear stance, as it relates to a conflict between a 'strict' obligation under the 1267 regime and obligations under the European Convention.[122]

3.2 The perspective of the United Nations

From the perspective of UN member states, then, and their courts in particular, the ever increasing potential conflicts between collective security measures and human rights norms present a considerable problem. The hierarchy of international law seems to direct states to give preference to Security Council decisions, by virtue of Article 103. But the general sentiment, at least on the part of their courts, seems to be that they do not want to do that. What is their way out? It is to interpret the conflict away, or shut international law out of the picture altogether, and apply the domestic law hierarchy that tends to favour human rights, which are to a large extent constitutionally protected and thus at the top of the (relevant) pyramid.

But what if we change the perspective, what if we look at the UN (and the Council as one of its principal organs) and try to determine the obligations incumbent upon it? Obviously the UN is subject to *jus cogens*.[123] So Council

decisions must be in conformity with it, or they are illegal. Also, the UN is bound by its own Charter, and the Council, as promulgator of secondary (derivative) law under the Charter, must comply with the Charter when producing norms.[124] This has led a part of the scholarship to try to 'read into' the UN Charter a whole set of human rights obligations which are, quite frankly, not there.[125] But in any event, **(p. 62)** the Charter at the very least provides for the obligation to respect certain notions of proportionality in imposing binding measures.[126]

As a subject of international law, finally, the UN (and the Council) is bound by general international law. And many human rights must be considered as customary law today—in any event, many more than could be considered to form part of *jus cogens*. Here, Article 103 comes into play. One could argue that Article 103 can be read as giving the Security Council the power to derogate from that part of international law (including human rights norms) which is derogable, since it may impose obligations on states in contravention of other obligations they have under international law. Even if one accepts this to be so, ie if the operation of Article 103 is not limited to international agreements but also supersedes conflicting customary law, still the Security Council would have to make such an obligation to derogate clear in its decision, which it has never done to date. Derogation by necessary implication could be accepted, depending however on the concept (and degree) of necessity. This leaves a lot to interpretation, and certainly does not finally close the issue of 'ranking' of human rights norms relative to Council collective security measures. It is in this connection that state practice, even if it is through court decisions, comes into play. They may just be able to provide the decisive interpretation.

4. Development of a normative hierarchy through practice

There is no state or international organ which can authoritatively interpret the UN Charter. At least the Council cannot, and neither can the ICJ, nor any other UN organ. The power of authoritative interpretation is vested in a concept, rather than a 'flesh-and-blood' subject: the 'general membership' of the organization.[127] No state acting alone could possibly claim to be acting on behalf of the general membership of the UN. However, the lack of authoritative power of interpretation preserves a basic feature of the international legal system: that of decentralized auto-interpretation and auto-determination of the breach of another subject's obligation at the determining subject's 'own risk'.[128] States are, in fact, reacting to Security Council measures that can be perceived as conflicting with international

norms for the protection of human rights. As much has now become apparent. How can this reaction be justified and what is its significance for the ranking of human rights within international law? **(p. 63)**

4.1 Conceptualizing Article 103 of the UN Charter

In schematically describing the hierarchy of norms in international law earlier, it was provisionally accepted that Article 103, while subject to *jus cogens,* outranks all other norms of international law, which rank at the level of derogable law, the *jus dispositivum*.[129] It is now time to revisit this provisional acceptance and test it against both theory and practice. On its face, Article 103 reads simply as a conflict clause, claiming to give obligations under the UN Charter priority over both prior and future international agreements. The reasons why Article 103 reads as a mere conflict clause are twofold. First, because clauses claiming priority over future treaties can be seen as 'futile': they can always be superseded by a subsequent expression of the will of the parties.[130] Secondly, because the clear language of the text indicates that precedence is limited to other international agreements only, not international law at large.[131]

As such, Article 103 does not establish any rule of hierarchy. It does not establish that obligations under the UN Charter are non-derogable except by a norm of the same or higher rank. It merely establishes that, occasionally, they may set aside (or displace or qualify) obligations under treaties.[132] Why then is Article 103 portrayed in theory (and avoided by courts in practice) as a rule of hierarchy establishing the absolute precedence of UN Charter obligations over everything except *jus cogens*? This is mostly done by the following circular reasoning, beautifully exposed by Suy:[133] the UN Charter is accepted as a constitutional document of the international community, and thus Article 103 is a hierarchy rule, establish **(p. 64)** ing the primacy of that constitution over everything else.[134] The UN Charter in turn is a constitution because it includes a rule establishing its primacy, Article 103.[135] Such reasoning cannot stand to scrutiny.

Other arguments in favour of Article 103 establishing a normative hierarchy rather than being a mere conflict rule revolve around the 'special status' given to the provision by Article 30(1) of the Vienna Convention on the Law of Treaties (VCLT).[136] This is because Article 30(1) VCLT explicitly disapplies the *lex posterior* principle with respect to Article 103, and as such no subsequent treaty could contradict it. Even if all UN members entered into a conflicting treaty, it is argued, that would still not supersede Article 103

without following the UN Charter's amendment procedure.[137] This, however, is not absolutely convincing: how could another treaty (the VCLT) establish the hierarchical superiority of the Charter?[138] It could not be expected that the ILC, a subsidiary organ of the UN General Assembly that provided the blueprint for the VCLT, would not include a saving clause with respect to its own constitutional document in the draft of a treaty, or that the states who signed on to it, already members of the UN,[139] would not accept it. But doctrinally this does not establish Article 103 as a hierarchy rule. Further, UN member states have already amended the UN Charter, not only without following the amendment procedure, but even without so much as an official act: merely through practice. Article 27(3) of the Charter and voting in the Security Council are thus instructive in this respect.[140] In any event, Article 30(1) VCLT does not establish the primacy of UN Charter obligations over customary law.[141]

Two further (related) points advocating against conceptualizing Article 103 as a hierarchy norm should be presented: normally, a rule of hierarchy does not merely give precedence to one norm over another, but it also precludes the wrongfulness of non-compliance with the superseded norm, while it is not necessarily so with mere conflict rules.[142] *Jus cogens* achieves this through its effect of voiding conflicting norms, at least in treaty law,[143] while the ILC Articles on State Responsibility confirm this *a contrario* by providing that no circumstance precluding wrongfulness can operate with respect to a violation of a rule of *jus cogens*.[144] On the other hand, reliance on Article 103 does not preclude the wrongfulness of non-compliance with an obligation. There is a general saving clause in the ILC Articles with respect to **(p. 65)** the UN Charter, but the commentary to that provision, while mentioning Article 103, is completely non-committal.[145] By contrast, there is a specific circumstance precluding the wrongfulness of use of force in self-defence under Article 51 of the UN Charter.[146] *A contrario,* compliance with the provision of Article 103 does not constitute a circumstance precluding wrongfulness. If the general saving clause were enough to preclude wrongfulness of the breach of an obligation because of compliance with Article 103, then that general saving clause should have been enough to preclude the wrongfulness of use of force in self-defence as well, without the need for a special provision. One could, of course, conceptualize the non-engagement of responsibility for the violation of an obligation on the basis of Article 103 as an instance of consent expressed between UN member states, which indeed constitutes a circumstance precluding wrongfulness.[147] First of all, this means that Article 103 cannot operate as a justification as against non-members.[148] But—most importantly—it does not operate with respect to human rights obligations,

particularly those under general international law: human rights obligations are not owed specifically to any UN member state or to any other state: they are primarily owed to their beneficiaries, ie those under the jurisdiction of the relevant state.[149] As such, consent cannot help justify the breach of a human rights obligation under Article 103 in this instance.

Further, even though the UN Charter can be seen as special law, contracting out of general international law (and also allowing the Council to do so), the relevant intention must be evident in the Charter and the relevant Council resolution.[150] The fact is, however, that the Security Council has always limited itself to declaring obligations under its decisions to supersede any 'international agreement' (or other contracts, licences, and permits).[151] More importantly, on occasion, for example with respect to measures against terrorism, it has made a point of confirming the continued applicability of human rights obligations of member states.[152] This must **(p. 66)** be interpreted to mean that the Security Council does not intend to derogate from general international law regarding the protection of human rights.[153]

In the end, however, these are all arguments and counterarguments, and they can always be made more or less convincingly. Doctrinally it would seem that Article 103 should be considered as a mere conflict, rather than a hierarchy rule. Most importantly, it should not apply to supersede obligations under general international law. But what is decisive is that nothing precludes development in the law and that it is practice that counts, as the ILC states (though to make the opposite point).[154] It has already been mentioned that unlike domestic law, where hierarchy is based on a strict hierarchy of sources, hierarchy in the decentralized international legal system relates to the substance of the rules.[155] But substance and importance lie in the eye of the beholder. Only one beholder's point of view counts in international law: that of states, which create the law, in part through their practice. Indeed, the ILC confirms that 'in the absence of a general theory about where to derive [the] sense of importance [of a hierarchically superior norm], *practice* has developed a vocabulary that gives expression to something like an informal hierarchy in international law'.[156]

What practice shows, at least in the treatment of potential conflicts in domestic courts, is that states (courts being their organs) are very reluctant to accept that Article 103 grants primacy to Security Council decisions over fundamental human rights guarantees. This must denote that states consider fundamental human rights to take precedence over Security Council-imposed obligations. The term 'fundamental' of course implies some sort of hierarchy

in and of itself: presumably ‘fundamental human rights’ are superior to just ‘human rights’. This, however, does not necessarily mean that only those rights that have attained the status of *jus cogens* are ‘fundamental’.[157] There may be indeed another hierarchical rank between *jus cogens* and *jus dispositivum*: this rank does not refer to obligations under the UN Charter by virtue of Article 103, but rather to fundamental human rights guarantees. Which are these guarantees? It is the practice of states that will fill the category; but provisional results can be presented already. One of the most prominent such guarantees that emerges from the discussion so far is the right to a fair trial in its various incarnations (right of access to a court, right to an effective remedy). This is the right that was invariably involved in all the domestic cases surveyed, and the one that in the majority of cases ‘won the day’, even though not by being directly pitched against Article 103. But of course, the arguments that ‘won the day’ relating to the right to a fair trial were made under domestic law. That must present an obstacle to considering said practice as establishing certain fundamental human rights as having a particular hierarchical rank in international law. **(p. 67)**

4.2 Domestic law as an obstacle

A way to overcome the Article 103 obstacle has been to focus on the domestic legality of the implementing measure, while disconnecting it from the Security Council decision that serves as its ‘genesis’ and as the underlying reason for its existence (in particular as far as ‘strict’ obligations under Council resolutions are concerned). This allows the court to ‘escape’ consideration of the hierarchy of norms under international law, and thus to avoid even having to mention Article 103. As has become evident, all courts that have struck down domestic implementing measures have done so on the basis of constitutional rules protecting fundamental rights, mainly the right to a fair trial.

But from the perspective of international law, such reliance on domestic law —while it avoids the Article 103 issue—is an obstacle in itself: the court is not asserting the normative superiority of certain human rights in international law, but rather in its own domestic law. That is fine as far as the domestic legal order is concerned, but it does not have any added value in the international sphere. Much to the contrary, it forces the state (through the annulment of the domestic implementing measure) into non-compliance with its international obligations under international law (Article 25). No domestic law argument can be raised to justify the breach of an international obligation.[158]

Still, the decentralized reaction of domestic courts, even if on the basis of domestic constitutional values, is important. For one, by forcing the state into non-compliance with the Security Council obligation and thus the UN Charter, the domestic court may in effect be forcing the state (ie the executive) to translate the legal argument put forward by the court in international law terms. This means that the state may be forced to justify its non-compliance, not of course in domestic law terms, because that would not be a valid argument, but rather in international law terms, thereby asserting the hierarchical superiority of fundamental human rights over Security Council measures that seem to be in genuine conflict with these fundamental rights.

In this respect, the substantive overlap between human rights guarantees under international law and 'fundamental rights' under domestic constitutional law should be highlighted. The right to a fair trial, for example, which in its various aspects is the protagonist in challenges to conduct imposed by Security Council decisions, is not just guaranteed in domestic constitutions, but also in the ECHR,[159] the American Convention on Human Rights (ACHR),[160] the ICCPR,[161] and thus quite probably general international law. Some of the reacting courts, even though deciding under domestic law, have explicitly drawn parallels between the constitutionally protected rights that were decisive in the instance, and substantively almost identical internationally protected rights. Examples include the Canadian Federal Court in *Abdelrazik,*[162] but also quite clearly the General Court of the EU in *Kadi II,* where the Court, even though applying primary EU law, cites the UN High Commissioner for Human Rights in support of the need for judicial **(p. 68)** decisions in, or judicial review of, the imposition of freezing measures that can be qualified as punitive.[163] For her part, the UN High Commissioner for Human Rights clearly enlists domestic and regional court decisions on sanctions, such as the ECJ decision in *Kadi,* as international practice regarding the *international* protection of human rights.[164]

The point then is broader, as one could generally argue that there are a number of human rights that substantively overlap in being guaranteed by both international and domestic law.[165] To this, one could add the practice of states such as Turkey and the Netherlands, which give primacy in their constitutions to human rights obligations under international treaties,[166] thus incorporating international human rights into the highest rank of domestic law (which then may be used as an escape from the operation of Article 103).[167] A number of other constitutions grant international law a hierarchical rank above that of ordinary law (even if below the constitution),

and engage in consistent interpretation of international and domestic law in fundamental rights issues.[168]

Even more importantly, one should not forget that courts themselves are organs of the state, and thus they engage in state practice, which further —when complemented by *opinio juris*—forms customary international law, and even peremptory law. Substantively, domestic courts are asserting the superiority of fundamental rights as against Security Council measures. In this way, domestic courts can be seen as entrenching the normative superiority of fundamental human rights in international law, since accumulated court decisions that overlap in their substantive considerations must have some impact in the formation of customary international law and in the clarification of the content of the nebulous concept of *jus cogens*.[169] Perhaps, then, *jus cogens* is now being (successfully) shaped from below, as per Article 53 VCLT, rather than from 'above', whether this 'above' is the **(p. 69)** ILC or international legal scholarship. In the final analysis, their approach grants fundamental human rights an '*effet utile*', in that the Security Council-imposed measure has to yield to fundamental human rights considerations, and the applicant is granted at least some relief.

5. Conclusion

It is only a relatively recent development that international law has been accepted as encompassing at least some rudimentary hierarchical elements in its otherwise horizontal structure. There is much work to be done in understanding and clarifying how these hierarchical elements are articulated in the international legal system. On the occasion of two sets of rules that may often conflict—those produced by the Security Council under Chapter VII of the Charter and those under international human rights law—it was sought to clarify some aspects of hierarchy in international law. An examination of the rudimentary hierarchical structure given in mainstream scholarship demonstrated that Article 103 of the UN Charter is overwhelmingly considered, whether explicitly or implicitly, to constitute a rule of hierarchy and to allow Security Council measures to supersede human rights obligations, whether under treaty or under customary law, as long as these latter obligations do not come under the rubric of *jus cogens*.

A careful examination of recent practice, however, and in particular on the part of domestic courts, demonstrated that there is a tendency to try to avoid the conflict between human rights obligations and Security Council measures at all costs. This determination on the part of courts to avoid

conflict may sometimes lead to extreme ‘interpreting away’ of the conflict, or even to seemingly blatant dualism. But what also becomes apparent is that such going to extremes in order to avoid conflict is guided by the inability of courts to accept Security Council measures as having the power to simply do away with human rights. Article 103 of the UN Charter has been stretched for years in order to serve as a cornerstone for the supremacy of the UN Charter—a document seen by many as standing for all that is good. But when Article 103 is being put to distasteful use by those who yield the power this provision enshrines, and when domestic courts exemplify that distaste through their reactions, then perhaps it is time for a more sober reading of Article 103, in light of its actual language and in light of the recent reactions.

The practice of domestic courts in preferring human rights obligations over Security Council measures may not simply denote a particular reading of Article 103, however. Courts engage in state practice, and perhaps this practice now establishes certain human rights guarantees, such as the right to a fair trial in its various incarnations, as occupying a superior hierarchical level than the rest of international law, whether they can be argued to partake in the status of *jus cogens* or to establish an intermediate hierarchical category between *jus cogens* and *jus dispositivum*.

Many questions regarding the actual hierarchy of norms in international law and the particular position of human rights norms in this hierarchy remain **(p. 70)** unanswered and open to further debate;[170] this is also the case when juxtaposing Security Council measures and human rights obligations. The precise scope of Article 103 and the sources of obligations incumbent upon the UN and the Security Council are areas where principled disagreement is to be expected. But it is practice that makes law at the international level, and this makes the words of Koskenniemi even more pertinent in our field: ‘Law is the complete opportunist: while it sustains hierarchy, it has equally the resources to reverse it.’[171] This is by and large reflected also in the decentralized reactions by domestic courts to Security Council measures that are widely perceived to challenge the most fundamental human rights. The fact that—substantively, if not formally—the reaction is based on asserting the normative superiority of human rights over Council measures may signify the entrenchment of certain fundamental rights beyond the prohibition of genocide, torture, and apartheid, as *jus cogens.*

Notes:

(1.) H Kelsen, *The Law of the United Nations* (Praeger, New York 1950) 295 and cf ?736.

(2.) Cf J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge 2003) 93: 'norms of international law are seldom "finished products," simply requiring implementation. The function of the international adjudicator in "completing" the norm as it applies to a particular dispute… should not be underestimated' (references omitted). This of course applies to all law, not just international law. There is no *acte clair* that merely requires implementation. See further H Kelsen, *Reine Rechtslehre* (2nd edn Franz Deuticke, Wien 1960) 242 ff; and cf H Lauterpacht, *The Function of Law in the International Community* (Clarendon, Oxford 1933) 100.

(3.) See, eg, E de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart, Oxford 2004) 227–33 with further references; E de Wet, 'Human Rights Limitations to Economic Enforcement Measures Under Article 41 of the United Nations Charter and the Iraqi Sanctions Regime' (2001) 14 LJIL 277; M Bossuyt, 'The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights' (2000) UN Doc E/CN.4/Sub.2/2000/33, 15–19, paras 59–73, particularly 16–19, paras 63–73 with further references; cf M Craven, 'Humanitarianism and the Quest for Smarter Sanctions' (2002) 13 EJIL 43, 45–6 and relevant references; generally SP Marks, 'Economic Sanctions as Human Rights Violations' (1999) 89 *American Journal of Public Health* 1509.

(4.) See, eg, the (then) OAU declarations and decisions in AHG/Dec.127 (XXXIV) of 8–10 June 1998, paras 2–3; AHG/Decl.2 (XXXIII) of 2–4 June 1997, paras 6–7.

(5.) For a brief overview see A Tzanakopoulos, 'Chapter VII Measures (UN Charter) (with regard to International Tribunals)' in A Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP, Oxford 2009) 260–1.

(6.) See, eg, F Francioni, 'The Rights of Access to Justice under Customary International Law' in F Francioni (ed), *Access to Justice as a Human Right* (OUP, Oxford 2007) 1, 51–4; and see further section 3 below for a number of relevant instances and discussion.

(7.) ECHR, Art 6 and ICCPR, Art 14; cf UDHR, Art 10 and Charter of Fundamental Rights of the European Union, Art 47. See, eg, *Golder v UK* (ECtHR) App No 4451/70 (21 February 1975) paras 28–36; *Canea Catholic Church v Greece* (ECtHR) App No 25528/94 (16 December 1997) para 38; *Hornsby v Greece* (ECtHR) App No 18357/91 (19 March 1997) para 40; HRC General Comment 32 in UN Doc CCPR/C/GC/32 (23 August 2007) 2–3, para 9, and 17, para 58 with further references, including to HRC views on relevant Communications.

(8.) Since the UN is a subject of international law, it is also subject to customary international law to the extent that its Charter does not indicate an intention to free it from customary obligations. On these points see in detail A Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP, Oxford 2011) ch 3, and especially 73–6.

(9.) This is because only decisions ‘in accordance with the Charter’ acquire binding force under UNC, Art 25: see, eg, D Bowett, ‘The Impact of Security Council Decisions on Dispute Settlement Procedures’ (1994) 5 EJIL 89, 92; D Akande, ‘The International Court of Justice and the Security Council’ (1997) 46 ICLQ 309, 333–5; J Delbrück, ‘Article 25’ in B Simma (ed), *The UN Charter—A Commentary* (2nd edn OUP, Oxford 2002) 452, 459 para 17; J Alvarez, ‘The Security Council's War on Terrorism’ in E de Wet and A Nollkaemper (eds), *Review of the Security Council by Member States* (Intersentia, Antwerp 2003) 119, 141; E Suy and N Angelet, ‘Article 25’ in JP Cot, A Pellet, and M Forteau (eds), *La Charte des Nations Unies—Commentaire article par article* (3rd edn Economica, Paris 2005) 909, 916; cf B Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 RdC 217, 264; *Namibia* [1971] ICJ Rep 16, 53–4, paras 115–16. For more detail see Tzanakopoulos (n 8) 164–74.

(10.) Cf *Certain Expenses* [1962] ICJ Rep 151, 168 and *Namibia* (n 9) 22, para 20. But see further Tzanakopoulos (n 8) 169–72.

(11.) This is an adaptation of the ‘strict’ approach to normative conflict, whereby there is conflict only between mutually exclusive obligations (see CW Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 BYIL 401, 426) along the lines suggested by H Kelsen, *Allgemeine Theorie der Normen* (Manz, Wien 1979) 99. Not every author agrees with Jenks's ‘strict’ or ‘technical’ definition of conflict, and with good reason: Pauwelyn (n 2) 169–75 and E Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17 EJIL 395, 395–6, for example, have pointed out, in following others before them, that a norm prohibiting certain conduct

may well come into conflict with one allowing the same conduct, even though here there is no instance of mutually exclusive obligations. Without adopting the ‘strict’ definition, which is here adapted to accommodate conflicts between rules rather than solely between mutually exclusive obligations, the focus in the present chapter is mostly on such situations of ‘strict’ conflict between obligations. A reference to conflict between rules is retained, however, as it appears that—in practice—much will depend on the interpretation of the precise scope of the conduct permitted, prescribed, or proscribed by each rule: see, eg, B Conforti, ‘Consistency among Treaty Obligations’ in E Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP, Oxford 2011) 187, 188 and the discussion in section 3.1.2 below. In this sense, there is a normative conflict when the effect of one rule is to impede the operation of the other: cf A Orakhelashvili, ‘Article 30 Convention of 1969’ in O Corten and P Klein (eds), *The Vienna Conventions on the Law of Treaties—A Commentary* (OUP, Oxford 2011) 764, 789, para 67.

(12.) Cf *Right of Passage over Indian Territory* [1960] ICJ Rep 6, 44: ‘a particular practice must prevail over any general rules’.

(13.) Cf VCLT, Art 30(3) which, however, applies by logical necessity to all norms having the same legal value, whether they stem from a treaty, from a customary rule, and so forth.

(14.) Significantly, no matter which rule prevails in the particular instance, all norms remain of the same legal value, this being a characteristic of the ‘neutrality’ of international law (other than *jus cogens*): cf Pauwelyn (n 2) 13–14.

(15.) For this terminology, namely ‘occasional’ hierarchy denoting conflict rules as opposed to ‘structural’ hierarchy denoting normatively hierarchically superior rules, see E Roucounas, ‘Engagements parallèles et contradictoires’ (1987) 206 RdC 9, 60 ff.

(16.) Cf L-A Sicilianos, ‘The Relationship between Reprisals and Denunciation or Suspension of a Treaty’ (1993) 4 EJIL 341, 352. However, Pauwelyn (n 2) 131–2 seems to consider general, open-ended rules, such as general principles of law under Art 38(1)(c) of the ICJ Statute, of a ‘lesser status’ than others, while recognizing a lack of hierarchy of sources. He does so despite further acknowledging (even though earlier in the text) that the reason general principles will have to give way if they come into conflict with a customary or treaty rule will be that they are by nature ‘general’, and

thus the more special rule will have to prevail: ibid 129. It is argued here that generality does not imply *de jure* 'lesser' status, as Pauwelyn claims; Pauwelyn himself seems to accept this when discussing potential conflicts between custom and treaty: there is no *a priori* hierarchy between the two, even though in practice a treaty will 'normally prevail' over custom: ibid 133. Elsewhere, the *lex specialis* rule, as well as the *lex posterior,* are described as mere 'principles of legal logic' rather than rules of hierarchy: ibid 126. Cf the discussion in the Report of the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/CN.4/L.682, 47 ff, paras 85 ff, speaking of an 'informal' hierarchy ('ILC Fragmentation').

(17.) See ILC Fragmentation (n 16), para 18.

(18.) See I Seidl-Hohenveldern, 'Hierarchy of Treaties' in J Klabbers and R Lefeber (eds), *Essays on the Law of Treaties—A Collection of Essays in Honour of Bert Vierdag* (Martinus Nijhoff, The Hague 1998) 7, 10.

(19.) Cf ibid. Similarly to treaties being in principle equal between themselves, treaties are also equal to custom in principle: M Akehurst, 'The Hierarchy of the Sources of International Law' (1974–5) 47 BYIL 273, 275.

(20.) If it can be shown, eg, that the earlier, special rule was intended to continue applying as special law despite subsequent new general law. Cf generally N Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law* (Clarendon, Oxford 1994) 20; 22; 146–7; Akehurst (n 19) 275–6. See also Pauwelyn (n 2) 137–43 and 405–9, especially 408–9 for an example of an earlier special norm prevailing over a later more general norm. The ILC gives the example of the UN Covenants not prevailing over the ECHR in Fragmentation (n 16) 24, para 34.

(21.) Note that Akehurst (n 19) 273 succinctly put the case when he remarked, with respect to the *lex specialis* rule, that 'particular' and 'general' are 'relative, not absolute terms; one rule may be more general than a second rule and less general than a third rule'. He further notes that the *lex posterior* rule is hard to apply in international law because of the relative uncertainty of the date of emergence of a customary rule for example, while the *lex specialis* rule is in essence 'no more than a rule of interpretation'.

(22.) ILC Fragmentation (n 16) 16, para 19; 'the operation of those relationships cannot be determined abstractly': 167, para 325. Cf the

observation of H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, London 1958) 28 that '[t]he priority as intimated by the apparently hierarchical order laid down in Article 38 of the Statute of the Court…of conventional international law is therefore *of a highly relative nature*' (emphasis added).

(23.) Cf Pauwelyn (n 2) 327 who calls them 'priority rules' and goes on to cast the question as one of 'choice of law'. The ILC in Fragmentation (n 16) 166 (Part E) seems to use the term 'conflict rules' as a blanket term, covering also rules of hierarchy, while Orakhelashvili (n 11) 773, paras 19 and 21 considers that [content-] 'neutral' conflict rules are part of the legal framework of hierarchy of international law. For M Koskenniemi, 'Hierarchy in International Law: A Sketch' (1997) 8 EJIL 566, 567 and fn 7, there is no such thing as a non-normative hierarchy, because hierarchy means difference in a normative light. This accords with the position taken here that rules of 'occasional hierarchy' are not really rules of hierarchy at all, and should rather be called conflict rules.

(24.) Cf Pauwelyn (n 2) 21: some rules 'protect so important and universal a value…that they have a hierarchical standing that is higher than other norms'; and 98–9; ILC Fragmentation (n 16) 166 ff (Part E).

(25.) See M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 MLR 1, 4–5 on the structural bias in functional expertise such as 'trade law', 'human rights law', 'environmental law', and so forth (with further references); M Koskenniemi, *From Apology to Utopia* (CUP, Cambridge 2005) 610 ff. Cf also the characteristic aversion of J Klabbers, 'Setting the Scene' in J Klabbers, A Peters, and G Ulfstein, *The Constitutionalization of International Law* (OUP, Oxford 2009) 1 that the CFI in Case T-315/01 *Kadi* [2005] ECR II-3649, when interpreting and applying human rights law adopted 'positions that few *human rights lawyers* would ever think defensible' (emphasis added).

(26.) ICJ Statute, Art 38(1). Cf generally Pauwelyn (n 2) ch 3; Kontou (n 20) 19–21.

(27.) The overriding effect of *jus cogens* norms was first introduced into positive law through the 1969 Vienna Convention on the Law of Treaties (VCLT) (Arts 53 and 64) and as such was initially considered as applying only in the context of treaty law. However, the effects of *jus cogens* norms are by now accepted as going beyond these strict confines: Commentary to the ILC Articles on the Responsibility of States for Internationally Wrongful

Acts (2001) UN Doc A/56/10 (‘ASR’) 85, para 5 with further references to case law; see generally further G Gaja, ‘*Jus Cogens* beyond the Vienna Convention’ (1981) 172 RdC 271; A Orakhelashvili, *Peremptory Norms in International Law* (OUP, Oxford 2006). With respect to *jus cogens* norms being in ‘genuine’ conflict with other norms cf n 43. Genuine (as opposed to apparent) conflict is one that cannot be resolved through interpretation: see text at n 50.

(28.) VCLT, Arts 53 and 64.

(29.) ASR, Arts 40 and 41.

(30.) ASR, Art 26.

(31.) See ASR Commentary 85, para 5 and 112–13, paras 4–6 for the traditional statement of a list of norms that are accepted as peremptory.

(32.) See generally the discussion by the ILC in Fragmentation (n 16) 175–6, paras 344–5 with further references. For an extreme view, arguing that Art 103 has not only passed into customary law but also enjoys the status of *jus cogens,* see Conforti (n 11) 189. One may be left to wonder what would then happen in cases where, say, an obligation established by a Security Council binding decision conflicted with *another* rule of *jus cogens*.

(33.) And of course sparking, in part, the whole debate over the ‘constitutional’ status of the UN Charter: cf R Bernhardt, ‘Article 103’ in Simma (n 9) 1292, 1302, para 37. On substantive (*jus cogens*) v institutional (Art 103) hierarchy cf C Chinkin, ‘*Jus Cogens,* Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution’ (2006) 27 Finnish YBIL 63.

(34.) See, eg, A Pellet, ‘Peut-on et doit-on contrôler les actions du Conseil de sécurité?’ in Société française pour le droit international (ed), *Le Chapitre VII de la Charte des Nations Unies—Colloque de Rennes* (Pedone, Paris 1995) 221, 235.

(35.) See section 4.1 below.

(36.) Cf ILC Fragmentation (n 16) 206, para 409; JHH Weiler and AL Paulus, ‘The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?’ (1997) 8 EJIL 545, 558–9 describing the ‘mainstream’ view.

(37.) Cf G Fitzmaurice, ‘Third Report on the Law of Treaties’ (1958) II YILC 40.

(38.) Cf VCLT, Art 64.

(39.) See, eg, Orakhelashvili (n 27) 53–60.

(40.) But see further K Teraya, ‘Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights’ (2001) 12 EJIL 917.

(41.) Cf UN Charter, Art 39.

(42.) See, eg, HRC General Comment 32 (n 7) 2, para 6.

(43.) As the ILC Commentary on Art 26 of the ASR (at 85, para 3) states, ‘peremptory norms of general international law generate *strong interpretative principles* which will resolve *all or most apparent conflicts*’ (emphasis added).

(44.) Cf text at nn 24–31 above and ILC Fragmentation (n 16) 167, para 327.

(45.) The 53 member states of the (then) OAU considered sanctions against Libya to be in violation of Charter provisions and subsequently decided to disobey them in 1998: see documents referred to in n 4 above. Even before 1998, the Organization of Islamic Conference (OIC) had called on UN member states to disobey the arms embargo against the former Yugoslavia as far as Bosnia was concerned, claiming that the embargo violated Bosnia's right to self-defence: Res No 6/22-P (10–12 December 1994) para 7; cf Res No 7/21-P (25–29 April 1993) 12th preamb; Res No 6/23-P (9–12 December 1995) paras 12–15. See in detail Tzanakopoulos (n 8) chs 5 and 7.

(46.) In the term ‘domestic courts’ one should include regional international courts of partial legal orders, such as the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ). Reference will be made to their jurisprudence.

(47.) See generally E de Wet and A Nollkaemper, ‘Review of Security Council Decisions by National Courts’ (2002) 45 GYIL 166; also, among others, G Nolte, ‘The Limits of the Security Council's Powers and its Functions in the International Legal System—Some Reflections’ in M Byers (ed), *The Role of Law in International Politics* (OUP, Oxford 2000) 315, 320; Pellet (n 34) 227–8.

(48.) Orakhelashvili (n 27) 439–40; Pauwelyn (n 2) 22: ‘issues of conflict between norms are more likely to arise *in concreto,* before…adjudicators’.

(49.) ILC Fragmentation (n16) 24–5, para 36.

(50.) Pauwelyn (n 2) 178.

(51.) See, eg, ibid 240–1; ILC Fragmentation (n 16) 25–6, paras 37–8; Akehurst (n 19) 275–6; Orakhelashvili (n 11) 776, para 31. See further text at nn 77–8 for an explicit statement of the presumption by the European Court of Human Rights.

(52.) *R (Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin), paras 109–12.

(53.) *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327, para 63; paras 68–87 (‘CA *Al-Jedda*’).

(54.) *R (Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58; (UK 2007) ILDC 832, paras 26–39 (Lord Bingham); para 114 (Lord Rodger); paras 125–9 (Baroness Hale, though with severe reservations); paras 130–6 (Lord Carswell); paras 151–2 (Lord Brown) (‘HL *Al-Jedda*’).

(55.) Ibid paras 33–5 (Lord Bingham).

(56.) See n 25 para 190.

(57.) *Lockerbie* [1992] ICJ Rep 3, 15, paras 39–40; [1992] ICJ Rep 114, 126–7, paras 42–3.

(58.) See SCR 1546 (2004). Cf Lord Bingham's argument with Baroness Hale's in HL *Al-Jedda* (n 54) paras 31–3 and 126–9 respectively.

(59.) See further section 3.1.2.2 below, but also consider the difficulty in interpreting the authorizations for the use of force in SCRs 1973 (2011) with respect to Libya and 1975 (2011) and related resolutions with respect to Côte d'Ivoire. For brief comment see ‘The UN/French Use of Force in Abidjan: Uncertainties Regarding the Scope of UN Authorizations’ [2011] EJIL: Talk! (9 April), available at http://www.ejiltalk.org.

(60.) Cf Case T-228/02 *OMPI* [2006] ECR II-4665, paras 100–2 with CFI *Kadi* (n 25) para 258. Cf also the distinction drawn in *HM Treasury v Mohammed Jabar Ahmed and others (FC); HM Treasury v Mohammed al-Ghabra (FC);*

R (Hani El Sayed Sabaei Youssef) v HM Treasury [2010] UKSC 2, para 148 (Lord Phillips); para 168 (Lord Rodger); paras 196 ff (Lord Brown) ('SC *A, K et al*'). See most importantly the arguments of the Commission and the discussion by the General Court of the EU in T-85/09 *Kadi v Commission* [2010] ECR II-0000; OJ C 317/29 (30 September 2010), paras 86–100 and 113–21 respectively ('*Kadi II*').

(61.) See, eg, HL *Al-Jedda* (n 54) and cf *Al-Jedda v UK* (ECtHR Grand Chamber) App No 27021/08 (7 July 2011) ('ECtHR *Al-Jedda*').

(62.) See, eg, *A, K, M, Q, G v HM Treasury* [2008] EWCA Civ 1187, paras 83 ff ('CA *A, K et al*'); CFI *Kadi* (n 25) paras 136–52; Case T-318/01 *Othman* [2009] ECR II-1627, para 59; Case No 1A 45/2007 *Nada v SECO* 133 BGE II 450; (CH 2007) ILDC 461, para 3.

(63.) *A and ors v The Netherlands* (3 February 2010) LJN: BL1862/334949; (NL 2010) ILDC 1463.

(64.) *Nada* (n 62) para 3.

(65.) *A, K, M, Q, G v HM Treasury* [2008] EWHC 869 (Admin), paras 19 ff, 33, and 37 ff ('HC *A, K et al*'); *Hay v HM Treasury* [2009] EWHC 1677 (Admin); (UK 2009) ILDC 1367, paras 26–7 and 36–41; Case T-727/08 *Abdelrazik v Minister of Foreign Affairs and Attorney General of Canada* (2009) FC 580; (CA 2009) ILDC 1332, paras 2 and 42–3; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, paras 121–6 and 237–9 ('ECJ *Kadi*'); CFI *Kadi* (n 25) paras 136–52; *A and ors* (n 63). In the first instance of *Al-Qadi* before the Turkish Council of State, referred to in UN Doc S/2007/132, 39–40, para 8 (unreported), the Turkish court found the domestic implementing measure in violation of Art 13 of the Turkish Constitution, presumably pursuant to a relevant argument by the applicant: cf *Al-Qadi* (TK 2007) ILDC 311 (forthcoming).

(66.) See, eg, Kadi's claim filed on 16 January 2009 before the District Court for the District of Columbia (*Kadi v Paulson and others* Case 1:09-cv-00108; available at http://www.carter-ruck.com/Documents/Sheikh_Yassin_Abdullah_Kadi_Complaint.pdf (last accessed 21 February 2010) 3, para 6 and 19, paras 49 ff: Kadi attacks the domestic measure solely on the basis of US law).

(67.) CFI *Kadi* (n 25) paras 181–208.

(68.) Ibid paras 213–22.

(69.) Cf ibid para 225.

(70.) See explicitly *Nada* (n 62) paras 5.1 and 6.2; HL *Al-Jedda* (n 54) para 35 (Lord Bingham); HC *A, K et al* (n 65) para 18; SC *A, K et al* (n 60) para 74 (Lord Hope, with whom Lord Walker and Lady Hale agree). Cf *A and ors* (n 63) para 4.6.

(71.) CFI *Kadi* (n 25) paras 226 ff.

(72.) Ibid para 292.

(73.) Cf A Tzanakopoulos, 'Domestic Court Reactions to UN Security Council Sanctions' in A Reinisch (ed), *Challenging Acts of International Organizations before National Courts* (OUP, Oxford 2010) 54, 62. But also because rules of *jus cogens* generate a strong interpretative pull towards avoiding the conflict: see n 43 above and section 3.1.2.2 below.

(74.) *Nada* (n 62) paras 5–7.2.

(75.) Ibid para 7.3.

(76.) See n 61 paras 105–9.

(77.) Cf Tzanakopoulos (n 8) 73–4 (reference not in original).

(78.) ECtHR *Al-Jedda* (n 61) para 102 (emphasis added).

(79.) SCR 1373 (2001), para 1(c). Cf *OMPI* (n 60) para 101; SC *A, K et al* (n 60) para 148 (Lord Phillips); para 168 (Lord Rodger); paras 196 ff (Lord Brown).

(80.) *OMPI* (n 60) para 102.

(81.) Ibid para 107.

(82.) See nn 79–81.

(83.) Cf *A, K et al*: HC (n 65) paras 39–40; SC (n 60) para 148 (Lord Phillips); para 168 (Lord Rodger); paras 196 ff (Lord Brown).

(84.) Para 17.

(85.) *A and ors* (n 63) paras 4.6–4.7.

(86.) Ibid ff.

(87.) See UN Doc S/2006/154 (2006) 46, paras 8–9; UN Doc S/2006/750 (2006) 48, para 5.

(88.) *Hafiz Muhammad Saeed and ors v Government of the Punjab, Home Department and ors* (2 June 2009) Writ Petition No 6208/2009, paras 20; 21 *in fine*; 23.

(89.) [2008] UKHL 26; [2008] 2 All ER 1097.

(90.) Ibid para 2.

(91.) Ibid para 12.

(92.) Ibid para 15.

(93.) Case C-340/08 *M and Others* [2010] ECR I-3913, paras 49–51; 64–7; 74.

(94.) *Bosphorus Hava v Minister for Transport* [1994] 2 ILRM 551, 557.

(95.) Ibid 558.

(96.) Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953, paras 19–27.

(97.) *R (Othman) v Secretary of State for Work and Pensions* [2001] EWHC Admin 1022, para 57.

(98.) Ibid paras 56; 60–1.

(99.) SCR 1452 (2002), para 1.

(100.) Ibid para 3.

(101.) See n 65 paras 2–3; 42–3; and 120–1; cf para 162.

(102.) Ibid paras 123–9; and 163–5. See for further comment A Tzanakopoulos, ‘United Nations Sanctions in Domestic Courts: From Interpretation to Defiance in *Abdelrazik v Canada*’ (2010) 8 JICJ 249.

(103.) Akehurst (n 19) 277.

(104.) The unity of the legal system may be propounded from two perspectives: either having international law at the top of the pyramid, granting validity to all other partial legal orders, including the legal orders of states, or with domestic law at the apex, which through domestication of international law grants the latter validity in the domestic legal system. In both cases the legal system is treated as unitary; only in the former it is so under international law, whereas in the latter it is so under domestic law (which means there are as many unitary legal systems as there are domestic legal orders).

(105.) ECJ *Kadi* (n 65) para 298.

(106.) Ibid para 326 quite clearly.

(107.) See *Othman* (n 62).

(108.) For the expression see T Stahlberg, 'Case T-85/09, Kadi II' [2010] ECJblog.com (26 October); available at http://www.ecjblog.com.

(109.) *Kadi II* (n 60) paras 113–21. See also paras 138–9 where the General Court acknowledges the obliteration of the distinction it drew in *OMPI* between the 1267 and the 1373 sanctions regimes with respect to the margin of discretion left to the implementing UN member states.

(110.) Ibid paras 121, 123. For brief comment see '*Kadi II:* The 1267 Sanctions Regime (Back) Before the General Court of the EU' [2010] EJIL: Talk! (16 November).

(111.) HC *A, K et al* (n 65); CA *A, K et al* (n 62).

(112.) *Hay* (n 65). For brief comment see 'Stepping Up the (Dualist?) Resistance' [2009] EJIL: Talk! (9 October); and the ILDC analysis available at http://www.oxfordlawreports.com.

(113.) SC *A, K et al* (n 60). For brief comment see 'The UK Supreme Court Quashes Domestic Measures Implementing UN Sanctions' [2010] EJIL: Talk! (23 February).

(114.) *Hay* (n 65) para 44 (emphasis added).

(115.) SC *A, K et al* (n 60) paras 66 ff.

(116.) Ibid para 75.

(117.) Ibid para 174.

(118.) See n 65 paras 303–4 and cf *Kadi II* (n 60) para 119.

(119.) *Behrami and Behrami v France* and *Saramati v France, Germany and Norway* (ECtHR Grand Chamber) App Nos 71412/01 and 78166/01 (2 May 2007).

(120.) See M Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 Duke JCIL 69, 86.

(121.) The wave of disobedience has not gone unnoticed by the Council itself: in SCR 1904 (2009) at 9th preamb, the Council '[takes] note of challenges, both legal and otherwise, to the measures implemented by Member States under [the 1267 regime]' before establishing an 'Office of the Ombudsperson' to try to alleviate the pressure for the creation of a fair review mechanism of individual sanctions (para 20 and Annex II).

(122.) *Nada v Switzerland* (Grand Chamber, pending) App No 10593/08.

(123.) See, eg, *Bosnia Genocide* [1993] ICJ Rep 325, 440, para 100 (sep op Lauterpacht).

(124.) *Conditions of Admission* [1948] ICJ Rep 57, 64; see, among many others, Tzanakopoulos (n 8) 57–69 with further references.

(125.) See, eg, H-P Gasser, 'Collective Economic Sanctions and International Humanitarian Law' (2006) 56 ZaöRV 871, 880–1; I Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights' (2003) 72 NJIL 159, 167; A Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 *Global Governance* 131, 136.

(126.) See, eg, S Talmon, 'The Security Council as World Legislator' (2005) 99 AJIL 175, 184; J A Frowein and N Krisch, 'Introduction to Chapter VII' in Simma (n 9) 701, 711. See also de Wet (n 3) 202–3; 218; 223–4; but cf 184–5.

(127.) See UNCIO XIII 709–10; *Certain Expenses* (n 10) 168; cf *Jaworzina* [1923] PCIJ Ser B No 8, 37.

(128.) *Air Services* (1978) 18 RIAA 443, para 81; *Lac Lanoux* (1957) 12 RIAA 310, para 16; JA Carrillo Salcedo, ‘Reflections on the Existence of a Hierarchy of Norms in International Law’ (1997) 8 EJIL 583, 584–5.

(129.) See section 2 above. An interesting point is made by G Thallinger, ‘Sense and Sensibility of the Human Rights Obligations of the United Nations Security Council’ (2007) 67 ZaöRV 1015, 1028–9, who argues that Art 103 can operate to supersede obligations under general international law, but cannot operate to supersede the UN's obligation to promote universal respect for human rights under Art 55(c) UNC: this is also an obligation under the Charter that partakes in the superior status granted to Charter obligations by Art 103. The problem with this argument, however, is that Art 55 is so open-ended that it would be quite a stretch to argue that it imposes a whole set of specific human rights obligations on the UN. Cf to this effect CA *Al-Jedda* (n 53) paras 49–50; 77.

(130.) See Pauwelyn (n 2) 335–6.

(131.) See ILC Fragmentation (n 16) 175–6, paras 344–5; Gasser (n 125) 881; Orakhelashvili (n 11) 782, para 46. Cf H Kelsen, ‘Conflicts between Obligations under the Charter of the United Nations and Obligations under Other International Agreements—An Analysis of Article 103 of the Charter’ (1948–9) 10 U Pitt LR 284. A similar approach can perhaps be glimpsed in Judge Oda's declaration attached to the *Lockerbie* order on Provisional Measures, where he argued that the rights sought to be protected by Libya, while brought on the basis of the 1971 Montreal Convention, were actually ‘sovereign rights under general international law’, which made for a different issue altogether: (n 57) 19 and 131. When read against Oda's dissent in the Preliminary Objections phase [1998] ICJ Rep 9 and 115 at 97–8 and 187–8, paras 42–3 respectively, it becomes clear that this was not merely a reference to the Court's (lack of) jurisdiction to consider claims under general international law in the case, but also to the (lack of) effect of the Security Council resolutions on the rights of Libya under general international law. That the language of Art 103 was intentionally circumscribed is supported by the Charter's *travaux,* since attempts to extend Art 103 to cover all of international law failed: see, among others, J Combacau, *Le pouvoir de sanction de l'ONU* (Pedone, Paris 1974) 282.

(132.) Indeed, as it has been contended, ‘the hierarchical order among the recognized manifestations of international law cannot be determined by treaty’: M Bos, ‘The Hierarchy Among the Recognized Manifestations

(“Sources”) of International Law’ (1978) 25 NILR 334, 337–8 with further references.

(133.) E Suy, ‘The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms’ in U Beyerlin et al (eds), *Recht zwischen Umbruch und Bewahrung: Völkerrecht, Europarecht, Staatsrecht—Festschrift für Rudolf Bernhardt* (Springer, Berlin 1995) 267. Cf text at nn 33–4 above.

(134.) See, eg, Bernhardt (n 33) 1298–9.

(135.) Cf generally TM Franck, ‘Is the UN Charter a Constitution?’ in JA Frowein et al (eds), *Verhandeln für den Frieden—Liber Amicorum Tono Eitel* (Springer, Berlin 2003) 95.

(136.) See Pauwelyn (n 2) 339; cf ILC Fragmentation (n 16) 175, para 343; Milanović (n 120) 76.

(137.) Pauwelyn (n 2) 339; Milanović (n 120) 76.

(138.) Cf Seidl-Hohenveldern (n 18) 11.

(139.) In fact Switzerland, which at the time of conclusion of the VCLT was not a UN member, expressed reservations with respect to the provision: see UN Doc A/CONF.39/C.1/SR.31, 164, para 9; UN Doc A/CONF.39/SR.13, 56, para 57.

(140.) Cf *Namibia* (n 9) 22, para 22.

(141.) And not only that, but—according to Orakhelashvili (n 11) 782, para 46—it also cannot establish the primacy of UN Charter obligations against treaty provisions that reflect customary law.

(142.) See section 2 above.

(143.) VCLT, Arts 53 and 64.

(144.) ASR, Art 26.

(145.) ASR, Art 59. Cf however Milanović (n 120) 76–7.

(146.) ASR, Art 21.

(147.) ASR, Art 20.

(148.) Cf n 139 above; this consideration may appear largely academic today —but it is doctrinally important, while one should not forget that there are some states that are still not UN members: not less so Kosovo, if indeed it is a state, notwithstanding the ICJ's 2010 Advisory Opinion.

(149.) Cf J Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Cannizzaro (n 11) 192, 195–6.

(150.) See *Tadić* (Appeals Chamber Judgment) ICTY-94–1 (15 July 1999) para 296; *Akayesu* (Appeals Chamber Judgment) ICTR-96-4 (1 June 2001) paras 465–6; A Orakhelashvili, 'The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions' (2005) 16 EJIL 59, 80; H-P Gasser, 'Comments' in HHG Post (ed), *International Economic Law and Armed Conflict* (Martinus Nijhoff, Dordrecht 1994) 175; Alvarez (n 9) 135; see in more detail Tzanakopoulos (n 8) 72–6 with further references. But cf CA *Al-Jedda* (n 53) paras 82–3.

(151.) See, eg, SCRs 670 (1990); 748 (1992); 1127 (1997); 1160 (1998); 1267 (1999); 1298 (2000).

(152.) See, eg, SCR 1456 (2003), para 6: 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, *in particular international human rights,* refugee, and humanitarian law' (emphasis added). But cf CA *Al-Jedda* (n 53) para 84. In its own *Al-Jedda,* the Grand Chamber of the ECtHR attached some importance to the preambular paragraph of Resolution 1546 where the Security Council noted 'the commitment of all forces…to *act in accordance with international law, including* obligations under international humanitarian law' (emphasis added), which informed the Court's interpretation of the scope of authorization: (n 61) paras 104–5.

(153.) See explicitly ECtHR *Al-Jedda* (n 61) para 105.

(154.) ILC Fragmentation (n 16) 175–6, paras 344–5; but cf also 167, para 327.

(155.) See section 2 above.

(156.) ILC Fragmentation (n 16) 167, para 327.

(157.) For an argument that 'fundamental human rights' are those that have *erga omnes* status see A Tzanakopoulos, 'Judicial Dialogue in Multi-level

Governance: The Impact of the *Solange* Argument' in OK Fauchald and A Nollkaemper (eds), *Unity or Fragmentation of International Law—The Role of International and National Tribunals* (Hart, Oxford 2012) section VI (available at http://www.ssrn.com).

(158.) ASR, Art 3; VCLT, Art 27.

(159.) Art 6.

(160.) Art 8.

(161.) Art 14.

(162.) See n 65 paras 51, 53. See for further comment Tzanakopoulos (n 102).

(163.) See n 60 para 150. Similarly, at paras 176–7 the General Court refers to and applies the criteria under Art 5(4) of the ECHR with respect to the ability to mount an effective challenge to a restrictive measure. It is noteworthy that Art 5(4) of the ECHR is almost identical to Art 9(4) of the ICCPR.

(164.) See UN Doc A/HRC/12/22 (2009) 15, para 40.

(165.) The *Solange II* doctrine and the cognate 'doctrine of equivalence' articulated by the ECtHR and partially influencing both ECJ *Kadi* and SC *A, K et al* should not be underestimated as a force of homogenization. See Tzanakopoulos (n 157) *passim* and section VI in particular. Cf in this respect A Nollkaemper, 'Rethinking the Supremacy of International Law' (2010) ZÖR 65 particularly at 76–9 (section V). See also generally T Broude and Y Shany (eds), *Multi-sourced Equivalent Norms in International Law* (Hart, Oxford 2011): if there can be equivalent norms between different 'branches' or 'sectors' of international law, why should one not assume some equivalence between norms at the national (constitutional) and international level?

(166.) Art 90(5) of the Turkish Constitution of 1982, as amended in 2004, provides that in case of conflict between domestic provisions on fundamental rights and provisions on fundamental rights under international agreements duly put into effect 'due to differences in provisions on the same matter', the provisions of international agreements shall prevail.

(167.) This can be parallelized to 'reborrowed' words (or 'repatriated loans') (*wandernde Wörter* or *Wanderwörter*; αντ↑↓α-νε↑α) in linguistics, whereby

a word is ‘lent’ (exported) to another language and is then ‘repatriated’ (re-imported) in its altered form. Similarly here international human rights guarantees are domesticated and then potentially re-exported through practice.

(168.) An example is Greece: see Art 28(1) of the Greek Constitution of 1975, as last amended in 2008.

(169.) Cf the comment at n 164 above.

(170.) Cf Weiler and Paulus (n 36) 565.

(171.) Koskenniemi (n 23) 571.

Hierarchy in International Law: The Place of Human Rights
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Human Rights and the Immunities of Foreign States and International Organizations

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Abstract and Keywords

By extensively drawing on existing judicial practice, this chapter argues that the relationship between human rights and the immunities of states and international organizations may be conceptualized as a tension among competing rules which can be worked out by means of interpretation, thus as an apparent conflict of norms open to the application of conflict avoidance techniques. It particularly advocates an ‘alternative-remedies test’ as a reasonable balance between the values and interests underlying the competing rules at stake. It considers that jus cogens may well play a role as a chiefly important element to be taken into account in this balancing process. The overall conclusion is that current and evolving practice in this field lends support to the emergence of a de facto human rights-based normative hierarchy in international law.

Keywords: immunities, international organizations, foreign states, alternative remedies, conflict avoidance techniques

1. Introduction

This chapter will address the relationship between human rights and the immunities of foreign states and international organizations (IOs). It will especially focus on the way to conceptualize that relationship in the light of judicial practice and the general principles concerning conflicts and interpretation of international norms. A rather unusual approach of dealing with the immunities of states and IOs in parallel, to the exclusion of the immunity of state agents, will follow. Indeed, the relentless rise of IOs in the

international arena and their growing involvement in disparate spheres of activity are likely to multiply the situations where an IO becomes entangled in breaches of human rights in a manner that is hardly distinguishable from what happens with states. Thus, despite undeniable persistent dissimilarities, both states and IOs are nowadays abstract entities seemingly amenable to comparable solutions when it comes to restraining their immunities on account of human rights violations. By contrast, contemporary practice increasingly militates in favour of considering the immunity of state agents, who after all remain individuals potentially subject to civil *and* criminal jurisdiction, as an area distinct and separate from the immunity of states as such.[1]

The chapter will argue against the theories which rule out any possible collision between human rights and international immunities (section 2). These theories tend to obfuscate that facet of immunity rules which makes them an 'obnoxious'[2] doctrine in fact denying justice to individuals suing foreign states and IOs before domestic courts. However, this chapter will obviate that the relationship between human rights and immunities may be viewed in terms of a genuine conflict of norms, ie as one between mutually exclusive obligations. This is empirically confirmed by the judicial practice examined below, which shows that courts have overwhelmingly marginalized rules and techniques on conflict of norms as recognized **(p. 72)** in international law.[3] Criteria such as *lex posterior* or *lex specialis* have not played any significant role in judicial decision-making, both in cases involving customary state immunity rules *and* in those concerning IOs' immunity treaty rules.

At any rate, the most-evoked conflict solution technique in *debates* about the relationship between human rights and immunities is that associated with the notion of peremptory international rules, or *jus cogens*. This chapter assumes that *jus cogens* does belong to the recognized sources of international law as a body of supreme rules protecting the fundamental values of the community of nations. It also agrees with the commonly held view that serious violations of human rights and humanitarian law are covered by *jus cogens*. By contrast, the practice reviewed below invites caution in respect of the proposition that the normative hierarchy arising from*jus cogens* per se entails striking down any inconsistent legal rule. That practice demonstrates that this conception of *jus cogens* has rarely been used by the courts, even in the field of IOs' immunity where Article 53 of the Vienna Convention on the Law of Treaties (VCLT) would make a robust case for the nullity of immunity agreements that turn out to be at odds with

fundamental rights. At the same time, this does not mean that *jus cogens* has been, or should be, deprived of any role whatsoever in cases dealing with human rights and immunities. It will be submitted that in such cases the primary normative function of this notion may be preserved by using it as a chief element of an interpretative balance to be pursued in the area of immunities and human rights.

Indeed, one of the main theses advanced in this chapter is that the relationship between human rights and the immunities of states and IOs may be conceptualized as a tension among competing rules which can be worked out by means of interpretation, thus as an apparent conflict of norms open to the application of conflict avoidance techniques (sections 3.2 and 4.2). From this perspective, which is supported by various manifestations of judicial practice, the ‘prevalence’ of human rights law over immunity rules in pertinent cases implies that the latter's rationale and scope are supportive of accommodation with the former. This accommodation may be operationalized by leaving immunity rules unapplied *in such cases,* rather than by declaring them null and void. A further terminological corollary is the rejection of the notion of a customary ‘human rights exception’ to immunity rules inevitably bound to emerge from state practice. Instead, the chapter's approach is that to conceive of human rights and international immunities in terms of exception to a rule is largely misplaced, as is the consequent quest for a customary rule to this effect (section 3.1).

Accordingly, the absence of an explicit human rights exception in the United Nations Convention on Jurisdictional Immunities of States and Their Property[4] **(p. 73)** (UNCSI) is here by no means considered as dispositive.[5] Crucially, UNCSI's last preambular paragraph affirms that ‘the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention’,[6] while states such as Switzerland have attached to their instruments of ratification a declaration pursuant to which UNCSI is ‘without prejudice’ to developments in international law relating to state immunity for human rights violations committed abroad.[7] Similarly, the Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, adopted by the *Institut de droit international* (IDI) at its 2009 Session in Naples, is ‘without prejudice’ to questions of state immunity in disputes relating to international crimes.[8] Such ‘without prejudice clauses’ in no way necessarily entail that where serious breaches of human rights are at stake immunity should subsist. On the contrary, they are neutral clauses, leaving unprejudiced any

evolution in state practice, *as well as* the application of existing customary law.

Obviously, the balancing test advocated in this chapter implies that a line of equilibrium should be identified in each specific case, and hence that one of the competing norms should be preferred over the other at the end of the day. Considering the shortcomings inherent in leaving to the courts and political authorities the task of drawing that line on an ad hoc basis, it will be submitted that a solution to this state of affairs, based on the obligation to secure effective remedies and reparation to victims of grave human rights violations, should be retained and the various options explored (sections 3.3 and 4.3). Hopefully, and *de lege ferenda,* this solution will be increasingly accepted in the law-making practice of states and international institutions. Failing the latter, the point remains that an 'alternative-remedies test' may be viewed as a method of avoiding conflicts between human rights and immunities stemming from a systemic interpretation of the *present* international legal order.

Finally, the volume of case law concerning the topic of this chapter is massive. This will inevitably require selection in terms of relevance for the arguments put forward. In doing so, special attention will be paid to lesser-known decisions, such as those coming from 'non-mainstream' jurisdictions. The paucity of the latter, however, remains evident, especially in relation to state immunity, and will be taken into account when drawing general conclusions. Moreover, domestic court case law is discussed below almost exclusively. The reason is simply that, with the **(p. 74)** important exception of the European Court of Human Rights (ECtHR), international courts have never had the chance to directly confront issues of human rights and the immunities of states and IOs. At the time of writing, a contentious case is pending before the International Court of Justice (ICJ)[9] on the issue of whether Italy, by repeatedly denying immunity to Germany for atrocities dating back to the Second World War, has violated customary law on state immunity.

The analysis will now bifurcate the problems of state immunity and immunity of IOs. This is necessary in view of the different nature and status of these immunities. First, it seems appropriate to give a more detailed account of the conceptual issues sketched out above.

2. Conceptualizing the relationship between human rights and the immunities of foreign states and international organizations

2.1 State immunity: dismissing the theory of the impossible antinomy

When seeking to conceptualize the relationship between human rights and state immunity, it is unavoidable to recall Lady Fox's highly influential theory.[10] This author seriously questions the pertinence of *jus cogens* in adjudicating cases involving a plea of immunity put forward by states accused of grave violations of human rights and/or humanitarian law. Most notably, she writes:

> State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite…Assuming a State has recognized the *jus cogens* nature of the norm, does that nature give rise to an obligation on the State to provide procedures to secure its implementation?[11]

It follows from this position that the relationship between human rights and state immunity cannot be framed in terms of a conflict bound to be resolved in favour of *substantive* human rights prohibitions denoted by an alleged hierarchically superior status vis-à-vis the customary rules on state immunity. The *procedural* obligation to grant immunity and the *substantive* prohibitions contained in *jus cogens* human rights norms would simply not clash one with another. To view these two branches of the law as giving rise to a genuine conflict of norms would be an impossible and misconceived task.

It is worthwhile noting that the implications of this ‘theory of the impossible antinomy’ go beyond the rejection of *jus cogens* as a conflict solution technique for **(p. 75)** cases involving state immunity for human rights violations. Evidently, it equally applies to *any* human rights obligation which, whatever its status, can be classified as a substantive rule. Moreover, its logic is perfectly apt for extrapolation to the rule on IOs’ immunity which, whatever its different rationale and foundation vis-à-vis the rule on state immunity, for present purposes retains a procedural nature. But the most significant implication of the theory is still that in no circumstances would

jus cogens be a suitable tool for settling disputes in this area. When a court declines jurisdiction by reason of international immunities, only the *procedural* human right of access to justice would be affected, regardless of the gravity of the underlying violation imputed to the defendant. Thus, although it follows from Fox's approach that a conflict between two procedural obligations is indeed at stake in any immunity case, *jus cogens* could not be the way out, as it would not encompass the right of access to justice.[12] Alternatively, one may argue that what is really at issue in these situations is the right to a remedy and reparation for victims of serious violations of fundamental rights and that this is a *substantive* right.[13] But here, the theory of the impossible antinomy would strike back, irrespective of the status and scope of this right.

Accordingly, as put by Lord Hoffmann in the *Jones* decision, reliance on *jus cogens* as a conflict solution technique would only be viable if one could show that the peremptory norm allegedly violated by the defendant state 'has generated an *ancillary procedural rule* which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states'.[14] In Lord Hoffmann's view, this should presently be ruled out, at least insofar as the prohibition on torture is concerned.[15] However appealing at first sight, this theory seems overly formalistic and detached from the reality of human rights protection as it has emerged in contemporary international law and practice.[16] It endorses an unacceptable conception **(p. 76)** of international human rights law as characterized by a sort of impassable line separating substantive prohibitions from procedural guarantees. It fails to acknowledge that the ordinary assertion of jurisdiction by *national* courts and their provision of effective remedies in cases involving human rights violations have become indispensable and indivisible complements of substantive protections themselves. The latter would run the risk of remaining on paper, if victims of violations were unable to enforce them before judicial or quasi-judicial authorities (*ubi jus ibi remedium*). This is not only, or not primarily, an argument in favour of effective interpretation of human rights instruments. It is chiefly a matter of legal obligations. The general obligation on states to 'ensure'[17] or 'secure'[18] to all individuals within their jurisdiction the human rights recognized under international law encompasses the positive duty to guarantee effective protection of those rights by means, inter alia, of accessible and appropriate remedies. The growing jurisprudence of the ECtHR acknowledging the essential need to respect and protect substantive rights *in their procedural dimension* is telling in that regard. Moreover, the very idea that substantive *jus cogens* violations would never be implicated

in these cases is unconvincing. In the *Jones* decision, Lord Hoffmann further remarked:

> The jus cogens is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom [of Saudi Arabia], is not proposing to torture anyone. *Nor is the Kingdom, in claiming immunity, justifying the use of torture*. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not.[19]

The italicized passage above may be regarded as a *non sequitur*: it is indeed obvious that a domestic court granting immunity for *jus cogens* violations abroad does not engage the responsibility of its state for *such* violations, but this does not imply that the *defendant* state invoking immunity thereby obliterates the cause of action on the basis of which the proceedings were instituted. The situation is different when the forum state (such as the United Kingdom in the instant case) is sued before international courts on account of its decision to afford immunity. Here, the defendant state can by no means be held responsible for violation of substantive *jus cogens* prohibitions.[20] The cause of action remains the alleged violation of the right of access to justice, while the underlying *jus cogens* prohibition plays an indirect role, ie that of a yardstick for reviewing the defendant's conduct in the light of the gravity of the allegations brought against the immune state domestically. This is one of the reasons why, for our purposes, the nature of domestic vis-à-vis international judicial proceedings should be kept distinct.

At any rate, the theory advanced by Lady Fox does not dispose of any discussion about the existence of normative conflicts in cases involving state immunity and serious violations of human rights. In the first place, recent manifestations of **(p. 77)** practice are bound to fuel that discussion. An important example in this respect is provided by the IDI Resolution on Immunity and International Crimes. The Preamble of the Resolution stresses ‘the underlying conflict between immunity from jurisdiction of States and their agents and claims arising from international crimes’[21] and the IDI's desire ‘of making progress towards a resolution of that conflict’.[22] Although no tangible progress may be recorded in its operative clauses with respect to *state* immunity, the resolution and related preparatory work have the merit of shedding light on the real stakes involved in this area of the law. These are, on the one hand, the need to safeguard the immunity of states as an essential tool ‘to ensure an orderly allocation and exercise of jurisdiction’[23] and ‘to respect the sovereign equality of States’,[24] and, on the other hand, the obligations on states to prevent and suppress international crimes,[25] *as*

well as to secure effective reparation to victims thereof.[26] Quite surprisingly, in her Final Report to the IDI,[27] Lady Fox repeatedly evokes the existence of a conflict between the two areas of international law at issue. It is, however, uncertain what kind of conflict the Rapporteur has in mind, ie whether it is an actual conflict of international rules[28] or a conflict of values.[29] Either way, it seems clear that the solution to such a conflict does not reside in the formal application of traditional criteria, but rather in an exercise aimed at 'determining where the line is to be drawn in achieving a balance'[30] between state immunity and the protection of human rights. This balancing exercise cannot but be undertaken pursuant to *interpretative techniques*.

Secondly, as hinted at above, the theory of the impossible antinomy does not per se wipe away any situation of potential norm conflict between human rights and immunities. It basically rules out conflicts among procedural and substantive rules, as well as the viability of *jus cogens* as a conflict-solution tool. By contrast, it does not explain why orthodox criteria, such as *lex posterior* or *lex specialis,* should not be used to address the relationship between the procedural customary rule on state immunity and the procedural human right of access to justice (or that between such right and the procedural treaty rule on IOs' immunity, for that matter).

The irrelevance of traditional conflict rules in the judicial practice examined below in section 3 cannot, therefore, be connected to the courts' adherence to the theory of the impossible antinomy which, whatever its soundness, cannot be applied across the board. That practice instead shows the courts' conviction that interpretation is a viable methodology in this area of the law. **(p. 78)**

2.2 Immunity of international organizations: the possible impact of its treaty-based nature in the light of ECtHR case law

According to a commonly accepted formula, IOs 'enjoy such immunities as are necessary for their effective functioning':[31] ie those immunities which are 'necessary for the exercise of their functions in the fulfilment of their purposes'.[32] Hence, IOs' immunity should by definition be restrictive, but practice shows that as a whole 'functional necessity' has not translated into a meaningful constraint (also) in that regard. At any rate, what is most relevant for our purposes is that IOs' immunity is usually considered as founded upon explicit provisions in *treaties and agreements*. It is debatable whether that also applies to the United Nations (UN) and certain other similarly important IOs, but it nonetheless remains valid for the

overwhelming majority of IOs. Therefore, and as opposed to customary law-based state immunity, traditional conflict rules and criteria may appear more likely to play a role whenever IOs' immunity comes into collision with human rights obligations. Whether the latter are a matter of *jus cogens,* customary law, or treaty law, those rules and criteria should provide an answer. While such an answer does not seem straightforward in respect of a conflict between treaty rules and supervening customary law, there should not be fundamental objections to allowing a *jus cogens* obligation to trump a treaty on IOs' immunity or to solving conflicts between human rights treaties and IOs' immunity agreements on the basis of criteria such as *lex specialis* or *lex posterior*. Yet, even here, and with certain notable exceptions, the existing judicial practice[33] shows that orthodox conflict rules have been marginalized. For the purpose of setting aside IOs' immunity, courts have mostly relied on *domestic* constitutional safeguards or, in Europe, on an interpretative exercise deemed in line with the European Convention on Human Rights (ECHR).

A different perspective could be suggested by ECtHR case law involving the relationship between the ECHR and other treaties binding upon ECHR parties, including those establishing IOs and affording them privileges and immunities. Thus, orthodox rules on treaty conflicts might explain the Strasbourg Court's assertion of persistence of ECHR liability notwithstanding such competing treaty obligations. For instance, in *Bosphorus,* after mentioning the need to take account of the *pacta sunt servanda* principle in interpreting the ECHR,[34] the Court reiterated that ECHR parties 'retain Convention liability in respect of treaty commitments *subsequent* to the entry into force of the Convention'.[35] This holding is part of the wider problem of the consequences arising from ECHR parties' transfer of powers to IOs and, as such, it has also been extended to the relation between IOs' immunity and ECHR rights. In *Waite and Kennedy,* the Court acknowledged **(p. 79)** that where states create IOs, thereby attributing competences and granting immunities to them, 'there may be implications as to the protection of fundamental rights'.[36] It would be 'incompatible with the purpose and object'[37] of the ECHR, the Court went on, if in so doing ECHR parties were 'absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution'.[38] Under the law-of-treaties perspective, this persistent liability for later treaty obligations may arguably be traced to the principle of *lex specialis,* thus to the ECHR's 'special character as a human rights treaty'[39] or to its role as a 'constitutional instrument of European public order in the field of human rights'.[40] Alternatively it may be taken, as at times has been taken in the Strasbourg

case law,[41] as a reminder that, regardless of the operation of conflict criteria, the latter are without prejudice to issues of responsibility arising from the conclusion of successive (potentially conflicting) agreements.[42]

It is, however, impossible to find in this line of jurisprudence any clarification as to why in such circumstances the special character of the ECHR is deemed capable of displacing the *lex posterior* principle.[43] But what in my view is most troubling is that this jurisprudence lends itself to an *a contrario* interpretation, according to which a transfer of powers to IOs occurring *earlier* than a state's ratification of the ECHR would *not* engage responsibility under the ECHR. The *lex prior* rule would govern this situation, regardless of the special nature of the ECHR *as here reinforced* by its later-in-time adoption. This issue is of primary importance vis-à-vis the consistency of the immunities of IOs established *earlier* **(p. 80)** than the ECHR's ratification by the state granting immunity with the ECHR's right to a court.[44] It especially calls into question the immunity of the UN and many of its specialized agencies.

Are ECHR parties' grants of immunity to the UN unreviewable against the ECHR *for the very precise reason* that the UN was established, and its immunity recognized,[45] earlier than ratification of the ECHR? While domestic courts are divided in this respect,[46] certain passages of the well-known *Behrami* decision[47] may lend themselves to that reading. In this case, the ECtHR offered some general remarks on the relationship between the ECHR and the UN system in order to determine the extent, if any, of its power to review ECHR parties' acts and omissions covered by UN obligations. In coming to the conclusion that such power was to be excluded, the Court noted that

> *nine of the twelve* original signatory parties to the Convention in 1950 had been members of the UN since 1945 (including the two Respondent States), that the *great majority* of the current Contracting Parties joined the UN before they signed the Convention and that *currently* all Contracting Parties are members of the UN.[48]

(p. 81) It is, however, clear that this was a secondary argument[49] as compared to the Court's heavy emphasis on the imperative purposes of the UN (peace and security) and its fundamentally different nature[50] vis-à-vis organizations such as the European Union (EU), in respect of which some degree of review would be justified.

True, were the Court ever to engage in a meaningful discussion of the pertinent norm conflict criteria as laid down in the VCLT and general international law, serious difficulties would hinder their application vis-à-vis the UN Charter. Article 30 of the VCLT is explicitly subject to the primacy clause in Article 103 of the UN Charter. Moreover, although the scope of this clause is a matter of significant debate, it is arguable that it envisages an unconditional priority of the UN Charter vis-à-vis *any* other international obligations, including those flowing from *jus cogens* (at least as conceived of in Articles 53 and 64 of the VCLT) and any *special* human rights regimes, such as the ECHR.

While these considerations may possibly be *inferred* from the reasoning in *Behrami,*[51] they have never expressly been canvassed in ECtHR case law. Thus, the point remains that no reasonable explanation on the basis of the law of treaties emerges from the pertinent ECtHR decisions that is capable of shedding light on the problem of IOs' immunity for violation of human rights.

What is safe to assume is that the chronological criterion at times retained by the Court does not provide a satisfactory answer, both conceptually and substantively.[52] First, there is no apparent reason why grants of immunity to an IO created earlier than the ECHR should deserve a privileged treatment vis-à-vis those to 'later' IOs. Secondly, the problem cannot be reduced to the sensitive issue of the relationship between the UN and the ECHR. It involves many other IOs to which the relevant powers have been transferred by ECHR parties earlier than the entry into force of the Convention *or* its Protocols *for each of them*.

Here, in the absence of provisions comparable to Article 103 of the UN Charter, the application of the chronological criterion seems plainly arbitrary. Moreover, this criterion cannot be squared with those decisions where the Court has *not* ruled out its power to review the acts taken by ECHR parties in fulfilment of obligations—including immunity-related obligations—arising from their **(p. 82)** membership in such IOs as the North Atlantic Treaty Organization (NATO)[53] or the Council of Europe.[54]

In respect of *jus cogens,* most of what was submitted in relation to state immunity applies equally here. First, its viability as a potentially available conflict principle is not undermined by a purported divide between procedural and substantive obligations. To dismiss its pertinence in matters of IOs' immunity by highlighting the non-peremptory nature of the right of access to justice[55] is too simplistic. Secondly, a distinction between domestic and international proceedings should be retained. When an IO is sued before

a domestic court on the grounds of serious violation of human rights, there exists no plausible reason why the latter should not constitute a direct yardstick for deciding whether to afford immunity. By contrast, when for instance an ECHR party is brought before the ECtHR on account of its grant of immunity to an IO, it is clear that the principal issue is about compliance with the right to judicial protection. The underlying violation imputed to the IO may only operate as an indirect yardstick for assessing the legality of the defendant's decision. Perhaps, in the present context, this point is more apparent than in state immunity cases. Indeed, where IOs' immunity is at stake, practice shows that the defendant state in Strasbourg may have nothing to do with the recognition of immunity in the specific case. Its joint and several responsibility may indeed be invoked simply by reason of its transfer of powers to the IO at hand.[56]

In any event, notwithstanding the treaty-based nature of IOs' immunity, a review of existing judicial practice will provide powerful evidence that the relationship between such immunity and human rights is also best conceptualized in terms of competing obligations which can be reconciled by means of interpretation. It may be anticipated that, rather than ruling out the quest for an interpretative balance, the treaty-based nature of IOs' immunity seems to have paved the way for that quest. Interpretation is at its strongest when it concerns the very same regime which needs to be construed. The provisions in legal instruments on IOs' immunity, which invariably require the establishment of methods for the settlement of *private* disputes to which IOs are parties, make up a robust case for resorting to a contextual and effective interpretation of such instruments. **(p. 83)**

3. Judicial practice relating to state immunity for serious human rights violations

3.1 The quest for a customary rule sanctioning the overriding effect of *jus cogens* as exemplified by the *Al-Adsani* and *Bouzari* decisions: a compelling necessity?

When confronting claims of immunity put forward by states accused of grave violations of human rights perpetrated outside the forum state, the overwhelming majority of courts have so far rejected the argument that *jus cogens* overrides the customary rule on state immunity. At the outset, it is necessary to note that these courts have never explicitly dismissed the overriding effect of *jus cogens in abstracto*. They have instead pointed to the absence of practice and *opinio juris* attesting to the emergence of a

customary norm allowing the withdrawal of state immunity by reason of *jus cogens* violations.

The most notable examples come from the *Al-Adsani* judgment of the ECtHR and the *Bouzari* decisions by Canadian courts,[57] both involving claims **(p. 84)** of compensation for torture suffered in states other than the forum state (Kuwait and Iran, respectively). In *Al-Adsani,* the ECtHR famously held:

> Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[58]

A few months later, in *Bouzari,* the Ontario Superior Court of Justice similarly stated:

> An examination of the decisions of national courts and international tribunals, as well as state legislation…, indicates that there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to *jus cogens*.[59]

This approach and the ensuing rulings were later endorsed by the UK House of Lords in *Jones,*[60] in which the *Al-Adsani* and *Bouzari* decisions have been extensively quoted and afforded much weight. In these situations, the courts' perceived need to identify a customary norm sanctioning the overriding effect of *jus cogens* is evident. What is *not* clear is the content of such a norm. That is, it is not clear whether the courts are seeking evidence of the overriding effect of the (undeniably peremptory) prohibition on torture, or rather of the peremptory status (and overriding effect) of an ancillary procedural obligation to afford civil remedies to victims of torture. The decision of the Ontario Court of Appeal upholding the lower court's ruling in *Bouzari* seems to endorse the latter alternative.[61] While the point remains uncertain, I would here[62] just recall that, in my view, this distinction between substantive and procedural effects of *jus cogens* translates into an alluring legal formalism which is, however, inconsistent with the contemporary structure and achievements of international human rights law.

It is remarkable that the Supreme Court of Canada, in the hitherto sole occasion on which it discussed the problem of state immunity in relation

to *jus cogens* violations, did not canvass that distinction. Quite to the contrary, it left the door **(p. 85)** open to situations where serious human rights violations may lead to the removal of state immunity. In the unduly oft-neglected decision in *Schreiber,* rendered at the same time that the *Bouzari* litigation was unfolding in Ontario, the Supreme Court rejected the argument that state immunity was to be denied by reason of a breach of the right to mental integrity resulting from the appellant's wrongful arrest and detention. However, Judge LeBel explained:

> Although I agree with some of the submissions of the intervener [ie Amnesty International] with respect to the fact that mental injury may be compensable in some form at international law, neither the intervener nor any other party has established that a peremptory norm of international law has now come into existence which would completely oust the doctrine of state immunity and allow domestic courts to entertain claims *in the circumstances of this case*.[63]

True, this passage is not devoid of ambiguity when read in its context, but it is undeniable that it per se refers to the absence of a 'primary' *jus cogens* norm which would allow the lifting of state immunity *in the case at hand*. Other situations may possibly yield a different conclusion. Unfortunately, the Supreme Court has since refrained from clarifying its thoughts on this issue.[64]

In any event, the most important question is whether the only valid and viable methodology for addressing the relationship between state immunity and human rights is the one followed by the *Al-Adsani* and *Bouzari* courts. In other words, for the purpose of accepting that human rights obligations may prevail over state immunity, is it really indispensable to determine that a customary international rule to that effect has developed? And if alternatives are indeed available, to what extent may they legitimize the decisions taken by the courts or political authorities in the specific circumstances of each case?

In my opinion, such an alternative does exist and resides in the general principles of interpretation of legal rules.[65] Courts may legitimately hold the view that **(p. 86)** the relevant obligations already exist, ie the obligations to secure human rights and to afford state immunity for *jure imperii* activities, and that the search for a further, tie-breaking rule is unnecessary and misconceived. According to this approach, these two obligations express competing rules and values whose reconciliation is a matter well within

the power of interpretation of courts. Obviously, this presupposes that the relationship between the competing norms at stake would be viewed as giving rise to an apparent conflict of norms amenable to interpretation. And indeed, if one looks at the historical development of the rule on state immunity, two points must be singled out. First, this rule is not inflexible and immutable. Its scope is instead bound to narrow as the changing needs and priorities of the international *and* national legal orders so require. Secondly, history tells us that the driving force behind these developments is the ground-breaking decisions of domestic courts resorting to a restrictive interpretation of the doctrine of state immunity.

This perspective is not meant to suggest that the practice prevailing in other countries and at the international level should be ignored by the courts of the forum. But lack of consistency in that practice would not be fatal, as it would only demonstrate different conclusions drawn by the courts according to the different circumstances of each particular case and the peculiarities of the legal system within which they exercise their function. At the same time, that practice need not be uniform so as to shed light on a newly emerged international custom. It is not to be confused with the *usus* element of customary law. Therefore, it seems unwarranted to flatly dismiss this approach as syllogistic,[66] entirely deductive, or anti-positivistic. The challenge is instead to reach an international consensus on the limits to be placed upon the interpretative autonomy of courts and tribunals so as to avert abuses, unpredictability, and judicial anarchy.

3.2 The evolution of the *Ferrini* jurisprudence of the Italian Supreme Court: interpretation as a viable methodology

The viability of interpretation as an appropriate methodology for adjudicating cases involving state immunity and serious human rights violations is, in the first place, attested by the ECtHR *Al-Adsani* decision. Most commentators, coming from *both* sides of the debate, have considered the approach of the Strasbourg Court as a chief example of a *systemic interpretation* of international law, prompting a balance between the competing interests at stake, which was finally struck in favour of the maintenance of state immunity. In the pertinent part of the decision,[67] the Court recalls that the ECHR must be interpreted in the light of the general rules laid down in the VCLT, especially the rule according **(p. 87)** to which, in interpreting a treaty, account is to be taken of ‘any relevant rules of international law applicable in the relations between the parties’ (Article 31(3)(c)). Hence, the ECHR ‘cannot be interpreted in a *vacuum*’,[68] but instead ‘so far as possible…in harmony

with other rules of international law of which it forms part, including those relating to the grant of immunity'.[69] In the Court's view, this triggers the conclusion that measures taken by ECHR parties 'which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court'.[70]

While Orakhelashvili has stigmatized this conception of Article 31(3)(c) of the VCLT as unduly construing the ECHR in a restrictive way,[71] Lady Fox has praised it as a welcome exercise of mutually supportive interpretation of the relevant norms.[72] It is clear that the ECtHR has often used 'other' international instruments and/or Article 31(3)(c) rather loosely.[73] But what is important here is that in *Al-Adsani,* the Court addressed the problem of state immunity vis-à-vis human rights from the perspective of a harmonious interpretation of the international legal system, while it made no mention of a situation of conflict leading to the application of traditional rules, such as *lex posterior* or *lex specialis*. These rules did not affect the Court's decision at all, either directly or indirectly. A contrary view cannot be 'square[d] with the Court's willingness to yield in favour of an earlier customary rule of State immunity'.[74] Also, evidently the Court's discussion about the consequences arising from the underlying violation of the peremptory ban on torture does not signal any predisposition to apply, as such, the hierarchical conflict principle inherent in the concept of *jus cogens*.[75]

The real bone of contention in the *Al-Adsani* decision is the outcome of the hermeneutic exercise undertaken by the Court, ie that the grant of state immunity in the case at hand did not violate the right to a court set out in Article 6(1) of the ECHR, regardless of the gravity of the allegations advanced by the applicant against the immune state. I will show later why this outcome cannot be regarded as a reasonable balance between the competing interests at stake.[76]

It is, however, the *Ferrini* jurisprudence of the Italian Supreme Court which provides the most significant insights into the appropriate methodology to be applied in cases involving claims of state immunity for serious human rights violations. This jurisprudence is visibly characterized by a shift from reliance on *jus cogens* as a tie-breaking conflict rule to an articulated and systematic interpretation of the **(p. 88)** international legal order. While in the well-known 2004 *Ferrini* judgment[77] the Supreme Court submitted a plethora of arguments in support of its decision to deny immunity to Germany for crimes against humanity perpetrated during the Second World War, it is

fair to concede that the cardinal argument was that of the primacy of *jus cogens,* which was deemed capable of setting aside the customary rule on state immunity. After recalling that the norms prohibiting forced labour and forced deportation are inderogable and that various other consequences are connected to the commission of international crimes, such as universal jurisdiction, the court stated:

> The recognition of immunity from jurisdiction for States that are responsible for such offences is in blatant *contrast* with the normative framework outlined above, since this recognition obstructs rather than protects such values, the protection of which is rather to be considered…essential for the entire international community…[T]here can be no doubt that this *antinomy* must be resolved by giving precedence to the higher-ranking norms…This therefore rules out the possibility that in such hypotheses the State could enjoy immunity from foreign jurisdiction.[78]

Significantly, the court then quoted with approval the part of the *Al-Adsani* judgment calling for a harmonious interpretation of the international legal system, and added:

> Respect for inviolable human rights has by now attained the status of a fundamental principle of the international legal system…And the emergence of this principle cannot but influence *the scope* of other principles that traditionally inform this legal system, particularly that of the 'sovereign equality' of States, which constitutes the rationale for the recognition of State immunity from foreign civil jurisdiction. Indeed, *legal rules should not be interpreted in isolation since they complement and integrate each other, and the application of one is dependent on the others*…[79]

This hermeneutic exercise would not only concern treaty rules, but also 'the interpretation of customary norms, which like the others are part of a system and therefore may only be correctly understood in relation to other norms that form an integral part of the same legal system…'.[80]

In the 2008 follow-up decisions involving further claims brought by victims (or their relatives) of Second World War crimes,[81] the Supreme Court insisted upon the necessity of working out the 'undeniable antinomy'[82] between the principles of respect for human rights and of state immunity at the

‘systematic level’,[83] by giving **(p. 89)** priority to the former as the higher-ranking one. Crucially, the court pointed out that it was

> *aware* of thus contributing to the *emergence* of a rule to which the immunity of the foreign State must conform [‘regola conformativa’], a rule which [was] however considered already *inherent* in the international legal system.[84]

This latter passage may be regarded as intrinsically contradictory: how is it possible to state that the mission of the court is to play a role in the progressive emergence of a rule, while at the same time suggesting that that rule is ‘already inherent’ in the law? Despite a controversial choice of terminology, the point made by the court may be grasped if one takes account of the main considerations submitted above: there is no need to identify a new rule of customary law for the purpose of denying immunity to states accused of egregious breaches of human rights, and therefore nor is it necessary to contribute to its emergence. This rule of non-immunity is inherent in the law insofar as it stems from the application of well-settled principles of *interpretation* to a situation where two *already existing* rules compete. The reference to a ‘rule to which State immunity must conform’ should be construed as a reference to a ‘judicial practice’ or ‘rule of decision’ which the court is willing to promote by reiterating the *Ferrini* principle.

The apex of this jurisprudence is hitherto constituted by the 2009 *Milde* case[85] involving a civil claim lodged by victims (or their relatives) of Nazi atrocities as *partie civile* within criminal proceedings against a former officer of the Third Reich. The Supreme Court upheld the lower courts’ decisions to the effect that Germany bore joint and several responsibility for compensating the damage suffered by the victims of the crime against humanity at stake (massacre and associated atrocities inflicted upon a civilian population). The court developed the interpretative approach sketched out in *Ferrini* and its 2008 follow-up decisions. Thus, ‘precise and reliable arguments of a logical and systematic nature’[86] demonstrated that

> [t]he customary rule on the jurisdictional immunity of foreign States was…bound *not to operate* each time it competed with the customary international law principle legitimizing the exercise of remedies to recover compensation for damage caused by international crimes arising out of grave breaches of inviolable human rights.[87]

Faced with the problem of the contrary jurisprudence of other states and the ECtHR, the court pointed out that the adjudication of the case at hand

> could not be based on a merely quantitative approach, ie on the number of decisions favouring one position or the other. While the judicial practice of domestic courts was important for discerning the existence of positive customary international law, the *role* **(p. 90)** *of the interpreter did not consist in a mere arithmetical calculation of the elements of practice*. Other elements had also to be taken into account, such as the particular *qualitative nature* of the *existing* customary rules, their reciprocal interrelations, and their *hierarchical position* in the international legal order.[88]

At this juncture, the 'qualitative approach' endorsed by the court should not engender misunderstandings. The court does not see itself as an actor engaged in the progressive development of customary law in the sense that such a process is commonly understood, but instead as an interpreter of current rules. Such role entails a consistent and systematic understanding of the existing normative framework geared towards a 'coordination of the respective scope of application'[89] of the principles of state immunity and of respect for human rights. This is the only reading capable of explaining the further holding of the court, according to which '[it] was essential to the *coherence of the international legal system*'[90] that gross violations of human rights triggered the victims' right to civil redress from the responsible state:

> If this were not so, it would have made no sense at all to formally proclaim the primacy of fundamental human rights while at the same time denying individuals access to a court in order to avail themselves of the remedies capable of securing the effectiveness of those rights…[91]

As the rights to judicial protection and to a remedy and reparation for victims of human rights violations are a matter of legal obligation, the court could have arguably framed the issue in terms of a conflict of customary norms.[92] However, and leaving aside that traditional conflict rules seem of little help in this regard, the court continued to rely on its interpretative method, which dictated the conclusion that the rule of immunity became *inapplicable* when individuals instituted judicial proceedings against foreign states to recover compensation for damage incurred as victims of international crimes.

This approach does not dispose of *jus cogens* altogether. It only downplays its role as a tie-breaking hierarchical principle automatically overriding any

inconsistent norm. By contrast, the fact that a foreign state is accused of *jus cogens* violations may represent a paramount element of the systematic interpretative exercise undertaken **(p. 91)** by the courts,[93] ie a *qualitative consideration* heavily tilting the balance[94] in favour of denying state immunity.

3.3 Restraining the interpretative autonomy of the courts: availability of effective remedies and reparation as a reasonable balance between state immunity and human rights

3.3.1 Sidestepping the issue of alternative remedies in the ECtHR and Italian case law

Although arriving at opposite conclusions, both the ECtHR and Italian courts have endorsed a systemic interpretative approach which may be considered a rational and feasible method for dealing with the issue of state immunity vis-à-vis serious breaches of human rights. However, they have left a problem unaddressed which is critical to the legitimacy of that approach and the ensuing decisions, namely the problem of identifying substantive limits to the interpretative power of the courts. In the absence of such limits, interpretation risks becoming a convenient tool paving the way for ad hoc decisions reflecting the different value judgements and policy preferences of the decision-makers, but not the actual state of the law.

It is submitted that a reasonable balance between the competing interests underlying the cases discussed here is achieved when it can be shown that the victims of gross violations of human rights may be or have been granted remedies and reparation for the damage sustained. This seems an inescapable imperative of contemporary international law. Hence, a grant of state immunity should be *conditional* upon the existence of (or a fortiori upon an earlier recovery of compensation through) remedies alternative to those available in the forum state. Conversely, immunity should be denied when those alternative remedies are unavailable or plainly ineffective. An unsuccessful article drafted in the context of the process leading up to the 2009 IDI Resolution on Immunity and International Crimes[95] was precisely moving in this direction. It read:

> A State enjoys immunity from the civil jurisdiction of the national courts of another State, which has jurisdiction under international law over international crimes, *unless it is established that it has not performed its obligations to*

> *make effective reparation* in accordance with the applicable international conventions or customary international law.[96]

(p. 92) Critics[97] of the *Al-Adsani* judgment have indeed submitted that one of its basic flaws is the absence of any analysis of the alternative remedies available to the applicant for asserting his right to compensation for the atrocities he had experienced in Kuwait. This analysis could have been subsumed within the *proportionality* test as applied by the ECtHR to determine whether a restriction of an ECHR right is proportionate to the aim pursued. But the Court ducked the issue and laconically ruled that measures taken by ECHR parties 'which reflect generally recognised rules of public international law cannot *in principle* be regarded as imposing a disproportionate restriction on the right of access to court'.[98]

Most recently, a unanimous judgment of a Grand Chamber of the ECtHR has provided an authoritative interpretation about the role of the proportionality test in state immunity cases. In *Cudak,*[99] the Court held that Lithuania's grant of immunity to Poland in a case involving the wrongful dismissal of a Polish Embassy employee violated the latter's right of access to a court. The chief reason for this ruling was that according immunity in such a situation was not in line with customary international law as reflected in the UNCSI.[100] What is troubling is that the Court did not disapprove the restriction on the ECHR right at stake on the ground that it did not pursue a legitimate aim.[101] It remained a legitimate means of complying with 'international law to promote comity and good relations between States through the respect of another State's sovereignty'.[102] Conversely, the restriction failed the test of proportionality for its incompatibility with generally recognized rules of international law on state immunity.[103]

Two lessons may be drawn from this ruling. First, when restrictions on ECHR rights arise from grants of state immunity, the legitimacy of the aim pursued is *in re ipsa,* regardless of their strict conformity with international law. The latter is only relevant vis-à-vis their proportionality. Secondly, by doing so, the two-tier test for justifying restrictions is in fact conflated into a sole condition of lawfulness, ie whether such restrictions are dictated by international law. This implies an unacceptable degree of deference of human rights requirements to the doctrine of state immunity. Instead, it would seem appropriate to make sense of the two-tier **(p. 93)** test also in this area by linking the proportionality condition to the existence of effective remedies alternative to those of the forum state. This would persuasively achieve a rational balance between the competing interests at stake in those

cases where, unlike—in the Court's view—*Cudak,* international law would require a grant of immunity or a fortiori where the law is not well settled. Crucially, as recalled below, the *Cudak* judgment disqualifies the remedies existing in the state invoking immunity as an effective alternative, but *not* in the context of the Court's assessment of proportionality.

On their part, Italian courts should have explained that lifting Germany's immunity in the cases before them was the only feasible means of protecting the claimants' right to reparation for the damage suffered as a result of the crimes at stake. This would have boosted the legitimacy of such decisions by strengthening the systemic interpretative exercise carried out by the courts with a powerful substantive argument grounded upon international law. It is important to note that the courts would have had a strong case in that connection. That of Mr Ferrini and those of fellow former Italian military internees and most civilian victims of Nazi atrocities are sad stories of entirely unredressed wrongs and of multiple unsuccessful attempts to recover compensation before the courts[104] or through diplomatic channels.

Well aware of this situation, Italy has filed a counterclaim within the pending ICJ proceedings instituted by Germany and submitted that the latter has failed to discharge its obligation to provide reparation to Italian victims of Nazi crimes. While the ICJ has rejected this counterclaim as inadmissible on jurisdictional grounds,[105] its substance will hopefully be discussed during the further stages of the dispute. The persuasiveness of the final ICJ decision would greatly benefit from a meaningful analysis of the argument at hand and would of course constitute a crucial test for the thesis advanced in this work.

3.3.2 Available options

The idea of an 'alternative-remedies test' is of course nothing new. It builds upon the well-known *Solange* jurisprudence of several European domestic courts on the relationship between their constitutional system and EU law, as well as upon the 'equivalent-protection principle' devised by the ECtHR for dealing with cases involving EU law. More to the point, it can also be regarded as a variation of the similar test endorsed by the ECtHR in respect of the consistency of IOs' immunity with the ECHR.[106] It is evident from the thrust of preceding remarks that one can only agree with the characterization of this so-called '*Solange* test' as 'a method of conflict avoidance through harmonious interpretation'.[107] **(p. 94)** But in the context of state immunity major difficulties remain, ie how is the 'alternative-

remedies test' supposed to be applied here? Where, against whom, and to what extent are remedies to be granted? These issues appear quite nebulous and largely unresolved. Yet, it is noteworthy that there exists a widespread consensus on the necessity of such a test in this area of the law.[108] The position that in order to dismiss human rights claims advanced in state immunity cases it '[i]s unnecessary to consider any question of remedies'[109] is quite isolated.

The solution to the problem at stake is, however, conceptualized in various different ways. A first straightforward solution is to point to alternative remedies in the state claiming immunity, as well as to traditional inter-state dispute settlement mechanisms such as, especially, diplomatic protection on the part of the state of nationality of the wronged individual. This was envisaged as early as 1951 by Hersch Lauterpacht, but—crucially—only in relation to situations which, according to his theory, should remain covered by an unconditional grant of immunity.[110] Conversely, in respect of situations not attracting immunity, the eminent author suggested that the existence of an alternative remedy in the state seeking immunity should be irrelevant:

> Such remedy, which deprives the plaintiff of the natural and proper forum, may be for him costly and impracticable. It may, on occasions, be purely nominal or incomplete. The courts whose jurisdiction is sought would be burdened with the difficult task of determining the existence *and the degree of reality* of the purported remedy…[111]

Nevertheless, Reinisch and Weber interpreted the failure of the ECtHR in *Al-Adsani* to perform a proportionality test as arising from 'the fact that in state immunity cases there is always a natural alternative forum in the defendant state'.[112] Rapid references to the possibility of redress in the courts of the state claiming immunity may indeed be read in other ECtHR decisions, especially *McElhinney*[113] **(p. 95)** and *Kalogeropoulou,*[114] which, however, fall short of envisaging such possibility as a condition on the grant of immunity. At any rate, the recent *Cudak* judgment[115] may be interpreted as disposing altogether of any defence based on the availability of remedies in the state seeking immunity. The ECtHR dismissed a preliminary objection put forward by the respondent to this effect on the grounds that

> such a remedy [resort to the Polish courts], even supposing that it was theoretically available, was not a particularly realistic one in the circumstances of the case. If the applicant had been required to use such a remedy she would have

> encountered serious practical difficulties which would have been incompatible with her right of access to a court…[116]

That remedy was to be regarded as neither accessible nor effective.[117] By contrast, in a little-noticed pre-*Al-Adsani* decision, the Slovenian Constitutional Court rejected a claim of compensation for Second World War crimes brought by a Slovenian national against Germany, but only after determining that in the case at hand the restriction on the right of access to court was proportionate because the complainant was not deprived of all judicial protection.[118] He could indeed sue Germany 'before its courts, where the argument of immunity from jurisdiction is not applicable'.[119] The court further pointed out that, in reaching its decision, it took into account that 'Germany is a state where general standards of human rights protection and of the rule of law…are implemented and respected'[120] and that 'the decisions of German courts are subject to review by the bodies of the Council of Europe'.[121] This ruling remains an important precedent, if only because it is the sole piece of judicial practice where a grant of state immunity in cases involving *jus cogens* violations is explicitly made conditional upon the existence of alternative remedies **(p. 96)** *in a state where the rule of law and human rights are observed*.[122] Had this substantive standard been seriously considered by the courts dealing with most of the cases discussed above, it is rather obvious that they would have resulted in denials of immunity.[123] The 'defendant-state-alternative-forum' test cannot be applied across the board, especially if it is not accompanied by a meaningful review of the observance in that forum of the basic tenets of human rights law, both in general and on the facts of the specific cases.[124]

As to diplomatic protection, contemporary scholars often build upon Lauterpacht's legacy. Lady Fox, for instance, advocates that removing state immunity for human rights violations committed outside the forum is fundamentally inconsistent with the rule of exhaustion of domestic remedies.[125] The rationale of this rule is indeed to give states a chance to redress the wrongs for which they are allegedly responsible according to the means available in their own domestic systems. From my perspective, this may be taken as an a fortiori reason militating in favour of performing an 'alternative-remedies test' before denying immunity on account of human rights violations.[126] By contrast, I firmly disagree in respect of the consequences flowing from the possibility that local remedies may be either unavailable or ineffective *or* proven to have been exhausted without receiving appropriate compensation for the damage suffered. In this situation, Lady Fox sees diplomatic protection as the only viable option.[127] It

is here unnecessary to spell out in detail the various reasons, circumstances, and complications that make diplomatic protection a tool essentially unsuitable for bringing about effective relief in most cases involving breaches of human rights. Suffice it to recall that the most glaring and recurring example is the case of victims who are nationals of the wrongdoing state at the time the injury occurs (eg *Bouzari* case): plainly no diplomatic **(p. 97)** protection is available for these injuries.[128] Dual (and multiple) nationals are in no better position, as it is usually accepted[129] that a state of nationality cannot exercise diplomatic protection against another state of nationality unless it is shown that the former constitutes the dominant nationality (the *Al-Adsani* case is telling in that regard).

A second possibility for the 'alternative-remedies test' to be brought into play in the field of state immunity is to rely on international dispute settlement means which, *unlike* diplomatic protection, may be triggered by the individual with the cooperation of the defendant state. Arbitral tribunals appear as the most logical forum in this regard. They are sometimes available for certain types of dispute with foreign states (eg commercial and labour disputes). However, if a foreign state does not meaningfully cooperate at the unfolding of the arbitral process or the latter results in a manifest denial of justice, arbitration translates into a 'purely nominal remedy'. If, on the other hand, the arbitral process is proven to be an effective means of defending one's rights, this should then outweigh any claim to a removal of immunity. Admittedly, practice does not offer significant examples of effective arbitration opposing individuals against foreign states, except in the field of investor-state disputes, which may therefore provide valuable suggestions[130] for developments in the area of state immunity vis-à-vis human rights violations.

A third possibility would be to indicate that a victim of human rights abuses is empowered to sue the individual foreign state agents responsible for such abuses in order to recover civil compensation from them. For instance, this possibility is not explicitly ruled out in the part of the *Bouzari* appeal decision discussing the compatibility between a grant of state immunity for torture abroad and the right to a remedy for victims thereof. However, it is safe to assume that Judge Goudge primarily had in mind criminal proceedings and sanctions against state officials accused of torture,[131] while he wanted to leave the issue of civil claims unprejudiced. This issue indeed appears entirely unsettled as a matter of international law.[132] Even assuming that such civil claims against state officials would not be barred by their *ratione materiae* immunity,[133] there are serious reasons for being sceptical about

the soundness of a solution requiring the plaintiff to modify the defendant against **(p. 98)** whom reparation is sought, as well as about the viability of such a remedy in terms of effective reparation to victims (eg obstacles associated with the identification of the individual perpetrators and with their patrimonial capacity to honour substantial awards of damages).[134] However, even this option should not a priori be ignored: as long as it is demonstrated that it has resulted or may result in effective reparation, a grant of state immunity may be justifiable.

When the above remedies are all unavailable or impracticable, a final possibility would be to canvass a principle according to which it is the state of the forum that has to devise compensatory mechanisms open to victims of abuses whenever their suits in that forum are dismissed by reason of state immunity. As disputable as it may seem, this solution often surfaces in literature and state practice. In Italy, for instance, it has frequently been considered. The Italian Supreme Court has recently dealt with it in *Cargnello,*[135] a case originating from an unsuccessful claim of wrongful dismissal brought against Canada by a consular employee.[136] The court refused to order Italy to pay compensation for damage on the ground, inter alia, that the extension of the remedy at stake to the area of state immunity was the sole responsibility of Parliament. Leaving aside substantial uncertainties in terms of accessibility and effectiveness of this potential remedy, one need only point out that states would most likely resist any suggestion to introduce it into their legal systems and, as a last resort, they would rather rethink their position on state immunity. Therefore, *de lege ferenda,* the ‘spectre’ of such a remedy might exert a deterrent effect on those countries insisting on a blanket grant of immunity in cases involving serious human rights violations.

4. Judicial practice on the immunity of international organizations and human rights

4.1 *Jus cogens* as a viable conflict principle? The Argentine *Cabrera* doctrine, *ordre public international,* and the *Mothers of Srebrenica* case

Similarly to state immunity, there are two avenues for setting in motion *jus cogens* as a conflict principle in disputes relating to human rights and the immunity of IOs. The first would be to posit that the right most commonly called into question in such disputes, ie the right of access to justice, has attained the status of a peremptory norm of international law. The second would be to rely on the peremptory status of the norm—and

of the correlative rights—allegedly violated by the IO, for example, the prohibition of crimes against humanity, such as genocide or torture. The **(p. 99)** consolidation of IOs as autonomous entities detached from the will of members and their growing involvement in activities directly affecting human rights, such as armed conflicts or worldwide protection against pandemics or famine, is likely to exponentially increase the number of disputes where private claimants invoke this second possibility.

However, there already exist a few significant examples of cases discussing either of the options outlined above. In its little-noticed 1983 decision in the *Cabrera* case,[137] the Argentine Supreme Court declared unconstitutional the immunity accorded to the *Comisión Técnica Mixta de Salto Grande* pursuant to the pertinent headquarters agreement. The failure on the part of this IO to set up methods of dispute settlement open to private claims infringed the right to judicial protection enshrined in the Argentine Constitution. But what is most striking in the decision is that Judges Gabrielli and Guastavino delivered an opinion, whose substance was shared by the court, to the effect that the denial of immunity in the case at hand primarily stemmed from Article 53 of the VCLT, which invalidated the pertinent treaty provision as a breach of the *peremptory norm of international law on the right of access to justice*.[138]

Crucially, the so-called *Cabrera* doctrine has never been overruled in the later case law of this Supreme Court. On the contrary, it has frequently been reiterated, such as for instance in a 1999 judgment involving the immunity of the World Health Organization (WHO) and its regional office in Argentina. In the *Duhalde* case, the court upheld WHO's immunity given the existence of appropriate alternative remedies for WHO employees (especially the International Labour Organization Administrative Tribunal (ILOAT)), but only after recalling that without such remedies that treaty-based immunity would be struck down by operation of a *jus cogens* norm.[139] While the obvious flaw in this case law is the absence of any articulated analysis of the strict requirements necessary for the emergence of **(p. 100)** *jus cogens,*[140] its resort to international law arguments is welcome. The precedential value, in terms of international law, of the myriad national court decisions justifying similar findings exclusively on the basis of domestic constitutional rules is slight. And, of course, the responsibility of the states concerned may more easily be engaged.[141]

This Argentine jurisprudence seems to constitute a *unicum* worldwide. Even in the context of the contemporary (especially European) trend to make

IOs' immunity conditional upon the right of access to justice,[142] one would look in vain for decisions grounded upon an explicit characterization of such right as a *jus cogens* norm. This also applies to a recent decision of the French Supreme Court rejecting a plea of immunity advanced by the African Development Bank (ADB) in a dispute concerning the amount of compensation owed to one of its officials following his dismissal. The court relied on the absence at the relevant time of a *tribunal* internal to the ADB competent to hear the employee's claim. This constituted a denial of justice, ie an unjustifiable interference with the exercise of a right 'that falls within international public policy'[143] (*ordre public international*), and authorized the assertion of jurisdiction by French courts on the basis of the employee's French nationality.

It is not uncommon to find in immunity cases references to the notion of an 'international public order' vis-à-vis the right to a court or, more generally, fair trial rights. For instance, in a few cases involving the immunity of the Food and Agriculture Organization (FAO), the Italian Supreme Court discussed whether the ILOAT (before which FAO staff cases may be brought) was endowed with impartiality as an element of international public order.[144] A 1999 decision of the Court of Appeal of Kenya provides another example in this respect. In *Tononoka Steels,*[145] a case concerning an IO's failure to discharge certain contractual obligations, the Court of Appeal lifted the immunity enjoyed by the IO on the grounds, **(p. 101)** inter alia, that the deprivation of access to Kenyan courts flowing from a purported absolute immunity 'would be contrary to public policy'.[146]

In this context, it is tempting to associate the concept of 'international public order' with *jus cogens,* understood as the supreme law safeguarding the essential values of the international community.[147] However, in relation to the decisions recalled above, there exist substantial objections to that reading. First, with particular reference to the French jurisprudence, which is undeniably novel[148] and much discussed, one should *in limine* take account of the historical opposition of France to the notion of *jus cogens*. Secondly, the right to a court is not generally considered as a matter of *jus cogens*. Nonetheless, these two propositions are somehow question-begging: what if the French Court of Cassation was willing to depart from that historical legacy? And what if it was willing to send a strong message in the name of the progressive development of international law? What is certain is that the court used the concept of *ordre public international* as a substitute for Article 6 of the ECHR, which was perceived as inapplicable to the case.[149] It is also clear that, unlike the Argentine case law, the characterization of the right of

access to justice as part of *ordre public international* did *not* lead the court to the conclusion that the treaty rule granting immunity was null and void as foreseen by Article 53 of the VCLT.

Coming now to the possibility of relying upon *jus cogens* on the basis of the specific wrongful conduct attributed to defendant IOs, a spectacular case study is provided by the litigation which is unfolding before the Dutch courts in respect of the 1995 Srebrenica genocide. In this litigation, the UN and the Netherlands are being sued for damages on account of their alleged failure to prevent the genocide. In *Association Mothers of Srebrenica v The Netherlands,*[150] two lower courts' decisions **(p. 102)** upheld the immunity of the UN. The plaintiffs argued inter alia that the UN's immunity should be set aside because of the *jus cogens* nature of the prohibition on (tolerating) genocide.[151] The District Court dismissed the argument for two reasons. In the first place, it pointed to the absence in the 1948 Convention[152] of any obligation to grant civil remedies to victims of genocide. This seems to accept that the obligations laid down in that Convention, whatever their status, do not include either per se or as a corollary the right to bring an action for compensation for damage.[153] Secondly, aware that this right may however ensue from sources external to the 1948 Convention, such as the ECHR and the ICCPR, the court recalled the ECtHR *Al-Adsani* jurisprudence and concluded that

> there is no generally accepted standard in international-law practice on the basis of which current immunities allow exception within the framework of enforcement in civil law of the standards of ius cogens, like the prohibitions on genocide and torture.[154]

This finding was therefore based on a very debatable extension of ECtHR case law on state immunity to IOs' immunity.[155] The approach of the Court of Appeal was significantly different. In discussing the test of proportionality as per Article 6 of the ECHR, the court emphasized the special mission of the UN in the international legal order and the crucial function performed by its peacekeeping operations in that respect.[156] This implied that only 'compelling reasons'[157] should lead to removing the UN's immunity as disproportionate to the aim pursued. Hinting at *jus cogens,* the plaintiffs posited that one such compelling reason was triggered by the case at hand, as it involved the heinous crime of genocide.[158] The court disagreed. It drew attention to the fact that the UN was not accused of genocide itself, nor of complicity in genocide, but 'only' of failure to prevent this crime against

humanity.[159] Thus, although the latter accusation was serious, it was not ‘that pressing that immunity should be [denied] or that the UN's invocation of immunity was, straightaway, unacceptable’.[160]

The obvious inference from this reasoning is that the *jus cogens* status of the obligation to prevent genocide, unlike that of the prohibition to commit genocide, is to be ruled out. A breach of that obligation is not therefore of such a gravity as to **(p. 103)** justify a denial of immunity. Hence, this decision evidently shows that *jus cogens* may well have a role to play in immunity cases. The Hague Appeal Court did not reject the argument based on the severity of the charges against the UN on the assumption that the latter were alien to an ancillary procedural rule to provide access to justice. The sole distinction retained by the court concerned the different gravity of the substantive obligations themselves. It is also remarkable that *both* Dutch courts had no hesitation in disavowing Article 103 of the UN Charter as an absolute bar to removing the UN's immunity *in any situation*. They stated that Article 103 did not imply the prevalence of the UN Charter over *jus cogens* and fundamental rights at large, either of a customary or a *treaty* nature.[161]

What remains to be clarified is the actual function which, according to the Appeal Court's reasoning, *jus cogens* may discharge in immunity cases. The court never alluded to the possibility that the gravity of the crimes at stake may lead to such a drastic outcome as the invalidation of the provisions granting immunity to the UN set forth in the UN Charter and in the General Convention. In the next section, it will be submitted that this decision provides further evidence of the interpretative potential of *jus cogens*.

4.2 Reconciling IOs’ immunity with the right of access to justice: interpretation as the key tool for the courts

The ECtHR jurisprudence on the immunity of IOs may be taken as an eminent example of systematic interpretation aimed at reconciling the competing obligations and interests at stake. In *Waite and Kennedy,* the Court addressed the compatibility of the immunity enjoyed by the European Space Agency (ESA) with the right of access to justice in Article 6 of the ECHR. It performed the classic two-tier test of legitimacy and proportionality of restrictions on ECHR rights. There was no doubt that rules on IOs’ immunity pursued the legitimate aim of ‘ensuring the proper functioning of such organisations free from unilateral interference by individual governments’.[162] In respect of

proportionality, the Court underscored that ‘a material factor’[163] to be taken into account was ‘whether the applicants had available to them *reasonable alternative means* to protect *effectively* their rights under the Convention’.[164] Such remedies indeed existed, as the applicants might have had recourse to the pertinent body internal to the IO, namely the ESA Appeals Board,[165] *plus* they might have sued the firms which had hired them out before domestic courts.[166] The Court unanimously concluded that Germany had not breached Article 6.[167]

A rational balance between the competing obligations at stake was thus found in the necessary existence of ‘alternative means of legal process’[168] open to aggrieved individuals who are unable to sue IOs before national courts because of immunity **(p. 104)** rules. This is usually taken to mean that whenever such alternative means are absent or patently ineffective, IOs’ immunity ought to be lifted.

The latter interpretation has been challenged on the grounds that the ECtHR did not actually state in *Waite and Kennedy* that alternative means of redress were a *precondition* to the enjoyment of IOs’ immunity. Such means were simply ‘a material factor’ in reviewing the proportionality of the interference with Article 6.[169] Their absence, or a fortiori their ineffectiveness, would not automatically entail a denial of immunity. This is indeed textually accurate, but it runs counter to the earlier and subsequent practice inter alia followed by European states and the ECtHR itself.

First of all, the ECtHR should by no means be seen as a forerunner in this area of the law. Its *Waite and Kennedy* jurisprudence built upon a wide array of earlier domestic decisions which, along similar lines, resorted to the principle of alternative remedies as a justification for granting immunity to IOs. While most of these cases are well documented,[170] others have come to light only in recent times. The latter include, for instance, a 1992 decision by the Supreme Court of Cyprus involving the immunity of the UN and of the United Nations Peacekeeping Force in Cyprus (UNFICYP). The Supreme Court accorded immunity to the UN pursuant to the 1946 General Convention and the 1964 UNFICYP Agreement. It pointed out, however, that such immunity did not encroach upon the right of access to courts as protected by the Cypriot Constitution, because the mechanism internal to UNFICYP for settling disputes with its local personnel ensured that ‘[t]he applicant was not left without a remedy’.[171]

The post-*Waite and Kennedy* practice is even more telling. Insofar as the ECtHR is concerned, mention must be made of a little-known decision

concerning the immunity of the NATO Undersea Research Centre in Italy.[172] In coming to the conclusion that the immunity afforded to the IO at hand did not violate Article 6, the Court not only reiterated the same approach canvassed in *Waite and Kennedy,* ie that such immunity was in line with the ECHR just because NATO had established an internal Appeals Board to hear staff disputes. It also went beyond *Waite and Kennedy* because it gave specific reasons why that NATO body was to be considered an *effective* remedy fulfilling the requirements of Article 6.[173] It is true that, recently, in a case involving disciplinary measures against an employee of the International Olive Council (IOC), the Court briskly dismissed the applicant's complaint insofar as it related to the denial of access to justice arising from the IOC's immunity.[174] However, this decision must be distinguished, as the IOC had accepted the jurisdiction of the ILOAT and the applicant had indeed (to no avail) challenged the disputed disciplinary sanctions before that tribunal.[175] The only lesson that may be **(p. 105)** taken from this case is that the ECtHR is unwilling to examine the compatibility of the ILOAT with the fair trial guarantees in Article 6.[176] By contrast, the same case does *not* stand for the proposition that alternative remedies are just another consideration when reviewing grants of IOs' immunity under Article 6.

At the national level, the *Waite and Kennedy* jurisprudence has spurred a new wave of case law whereby the recognition of IOs' immunity has consistently been made dependent upon the existence of alternative forums competent to hear private claims.[177] This is undoubtedly true for Belgium,[178] Switzerland,[179] and France,[180] while possibly true for the Netherlands.[181] Such decisions are oscillating *only* in respect of the degree of judicial review exercised vis-à-vis the specific alternative remedies at stake (if any). Thus, at times they resulted in a denial of immunity,[182] whereas in others immunity was afforded. But *none* of them ever questioned the requirement of alternative means of legal process as a precondition for the enjoyment of immunity.

The sole notable exception comes from the United Kingdom. In a recent case concerning the alleged repudiation of a contract by UNESCO,[183] an English court upheld the latter's immunity as provided by the 1947 Specialized Agencies Convention. Justice Tomlinson stated that the *Waite and Kennedy* test was not intended by the ECtHR as a 'pre-requisite to the compatibility with Article 6 of organisational immunity'.[184] This decision may be distinguished from the previous ones. The IO concerned was a UN specialized agency and this raised specific **(p. 106)** issues which have been recalled elsewhere.[185] It is however telling that even here, Justice Tomlinson

was eager to clarify that an alternative—presumptively effective—remedy was available to the claimant, ie arbitration under the rules of the United Nations Commission on International Trade Law.[186]

Italy is a special case, as far as its recent judicial decisions on IOs' immunity[187] never cite the *Waite and Kennedy* judgment nor Article 6 of the ECHR, but only rely upon the Italian constitutional right of access to justice. To some extent, this is understandable as the requirement of effective alternative remedies is a well-settled principle of Italian jurisprudence, pre-dating the pertinent ECtHR case law.[188] Nevertheless, it would be important for this jurisprudence to be fortified with arguments drawn from international law and references to other domestic court practice. In this respect, the most recent Italian decision on IOs' immunity has indeed endorsed an approach which can be squared with international law. In *Drago,* the Supreme Court denied immunity to an IO because of the latter's failure to set up adjudicatory bodies endowed with impartiality and independence and that were competent to hear staff disputes.[189] Most importantly, in the court's view, this failure did not result in a violation of the right to judicial protection under the Italian Constitution. It was instead to be regarded, first and foremost, as a breach of a specific treaty obligation included in the headquarters agreement at hand,[190] according to which the IO was bound to establish adequate procedures for settling disputes with its personnel. Hence, non-fulfilment of that obligation entailed the *inapplicability* of the agreement's provision[191] granting immunity to the IO.[192] Although the court relied upon an interpretation in harmony with the Italian Constitution, the same outcome may well be explained on the basis of international law principles.[193] Chiefly, the principle of *effective interpretation* of treaties urges hermeneutic solutions which are capable of preserving the *effet utile* of each and every of the treaty rules at stake. Applied to the court's reasoning in *Drago,* this means that compliance with the treaty rule granting immunity in a case where the concerned IO has not established adequate means of dispute settlement would undermine the effectiveness of the treaty rule binding the IO to do so.

Interpretation operates here from *within* the treaty regime affording immunity to IOs in order to safeguard the right of access to justice without calling into **(p. 107)** question external, purportedly overriding, rules. The latter may instead be retained as elements to be taken into account pursuant to an evolutionary or systemic interpretation of treaties.

This notion of a synallagmatic relationship between IOs' immunity and IOs' duty to establish mechanisms to settle private disputes is nothing new.[194] It arises from a long-standing debate involving the interpretation of similarly worded standard clauses contained in IOs' immunity instruments. For instance, Article VIII, section 29 of the General Convention provides, so far as material, that the UN 'shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party'. In *Entico,* Justice Tomlinson ruled out that the fulfilment of an identical obligation foreseen by the Specialized Agencies Convention[195] was a prerequisite for granting immunity to UNESCO.[196] But this holding was exclusively based on *textual* interpretation, pursuant to which the provisions applying to UNESCO's immunity appeared 'clear, unequivocal and unconditional'.[197]

The approach of the Hague Appeal Court in *Mothers of Srebrenica* was significantly dissimilar. The court acknowledged its task as one of making a decision in 'a field of tension'[198] where 'the pros and cons must be balanced between two very important principles of law',[199] namely the UN's immunity and imperative purposes and the right to a remedy and reparation for victims of international crimes. In achieving that balance, the court was quite attentive to the availability of alternative remedies for the complainants. It seriously considered the latter's argument that the UN had undeniably failed to establish mechanisms of redress open to their claims as required by Article VIII, section 29(a) of the General Convention. However, it was unable to reach the conclusion that that failure, although regrettable,[200] ought per se to result in removing the UN's immunity.[201] The crucial point in the court's reasoning was that granting immunity to the UN did not completely erase the complainants' right of access to justice.[202] There indeed existed alternative remedies, such as, in particular, compensation claims against the individuals responsible for the genocide as well as against the State of the Netherlands itself.[203] Whereas the effectiveness of these alternative remedies is questionable, this may be regarded as a balanced decision showing a genuine effort to take into account all the competing obligations at stake. The court did not accept the notion of a synallagmatic relationship between the UN's immunity and its obligation to establish means for settling private disputes. It nonetheless engaged in an articulated interpretative exercise which included, as pertinent considerations, non-compliance with that obligation, the *customary*[204] right of access to justice, and the gravity of **(p. 108)** the underlying crimes. *Jus cogens* was arguably subsumed within the latter element and was thus an integral part of the interpretive balance sought by the court. What is certain is that this decision implies that the UN

does *not* enjoy unconditional immunity where serious violations of human rights are at stake.

4.3 Available options

As compared to state immunity, the preceding analysis shows that in the field of IOs' immunity there is certainly a broader consensus on the necessity of an alternative-remedies test. Rather, in respect of IOs, there exists a risk of banalization of such a test. This may result from an unqualified acceptance of any disparate solutions devised by a court for bringing IOs' immunity in line with the right of access to justice. Therefore, the coming challenge in this area of the law will most likely arise from a growing judicial scrutiny of the actual ability of the envisaged remedies to preserve the essence of the right to a court and associated due process guarantees.

For instance, the enquiry undertaken above in respect of state immunity warrants caution in accepting with no reservation that victims of crimes would be better to sue the individual perpetrators rather than the allegedly responsible IO. As a matter of principle, if any entity whatsoever is responsible for a wrongful act, it ought to make good any damage so caused, without shielding behind its immunity and diverting the aggrieved individuals to different defendants. Also, if the alternative forum offers a remedy different from that sought by the individual (ie compensation instead of recognition of permanent employment), there is room to doubt the appropriateness of this solution.[205]

In the area of IOs' immunity, the most-discussed alternative-remedy options are essentially two: judicial or quasi-judicial bodies whose jurisdiction is accepted by concerned IOs, and/or compensatory remedies provided by IOs' member states. As to the first option, a significant reform has recently been passed in relation to the so-called UN system of administration of justice, ie the system of remedies available to UN officials and employees.[206] The most important innovation concerns the creation of a two-tier structure made up of the UNDT and the UNAT. This is of course intended to guarantee the hitherto inexistent *individual*'s right to bring an appeal against the decisions of the former UN Administrative Tribunal. **(p. 109)** However, the subject-matter jurisdiction of these new bodies does not go beyond the settlement of traditional employment disputes. Indeed, the latter continue to be narrowly defined as those concerning contracts of employment and terms of appointment,[207] to the exclusion of those incidents of an employment relationship which are strictly connected to the enjoyment of human rights,

such as discrimination, sexual harassment, and non-compliance with health and safety standards. Moreover, jurisdiction *ratione personae* only concerns staff and former staff members, thereby barring applications by, for example, the myriad individuals employed on a fixed-term basis or as external contractors.[208]

A crucial consideration is that the ILOAT as well as other IOs' administrative tribunals have not undertaken any comparable reform. Sooner or later, this is likely to catch the attention of domestic courts and affect their decisions involving the immunity of the dozen IOs whose employment disputes are adjudicated in those forums. By the same token, it is probable that the human rights performance of those IOs which insist on relying exclusively upon internal bodies and commissions, with no possibility of recourse to external (truly) independent bodies, will increasingly be challenged.

Most importantly, the implications of the UN reform at issue go well beyond the area which is immediately affected by it, ie labour disputes. It constitutes a significant precedent and model for all present and future cases where the UN's responsibility may be engaged, first and foremost in cases involving breaches of human rights and humanitarian law and related reparation claims advanced by victims. The absence of any impartial mechanism with effective powers to investigate facts and award damages in such cases will increasingly become unsustainable. The purportedly absolute immunity of the UN for human rights violations may be questioned precisely on this ground.

The second alternative-remedy option would consist of establishing a principle according to which IOs' member states would be accountable towards individuals who are victims of wrongful acts (including human rights violations) committed by IOs and of a denial of justice ensuing from the IOs' immunity. This option, which has never been explicitly accepted by national courts, is more complex than the similar idea discussed in relation to state immunity. In the latter case, only the state of the forum where immunity is granted would be affected by this purported form of responsibility. In respect of IOs, by contrast, it would seem rational to envisage a form of joint and several responsibility of all the member states of the IO at hand on the grounds of their collective decision to endow the IO with powers and immunities.

This perspective has, at times, been supported in literature. Recently,[209] for instance, it has been endorsed as a reasonable compromise between the necessity to ensure the effective functioning of IOs and the safeguarding of

the individual's **(p. 110)** right of access to justice. The civil responsibility of IOs' member states would inter alia preserve some *effet utile* to the clauses in IOs' immunity agreements imposing the creation of mechanisms to settle private disputes, whenever such clauses are not duly acted upon, as in the case of Srebrenica's genocide.

This would be a form of tort responsibility based on domestic law. However, the *Waite and Kennedy* (and *Bosphorus*) jurisprudence of the ECtHR fuels the debate. Far from envisaging any loss of immunity in the absence of alternative individual remedies, this jurisprudence might be read as simply recognizing the ECHR's responsibility of the state granting immunity.[210] The latter would then have to compensate the individuals deprived of their right of access to justice. Supposedly, in case of further applications against that state, the ECtHR would reject them, given the existence of such compensatory remedy.

Recent jurisprudence of the ECtHR might even provide further arguments in favour of the above perspective. In *Gasparini,*[211] a case involving the compatibility of a decision of the NATO Appeals Board with the fair trial standards in Article 6 of the ECHR, the Court stated that the respondents' responsibility was engaged by reason of their transfer of sovereign powers to NATO, ie the power to settle labour disputes through an internal system. The Court declared the application inadmissible, as the applicant had not demonstrated that at the time of the transfer of powers the defendant states might have envisaged that that dispute settlement system would be in *flagrant contradiction* with the ECHR. Thus, on the one hand, this decision undeniably widens the responsibility of IOs' member states that are parties to the ECHR: the origin of such responsibility simply lies in the transfer of powers to IOs (such as the conclusion of immunity agreements or the taking of decisions within IOs' organs), regardless of the actual participation in the allegedly wrongful act. But, on the other hand, the threshold for a finding of inconsistency with ECHR rights seems prohibitively high.

The *Gasparini* ruling should be taken into account when trying to establish the boundaries of the *Behrami* principle.[212] It is worth recalling that that principle dictates that human rights breaches committed in the context of UN-mandated or UN-authorized military operations are exclusively attributable to the UN and do not therefore engage the responsibility of troop-contributing states under the ECHR, provided the UN can be seen as retaining 'ultimate authority and control' over the relevant acts and omissions.[213] Thus *Behrami* is somewhat the reverse **(p. 111)** of *Gasparini*.

Behrami's shortcomings are well apparent to the claimants in the *Srebrenica* litigation in the Dutch courts, where it might bar the action against the Netherlands,[214] while the plea of immunity advanced by the UN has so far been successful. The looming spectre of a situation where serious violations of human rights remain entirely unredressed is well epitomized by this litigation.

Coming back to our specific field of study, the above solution, according to which it would be the state granting immunity to IOs to bear exclusive responsibility for denials of justice to victims of human rights violations, seems both unrealistic and outdated. It is unrealistic because states would rather modify their attitude towards the problem of IOs' immunity before exposing themselves to a flood of compensation claims. It is also outdated, because it is the legacy of an era where organizations were the mere mouthpieces of their member states. That era has gone. Nowadays IOs, and certainly the most important among them, are autonomous entities largely exempt from the *diktat* of their member states. The latter's ability to decidedly affect a wide range of IOs' activities and related decision-making processes must seriously be questioned. At the same time, IOs are well equipped to establish adjudicatory mechanisms to compensate victims for their wrongful acts. If they fail to do so, they should be aware of the risk of losing their immunity before domestic courts.

In my view, the international community should by all means avoid letting the current dilemmas surrounding the responsibility of IOs generate unaccountability for both IOs and their member states, to the complete disadvantage of the victims of human rights violations. **(p. 112)**

5. Conclusions

The analysis undertaken in this chapter shows that human rights standards increasingly exercise considerable pressure upon the immunity of foreign states and IOs. With respect to IOs, this has resulted in a solid jurisprudence which makes their immunity subject to alternative remedies available to individual claimants. Fulfilment of this test is conceived of as the essential means of reconciling IOs' immunity with the fundamental right of access to justice. This jurisprudence is predominantly European, but significant examples thereof may be found in non-European jurisdictions, such as, especially, in Argentina and the African region. Moreover, although so far almost exclusively confined to labour disputes, the same jurisprudence is bound to produce a spill-over effect in the rapidly emerging area of

serious human rights violations attributable to IOs, as demonstrated by the Dutch *Srebrenica* litigation against the UN. There is no plausible *legal* reason why the alternative-remedies test should not be applied to the latter category of disputes. Rather, the adoption of the test in employment decisions constitutes an a fortiori argument for using it where the underlying violations appear more serious.

By contrast, in relation to states, the prevailing judicial practice has so far upheld pleas of immunity in cases involving serious breaches of human rights committed outside the state of the forum. Neither the right of access to justice per se nor the gravity of the underlying violations have usually persuaded such courts to deny immunity. The pertinent practice exclusively comes from developed country jurisdictions, something which however should not foreclose general considerations. Such jurisdictions are indeed called upon to play a pioneering role in the area of human rights and state immunity: economic and political repercussions on the international level, which are always at stake in immunity decisions, are surely a less significant concern for them than for developing countries. And indeed, transnational human rights litigation, including several examples discussed above, most frequently takes shape by means of proceedings in courts of developed countries instituted by victims of abuses in developing countries with a poor human rights record.

Significant exceptions of courts not accepting an unconditional grant of state immunity in disputes involving egregious human rights violations are provided by Italian and Slovenian jurisprudence. While the former is now well settled in the sense that state immunity yields to human rights breaches amounting to international crimes or *jus cogens* violations, the latter is less drastic and posits that immunity should be withdrawn only when no effective alternative remedies exist in the state invoking immunity. In both instances, the courts seemed to accept that the relationship between immunity and human rights may be disentangled by means of interpretation, ie by a systematic balancing of existing international rules. This chapter has submitted that such a pragmatic conceptualization of the area at hand, in terms of a tension among competing obligations that can be reconciled, is to be preferred over theories based on a genuine conflict of norms. Hermeneutic criteria, such as systemic and effective interpretation, are indeed significant tools **(p. 113)** of conflict avoidance between the obligations on states to secure human rights (including remedies and reparation for victims thereof) and to grant immunity for *jure imperii* or functional activities. In this respect, the Slovenian jurisprudence is in

principle more convincing than its Italian counterpart, to the extent that it explicitly links a loss of immunity to the absence of effective remedies in the state claiming immunity. Here, the largely unfettered power of interpretation is associated with a so-called *Solange* technique of conflict avoidance aimed to objectively assess whether and how the aggrieved individual may be granted comparable protection in an alternative forum.

This chapter has indeed canvassed a convergence between the immunity of foreign states and that of IOs over the test of alternative remedies capable of securing redress to victims of human rights violations, and has, accordingly, explored the feasible options in that respect. This seemed a reasonable compromise safeguarding the essence of the right of access to remedies without impairing the values underlying international immunities.

The absence of genuine norm conflicts in this area is crucially confirmed by the scant relevance that *jus cogens* has been attributed in the judicial practice illustrated above. With the exception of the Argentine *Cabrera* jurisprudence on the immunity of IOs, no domestic court has ever declared the invalidity of immunity rules on the ground of their alleged conflict with peremptory norms, not even the Italian *Ferrini* jurisprudence on state immunity. The latter, instead, seems to have most recently endorsed a manifold interpretative exercise including, but not confined to, consideration of the *jus cogens* status of fundamental human rights.

The most important point here is that this jurisprudence should not be taken to dismiss the existence of a human rights-based normative hierarchy in international law as powerfully epitomized by the notion of *jus cogens,* nor as relegating *jus cogens* to a purely symbolic role. Whenever breaches of rights belonging to *jus cogens* underlie a given dispute, the primary normative function of peremptory rules may be preserved by regarding those breaches as a chief concern in favour of removing immunity. This approach may also be useful to countenance the argument that *jus cogens* may never really be at stake in immunity cases, as the latter would only interfere with the right of access to justice, ie a right that is preferably still to be considered as alien to *jus cogens*.

But if this final proposition is true, then it only remains possible to view the jurisprudence subordinating immunities to human rights as witnessing the steady emergence of the latter as a living, de facto constitution of the international community.

Notes:

(1.) See Chapter 5 (Philippa Webb).

(2.) H Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 BYIL 220, 246. In this seminal piece, the distinguished author had already lucidly identified the perverse effect of immunity rules upon the enjoyment of human rights, ibid 235–6.

(3.) Cf A Reinisch and UA Weber, ‘In the Shadow of Waite and Kennedy. The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement’ (2004) 1 IOLR 59, 90.

(4.) New York, 2 December 2004, General Assembly Resolution A/59/38, not yet in force. As of 28 September 2011, there are 13 states parties to the Convention. It shall enter into force after ratification by 30 states.

(5.) See N Ronzitti, ‘L'eccezione dello *ius cogens* alla regola dell'immunità degli Stati dalla giurisdizione è compatibile con la Convenzione delle Nazioni Unite del 2005?’ in F Francioni, M Gestri, N Ronzitti, and T Scovazzi (eds), *Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione europea* (Giuffrè, Milano 2008) 45.

(6.) See also UNCSI, Art 4.

(7.) The Swiss interpretative declaration at hand is available at http://treaties.un.org. See also ibid, for the similar declarations by Norway and Sweden (referring however to ‘future’ developments in the protection of human rights). Notably, the Swiss declaration is made in the context of UNCSI, Art 12 codifying the so-called ‘territorial tort exception’ to state immunity (no immunity for personal injuries and damage to property caused by acts or omissions in the state of the forum), and brings further support to the increasingly accepted notion that such torts may well arise from human rights breaches.

(8.) Art IV of the Resolution; text available at http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf (‘Resolution on Immunity and International Crimes’).

(9.) *Jurisdictional Immunities of the State (Germany v Italy),* Application of 23 December 2008, available at http://www.icj-cij.org.

(10.) This theory was originally propounded in the first edition of her treatise on the law of state immunity: see H Fox, *The Law of State Immunity* (1st edn OUP, Oxford 2002) 524–5 ('Fox (2002)'). Its essential tenets have been reproduced verbatim in the second edition of the book: see H Fox, *The Law of State Immunity* (2nd edn OUP, Oxford 2008) 151–2 ('Fox (2008)').

(11.) Fox (2002), ibid 525; Fox (2008), ibid 151.

(12.) There exist, however, a few examples of judicial pronouncements advocating the opposite view. Hugely interesting in this respect is a recent decision by the President of the Special Tribunal for Lebanon, *In the Matter of El Sayed,* Case No CH/PRES/2010/01, Order Assigning Matter to Pre-Trial Judge (15 April 2010), available at http://www.stl-tsl.org/en/the-cases/in-the-matter-of-el-sayed/main/filings/orders-and-decisions/president-s-office/order-assigning-matter-to-pre-trial-judge. According to President Cassese, '[t]he right of access to justice is regarded by the whole international community as essential and indeed crucial to any democratic society. It is therefore warranted to hold that the customary rule prescribing it has acquired the status of a peremptory norm (*jus cogens*)', ibid para 29; the existence of several grounds for restricting the enjoyment of this right (ie its non-absolute nature), including the need to respect international immunities, would not foreclose its peremptory character, ibid para 33; such restrictions would in any event be subject to stringent requirements, fulfilment of which would be judicially reviewed by means of a 'balancing exercise that is required of tribunals when weighing different (and possibly conflicting) rights and legal interests brought before them', ibid para 34. See also the Argentine and Latin American case law referred to at nn 137, 139 and 140 below.

(13.) As Lady Fox herself accepts: see Fox (2008) (n 10) 159 ('substantive right to an effective remedy'); see also her Final Report submitted to the IDI within the process leading up to the 2009 Resolution on Immunity and International Crimes, (2009) 73 *Annuaire de l'Institut de droit international* 74, 84 (para 27).

(14.) *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia,* [2006] UKHL 26 (House of Lords, 14 June 2006), para 45 (per Lord Hoffmann), emphasis added.

(15.) Ibid.

(16.) For further criticism, see A Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong' (2007) 18 EJIL

955, 964–70 (for references to doctrinal support for the theory of the necessity of a peremptory ancillary procedural rule, see ibid 964, n 35).

(17.) Art 2(1) of the International Covenant on Civil and Political Rights (ICCPR). See Human Rights Committee, General Comment No 31, 'Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13 (26 May 2004), especially paras 8, 16, and 18.

(18.) Art 1 of the European Convention on Human Rights (ECHR).

(19.) *Jones* (n 14) para 44 (per Lord Hoffmann), emphasis added.

(20.) See *Al-Adsani v United Kingdom,* App No 35763/97 (ECtHR, 21 November 2001), paras 35–41.

(21.) See n 8 above, third preambular paragraph.

(22.) Ibid fourth preambular paragraph.

(23.) Ibid Art II(1).

(24.) Ibid.

(25.) Ibid Art II(2).

(26.) Ibid fifth preambular paragraph ('removal of immunity from proceedings in national courts is one way by which effective reparation for the commission of international crimes may be achieved') and Art II(2) ('… Immunity should not constitute an obstacle to the appropriate reparation to which victims of crimes…are entitled').

(27.) See n 13 above, 74 (para 1), 76 (paras 4–5), 81 (para 21), and 94 (para 51).

(28.) Cf ibid 81 (para 21).

(29.) Cf ibid 92–3 (para 47) and 97 (para 53).

(30.) Ibid 76 (para 4).

(31.) J Klabbers, *An Introduction to International Institutional Law* (2nd edn CUP, Cambridge 2009) 132.

(32.) Ibid.

(33.) See section 4 below.

(34.) *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Şirketi v Ireland,* App No 45036/98 (30 June 2005), para 150.

(35.) Ibid para 154, emphasis added.

(36.) *Waite and Kennedy v Germany,* App No 26083/94 (18 February 1999), para 67. On the same date, the ECtHR delivered an essentially identical decision in the case of *Beer and Regan v Germany,* App No 28934/95.

(37.) *Waite and Kennedy,* ibid para 67.

(38.) Ibid.

(39.) See, eg, *Al-Adsani* (n 20) para 55.

(40.) As reiterated, for instance, in *Bosphorus* (n 34) para 156.

(41.) See, eg, with reference to earlier case law, *M & Co v Federal Republic of Germany,* App No 13258/77 (European Commission of Human Rights, 9 February 1990): 'The Commission recalls that "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty"…The Commission considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers.'

(42.) See VCLT, Art 30(5).

(43.) Indeed, it has been persuasively submitted that this jurisprudence of the ECtHR is testimony to a 'de facto hierarchical superiority' of ECHR obligations: E de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 Leiden JIL 611, 627. One should also recall that the *lex specialis* nature of a given treaty is somehow in the eye of the beholder, as demonstrated by those who consider that for our purposes this criterion should unquestionably operate in favour of rules on IOs' immunity: see N Angelet and A Weerts, 'Les immunités des organisations internationales face à l'article 6 de la Convention européenne des droits de l'homme' (2007) 134 *Journal du droit international* 3, 24. Neither should the marginalization of the *lex posterior* principle be connected to the requirement in VCLT, Art

30 that the successive treaties at hand be ‘relating to the same subject-matter’. It is indeed widely accepted that this requirement should not be interpreted strictly, ie as envisaging application of the *lex posterior* principle only in respect of treaties that concern the very same area of the law. The requirement is best understood as referring to treaties applicable to the same *series or set of facts or actions,* or to the same *legal situation*. See recently, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission—Finalized by Martti Koskenniemi, UN Doc A/CN.4/L.682 (13 April 2006), paras 21–4, 253–6 (‘Fragmentation Report’).

(44.) Or more precisely: consistency of immunity of IOs stemming from treaties concluded earlier than ECHR's ratification with the ECHR's right to a court. The ‘time factor’ is crucial to this perspective and to a sensible application of the *lex posterior* rule. It gives rise to a series of complications which is here unnecessary to spell out in detail. For an intelligent reappraisal of this problem on the facts of the ECtHR *Matthews* case (*Matthews v United Kingdom,* App No 24833/94 (18 February 1999)), see M Milanović, ‘Norm Conflict in International Law: Whither Human Rights?’ (2009) 20 *Duke Journal of Comparative & International Law* 69, 118–19.

(45.) The immunity of the UN stems from Art 105(1) of the UN Charter (‘The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes’). It was later spelled out in the 1946 Convention on the Privileges and Immunities of the United Nations (General Convention), 1 UNTS 15.

(46.) According to an English court, it cannot be assumed that the ECtHR ‘would in a case involving the immunity of a global organisation created prior to the ECHR [ie the United Nations Educational, Scientific and Cultural Organization (UNESCO)] adopt reasoning similar to that found in *Waite and Kennedy*’, the latter urging consideration of alternative remedies available to individuals before granting immunity to IOs: *Entico v UNESCO,* [2008] EWHC 531 (Comm) (High Court of Justice, 18 March 2008), para 27 (per Tomlinson J); it would indeed be unjustifiable to read an earlier multilateral convention on IOs’ immunity ‘in the light of the later principles espoused by only a small sub-set of the parties to the earlier convention’, ibid (see also ibid paras 18–19 and 24). By contrast, a Dutch appeals court has recently excluded that the ECtHR's transfer-of-powers doctrine ‘implies that the single fact that an international organisation has existed longer than the ECHR is sufficient

reason to believe that the co-signatories are discharged from their obligation to guarantee fundamental rights under the ECHR', *Association Mothers of Srebrenica and Others v The Netherlands,* Case No 200.022.151/01 (Appeal Court of The Hague, 30 March 2010), para 5.4. This court further remarked: 'Particularly in the case of (older) international organisations (like the UN) that presumably will continue to exist for a long time…this would mean that part of the rights guaranteed by the ECHR would be barred from application almost permanently', ibid.

(47.) *Behrami and Behrami v France and Saramati v France, Germany and Norway,* App Nos 71412/01 and 78166/02 (ECtHR, 2 May 2007).

(48.) *Behrami,* ibid para 147, emphasis added. The two respondent states referred to are France and Norway. The application against Germany, a state which joined the UN in 1973 (ie some 20 years after its ratification of the ECHR), had indeed been struck out by the Court upon request from one of the applicants, see ibid paras 64–5.

(49.) Ibid para 148 ('*Of even greater significance* is the imperative nature of the principle aim of the UN', emphasis added).

(50.) Ibid para 151 ('organisation of universal jurisdiction fulfilling its imperative collective security objective').

(51.) Cf ibid para 35 (merely listing VCLT, Art 30(1) among the pertinent legal materials) and paras 26–7, and 147 (stating that the Court 'had regard' to Arts 25 and 103 of the UN Charter as interpreted by the ICJ, but with no follow-up discussion on their *legal* impact upon the situation at issue).

(52.) There are other inconsistencies in ECtHR case law: see eg *Slivenko v Latvia,* App No 48321/99 (23 January 2002 and 9 October 2003), upholding the priority of the ECHR over an *earlier* bilateral treaty; for telling observations on this case, see Fragmentation Report (n 43), paras 246–9.

(53.) See especially *AL v Italy,* App No 41387/98 (11 May 2000), and most recently, *Gasparini v Italy and Belgium,* App No 10750/03 (12 May 2009). As is well known, the NATO was created pursuant to the 1947 North Atlantic Treaty, while its immunities are envisaged by the 1951 Ottawa Agreement on the Status of the North Atlantic Treaty Organisation, National Representatives and International Staff, in force 18 May 1954, 200 UNTS 3.

(54.) *Beygo v 46 Member States of the Council of Europe,* App No 36099/06 (16 June 2009). The Statute of the Council of Europe and the General Agreement on Privileges and Immunities of the Council of Europe were adopted respectively on 5 May 1949 and 2 September 1949.

(55.) As, for instance, posited by Angelet and Weerts (n 43) 21–3.

(56.) In the ECHR context, a frequent practice is to institute proceedings against all ECHR parties which are members of the IO whose immunity or acts are at stake. For further options, see, eg, *AL v Italy* (n 53), where the applicant brought proceedings against Italy as the host state of the NATO body concerned; *Gasparini* (n 53), where both NATO's host state and the state of nationality of the applicant were sued (Belgium and Italy, respectively).

(57.) These Canadian decisions are remarkable because they thoroughly address the pertinent international law issues. They do not (or do not *only*) hide behind the argument that in any event domestic state immunity legislation cannot be superseded by inconsistent international law obligations, something which Canadian courts could easily do. Conversely, and precisely for that reason, the significance of US jurisprudence dismissing the overriding effect of *jus cogens* over state immunity is slight. Perhaps the 1992 *Siderman de Blake* decision provides the most compelling evidence thereof: *Siderman de Blake v Argentina,* 965 F.2d 699 (US Court of Appeals for the Ninth Circuit, per Fletcher CJ, 22 May 1992). The court, confronted with an action for damages for torture abroad, accepted that the argument of the primacy of *jus cogens* over the rule on state immunity 'carrie[d] much force' (ibid 718). Nevertheless, it stated: 'Unfortunately, we do not write on a clean slate. We deal not only with customary international law, but with an affirmative Act of Congress, the [Foreign Sovereign Immunities Act]…Nothing in the text or legislative history of the FSIA explicitly addresses the effect violations of *jus cogens* might have on the FSIA's cloak of immunity' (ibid). Hence, 'if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so' (ibid 719). On the other hand, the argument according to which *jus cogens* violations would be covered by the 'implied waiver exception' to sovereign immunity as set out in the FSIA has been rejected by US courts, see particularly *Princz v Germany,* 26 F.3d 1166 (US Court of Appeals for the District of Columbia Circuit, per Ginsburg CJ, 1 July 1994), 1173–4 (majority opinion) and 1176–85 (for an impassioned dissent by Wald CJ). The more recent (and little-noticed) *Sampson* decision, involving a reparation claim by a Holocaust survivor,

is entirely devoted to the discussion (and rejection) of the pertinence of the *jus cogens* argument in state immunity cases, *Sampson v Germany,* 250 F.3d 1145 (US Court of Appeals for the Seventh Circuit, per Manion CJ, 23 May 2001). By contrast to other US decisions, this court justified its conclusions also on the basis of (its views on) the nature and status of *jus cogens* under international law. It accordingly excluded that international law compelled states to assert jurisdiction over other states responsible for *jus cogens* violations; there was therefore no need to interpret the FSIA consistently with international law pursuant to the well-known 'Charming Betsy canon' (ibid 1152). The court displayed a markedly adversarial and sceptical attitude towards the role of *jus cogens* and customary rules at large (see, eg, ibid 1154, respectively criticizing the 'chameleon qualities' and 'vagaries' of customary law; ibid 1155: '*jus cogens* norms are…an uncertain means to determine whether a foreign sovereign has waived jurisdiction, and missteps in this area would have profound effect'). For the implications arising from the existence of state immunity legislation in the US and other (common law) countries, see especially A Bianchi, 'L'immunité des États et les violations graves des droits de l'homme: la fonction de l'interprète dans la détermination du droit international' (2004) 50 *Revue générale de droit international public* 63, 71–2.

(58.) *Al-Adsani* (n 20) para 61; for a similarly worded finding see ibid para 66.

(59.) *Bouzari v Iran,* [2002] OTC 297 (Ontario Superior Court of Justice, per Swinton J, 1 May 2002), para 63 (see also ibid para 73).

(60.) *Jones* (n 14) paras 14–28 (per Lord Bingham of Cornhill), 46–63 (per Lord Hoffmann). A more recent decision endorsing the approach at hand, though in a rather convoluted way, comes from the Polish Supreme Court, *Winicjusz Natoniewski v Germany,* No 4 CSK 465/09, 30 *Polish Yearbook of International Law* 299 (2010) (29 October 2010), 302–303 (unofficial English translation of key excerpts).

(61.) *Bouzari v Iran,* 243 DLR (4th) 406, ILDC 175 (CA 2004) (Ontario Court of Appeal, per Goudge JA, 30 June 2004), paras 90 (no civil action for damages for torture abroad because 'the extent of the prohibition of torture as a rule of *jus cogens* is determined not by any particular view of what is required if it is to be meaningful, but rather by the widespread and consistent practice of states') and 94 ('The peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant').

(62.) See section 2.1 above.

(63.) *Schreiber v Germany and Canada,* [2002] 3 SCR 269, ILDC 60 (CA 2002) (per LeBel J, 12 September 2002), para 49, emphasis added. The same considerations about this case a fortiori apply to a recent French decision concerning a damages action against Libya for its involvement in the well-known 1989 explosion of a DC-10 aircraft over the Sahara desert, which caused the death of 170 people, *GIE La Réunion aérienne and ors v Libya,* No 09-14.743 (Court of Cassation, First Civil Section, 9 March 2011). This court explicitly *accepted* the overriding effect of *jus cogens* vis-à-vis the rule on state immunity, although it controversially stated that in the case at hand it would have been disproportionate to remove Libya's immunity as the sole moral responsibility of the latter was engaged. The court was only assuming that acts of terrorism belonged in *jus cogens*.

(64.) Notably, the court has denied *certiorari* in the *Bouzari* case, [2005] 1 SCR vi (27 January 2005). On their part, Ontario courts have continued to dismiss human rights arguments put forward in cases involving state immunity: see *Arar v Syria and Jordan,* 28 CR (6th) 187, ILDC 639 (CA 2005) (Ontario Superior Court of Justice, per Echlin J, 28 February 2005).

(65.) This is the stance long taken by Andrea Bianchi: see most recently Bianchi (n 57) 96–100. A peculiar position is held by R van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP, Oxford 2008): in view of the origins and nature of the state immunity rule, this author accepts that ‘there is room for arguments based on “reason” or “logic” in the debate on the human rights exception and that hence the *form* of arguments of proponents of [this] exception appears rational’ (98); indeed, the arguments advanced in this debate ‘cannot be limited to the standard inductive approach to the identification of exceptions to the rule’ (97); this would not entail ‘lapsing into natural law reasoning’ (102); see also ibid 62 and 416. The author, however, does not discuss why, instead of controversially relying on ‘reason’ and ‘logic’ per se, the general principles of interpretation of positive international law should not be relevant in this process.

(66.) See for instance *Jones* (n 14) paras 43 and 63 (per Lord Hoffmann).

(67.) *Al-Adsani* (n 20) para 55. In the ensuing Strasbourg case law see, *mutatis mutandis, Kalogeropoulou and Others v Greece and Germany,* App No 59021/00 (12 December 2002), 8; *Grosz v France,* App No 14717/06 (16 June 2009), 7.

(68.) *Al-Adsani* (n 20) para 55.

(69.) Ibid.

(70.) Ibid para 56.

(71.) A Orakhelashvili, ‘Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights’ (2003) 14 EJIL 529, 537.

(72.) Fox (2008) (n 10) 155. See also Fragmentation Report (n 43) paras 161–4, 437–8.

(73.) Most clearly, see the résumé of the pertinent case law in *Demir and Baykara v Turkey,* App No 34503/97 (12 November 2008).

(74.) Fragmentation Report (n 43) para 249.

(75.) Cf section 3.1 above. This stands in marked contrast with the Joint Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajić appended to the *Al-Adsani* judgment (n 20).

(76.) See section 3.3 below.

(77.) *Ferrini v Germany,* No 5044/04, 87 *Rivista di diritto internazionale* 539 (2004), ILDC 19 (IT 2004), 128 ILR 659 (11 March 2004).

(78.) Ibid para 9.1, emphasis added.

(79.) Ibid para 9.2, emphasis added.

(80.) Ibid.

(81.) See for instance *Germany v Mantelli and Others,* No 14201/08, ILDC 1037 (IT 2008) with a headnote by Chechi and Pavoni (29 May 2008); *Germany v Presidency of the Council of Ministers and Maietta,* No 14209/08, 91 *Rivista di diritto internazionale* 896 (2008) (29 May 2008). Specifically, on 29 May 2008 the Supreme Court delivered twelve (Nos 14201–12) essentially identical decisions upholding the 2004 *Ferrini* ruling, thereby denying immunity to Germany in relation to facts and crimes analogous to the *Ferrini* situation.

(82.) *Germany v Mantelli,* ibid para 11.

(83.) Ibid.

(84.) Ibid.

(85.) *Criminal Proceedings against Milde,* No 1072/09, 92 *Rivista di diritto internazionale* 618 (2009), ILDC 1224 (IT 2009) (13 January 2009).

(86.) Ibid para 4.

(87.) Ibid and ILDC 1224 (IT 2009), H3, emphasis added.

(88.) Ibid and ILDC 1224 (IT 2009), H5–H6, emphasis added.

(89.) Ibid para 5.

(90.) Ibid para 7, and ILDC 1224 (IT 2009), H10, emphasis added.

(91.) Ibid.

(92.) The right of access to justice is increasingly regarded as enjoying the status of a customary norm or of a general principle of law. Cf for instance Reinisch and Weber (n 3) 67. In *Golder,* the ECtHR described this right as 'one of the universally "recognised" fundamental principles of law': *Golder v United Kingdom,* App No 4451/70 (21 February 1975), para 35. As already recalled, certain judicial decisions go beyond this by elevating the right of access to justice to the status of a *jus cogens* norm, see n 12 above.

(93.) Cf *Milde* (n 85) para 6 (recalling VCLT, Art 53 and the inderogability of *jus cogens* vis-à-vis the indisputable derogability of immunity rules). Despite departing from different assumptions and reaching opposite conclusions as compared to this study, the idea of a central role of *jus cogens* in the dynamics of the sources of international law, ie of a promotional *jus cogens* used to pave the way for the transformation of the law, can certainly be squared with the point made here in the text: see C Focarelli, 'Promotional *Jus Cogens*: A Critical Appraisal of *Jus Cogens*' Legal Effects' (2008) 77 *Nordic Journal of International Law* 429; C Focarelli, *Lezioni di diritto internazionale* (Vol I, Cedam, Padova 2008) 222–3.

(94.) See F Francioni, 'The Rights of Access to Justice under Customary International Law' in F Francioni (ed), *Access to Justice as a Human Right* (OUP, Oxford 2007) 1, 50.

(95.) See n 8 above.

(96.) Art IV(2), Draft Resolution 3 (8 September 2009), (2009) 73 *Annuaire de l'Institut de droit international* 169 (emphasis added). The essence of this provision was also contained in the draft resolution appended to Lady Fox's Final Report to the IDI (n 13 above, 97, 101), although in this case it was conceived of as a *de lege ferenda* suggestion.

(97.) See for instance Bianchi (n 57) 94. See also de Wet (n 43) 621.

(98.) *Al-Adsani* (n 20) para 56, emphasis added.

(99.) *Cudak v Lithuania,* App No 15869/02 (23 March 2010).

(100.) See UNCSI, Art 11 on contracts of employment. On its merits this ruling is quite courageous. It stems from a very restrictive (and debatable) reading of the pertinent exceptions to the rule of non-immunity in employment disputes. It makes inroads into the sensitive area of labour relationships with diplomatic and consular staff and will urge many ECHR parties, such as the UK and Italy, to rethink their legislation and practice on this matter. A flood of employment-related state immunity litigation in Strasbourg is predictable. Indeed, the judgment at issue has already been upheld in *Guadagnino v Italy and France,* App No 2555/03 (18 January 2011) and *Sabeh El Leil v France,* App No 34869/05 (29 June 2011).

(101.) *Cudak* (n 99) para 62.

(102.) *Al-Adsani* (n 20) para 54, reiterated in *Cudak* (n 99) para 60.

(103.) 'In conclusion, by upholding…an objection based on State immunity…, the Lithuanian courts, in failing to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the applicant's right of access to a court', *Cudak* (n 99) para 74. The reasoning of the Court is glaringly based on Fox (2008) (n 10) 161 and note 67.

(104.) Including before German courts and the ECtHR: for the former's case law, see, eg, the decisions cited at n 114 below; for the latter's, *Associazione Nazionale Reduci (ANPR) and 275 Others v Germany,* App No 45563/04 (4 September 2007), and lately, *Sfountouris and Others v Germany,* App No 24120/06 (31 May 2011).

(105.) *Jurisdictional Immunities of the State (Germany v Italy),* Counter-Claim, Order of 6 July 2010, available at http://www.icj-cij.org.

(106.) See section 4.2 below.

(107.) Milanović (n 44) 113.

(108.) At least in general terms, while disagreement is visible with respect to the practical solutions envisaged to operationalize the test, see further below in this section. Most explicitly, the thesis that state immunity is qualified by the existence of effective alternative remedies for victims of human rights violations is endorsed by M Iovane, 'The *Ferrini* Judgment of the Italian Supreme Court: Opening Up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights' (2004) 14 Italian YIL 165, 191–2. See also Francioni (n 94) 50, who however takes the position that the unavailability of alternative remedies does not dispose of the matter. In his view, a court should further consider the criteria of the gravity of the human rights violation at stake and of the existence of a sufficient jurisdictional connection (chiefly territorial) with the forum.

(109.) *Jones* (n 14) para 28 (per Lord Bingham of Cornhill). By contrast, in the Court of Appeal decision on the same case, the unavailability of effective remedies in the defendant state was an important consideration, though only in respect of state officials' immunity, which according to the court had to be denied: *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia,* [2005] QB 699 (Court of Appeal, 28 October 2004), paras 43, 85, and 86 (per Mance LJ).

(110.) Lauterpacht (n 2) 237–8. The commission of torts outside the forum state was understandably deemed one of such situations *at the time* Lauterpacht was writing.

(111.) Ibid 247, emphasis added.

(112.) Reinisch and Weber (n 3) 85–6 (significantly adding, however, that this 'cannot distract from the fact that the Court here falls short of its own demands as expressed in previous cases', 86); see also ibid 67 and 88–9.

(113.) *McElhinney v Ireland,* App No 31253/96 (21 November 2001), para 39 (applicant may sue the UK authorities in UK courts).

(114.) *Kalogeropoulou* (n 67) 12 (upholding proportionality of the restriction *on the right to property* arising from a grant of immunity from execution by reason inter alia of the possibility to enforce the debt owed by Germany 'at a more appropriate time, or in another country, such as Germany' itself).

Enforcement of the judicial decision at issue (awarding damage for the Second World War Distomo massacre in Greece) was however refused in Germany: see *Greek Citizens v Germany,* 42 ILM 1030 (2003) (Federal Supreme Court, 26 June 2003), 2 BvR 1476/03, ILDC 390 (DE 2006) (Federal Constitutional Court, 15 February 2006). On the contrary, the same decision was recognized in Italy on the strength of the *Ferrini* jurisprudence: see for instance *Germany v Prefecture of Voiotia,* No 14199/08, 92 *Rivista di diritto internazionale* 594 (2009) (Court of Cassation, 29 May 2008). While awaiting the ICJ judgment in the *Jurisdictional Immunities* case (n 9 above), actual enforcement against German properties located in Italy has been frozen until 31 December 2011 by Law No 98/2010, approved by the Italian Parliament on 23 June 2010 (*Gazzetta Ufficiale,* No 147 of 26 June 2010).

(115.) *Cudak* (n 99).

(116.) Ibid para 36.

(117.) Ibid para 37. Although the Court specified that this ruling was confined to the circumstances of the case (ie 'Lithuanian national, recruited in Lithuania under a contract that was governed by Lithuanian law', ibid para 36), it is difficult to see why its considerations at para 36 should not be generalized.

(118.) *AA v Germany,* Up-13/99–24, ILDC 406 (SI 2001) (8 March 2001), *Official Journal of the Republic of Slovenia,* No 28/01, para 21. The court instead dismissed the '*jus cogens*-overriding-effect' argument on account of the absence of well-settled practice to that effect, para 14. See Reinisch and Weber (n 3) 87–8. I am indebted to Jure Vidmar for providing an accurate analysis of the decision, as well as a translation of its key excerpts.

(119.) *AA v Germany* ibid.

(120.) Ibid.

(121.) Ibid.

(122.) No doubt, the decision was influenced by the ECtHR case law on the immunity of IOs: see section 4.2 below. Moreover, in view of the different *Al-Adsani* approach taken by the ECtHR a few months after the Slovenian judgment was delivered, it is arguable that Slovenian courts would now consider their 2001 precedent as outdated. This seems all the more likely in the aftermath of the *Cudak* judgment (n 99). However, even as recently as

in 2010, the Polish Supreme Court recalled the same ECtHR jurisprudence, making the immunity of IOs conditional upon alternative remedies, in a dispute involving state immunity for international crimes, *Natoniewski* (n 60) 303.

(123.) It is very significant that the impracticability of remedies theoretically available to the plaintiff in Iran was an important consideration for the Canadian courts dealing with the *Bouzari* case. However, that consideration only prompted such courts not to dismiss the case on jurisdictional and conflict-of-laws grounds. See especially the telling observations by Judge Goudge in the appeal decision, *Bouzari* (n 61) paras 24, 36, and 37.

(124.) Cf Angelet and Weerts (n 43) 11.

(125.) Fox (2008) (n 10) 142.

(126.) Interestingly, the rule of prior exhaustion of domestic remedies is explicitly retained by one of the many legislative proposals introduced in Canada with a view to amending the 1982 State Immunity Act so as to allow civil claims against states accused of genocide, war crimes, crimes against humanity, and torture. Bill C-483 provides that in such cases a removal of immunity would only be possible 'after all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law', except that this would not apply 'when the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief' to the victim of the crime. The text of this Bill is available at http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=4261507&file=4.

(127.) Fox (2008) (n 10) 144–6.

(128.) See Art 5(3) of the ILC Draft Articles on Diplomatic Protection, ILC Report on the Work of Its 58th Session (2006), GAOR, 61st Session, Supp No 10 (A/61/10) 17.

(129.) Art 7 of the ILC Draft Articles on Diplomatic Protection, ibid 18.

(130.) It is interesting to read a remark in this direction by a Chinese scholar: see D Qi, 'State Immunity, China and Its Shifting Position' (2008) 7 Chinese JIL 307, 319 (arbitration based on bilateral investment treaties 'could be seen as a viable limitation on State immunity and an available redress to injured foreign private investor').

(131.) ‘As a matter of principle, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition. The criminal prosecution of individual torturers who commit their acts abroad… gives *some* effect to the prohibition without damaging the principle of state sovereignty on which relations between nations are based’, *Bouzari* (n 61) para 93, emphasis added. But compare the question-begging terminology used at paras 94 (‘civil remedy for torture committed abroad by foreign states’) and 95 (‘civil remedy against a foreign state’).

(132.) See Chapter 5 (Philippa Webb).

(133.) And leaving aside the issue of immunity *ratione personae* of incumbent Heads of State, Heads of Government, and Ministers for Foreign Affairs which is almost unanimously considered as an acceptable *temporary* bar to proceedings before domestic courts.

(134.) See NB Novogrodsky, ‘Immunity for Torture: Lessons from *Bouzari v. Iran*’ (2007) 18 EJIL 939, 950–1.

(135.) *Cargnello v Italy,* No 13175/05, ILDC 557 (IT 2005) with an insightful headnote by Palchetti (Court of Cassation, 20 June 2005). See also R Pavoni, ‘La jurisprudence italienne sur l'immunité des États dans les différends en matière de travail: tendances récentes à la lumière de la convention des Nations Unies’ (2007) 53 *Annuaire français de droit international* 211, 221–3.

(136.) *Canada v Cargnello,* No 4017/98, (1999-I) *Foro italiano* 2340 (Court of Cassation, 20 April 1998).

(137.) *Cabrera v Comisión Técnica Mixta de Salto Grande,* 305 *Fallos de la Corte Suprema* 2150 (5 December 1983); see RE Vinuesa, ‘Direct Applicability of Human Rights Conventions Within the Internal Legal Order: The Situation in Argentina’ in B Conforti and F Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, The Hague 1997) 149, 154.

(138.) After recalling various instruments protecting the right to a court, such as Art 14 of the ICCPR and, crucially, Art IX, s 31 of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), Judges Gabrielli and Guastavino stated: ‘Tal limitación [to IOs’ immunity, ie the right of access to justice]…constituye una norma imperativa de derecho internacional general…insusceptible de ser dejada de lado por acuerdos en contrario conforme al art. 53 de la Convención

de Viena' (*Cabrera* (n 137) para 9); therefore, the treaty clause according immunity to the IO 'vulneró la mencionada norma imperativa de derecho internacional general. Padece, pues, del vicio de nulidad "ab initio"' (ibid para 11).

(139.) *Duhalde v Organización Panamericana de la Salud—Organización Mundial de la Salud—Oficina Sanitaria Panamericana,* D.73.XXXIV, 322 *Fallos de la Corte Suprema* 1905 (31 August 1999). After recalling that states should not endow IOs with an absolute immunity depriving individuals of their right to judicial protection, the court stated that indeed 'resulta imprescindible—*y ello hace a la validez de la cláusula del tratado que establece la inmunidad* [*Cabrera* doctrine]—que la organización internacional cuente con tribunales propios o jurisdicción arbitral o internacional, con garantías suficientes para administrar justicia en los posibles pleitos' (ibid para 10, emphasis added). See also, to the same effect, *Fibraca Constructora v Comisión Técnica Mixta de Salto Grande,* 316 *Fallos de la Corte Suprema* 1669 (7 July 1993).

(140.) It is however important to note that this expansive Argentine conception of the right to a court is nowadays to be regarded as a trend common to Latin American countries as a whole, a trend which also finds reflection in certain pronouncements of the Inter-American Court of Human Rights: see AA Cançado Trindade, 'The Right of Access to Justice in the Inter-American System of Human Rights Protection' (2007) 17 Italian YIL 7, 23–4. For exhaustive references to this case law, see Special Tribunal for Lebanon, *In the Matter of El Sayed* (n 12) para 29.

(141.) Cf Arts 3 and 32 of the Articles on State Responsibility and Art 27 of the VCLT.

(142.) See section 4.2 below.

(143.) *African Development Bank v Degboe,* ILDC 778 (FR 2005) (25 January 2005), para 3. The original text of the relevant passage reads: 'l'impossibilité pour une partie d'accéder au juge chargé de se prononcer sur sa prétention et d'exercer un droit qui relève de l'ordre public international constitu[e] un déni de justice fondant la compétence de la juridiction française lorsqu'il existe un rattachement avec la France'.

(144.) *FAO v Colagrossi,* No 5942/92, 75 *Rivista di diritto internazionale* 407 (18 May 1992); *Carretti v FAO,* No 1237/04, (2004) *Archivio civile* 1328 (23 January 2004). However, the court has never engaged in a substantive

review of the elements evidencing the impartiality of the ILOAT. The latter has somehow been taken for granted.

(145.) *Tononoka Steels Ltd v The Eastern and Southern Africa Trade and Development Bank,* [2000] 2 EA 536 (CAK), ILDC 1283 (KE 1999) (13 August 1999).

(146.) Ibid 545 (per Tunoi JA). See also ibid 541 ('There is no power [on the part of the Executive] to enact rules depriving any party of his access to the courts', per Lakha JA). Admittedly, this ruling is less significant than the cases considered above, as it refers to an unqualified notion of public policy, thereby lending itself to being interpreted as only relying upon fundamental precepts of domestic law.

(147.) See generally A Orakhelashvili, *Peremptory Norms in International Law* (OUP, Oxford 2006); see also E de Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51, 70.

(148.) For a fine résumé of the evolution of French case law and insights into the origin of its espousal of the notion of *ordre public international,* see A Reinisch, 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals' (2008) 7 Chinese JIL 285, 296–8.

(149.) By contrast, the appeals court in the *Degboe* case had explicitly relied upon Art 6 of the ECHR for the purposes of denying immunity to the ADB: see *African Development Bank v Degboe,* 93 *Revue critique de droit international privé* 409 (2004) (Court of Appeal of Paris, 7 October 2003). The Supreme Court's different approach is however understandable, as it is not easy to identify a pertinent jurisdictional link in this case as required by Art 1 of the ECHR, also given the fluid and (somehow) elusive nature of ECtHR case law in this field. First, that link has by no means anything to do with an individual's nationality. Secondly, the relevant facts took place in Côte d'Ivoire in circumstances which can hardly be connected with any 'effective control' by France. An arguable jurisdictional criterion might be France's membership of, and thus its transfer of powers to, the IO at stake, see text accompanying n 211 below.

(150.) *Association Mothers of Srebrenica and Others v The Netherlands,* Case No 295247/HA ZA 07–2973 (District Court of The Hague, 10 July 2008), Case No 200.022.151/01 (Appeal Court of The Hague, 30 March 2010), n 46 above, now pending before the Dutch Supreme Court, English translation of both decisions at http://www.vandiepen.com/en/international/srebrenica/

proceedings-the-hague.html. The UN did not appear in court and was noted in default. Instead, the UN's right to immunity was pleaded by the Netherlands and decided in proceedings incidental to the principal case of *Association Mothers of Srebrenica and Others v The Netherlands and the United Nations*.

(151.) *Association Mothers of Srebrenica* (District Court) (n 150) para 3.4.

(152.) Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

(153.) *Association Mothers of Srebrenica* (District Court) (n 150) para 5.19. This argument seems therefore to fall back on the theory of the impassable boundary between substantive and procedural obligations.

(154.) Ibid para 5.20.

(155.) And indeed, as we shall see (section 4.2 below), the court later attempted to distinguish the case at hand from the ECtHR *actual* jurisprudence on IOs' immunity.

(156.) *Association Mothers of Srebrenica* (Appeal Court) (n 46) para 5.7.

(157.) Ibid.

(158.) Ibid para 5.8.

(159.) Ibid para 5.10.

(160.) Ibid. The court further specified: 'The reproach that the UN failed to prevent genocide…and therefore was negligent is *insufficient* in principle to [deny] its immunity', ibid, emphasis added.

(161.) *Association Mothers of Srebrenica* (District Court) (n 150) para 5.16; ibid (Appeal Court) (n 46) para 5.5 (Art 103 'was not intended to allow the Charter to…set aside…fundamental rights recognised by international (customary) law or in international conventions').

(162.) *Waite and Kennedy* (n 36) para 63.

(163.) Ibid para 68.

(164.) Ibid, emphasis added.

(165.) Ibid para 69.

(166.) Ibid para 70.

(167.) Ibid para 74.

(168.) Ibid para 73.

(169.) Angelet and Weerts (n 43) 10.

(170.) For a thorough review, see A Reinisch, *International Organizations Before National Courts* (CUP, Cambridge 2000).

(171.) *Stavrinou v United Nations,* (1992) CLR 992, ILDC 929 (CY 1992) with insightful comments by Constantinides (Supreme Court of Cyprus, 17 July 1992), H8.

(172.) *AL v Italy* (n 53); see M Di Filippo, 'Individual Right of Access to Justice and Immunity of International Organisations: An Italian Perspective' (2007) 17 Italian YIL 79, 96.

(173.) *AL v Italy* (n 53) 5.

(174.) *Lopez Cifuentes v Spain,* App No 18754/06 (7 July 2009), paras 26 and 31.

(175.) Ibid paras 9, 10, and 20.

(176.) This would indeed require a major step forward on the part of the ECtHR and would overrule its previous jurisprudence finding that remedies internal to IOs, such as the appeals boards of ESA and NATO, are essentially in line with the requirements of Art 6.

(177.) For exhaustive accounts, see C Ryngaert, 'The Immunity of International Organizations Before Domestic Courts: Recent Trends' (2010) 7 IOLR 121; Reinisch (n 148) 295–303.

(178.) *SA Energies Nouvelles et Environnement v European Space Agency,* ILDC 1229 (BE 2005) (Brussels Court of First Instance, 1 December 2005); *Siedler v Western European Union,* ILDC 53 (BE 2003) (Brussels Labour Court of Appeal, 17 September 2003), ILDC 1625 (BE 2009) (Court of Cassation, 21 December 2009); *Lutchmaya v General Secretariat of the ACP Group,* ILDC 1363 (BE 2003) (Brussels Court of Appeal, 4 March 2003), ILDC 1573

(BE 2009) (Court of Cassation, 21 December 2009); *General Secretariat of the ACP Group v BD,* ILDC 1576 (BE 2009) (Court of Cassation, 21 December 2009).

(179.) *Consortium X v Switzerland,* ILDC 344 (CH 2004) (Federal Supreme Court, 2 July 2004).

(180.) *African Development Bank v Degboe* (n 143). Although the Supreme Court did not quote Art 6 ECHR in its judgment, the impact of the *Waite and Kennedy* decision on this French jurisprudence is undeniable.

(181.) The *Waite and Kennedy* test was clearly performed by the Hague Appeal Court in its 2010 *Mothers of Srebrenica* decision (n 46), see text accompanying nn 198–204 below, and also by the Dutch Supreme Court in *X v European Patent Organisation,* (2009) NIPR 290 (23 October 2009). The latter was a highly interesting case at the crossroads between an employment and a human rights dispute (right to a safe working environment). Although the Supreme Court addressed the case as a purely labour dispute, it agreed to review certain controversial aspects of the ILOAT procedure, such as its de facto denial of oral hearings, see ibid para 35 of the judgment, and especially paras 15 and 23–8 of the opinion of Advocate-General Strikwerda (19 June 2009). By contrast, the Supreme Court ignored the *Waite and Kennedy* test in a 2007 decision according immunity from *criminal* jurisdiction to the European Atomic Energy Community pursuant to the elusive notion of IOs' functional immunity, *Greenpeace Nederland v Euratom,* ILDC 838 (NL 2007) with a headnote by Brölmann (13 November 2007).

(182.) *Siedler* (n 178); *Lutchmaya,* ibid; *General Secretariat of the ACP Group v BD,* ibid; *African Development Bank v Degboe* (n 143).

(183.) *Entico* (n 46); see Fox (2008) (n 10) 731–2.

(184.) *Entico* (n 46) para 27.

(185.) See section 2.2 above, text accompanying nn 44–54.

(186.) *Entico* (n 46) paras 12–15 and 28.

(187.) See especially *European University Institute v Piette,* No 149/99, (2000) *Rivista di diritto internazionale privato e processuale* 472 (Court of Cassation, 18 March 1999); *Pistelli v European University Institute,* No

20995/05, 89 *Rivista di diritto internazionale* 247 (2006), ILDC 297 (IT 2005) (Court of Cassation, 28 October 2005).

(188.) See, for instance, the decisions concerning the FAO's immunity (n 144). For a thorough review, see Di Filippo (n 172) 80–9; G Adinolfi, 'L'immunità delle organizzazioni internazionali dalla giurisdizione civile nella giurisprudenza italiana' (2007) 23 *Comunicazioni e studi* 233.

(189.) *Drago v International Plant Genetic Resources Institute,* No 3718/07, ILDC 827 (IT 2007) (19 February 2007).

(190.) Agreement between the Italian Republic and the International Plant Genetic Resources Institute Relating to Its Headquarters in Rome (1991), Art 17.

(191.) Ibid Art 5.

(192.) *Drago* (n 189) paras 6.7–6.8.

(193.) For a discussion of various options to this effect, see Di Filippo (n 172) 91–2.

(194.) In respect of remedies available to individuals affected by UN targeted sanctions, recent support for the thesis at stake comes from L Condorelli, 'Le Conseil de sécurité, les sanctions ciblées et le respect des droits de l'homme' in M Cremona, F Francioni, and S Poli (eds), *Challenging the EU Counter-terrorism Measures through the Courts* (EUI Working Paper AEL 2009/10) 131, 137–8.

(195.) Art IX, s 31(a).

(196.) *Entico* (n 46) paras 17–18.

(197.) Ibid para 18.

(198.) *Association Mothers of Srebrenica* (Appeal Court) (n 46) para 5.9.

(199.) Ibid.

(200.) Ibid para 5.13.

(201.) Ibid.

(202.) Ibid para 5.11.

(203.) Ibid paras 5.11–5.12.

(204.) Ibid para 5.1.

(205.) This is for instance a clear shortcoming arising from the ECtHR's suggestion to Mr Waite and Mr Kennedy to sue the firms that had hired them out (*Waite and Kennedy* (n 36) para 70). Cf P Pustorino, 'Immunità giurisdizionale delle organizzazioni internazionali e tutela dei diritti fondamentali: le sentenze della Corte europea nei casi *Waite et Kennedy*e *Beer et Regan*' (2000) 83 *Rivista di diritto internazionale* 132, 138.

(206.) The suppression of the UN Administrative Tribunal and its replacement with the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT) has been approved by General Assembly Resolution 63/253 (24 December 2008), which includes the statutes of the newly created tribunals. The latter have been operative since July 2009. For a comprehensive account of the process leading to the establishment of UNDT and UNAT, see A Reinisch and C Knahr, 'From the United Nations Administrative Tribunal to the United Nations Appeals Tribunal—Reform of the Administration of Justice System within the United Nations' (2008) 12 Max Planck UNYB 447.

(207.) UNDT Statute, Art 2.

(208.) UNDT Statute, Art 3. This is a remarkable step back vis-à-vis the final draft statute, cf Reinisch and Knahr (n 206) 468–71.

(209.) S Dorigo, *L'immunità delle organizzazioni internazionali dalla giurisdizione contenziosa ed esecutiva nel diritto internazionale generale* (Giappichelli, Torino 2008) 112–15, 121, 180–6, 192.

(210.) Ibid 112. Cf Art 60 of the ILC Draft Articles on Responsibility of International Organizations and the related commentary, ILC Report on the Work of Its 61st Session (2009), GAOR, 64th Session, Supp No 10 (A/64/10), at 163.

(211.) *Gasparini* (n 53). For a fine comment, see E Rebasti, 'Corte europea dei diritti dell'uomo e responsabilità degli Stati per trasferimento di poteri ad una organizzazione internazionale: la decisione nel caso *Gasparini*' (2010) 93 *Rivista di diritto internazionale* 65. The solution adopted by the court in *Gasparini* had already (perhaps inadvertently) been retained in the previously discussed *AL v Italy* decision (n 53). In this case, the applicant

had not instituted proceedings against the NATO Undersea Research Centre before Italian courts or elsewhere. He or she was only claiming that Italy, by concluding an immunity agreement with that Centre, had deprived him or her of access to Italian courts.

(212.) See Rebasti ibid 86–8.

(213.) *Behrami* (n 47) para 140. Most recently, a discreet inroad into the *Behrami* principle comes from the *Al-Jedda* judgment of the ECtHR, involving the interment by UK authorities of a dual Iraqi/British national in breach of Art 5 of the ECHR during the occupation of Iraq by the US-led Multi-National Force, *Al-Jedda v United Kingdom,* App No 27021/08 (7 July 2011). The Court concluded that 'the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations', ibid para 84. Crucially, the Court hinted at the possibility that the situation at hand might trigger a case of shared responsibility between the UN and the troop-contributing states ('The Court does not consider that, as a result of the authorisation contained in Resolution 1511, the acts of soldiers within the Multi-National Force became attributable to the United Nations *or—more importantly, for the purposes of this case—ceased to be attributable to the troop-contributing nations*', ibid para 80, emphasis added).

(214.) At the moment of writing, the final outcome and future scenarios of the *Srebrenica* civil litigation before the Dutch courts seems however particularly uncertain. This especially in view of the recent decisions of the Hague Appeal Court in *Mustafic* and *Nuhanović,* according to which, on the facts of these cases, the Netherlands exercised effective control over the Dutch troops/UN peacekeepers deployed in the Srebrenica area and was therefore liable for the damages arising from the acts and omissions of those troops: *Mustafic v The Netherlands,* Case No 200.020.173/01 (Appeal Court of The Hague, 5 July 2011); *Nuhanović v The Netherlands,* Case No 200.020.174/01, ILDC 1742 (NL 2011) (Appeal Court of The Hague, 5 July 2011), reversing the respective lower court decisions, *Mustafic,* Case No 265618/HA ZA 06–1672 (District Court of The Hague, 10 September 2008); *Nuhanović,* Case No 265615/HA ZA 06–1671, ILDC 1092 (NL 2008) (District Court of The Hague, 10 September 2008).

Hierarchy in International Law: The Place of Human Rights
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Human Rights and the Immunities of State Officials

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Abstract and Keywords

This chapter examines the norm conflict that arises when a state official is accused of serious human rights violations in the court of another state. The human rights norm militates in favour of holding individuals accountable for violations, regardless of their position, while the sovereign equality and effective performance norm favours upholding immunity. Drawing on the case law of twenty-four jurisdictions, the chapter identifies the circumstances in which courts decide that human rights prevail over immunities, and vice versa. It reveals various conflict avoidance techniques and sets out the inconsistent treatment of jus cogens. It concludes that the case law does not yet indicate the emergence of a human rights-based hierarchy within international law.

Keywords: state official, immunity, human rights, ratione materiae, ratione personae

1. Introduction

When a state official is accused of serious human rights violations in the court of another state, that court must make a choice with normative consequences. On the one hand, there is the importance of protecting human rights by holding individuals accountable for violations, regardless of their position. That norm militates in favour of setting aside the state official's immunity and allowing the case to proceed. On the other hand, there is the classic principle, enshrined in the United Nations Charter and still forming the basis for international relations despite some erosion

of the principle over the years, that states enjoy sovereign equality and consequently should not be subjected to each other's jurisdiction.[1] In this context, immunities are seen as permitting the effective performance of the functions of individuals who act on behalf of states.[2] According to this norm, the state official's immunity should be upheld and the case should not proceed.[3]

This chapter examines the ways in which domestic and international courts are resolving this conflict of norms between immunities and human rights, and whether the case law indicates the emergence of a hierarchy of norms within international law.

Historically, the choice between the law on immunity and the law on human rights was usually resolved in favour of immunity.[4] In recent decades, that choice **(p. 115)** has become more complex due to three phenomena: the development of the principle of individual responsibility under international law; the ascendance of human rights; and the expansion of domestic jurisdiction over human rights violations.

The experience of two world wars led to the development of the principle of individual responsibility for serious violations of international law ‘independent of the question of state responsibility’.[5] After the Second World War, individual responsibility was enforced by the International Military Tribunals at Nuremberg and Tokyo, regardless of the official position of the defendants.[6] The principle of individual accountabilityunderpinned the establishment of the various international criminal courts and tribunals in the past two decades, including the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL).

Since the end of the Second World War, there has been both a deepening of the substantive law of human rights and a broadening of what is perceived as human rights entitlements.[7] The Universal Declaration of Human Rights has been joined by covenants on civil, political, economic, social, and cultural rights; there are conventions concerned with particular rights, such as torture, and treaties regarding particular rights-holders, such as women, children, or refugees. The Genocide Convention of 1948 was the first human rights treaty that restricted the immunity of state officials, albeit in limited circumstances.[8]

Some of these human rights instruments expressly envisage domestic courts having jurisdiction over violations, such as the Torture Convention[9] and the grave breaches provisions of the 1949 Geneva Conventions.[10] States have been ratifying **(p. 116)** such treaties and expanding the jurisdictional reach of their laws, thus establishing the logical precondition for the consideration of the nature and extent of immunities from such jurisdiction by domestic courts.[11] The expansion of jurisdiction for human rights violations has in particular been driven by the national legislation passed as a result of the implementation of the Rome Statute of the ICC.[12] According to the principle of complementarity, states parties to the ICC Statute have the first responsibility and right to prosecute the most serious crimes of international concern,[13] though the court does not have the power to order states to open domestic investigations or prosecutions.[14] A number of states have also passed legislation allowing for the exercise of universal jurisdiction over a limited category of offences.[15] The *Institut de droit international* determined that there exists in international law a universal criminal jurisdiction for genocide, crimes **(p. 117)** against humanity, and war crimes, while also noting that the forum state should carefully consider any extradition request from a state having a significant link with the crime, offender, or victim.[16]

Domestic and international courts play a critical role in addressing the norm conflict between immunities and human rights. By definition, it is before domestic courts that issues of immunity from local jurisdiction are raised,[17] though questions also come before international courts as the result of an inter-state dispute or a challenge by an individual defendant.[18] Domestic and international courts are therefore engaged in understanding what is required and permitted under international law, and their decisions in turn contribute to the state practice that shapes customary international law.[19] The expanding body of case law in which state officials are accused of human rights violations offers the possibility to examine how the norm conflict is resolved. While this body of case law is drawn from every region of the world, there is at present a greater number of cases on immunity being decided by courts in Western Europe and the United States.[20]

Before proceeding to an examination of the cases, it is important to specify the nature of the norm conflict represented by the clash between immunities and human rights. A narrow definition of norm conflict is that such a conflict arises where a party to two treaties ‘cannot simultaneously comply with its obligations under both treaties’.[21] This is the type of norm conflict that is addressed in this chapter: a court confronted with a state official accused of serious human rights violations cannot simultaneously grant immunity to the

official *and* hold him or her accountable for the alleged violations. Further, since the law on immunity and human rights law are two distinct bodies of law, this chapter addresses an inter-regime interaction.[22]

The nature of the norm conflict presented by the law on immunity and human rights law is therefore narrow and inter-regime. There is, however, a further distinction that needs to be drawn between apparent and genuine norm conflict. An apparent conflict is where 'the content of the two norms is at first glance contradictory, **(p. 118)** yet the conflict can be avoided' by, for example, interpretative means.[23] Where techniques of conflict avoidance fail, a genuine norm conflict exists and must be resolved by requiring one norm to prevail over the other.[24]

According to one view, the norm conflict between immunities and human rights is merely apparent because one principle is procedural (immunity from jurisdiction) and the other is substantive (prohibition of human rights violations).[25] It has been suggested that to produce a genuine norm conflict, it is necessary to show that the substantive prohibition of human rights violations (eg torture) has generated an ancillary *procedural* rule which sets aside state immunity by requiring states to assume civil jurisdiction over other states and their officials (or to initiate criminal proceedings against those officials) in such cases.[26] The validity of this 'procedural v substantive' distinction will be examined through a study of the case law on immunities.

Drawing on case law from over 20 domestic and international jurisdictions,[27] the following section 2 seeks to identify the general circumstances in which human rights norms prevail over the immunity of state officials. Section 3 then looks at the general circumstances that lead to the converse scenario of immunity prevailing over human rights. Section 4 considers whether there is a pattern in the case law that suggests that certain human rights norms[28] are hierarchically superior to the rules on immunities.

2. Circumstances in which human rights norms prevail over immunity

This section will identify the main circumstances in which domestic and international courts have found that human rights norms prevail over immunity. Two observations should be made at the outset. First, most decisions involve more than one circumstance. Where possible, the dominant circumstance will be indicated.[29] Secondly, reliance by courts on one or more of these circumstances does not automatically mean that the judges

consider human rights norms hierarchically superior to international law rules governing the immunities of state officials. Judges **(p. 119)** may be employing traditional conflict rules such as *les posterior* or *lex specialis,* which do not imply the normative superiority of the rule that prevails. Judges may also be giving preference to human rights as a result of provisions in domestic statutes or constitutions, which may or may not be indicative of a hierarchical interpretation of international law.[30]

2.1 Nature of the immunity and status of the defendant

The nature of the immunity is a major factor in whether courts decide that human rights norms prevail.[31] The nature of the immunity is inextricably linked with the status of the defendant. Immunity *ratione personae* applies to the most high-ranking officials who embody the state itself, as well as to diplomatic agents.[32] It applies only throughout the period of their office and covers both official and private acts during this period.[33] Immunity *ratione materiae,* by contrast, applies to all state officials, regardless of their rank, and is more concerned with their official acts rather than their ability to represent the state to the outside world.[34] This immunity extends beyond the period in which officials were exercising their functions; former officials can invoke this immunity with respect to their official—not private—acts performed while in office.[35]

In the aftermath of the Second World War, there were a number of domestic prosecutions of military officials in countries including Israel, France, Italy, the Netherlands, Poland, and the United States.[36] These officials were not allowed to **(p. 120)** benefit from immunity *ratione materiae,* but this was not always based on a clear recognition of a norm hierarchy. The heinous nature of the crimes was important in various judgments,[37] but in other cases there were political factors involved. In *Re Yamashita,* for example, Japan had acquiesced to the trial of military officers through its acceptance of the Potsdam Declaration and its surrender.[38]

Outside the context of the Second World War, courts in the United Kingdom,[39] the Netherlands,[40] the United States,[41] and Italy[42] have lifted the immunity *ratione materiae* of state officials accused of international crimes.[43] Although the nature of the immunity was a factor in these decisions, the driving force appears to have been the nature of the crimes alleged and, in the US cases, the application of domestic statutes.

The difference in how courts approach immunity *ratione materiae* and immunity *ratione personae* is vividly illustrated by the proceedings against Augusto Pinochet in the United Kingdom and against Hissène Habré in Belgium. In both cases, the defendants were *former* heads of state. Several Law Lords in *Pinochet (No 3)* emphasized that Pinochet would have benefited from immunity if he had been the incumbent head of state at the time of the proceedings, regardless of the serious nature of the alleged crimes. Belgian authorities did not indict Habré until he was ousted from power in Chad.

An explanation for why courts are more likely to set aside immunity *ratione materiae* than immunity *ratione personae* lies in the finite duration of the latter. Whereas immunity *ratione personae* ceases when the state official leaves office, immunity *ratione materiae* subsists for their official acts. Courts may be more willing to leave immunity *ratione personae* intact in the knowledge that the person can be prosecuted once they leave office, at least in respect of private acts. This would partly explain why Pinochet and Habré were not indicted while they were **(p. 121)** in office.[44] Where heads of state have been charged *while* in office, the court in question has usually been international in nature and acting pursuant to a statute that is interpreted as setting aside immunity *ratione personae*.[45] This suggests that the norm conflict between immunities and human rights is not a simple equation; it can be contingent on the nature of the immunity and questions of timing. As will be seen in the next section, the nature of the human rights violation also plays an important role.

2.2 Nature of the human rights violation

The nature of the human rights violation is a key consideration for courts seeking to resolve the norm conflict between immunities and human rights. One would expect that courts would be more likely to hold that human rights norms prevail over immunity where the human rights violations in question involve core international crimes, namely war crimes, crimes against humanity, and genocide, rather than ‘ordinary’ crimes, such as murder or kidnapping.[46] One may also assume that where the prohibition of such crimes is of a peremptory or *jus cogens* nature, courts would be even more inclined to set aside a state official's immunity.[47] These assumptions will now be tested against the case law on immunities.

In general, courts have set aside immunity *ratione materiae* when officials are accused of international crimes. The prosecutions of military officers after the Second World War emphasized that persons were accused of heinous

crimes.[48] In later years, courts in the United Kingdom,[49] the United States,[50] the Netherlands,[51] and Italy[52] have held that immunity *ratione materiae* does not apply in cases where state officials are accused of international crimes.[53]

Two approaches have been taken by these courts to the question of immunity *ratione materiae* and crimes under international law. The first approach, followed by certain judges in the United Kingdom, the Netherlands, the United States, and at the International Court of Justice (ICJ), is to say that crimes under international **(p. 122)** law cannot constitute 'official acts' of a state and must be qualified as private acts of the individual.[54] Logically, this is neither an exception to immunity nor an application of a norm hierarchy because the acts do not fall within the scope of the immunity *ratione materiae* in the first place. The norm conflict between immunities and human rights is perceived as apparent rather than genuine. This conflict avoidance technique has been criticized by Law Lords in *Jones v Saudi Arabia*[55] and by Judge ad hoc van den Wyngaert in the ICJ *Arrest Warrant* judgment.[56] They observe that such crimes can typically only be committed with the means and mechanism of the state and as part of state policy; it distorts reality to say that these acts are 'private'. This criticism appears justified. Genocide, for example, is an ambitious crime directed to the extermination of a group. It almost always requires the active or passive support of the state apparatus.[57] The definitions of crimes against humanity and war crimes include aspects of large-scale or systematic commission, which also suggests the involvement of a state in most situations.[58] In addition, the conflict avoidance technique of removing international crimes from the category of 'official acts' necessarily means that a state could never be held responsible under international law for such crimes committed by its agents. This in effect shifts the problem of impunity from the individual level to the state level.

The second approach to immunity *ratione materiae* appears to acknowledge that a norm hierarchy exists by holding that there is an 'international crimes exception' to the immunity. The Italian Court of Cassation said in *obiter dictum* in *Lozano* that the immunity *ratione materiae* of a US serviceman could be lifted in the event of an international crime.[59] Lords Millett and Phillips took the view in *Pinochet (No 3)* that immunity *ratione materiae* cannot apply in the case of international crimes.[60]

Sometimes this norm hierarchy approach can also operate to set aside the 'act of state' doctrine. Whereas state immunity is a rule of international law that protects the interests of equal sovereign states and is decided by a

court as a threshold issue, the act of state doctrine is a principle of domestic law focused on protecting the internal distribution and separation of powers and is a matter for the merits.[61] The **(p. 123)** Supreme Court of Israel in *Eichmann* dismissed the plea of act of state because such a defence did not operate in respect of crimes under international law.[62] Along the same lines, the Federal Court of Australia recently held that a claim brought by an Australian citizen against Australian government officials who had allegedly aided and abetted his torture at the hands of foreign governments was not barred by the act of state doctrine.[63]

The acknowledgement of a 'crimes exception' may also occur in relation to immunities under national law. Such immunities are provided for in national legislation and are justified on the grounds of the need for separation of powers so that courts cannot interfere with political organs in a way that could jeopardize their independence or political action.[64] They often relate to immunity from prosecution for ordinary crimes.[65] There was interaction between national and international immunities in the *Scilingo* case. A prosecution for crimes against humanity was able to proceed against an Argentinean former naval officer in a Spanish court as a result of the decision of the Supreme Court of Argentina to declare void all national immunity laws.[66] These laws had been adopted in the late 1980s to protect members of the military junta who committed serious human rights violations during the 'Dirty War'.[67]

Regardless of whether a court is considering immunities under national law or international law, the concept of *jus cogens* rarely plays an important role. The **(p. 124)** *Lozano* case is an exception in that the court plainly stated that the *jus cogens* nature of the violation was essential to resolving the norm conflict:

> [I]n case of conflict between the rule granting functional immunity to state officials and that on the removal of such immunity for international crimes, the latter must prevail since it has the nature and character of *jus cogens*.[68]

In most cases, however, the role of *jus cogens* was not so clear. This is aptly illustrated by the *Pinochet (No 3)* judgment. Of the six Law Lords in the majority, only Lord Millett recognized a norm hierarchy rooted in the *jus cogens* status of the prohibition on torture. For him, the *jus cogens* nature of the prohibition *necessarily* resulted in a hierarchy: 'International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-

extensive with the obligation it seeks to impose.'[69] Lord Browne-Wilkinson and Lord Hope, on the other hand, took the view that even though the prohibition on torture has acquired *jus cogens* status, immunity rules still applied and prevailed.[70] The balance was only shifted with the entry into force of the Torture Convention.[71] This reasoning invokes the 'procedural v substantive' distinction; it was only once the *jus cogens* prohibition on torture was matched by an ancillary procedural rule in Article 14 of the Torture Convention that the norm conflict became genuine. Lord Saville took the same approach, without mentioning the phrase *jus cogens*. Lord Hutton agreed that torture was a *jus cogens* violation, but found that it did not give rise to a conflict with immunity rules since the commission of acts of torture is not a function of a head of state. He invoked a conflict avoidance technique by characterizing torture as a private, non-official act.[72] Lord Phillips referred to *jus cogens* in passing, but gave more weight to the intention of the states parties to the Torture Convention to remove immunity *ratione materiae* in respect of torture.

The mixture of legal reasoning in the *Pinochet (No 3)* judgment suggests that finding that a *jus cogens* norm has been violated does not automatically resolve the norm conflict, contrary to what one may assume. The Law Lords tended to refer to the applicable treaty (the Torture Convention) rather than a hierarchy of norms with *jus cogens* norms at the peak. *Jus cogens* also played a minor role in the Spanish cases concerning the prosecution of ex-officers who had committed crimes under the Argentine military dictatorship. In those cases, the *jus cogens* nature of the violations was relevant to the justification for extra-territorial jurisdiction and compliance with the principle of legality, but was not used for **(p. 125)** resolving the norm conflict with immunity.[73] At the international level, the ICJ rejected the argument of Belgium that the Congolese Minister for Foreign Affairs did not enjoy immunity for international crimes that amounted to *jus cogens* violations.[74]

The lack of clarity about the impact of *jus cogens* on the norm conflict between immunities and human rights reflects the amorphous nature of the concept of *jus cogens* itself. Beyond the general agreement that there is a category of norms of international law of peremptory status that are non-derogable,[75] the legal effects that flow from the *jus cogens* status are uncertain. This is partly a result of a lack of state practice. As Brunnée rightly observes, 'states have been largely unwilling to realize the normative ambition of *jus cogens* in international practice'.[76] Domestic and international courts have been left to define the legal ramifications of *jus cogens,* but the case law to date has been marked by avoidance and mixed

messages. The reluctance of the ICJ, until recently,[77] even to invoke the term may have contributed to this lack of certainty.

2.3 Applicable treaty

The role of treaty law in privileging human rights is a dominant factor in the international and domestic case law on immunities. Treaties of various types—statutes of international criminal courts and tribunals, international human rights conventions, bilateral extradition treaties—may endow human rights with a normative superior quality. As judges apply these treaties, a body of case law has developed in which human rights prevail over rules on immunity. The question is whether these judges are consciously recognizing the normative superiority of human rights or whether they are simply applying a treaty because it constitutes *lex specialis*.

2.3.1 Statutes of international criminal courts and tribunals

There is a significant body of practice arising from the Nuremberg Tribunal, the ICTY, the ICTR, the ICC, and the SCSL in which state officials, including sitting heads of state, have been the subject of criminal proceedings.[78] **(p. 126)**

Determining the extent to which this practice is evidence of an emerging hierarchy of norms requires a close examination of the relevant statutes and cases. There is a widespread perception—promoted in some cases by the courts themselves—that the statutes of the international criminal courts and tribunals *remove immunity* and that their judgments have *created a human rights exception to immunity,*[79] but the reality is more nuanced.

The Statutes of the Nuremberg Tribunal, the ICTY, and the ICTR provide that the official capacity of the defendant is not a defence before these judicial bodies: the official position of a person ‘shall not relieve such person of criminal responsibility nor mitigate punishment’.[80] This is not the same as removing immunity: immunity is a bar to *jurisdiction* rather than responsibility,[81] and the provisions are silent as to jurisdiction.[82] As Akande has persuasively argued, there is no general rule that international law immunities do not apply before international courts and tribunals.[83] These immunities are rights belonging to the state, not the official, and other states cannot deprive a state of its rights without its consent. This consent may be expressed through treaties. In this way, the Statutes of the Nuremberg

Tribunal, the ICTY, and the ICTR may be seen as treaty law that provides an exception to the customary international law governing immunities.

The Rome Statute of the ICC goes beyond removing the substantive official capacity defence by expressly denying procedural immunities. Article 27 provides:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person. **(p. 127)**

Article 27(2) is the first express denial of immunity in the constitutive instrument of an international court, but even then it must be read with Article 98, which preserves immunity in certain situations.[84]

A close examination of cases against state officials reveals that they do not provide clear-cut evidence of the recognition of a norm hierarchy. When Slobodan Milosevic was indicted while he was President of the Federal Republic of Yugoslavia, he never protested that he was entitled to immunity.[85] Ultimately, Milosevic was arrested and brought to the ICTY by national authorities *after* he had left office and the ICTY did not comment directly on the application of Article 7(2) of its Statute to a sitting head of state.[86] Charles Taylor, President of Liberia at the time of his indictment, argued that immunity *ratione personae* shielded him from proceedings before the SCSL. The Appeals Chamber of the SCSL rejected his argument. The Chamber's reasoning was based not on the normative superiority of human rights, but on the SCSL's legal status as an international court.[87] It also conflated the removal of the defence of official capacity (in Article 6(2) of its Statute) with the removal of immunities (as in Article 27 of the ICC Statute).[88]

In issuing the arrest warrants for Sudanese President Al Bashir and Libyan leader Gaddafi, the ICC was careful to leave the international law on immunity undisturbed by basing itself on the specific, technical circumstances of the case. First, the Chamber's decision to issue the arrest warrant for a sitting head of state was firmly based on the statutory framework of the Court.[89] Although statutory provisions also impact on customary international law and may change **(p. 128)** it over time, the short interval since the establishment of the ICC and the limited amount of practice under its Statute does not suggest that all of its provisions have attained customary status.[90] Secondly, the situations in Darfur and Libya —which form the backdrop to the *Bashir* and *Gaddafi* cases—were referred to the ICC by the Security Council pursuant to a Chapter VII resolution.[91] According to Articles 25 and 103 of the UN Charter, member states are obliged to carry out Security Council decisions even if they conflict with any 'other international agreement'.[92] The respective Security Council resolution decided that the Government of Sudan and Libyan authorities 'shall cooperate fully' with the ICC, which arguably had the effect of making the ICC Statute (including Article 27(2)) binding on the Sudan and Libya.[93] The removal of immunity in this case is thus a function of Charter law operating in a specific situation. It is also an issue that may be revisited by the judges at a later stage of proceedings if Bashir ever appears before the Court while he is the incumbent head of state.

2.3.2 Human rights conventions

Certain international human rights conventions appear to preclude reliance on immunities, albeit sometimes in an indirect manner.[94] The Genocide Convention restricts immunity in limited circumstances: the prosecution of a foreign head of state or state official by the state where the alleged genocide was committed.[95] The Geneva Conventions are silent as to immunities and actual prosecutions are scarce,[96] but the grave breaches regime contained therein appears to establish universal jurisdiction and the obligation *aut dedere aut iudicare*.[97]

The Torture Convention played a key role in the *Pinochet (No 3)* judgment of the UK House of Lords. The centrality of the Convention to the outcome of the **(p. 129)** case limits the ability of the *Pinochet (No 3)* judgment to serve as evidence of—or, indeed, as precedent for—an emerging hierarchy of norms within international law. The potential impact of the case is primarily constrained by the fact that the reasoning in each of the opinions differs. Three Lords (Browne-Wilkinson, Hope, and Saville) relied upon implied

waiver of the immunity *ratione materiae* that states parties to the Torture Convention must have intended (otherwise the criminalization of torture would be empty, as immunity *ratione materiae* would always apply). Three others (Hutton, Millett, and Phillips) took a broader approach: the development of international crimes and extra-territorial jurisdiction was inconsistent with the existence of an immunity *ratione materiae.*

Aside from the disparate strands of reasoning, another constraint on the impact of *Pinochet (No 3)* is the fact that the outcome of the case was closely tied to the distinctive features of the Torture Convention. Article 1(1) defines torture as, inter alia, acts 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Article 4(1) requires parties to ensure that all acts of torture are offences under criminal law, while Article 5(2) requires each state party to establish jurisdiction over acts of torture where the alleged offender is present on its territory and Article 5(3) clarifies that any criminal jurisdiction exercised in accordance with internal law is not excluded. Some Law Lords read these articles together as removing immunity *ratione materiae* (which otherwise applies to persons acting in their official capacity) so far as torture is concerned.[98] As Van Alebeek points out, not all crimes against international law are supported by a treaty that grants universal jurisdiction or makes explicit reference to state officials in the definition of the crime.[99] This severely limits the scope of the *Pinochet (No 3)* judgment.

It seems that the outcome of a case involving allegations of torture by a state official could be different from *Pinochet (No 3)* if it was based on the customary prohibition as a norm of *jus cogens* rather than the terms of the Torture Convention. In such a scenario, the parsing of the language of the Convention would not be possible and the judges would instead have to consider the broader (and more vague) notion of 'the status of customary international law'. It would also be more difficult for the plaintiff to pursue the 'implied waiver' argument that resonated with some Law Lords in *Pinochet (No 3)* because there would be no state act of ratification to which the plaintiff could point. As a result, even though *Pinochet (No 3)* was a specific case in which human rights prevailed over immunities, it does not stand for a broader proposition that a norm hierarchy exists with the prohibition of torture at a higher level than immunity *ratione personae*. It is thus not indicative of the emergence of a hierarchy of norms within international law.

2.3.3 Bilateral extradition treaties

Another category of convention that can impact on the norm conflict is bilateral extradition treaties. The extradition of former President Alberto Fujimori from **(p. 130)** Chile to Peru pursuant to such a treaty illustrates how a norm hierarchy may be hidden in judicial reasoning. Fujimori was charged with enforced disappearances, extra-judicial executions, and other crimes conducted in a 'widespread or systematic' manner that could qualify as crimes against humanity. However, the decision appeared to be concerned only with the terms of a 1932 bilateral extradition treaty[100] and the Chilean penal code[101] rather than a choice between human rights and immunity.[102] The Chilean Supreme Court did not expressly examine the possibility of extraditing Fujimori on the basis of universal jurisdiction pursuant to treaties to which it is a party and it also disregarded the *Pinochet (No 3)* case; it asserted the narrowest jurisdictional basis available.[103]

In not mentioning any basis of universal jurisdiction for the Fujimori extradition despite the *Pinochet* example, the Chilean Supreme Court's decision has been interpreted as 'den[ying] the international community an opportunity to add to this body of international jurisprudence'.[104] Oxman observes that 'courts seem predisposed, for understandable reasons, to avoid the less familiar, somewhat scary waters of universal jurisdiction when instead they can find, or fictionalize, a traditional jurisdiction nexus'.[105] Indeed, those domestic courts that have entered the 'scary waters' have been pulled back by their legislatures under pressure from other states, as can be seen in the restrictions placed on the universal jurisdiction statutes of Belgium and Spain.[106] From the perspective of the Chilean Supreme Court, it was perhaps politically safer to locate itself within a 'traditional jurisdiction nexus' where the international legal issues would be subsumed by the technical requirements of the treaty and domestic law. This assertion of the narrowest and most uncontroversial jurisdictional nexus can be seen as a conflict avoidance technique.

(p. 131) Nonetheless, it is possible that international human rights norms informed the decision to extradite, even if these were not expressly stated. One of the charges against Fujimori related to the *La Cantuta* massacre, which had been the subject of a case against Peru at the Inter-American Court of Human Rights (IACtHR).[107] In that case the IACtHR held that under international law, states have an obligation to cooperate in bringing to justice those responsible for gross human rights violations. Speaking specifically of the acts in which Fujimori was implicated, the IACtHR stated:

> In view of the nature and seriousness of the events, all the more since the context of this case is one of systematic violation of human rights, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states for such purpose…[U]nder the collective guarantee mechanism set out in the American Convention, and the regional and universal international obligations in this regard, the States Parties to the Convention must collaborate with one another towards that end.[108]

With this statement, the IACtHR reminded Chile that it had the obligation to consider the extradition of Fujimori to Peru for cases like *La Cantuta*.[109] The Chilean Supreme Court probably took this into account when it decided to grant extradition less than one year later, thereby resolving the norm conflict in favour of human rights. Yet, the court's silence as to this aspect of its reasoning makes it difficult to extrapolate the existence of a hierarchy of norms from its decision.

2.4 Domestic law

It is somewhat ironic that it is in common law jurisdictions—traditionally associated with the slow process of developing rules through an accumulation of judgments on similar cases—that immunity rules are being codified in domestic statutes,[110] whereas civil law jurisdictions—associated with the systematic codification of rules—generally have no governing code on this topic and still apply customary international law.[111] It is thus in the common law systems, such as the United States, that one can observe the role of domestic law in resolving—or avoiding—the norm conflict between immunities and human rights.

There have been a number of US cases in which the immunities of state officials accused of human rights violations have been set aside by the courts.[112] These decisions have been largely based on two domestic statutes: the Alien Torts Claims **(p. 132)** Act of 1789 (ATCA) and the Torture Victim Protection Act of 1992 (TVPA),[113] which provide federal courts with jurisdiction to hear cases brought by aliens seeking damages for human rights violations.

The differences in the histories of the ATCA and the TVPA illustrate the complex relationship that the United States has with international law.[114] After it was passed in 1789, the ATCA lay dormant until the 1980 decision

in *Filartiga v Peña-Irala*.[115] Since then numerous plaintiffs have used the ATCA to seek redress for torture, extra-judicial killings, and state-sponsored violence against defendants either residing or travelling in the United States.[116] In the 2004 case of *Sosa v Alvarez-Machain,* the US Supreme Court narrowed the future applicability of the ATCA, holding that the statute did not incorporate by reference all of substantive international law as possible causes of action, but that a 'modest number of international law violations with a potential for personal liability' at the time it was passed were directly actionable.[117] The TVPA was established in 1992 to provide a civil remedy for torture and summary execution in suits against individuals, including foreign state officials.

In the recent *Samantar* case,[118] the US Supreme Court was asked whether a former Prime Minister and Defence Minister of Somalia accused of torture and extra-judicial killing retained immunity for acts performed in his former official capacity. Samantar argued that the actions alleged were official in nature and thus fell within the scope of the 1976 Foreign Sovereign Immunities Act (FSIA).[119] The Supreme Court held that the FSIA did not grant an individual foreign official such as Samantar immunity from civil suit. This was not, however, a clear-cut resolution of the norm conflict in favour of human rights. Rather, it was a decision grounded on the technical details of the domestic statute that left open the possibility that Samantar enjoyed immunity under international law. The court said that nothing in the text of the FSIA itself suggested that the term 'foreign state' should be read to include individual officials acting on the state's behalf.[120] The definition **(p. 133)** of an 'agency or instrumentality of a foreign state' also did not extend to include officials.[121]

The Supreme Court remanded the *Samantar* case to a federal district court so that it could determine whether Samantar 'may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him'; the lower court determined that he was not entitled to immunity.[122] The Supreme Court thus did not decide whether the TVPA created an exception to the common law of immunity for foreign state officials. The court also appeared to show deference to the role of the Executive in the realm of immunities, noting that '[w]e have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity'.[123] The *Samantar* case used statutory interpretation to answer a narrow question (the applicability of the FSIA) and to avoid resolving the

broader norm conflict between immunities and human rights, apparently seeing that conflict as best addressed by the Executive.[124]

The Superior Court of Quebec declined to follow the *Samantar* case despite the similarities between the US FSIA and the Canadian State Immunity Act (SIA). The son of Zahra Kazemi, a photojournalist who was allegedly tortured and killed in Iran in 2003, brought a civil suit against the state of Iran, the head of state, the Chief Public Prosecutor and the Deputy Chief of Intelligence on behalf of his mother's estate and also for the emotional and psychological trauma he claimed to suffer in Canada as a result of his mother's treatment. The court held that the Canadian SIA did apply to officials as well as states and, in respect of the estate of Zahra Kazemi, the defendants were immune from Canada's jurisdiction even for reprehensible acts.[125] However, the court did allow the case for the son's trauma suffered in Canada to proceed on the basis of the tort exception in section 6(1) of the SIA. The court's reasoning was firmly based on the language of the statute, and did not endorse a norm hierarchy.

Courts in the Philippines have also set aside immunities of state officials in human rights cases by applying domestic law. Unlike the United States, judges in the Philippines have not applied specific statutes on international crimes. Instead, judges have applied a domestic law standard to lift the immunity *ratione materiae* **(p. 134)** of foreign state officials (US military officers) by characterizing the person's acts as private rather than official.[126] This judicial approach has been taken even when the US government has intervened to confirm that the acts were official in nature. The lifting of immunity appears to be a result of tensions regarding the presence of the US military in the Philippines rather than the application of a norm hierarchy;[127] this perception is strengthened by the fact that the violations in question fall far short of international crimes.[128]

The application of domestic law may result in immunities being set aside in human rights cases, but this should not be interpreted as recognition of a norm hierarchy. The passing of domestic statutes—and their application in domestic courts—may be motivated by a number of factors (including political tensions), and may also not reflect what the court perceives as the state of customary international law.

2.5 Nature of the proceedings (civil v criminal)

The nature of the proceedings is occasionally invoked as a factor in deciding to lift immunity for human rights violations. Unlike the ‘procedural v substantive’ distinction, judges invoking the ‘civil v criminal’ division recognize that the norm conflict is genuine. However, their technique of resolving the conflict is to focus on the different procedural requirements and remedies, not to examine the existence of a norm hierarchy.

In *Pinochet (No 3),* the criminal nature of the proceedings was important to the reasoning of four of the six Law Lords in the majority. Lord Millet argued that other states were permitted, and indeed required, to convict and punish the individuals responsible for torture if the offending state declines to take action.[129] Lord Hutton was persuaded that certain crimes ‘are so grave and so inhuman that they constitute crimes against international law and…the international community is under a duty to bring to justice a person who commits such crimes’.[130] Lords Hope and Phillips also found that there was no immunity *ratione materiae* from criminal jurisdiction for torture, but placed heavy reliance on the Torture Convention; the non-immunity took effect only upon the ratification of a convention allowing for the exercise of universal jurisdiction.[131] For these Law Lords, the common theme is that criminal proceedings target the *individual* as such. The punishment of imprisonment is personalized and can thus be separated from the state of nationality of the perpetrator. In this context, the ‘civil v criminal’ distinction is further reinforced by the fact that international law does not recognize the **(p. 135)** criminal responsibility of states; the notion of international crimes was excluded by the International Law Commission (ILC) as it prepared its Articles on State Responsibility.[132]

Three of the Law Lords in *Pinochet (No 3)* observed that the decision to lift Pinochet's immunity as regards criminal proceedings would not affect the correctness of decisions upholding the plea of immunity in respect of *civil* claims.[133] This line of reasoning regards the state official as immune whenever the acts can be attributed to his or her home state and that state enjoys sovereign immunity. In other words, no jurisdiction can be exercised over state officials that acted in their official capacity if immunity would be available had the claim instead been brought directly against the state.[134] This conflation of state immunity with immunity *ratione materiae* was seized upon in *Jones v Saudi Arabia* to uphold the immunity of state officials in civil proceedings, as discussed in the section below.[135]

The conflict avoidance technique of invoking a distinction between civil and criminal proceedings makes it difficult to identify a norm hierarchy. While the norm conflict is implicitly recognized in such cases, it is not resolved.

3. Circumstances in which immunity prevails over human rights norms

There is significant overlap between the circumstances in which human rights prevail over immunity and vice versa. These circumstances emerge as a pattern from an inductive approach to analysing the norm conflict. Nonetheless, it is important to acknowledge that in many situations where immunity is upheld, the norm conflict does not even require a judicial decision—it is determined by the Executive. Conversely, where the Executive does not take certain positions regarding the status of officials, the court may not be able to proceed.[136] The practice of deferring to the Executive's assessment was viewed favourably by the US Supreme Court in the *Samantar* case.[137] Indeed, a former US Legal Adviser has predicted that the *Samantar* judgment will increase the frequency with which judges ask (and defer to) the opinion of the State Department Legal Adviser on whether foreign officials are entitled to immunity.[138] In addition, in some US and New Zealand cases the **(p. 136)** filing by the Executive of a ‘suggestion of immunity’ has proved conclusive.[139] In such cases, judges have not addressed the question of hierarchy of norms, instead deferring to the Executive's prerogative to conduct foreign affairs and, as part of that role, to make delicate diplomatic and foreign policy judgments as to the scope of immunity.[140] The specific action taken by the Executive is not always transparent, which makes it difficult to assess the degree to which it influences the courts in the immunities cases that do appear before them.[141]

3.1 Nature of the immunity and status of the defendant

The nature of the immunity has been a key factor in international and domestic decisions upholding the immunity of state officials, even when cases involve allegations of serious human rights abuses. The ICJ *Arrest Warrant* judgment confirmed the absolute nature of immunity *ratione personae* from criminal process accorded to a Minister for Foreign Affairs. Having surveyed the state practice (domestic court decisions and domestic legislation) that existed at the time, the ICJ concluded that it was unable to deduce ‘that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs where they are

suspected of having committed war crimes or crimes against humanity'.[142] In other words, human rights norms did not—and could not—prevail over immunity *ratione personae*. This stands in contrast to the practice of the ICC, the ICTY, and the SCSL, which have taken action against officials benefiting from immunity *ratione personae*. These international criminal courts and tribunals have, however, relied on their statutes rather than customary international law, providing evidence that these treaties provide exceptions to customary international law.[143]

Domestic court decisions have almost always upheld immunity *ratione personae,* even when confronted with allegations of massive human rights violations. The **(p. 137)** practice is consistent across the jurisdictions with case law on this topic, namely France,[144] the Netherlands,[145] the United States,[146] the United Kingdom,[147] Belgium,[148] and Spain.[149] Two cases in the United States and Ethiopia that have been cited as examples of removing immunity *ratione personae* are not strictly immunity cases.[150] In *United States v Noriega,* the court denied Noriega's claim of immunity *ratione personae,* stating that the US government had never recognized Noriega as head of state of Panama and that by pursuing Noriega's capture and his prosecution, the Executive branch of the US government had manifested its clear sentiment that Noriega should be denied immunity.[151] The immunity *ratione personae* was removed (if it ever existed) by Executive action, not judicial decision.[152] In *Special Prosecutor v Col Hailemariam and ors,*[153] the former head of state of Ethiopia argued that he enjoyed immunity *ratione personae* with regard to claims of genocide. The Central High Court rejected this argument, holding that there was no immunity *ratione personae* for incumbent or former officials being tried in their *own* country.[154]

While the ICJ *Arrest Warrant* judgment was a continuation of the trend in domestic court decisions to uphold the immunity *ratione personae* of a head of state, it also apparently had the effect of 'freezing' this trend in place. Subsequent domestic court decisions in the United Kingdom, for example, have tended to cut short the balancing of norms in immunities cases by referring to the *Arrest Warrant* judgment.[155] Moreover, the ICJ's wording that 'certain holders of high-ranking **(p. 138)** office in a State, such as…' benefited from immunity *ratione personae*[156] has opened the door for other courts to extend this immunity beyond Heads of State, Heads of Government, and Ministers for Foreign Affairs.[157] A Swiss court has since suggested that a Minister of Atomic Energy benefits from immunity *ratione personae,*[158] two UK cases have extended immunity to a Minister of Defence and a Minister for Commerce,[159] and a French court found that an

international arrest warrant infringed the immunities of a Prime Minister and a Minister of the Armed Forces.[160]

The tendency to resolve norm conflicts in favour of immunity *ratione personae* has a few possible explanations. For the ICJ, the critical factor was that officials possessing such immunity played an important role in facilitating smooth international communication and stable international relations.[161] Building on this view, it could be said that the destabilization caused by removing the immunities of such high officials may outweigh the benefits of promoting accountability for human rights. There could be systemic consequences from arresting and imprisoning leaders, including fears of politically motivated prosecutions, diplomatic isolation, and worsening of human rights abuses. An alternate explanation focuses on the finite duration of immunity *ratione personae,* as noted above.

As for immunity *ratione materiae,* as explained above, domestic and international courts tend to hold that human rights norms prevail over this type of immunity, though their reasons differ. Nonetheless, some courts in the United Kingdom,[162] the United States,[163] and Canada[164] have held that immunity *ratione* **(p. 139)** *materiae* prevails even when state officials are accused of violating human rights. The judges in these cases tend to emphasize the civil nature of the proceedings and the fact that the foreign state's right to immunity cannot be circumvented by suing its officials.[165]

This approach appears to receive support from an *obiter dictum* in the ICJ *Arrest Warrant* judgment. Although the ICJ was concerned with the immunity *ratione personae* of an incumbent Minister for Foreign Affairs, it said the following as to the situation once Mr Yerodia had left that position:

> [A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a *private* capacity.[166]

By omitting to mention the potential prosecution of acts committed during the period of office in an *official* capacity, this paragraph has been interpreted as denying the existence of an exception to immunity *ratione materiae* for international crimes.[167]

The ICJ's *dictum* stands in contrast to the majority of national court decisions on immunity *ratione materiae*.[168] It also appears to go against what the Appeals Chamber of the ICTY said in its decision in the *Blaskic* case (a decision that pre-dated the ICJ judgment). The Appeals Chamber stated that there existed an exception to immunity *ratione materiae* for international crimes:

> These exceptions [to immunity *ratione materiae*] arise from the norms of international criminal law prohibiting war crimes, crimes against humanity and genocide. Under these norms, those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity.[169]

This question was not directly before the ICTY and must also be regarded as an *obiter dictum*.[170] At the same time, it is a line of reasoning that stretches back to the *Nuremberg Judgment,* which held that '[h]e who violates the laws of war cannot **(p. 140)** obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law'.[171]

3.2 Nature of the human rights violation

In cases where the immunity of a state official blocks proceedings, the nature of the alleged human rights violation can either be a decisive factor or completely irrelevant. In the former instance, a court may consider the alleged human rights violation and find it to be insufficiently grave to justify removing the immunity of the state official. The assumption in such cases is that a norm hierarchy pertains only to a small subset of human rights violations, namely war crimes, crimes against humanity, and genocide. In the *Lozano* judgment, the Italian Court of Cassation declined to remove the immunity of a US soldier who killed an Italian intelligence officer in Iraq because, in the court's view, the act did not constitute a war crime; it did not 'bear the stigma of being contrary to the most elementary principles of humanity'.[172] Similarly, the Supreme Court of Austria noted that immunity could be removed for 'aggravated violations of public international law' such as genocide, crimes against humanity, and torture, but declined to lift the immunity of the Prince of Liechtenstein in a case concerned with family status.[173]

In other cases, the nature of the human rights violation is treated as irrelevant as a result of the 'procedural v substantive' distinction. In the

Arrest Warrant judgment, the ICJ found no exception to immunity *ratione personae* for war crimes or crimes against humanity.[174] Courts in a number of domestic jurisdictions share this view.[175] This can be seen as a conflict avoidance technique. The assumption underlying such decisions is that there is in fact no genuine conflict between rules on immunity and norms of *jus cogens*; the former is procedural and the latter is substantive so no question of hierarchy between them even arises. Another possible explanation is that a certain human rights protection might simply not come with an ancillary obligation not to recognize immunity, which is a matter of normative scope. This is subtly different from the 'procedural v substantive' distinction, because if the norm's scope does not touch the question of immunity from jurisdiction, then the norm conflict between immunities and human rights does not arise in the first place.

3.3 Applicable treaty or statute

The existence of an applicable treaty or domestic statute plays a more minor role in cases that uphold immunity as compared to those cases that remove immunity. **(p. 141)** While there are a number of treaties on immunities, most concern very specific topics, such as the immunities of diplomatic agents,[176] consular officials,[177] members on special mission,[178] and representatives of states to international organizations.[179] As a result, a whole range of questions concerning immunities is left unanswered by the existing treaty law.[180]

The only comprehensive treaty on state immunity, the UN Convention on Jurisdictional Immunities of States and Their Properties, is restricted to civil proceedings and is not yet in force.[181] It does not include an exception to state immunity for violations of human rights, in particular of *jus cogens* norms, even though such an exception was argued for by non-governmental organizations during the drafting process.[182] Some courts have perceived this omission as a significant indicator of the current state of customary international law, and have employed it in their judicial reasoning. A New Zealand court has referred to the Convention as 'a very recent expression of the consensus of nations' when upholding the immunity of state officials accused of torture in a civil suit.[183] In *Jones v Saudi Arabia,* Lord Bingham stated:

> [the Convention's] existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities

> of States and Their Property, powerfully demonstrates international thinking on the point.[184]

In the same case, a critical factor for the House of Lords was that the proceedings were civil in nature (as opposed to the criminal nature of the *Pinochet (No 3)* **(p. 142)** proceedings) and were thus covered by Part I of the State Immunity Act 1978. Section 1(1) of that Act stated the general rule of immunity for foreign states from the jurisdiction of the courts of the United Kingdom, subject to the specified exceptions. Since there was no exception for human rights violations, the House of Lords held that immunity prevailed.[185]

Although treaties and statutes play a less important role in *upholding* immunity rather than setting it aside, where a legal instrument is silent as to how the immunity of a state official is affected by a claim of human rights violations, some courts have perceived this as indicating that immunity should be retained.

3.4 Nature of the proceedings (civil v criminal)

As explained above,[186] there is an emerging practice of treating civil and criminal proceedings differently with respect to immunities. In *Jaffe v Miller,* the Ontario Court of Appeal upheld the immunity of state officials despite the acknowledged 'illegal and malicious' nature of the acts, largely on the basis of it being a civil proceeding.[187] The *Jones v Saudi Arabia* judgment of the UK House of Lords sought to characterize the *Pinochet (No 3)* judgment as 'categorically different' since it concerned criminal proceedings, and has become the leading case on upholding immunity of state officials in civil proceedings.[188] A court in New Zealand reserved its decision in a case brought against Chinese senior officials for torture pending the release of the *Jones v Saudi Arabia* judgment, and ultimately approved of the distinction between civil and criminal proceedings.[189] In the *Habib* judgment, the Federal Court of Australia agreed with the *Jones v Saudi Arabia* approach in an *obiter dictum*.[190]

The reasoning in *Jones v Saudi Arabia* proceeded as follows: immunity should be upheld in civil proceedings because state officials are accorded immunity in part because states *themselves* are responsible for their officials' acts. Lifting immunity in civil cases would permit recovery against foreign states in circumstances where direct proceedings against the state would be precluded by a claim of sovereign immunity.[191] This echoed the reasoning

of the Canadian court in *Jaffe v Miller*: '[t]o avoid having its action dismissed on the grounds of state immunity, a plaintiff would have only to sue the functionaries who performed the acts'.[192] In criminal proceedings, by contrast, international law holds individuals *personally* responsible for their international crimes, and does not recognize the concept of state criminal responsibility.[193] Moreover, there is usually the check of prosecutorial or executive **(p. 143)** discretion in the criminal context, whereas civil claims are initiated by private parties.[194]

There are four reasons for doubting the need for a strict demarcation in the immunity context between criminal and civil cases.[195] First, there is a significant body of practice in US courts in which foreign officials have had their immunity set aside in *civil* proceedings.[196] However, in isolation the impact of this may be limited, as it could be—and indeed has been—explained as a specific state practice that does not express principles widely shared and observed among other nations.[197] Secondly, the criminal courts of many states, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, and the Netherlands, combine civil and criminal proceedings, allowing victims to be represented and to recover damages in the criminal proceeding itself.[198] Thirdly, damages awarded to a plaintiff in a civil proceeding will only be enforceable against the individual state official and not against the state itself, as a matter of international law. The state may choose to pay the damages on behalf of its official, but it is not obliged to do so.[199] This factor appears to have persuaded Lord Phillips to change his view between *Pinochet* and *Jones,* coming to the conclusion that there was no need to draw a distinction between civil and criminal proceedings in the immunity context.[200]

Finally, the assumption in *Jones v Saudi Arabia* and *Jaffe v Miller* that the state official should not incur responsibility for an act that was performed on behalf of the state only seems appropriate when that state official behaves with no individual volition. As Van Alebeek has persuasively argued:

> If an individual cannot be regarded to have acted as a mere arm or mouthpiece of a foreign state in the performance of a particularly despicable act he incurs responsibility for the act in his personal capacity. It makes no sense to argue that the question whether an act qualifies as an act of state depends on the type of proceedings involved.[201]

An act can have a dual nature: it can be an act of state *and* an act attributable to an individual personally.

(p. 144) The applicability of the ‘civil v criminal’ distinction in the immunity context is far from settled. State practice is divided: the *Jones v Saudi Arabia* judgment has led to an action before the European Court of Human Rights (ECtHR) on the question of whether state immunity in a civil action for torture breaches the right of access to a court,[202] and the pending *Germany v Italy* case asks the ICJ to decide whether state immunity applies to *jus cogens* violations. A statement by one of these international courts on the validity of the ‘civil v criminal’ distinction is likely to be given serious consideration by domestic judges.[203]

4. An emerging hierarchy of norms?

The above analysis demonstrates that there are some identifiable circumstances in which human rights norms prevail over immunity. International and domestic courts tend to remove the immunity of state officials accused of human rights violations when more than one of the following factors is present:

1. The immunity being invoked is immunity *ratione materiae*.
2. The alleged human rights violation is a war crime, a crime against humanity, or genocide.
3. There is an applicable treaty that lifts immunity or removes the defence of official capacity.
4. There is domestic law that lifts immunity in human rights litigation.
5. The proceedings are criminal in nature.

However, this simple list belies a messy reality. First, there is the less visible influence on judicial decision-making of the Executive in waiving or recommending the immunity of state officials. Secondly, identifying a hierarchy of norms through an analysis of domestic and international decisions is complicated by reliance on treaties and domestic statutes. Where international criminal courts and tribunals rely on their constitutive instruments to set aside immunity, the norm hierarchy is implied by the fact that certain breaches of international norms lead to individual criminal responsibility. The situation is more ambiguous for domestic courts. Where domestic courts rely on treaties, the preference given to human rights norms may be a result of traditional conflict rules (*lex specialis*), which are neutral as to the normative superiority of human rights. Where courts invoke domestic law, the statutes may be reflective of a hierarchy of norms because

they implement international law obligations[204] or they may be more technical in nature.[205] Thirdly, the concept of *jus cogens,* which is central to the theory of a norm hierarchy, has **(p. 145)** been treated inconsistently in judicial practice. For some courts and some judges, the *jus cogens* nature of a prohibition necessarily results in a norm hierarchy and the immunity of a state official must be set aside.[206] For others, there is no norm conflict because a *jus cogens* norm is substantive whereas the rules on immunity are procedural; they do not interact with each other.[207] In some cases, the scope of the human rights protection might encompass an ancillary obligation not to recognize immunity.

Conflict avoidance techniques such as the 'civil v criminal' distinction and characterizing human rights violations as non-official or private acts[208] are of doubtful validity. The 'civil v criminal proceedings' distinction exemplified by the UK *Jones v Saudi Arabia* judgment does not adequately address the reality that proceedings are combined in a number of jurisdictions, states are not necessarily bound to pay damages incurred by their officials, and individuals can and should incur personal responsibility for official acts that constitute serious human rights violations. The 'human rights violations as private acts' argument is also flawed because it is not consistent with the nature of the crimes and opens the door to a wholesale avoidance of state responsibility.[209]

The 'procedural v substantive' argument cannot be so easily dismissed because in some areas it has been established that *jus cogens* norms cannot operate to set aside procedural rules. In the 2006 *Congo v Rwanda* judgment, the ICJ held that an alleged violation of a *jus cogens* norm does *not* override the consent requirement to the jurisdiction of the ICJ:

> the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.[210]

This point would seem to indicate that procedural rules may not be derived from substantive norms, unless this is done explicitly as in Article 14 of the Torture Convention. And even when procedural rules can be derived, it is not at all clear that they would be also be *jus cogens* in nature.[211] In sum, the 'procedural v substantive' debate seems to be preventing judges from

reaching the point of weighing ‘like’ concepts and determining the existence of a norm hierarchy. **(p. 146)**

5. Conclusion

The practice of domestic and international courts with respect to the immunities of state officials accused of human rights violations is inconsistent, making it difficult to identify an emerging hierarchy of norms.

In a broad sense, there are indications that human rights are acquiring a higher status: states have created international criminal courts and tribunals to prosecute individuals regardless of their official capacity; they have ratified human rights treaties and expanded the jurisdictional reach of their domestic laws. At the same time, there are signs of hesitancy to recognize a hierarchy of norms. During the negotiations on the UN State Immunity Convention, the drafters twice rejected proposals to remove immunity in cases involving claims for civil damages against states for serious human rights violations.[212] The Chair of the Ad Hoc Committee later explained that there was no clearly established pattern of state practice in this regard, and if the Committee had included such a provision, it would have jeopardized the conclusion of the Convention.[213] After years of study, the *Institut de droit international,* which may be said to represent ‘teachings of the most highly qualified publicists of the various nations’,[214] reached a mixed conclusion on the interaction between immunities and human rights. Its 2009 Resolution on ‘Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes’ upholds immunity *ratione personae* for international crimes, removes immunity *ratione materiae* for such crimes, and deliberately leaves the question open for state immunity.[215]

The international law on immunity is in a transitional phase, which is reflected in the lack of consensus among courts, states, and scholars as to how the norm conflict should be resolved. The problem is likely to become more complex over time. One of the contemporary challenges is the extent to which different types of immunities may bar proceedings instituted against private military and security companies and their employees. Unlike state officials, these contractors are not beneficiaries of immunities *ratione personae* or *materiae*. However, they do perform governmental functions and have been granted different kinds of immunities pursuant to contracts or specific legislation as regards the performance of sensitive tasks in foreign states.[216] US courts in particular have been grappling with whether to set

aside such immunities when private contractors are implicated in human rights violations.[217]

(p. 147) The conflict avoidance techniques are preventing a deeper, more reflective analysis of the choice between different norms.[218] On the one hand is the drive to end impunity for serious human rights violations by holding perpetrators, whatever their official status, responsible. On the other hand is the classic principle of sovereign equality of states and, in this context, the purpose served by immunities: namely, 'the proper functioning of the network of mutual inter-state relations, which is of paramount importance for a well-ordered and harmonious international system'.[219] While the protection of human rights is clearly at the heart of the first norm, the inter-state communication and exchange facilitated by immunities can also help prevent or remedy human right violations.[220] Taking this approach, it would make sense for immunity *ratione materiae* to be set aside for core human rights violations (war crimes, crimes against humanity, and genocide) in both civil and criminal proceedings, as suggested by the 2009 Naples Resolution of the *Institut de droit international*. This should be based on clearly articulated customary international law 'human rights exception' to immunity rather than the argument that human rights violations are always private acts and cannot be carried out in an official capacity. Immunity *ratione personae* is less easily set aside, due to the strong identification between high officials and the state itself and the potential disruption to inter-state relations. It should only be set aside pursuant to state consent in the form of treaties or waiver by the Executive.

The narrow and inter-regime conflict between immunities and human rights has generated a substantial amount of jurisprudence in national and international courts. In this respect, the case law on the immunities of state officials accused of human rights violations opens up rich possibilities for exploring whether there is hierarchy of norms in international law. However, the evolving nature of the law on immunity, the inconsistency between decisions, and the frequent resort by judges to conflict avoidance techniques make it difficult to discern any such hierarchy. At this stage of the development of both the law on immunity and the law on human rights, the legitimacy of a norm hierarchy is questionable.

Notes:

(1.) UN Charter, Art 2(1). See Court of Appeal of Ontario in *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675, para 95. See also R Van Alebeek,

The Immunity of States and their Officials in International Criminal Law and International Human Rights Law (OUP, Oxford 2008) 219–22, 317–20.

(2.) *Institut de droit international,* Napoli Session 2009, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Third Commission (Rapporteur: Lady Fox), Art II.

(3.) The question of immunity is to be considered as a preliminary issue, before the court examines the merits of the case: *Difference relating to immunity from legal process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep, para 67.

(4.) This broadly followed the movement from a notion of absolute state immunity to the restrictive doctrine of state immunity: H Fox, *The Law on State Immunity* (2nd edn OUP, Oxford 2008) chapter 9; 105–12, 169–82; Van Alebeek (n 1) 14–21. See also *Siderman de Blake v Republic of Argentina* (US 1992) 718–19 referring to *Argentine Republic v Amerada Hess Shipping Corporation* (US 1989) 436–9.

(5.) Van Alebeek (n 1) 201.

(6.) Art 7 of the Nuremberg Charter ('The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment'); *Nuremberg Judgment* (International Military Tribunal 1946) 221, reprinted in (1947) 41 AJIL 172. Since US officials granted immunity to Emperor Hirohito, Art 6 of the Charter of the Tokyo Tribunal does not contain the equivalent provision regarding heads of state that appears in Art 7 of the Nuremberg Charter: AC Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (William Morrow, New York 1987) 61. Absence of the defence of official capacity is not the same as absence of immunity, see n 81.

(7.) R Higgins, 'Dispersal and Coalescence in International Human Rights Law' in *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (OUP, Oxford 2009) 679, 680.

(8.) Convention on the Prevention and Punishment of the Crime of Genocide (opened for signature 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 ('Genocide Convention'), Art IV. The Convention provides for

the prosecution of a foreign head of state or state official by the state where the alleged genocide was committed.

(9.) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('Torture Convention'), Art 5(2).

(10.) First Geneva Convention (12 August 1949) 75 UNTS 31, Art 49; Second Geneva Convention, 75 UNTS 85, Art 50; Third Geneva Convention, 75 UNTS 135, Art 129; and Fourth Geneva Convention, 75 UNTS 287, Art 146. Universal criminal jurisdiction exists over crimes against humanity that were recognized in Art 6(2)(c) of the Nuremberg Charter of the International Military Tribunal, 8 UNTS 279, including murder, extermination, enslavement, deportation, and other inhumane acts.

(11.) As the International Court of Justice (ICJ) stated in the *Arrest Warrant* judgment, immunity is an immunity from a jurisdiction that otherwise exists: '[T]he rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law…These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions': *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Merits)* [2002] ICJ Rep 3, para 59; ICGJ 22 (ICJ 2002). See also Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para 3.

(12.) The ICC website lists the national implementing legislation of 42 states parties. Only some of these states parties, such as Australia, have introduced extra-territorial jurisdiction for crimes under the ICC Statute (http://www.legal-tools.org/en/).

(13.) Art 17 and preambular paras 4 and 6 of the ICC Statute. The ICC Appeals Chamber recently interpreted Art 17. While it acknowledged that states have a duty to exercise their criminal jurisdiction over international crimes, it stressed that the complementarity principle 'strikes a balance between safeguarding the primacy of domestic proceedings *vis-à-vis* the International Criminal Court on the one hand, and the goal of the Rome

Statute to “put an end to impunity” on the other hand. If states do not or cannot investigate and, where necessary, prosecute, the International Criminal Court must be able to step in’: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui (Judgment on the appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* ICC-01/04–01/07 OA 8 (25 September 2009) para 85.

(14.) *Katanga* judgment ibid para 86.

(15.) ‘Universal jurisdiction’ allows every state to exercise jurisdiction irrespective of the *situs* of the offence and the nationalities of the alleged perpetrator and the victim: R O'Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004) 2 JICJ 735 and *The Princeton Principles on Universal Jurisdiction* produced by the Princeton University Program in Law and Public Affairs (2001). A major study by Amnesty International conducted in 2001 concluded that approximately 125 countries had legislation allowing the exercise of criminal jurisdiction without requiring ‘a constructive and effective link’ between the crime and the forum state, although as a matter of due process most of those states excluded trials *in absentia*: Amnesty International, ‘Universal Jurisdiction: The duty of states to enact and enforce legislation’ AI index: IOR 53/002–018/2001 (September 2001). Since then, Belgium and Spain, two of the most active users of universal jurisdiction, have moved to repeal or amend their universal jurisdiction laws to make them more restrictive: L Reydams, ‘Belgium Reneges on Universality: the 5 August 2003 Act on Grave Breaches of International Humanitarian Law’ (2003) 1 JICJ 679; Centre for Justice and Accountability, ‘Spanish Congress Enacts Bill Restricting Spain's Universal Jurisdiction Law’ 4 November 2009.

Some states permit civil claims based on torts committed abroad: see, especially for Europe, Brief of the Amicus Curiae the European Commission Supporting Neither Party, Sosa v Alvarez-Machain, 542 US 692 (2004).

(16.) *Institut de droit international,* Krakow Session Resolution III ‘Universal Criminal Jurisdiction with Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes,’ in (2006) 71-II *Annuaire de l'Institut de droit international* 297–301. States may also exercise extra-territorial criminal jurisdiction when there is a link to the forum state, such as territoriality, nationality of the offender, or passive personality.

(17.) R Higgins, *Problems and Process: International Law and How We Use it* (Clarendon Press, Oxford 1994) 81.

(18.) Eg *Arrest Warrant* (n 11); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Merits)* [2008] ICJ Rep 177 ICGJ 1 (ICJ 2008); and *Jurisdictional Immunities of the State (Germany v Italy),* which was under consideration as of October 2011.

(19.) Under Art 38(1)(d) of the Statute of the International Court of Justice, 'judicial decisions'—not only 'international judicial decisions'—are a subsidiary means for the determination of rules of law. Art 38(1)(d) also states that the Court shall apply, inter alia, 'international custom, as evidence of a general practice accepted as law'.

(20.) This chapter considers case law from 24 national and international jurisdictions. See n 27 below.

(21.) CW Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 BYIL 401, 426.

(22.) See Chapter 1 (Introduction).

(23.) M Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 *Journal of Conflict and Security Law* 459, 465; J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge 2003) 272.

(24.) Milanović ibid 465.

(25.) Fox (n 4) 524–5.

(26.) See Lord Hoffman in *Jones (Appellant) v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26, (2007) 1 AC 270 para 45 (*Jones v Saudi Arabia*). See also Dissenting Opinion of Judge Al-Khasawneh in *Arrest Warrant* (n 11).

(27.) Australia, Austria, Belgium, Canada, Chile, Ethiopia, France, Israel, Italy, the Netherlands, New Zealand, Peru, the Philippines, Poland, Spain, Switzerland, the United Kingdom, the United States, Zambia, the ICJ, the ICTY, the ICTR, the SCSL, and the Inter-American Court of Human Rights (IACtHR).

(28.) These human rights norms may be defined by their content (eg prohibition of torture) or by their nature (eg peremptory status).

(29.) This is a function of the judicial reasoning. Not all judgments expressly state the dominant factor for the decision.

(30.) This will be indicated where relevant. In such situations it may be difficult to draw implications for international law, as judges rely on domestic law. However, if the provisions of statutes and constitutions that privilege international law or human rights, this may be indicative of state practice and *opinio juris*.

(31.) In this chapter, 'immunity' refers to the immunity from jurisdiction because this is the topic that has attracted decisions by multiple international and national courts in recent years.

(32.) *Arrest Warrant* (n 11) para 51. The 1961 Vienna Convention on Diplomatic Relations is widely accepted as reflecting customary international law on diplomatic immunity: *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (Merits)* [1980] ICJ Rep 3, 40, paras 45, 62 and 86. Diplomatic agents enjoy almost absolute immunity from civil and criminal jurisdiction, but their immunity can be waived by the sending state. For further details, see JC Barker, *The Abuse of Diplomatic Privileges and Immunities: A Necessary Evil?* (Aldershot, Dartmouth 1996). In addition to immunities associated with permanent diplomatic missions, there are immunities for ad hoc missions: see the UN Convention on Special Missions, 1969.

(33.) A Watts, *The Legal Position in International Law of Heads of States, Heads of Governments, and Foreign Ministers* (1994-III) Recueil des Cours Volume 247 (Martinus Nijhoff, Leiden 1995).

(34.) *Prosecutor v Blaskic (Judgment on the Request of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* IT-95–14 (29 October 1997) para 38.

(35.) See H Kelsen, *Principles of International Law* (RW Tucker (ed) 2nd edn Holt, Rinehart & Winston, Toronto 1966) 358.

(36.) *Eichmann* judgment of 29 May 1962, 36 ILR 277 (Israel); *Klaus Barbie* case, 78 ILR 125 and 100 ILR 331 (France); *Kappler* judgment of 25 October 1952 (1953) 36 *Rivisto di diritto internazionale* 193 (Italy); *Rauter* judgment

of 12 January 1949, (1949) *Annual Digest* 526 (Netherlands); *Albrecht* judgment of 11 April 1949 (1949) *Nederlandse Jurisprudentie* 747 and (1949) *Annual Digest* 397 (Netherlands); *Buhler* (1948) *Annual Digest* 682 (Poland); *In re Yamashita,* 327 US 1 (1945) (US). British Military Courts sitting in Venice and Hamburg also handed down similar decisions in *Kesserling, Law Reports of Trials War Criminals* (1947), vol 8, 9 and *von Lewinski* (1949) *Annual Digest* 523. All cases are cited by A Cassese in 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case' (2002) 13 EJIL 853, 870–1.

(37.) Section 2 (Nature of the human rights violation) below.

(38.) See n 36 at 13. The International Law Commission Special Rapporteur on the immunity of state officials from criminal jurisdiction notes that he has not seen evidence that the states which these officials served asserted their immunity from foreign criminal jurisdiction. Indeed, there is instead evidence of a general agreement between the states exercising jurisdiction and the home states that in respect of the specified crimes immunity was inapplicable: RA Kolodkin, *Second Report on immunity of State officials from foreign criminal jurisdiction* (10 June 2010) UN Doc A/CN.4/631 43–4.

(39.) *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147, [1999] 2 All ER 97. Hereinafter referred to as *Pinochet (No 3*) with cites to All ER reports.

(40.) Supreme Court of the Netherlands, *Bouterse,* judgment on appeal, 20 November 2000, Amsterdam Court of Appeal.

(41.) *Yousuf v Samantar,* 552 F 3d 371 (4th Cir 2009); *Enahoro v Abubakar,* 408 F 3d 877 (7th Cir 2005), ILDC 302 (US 2005); *Jane Doe I et al v Liu Qi et al,* 349 F Supp 2d 1258 (ND Cal 2004); *In re estate of Ferdinand Marcos,*103 F 3d 767 (9th Cir 1996); *Teresa Xuncaz et al v Hector Gramajo,* 886 F Supp 162 (D Mass 1995); *Bawol Cabiri v Baffour Assasie-Gyimah,* 921 F Supp 1189, 1198 (SDNY 1996) 1198; *Nikbin v Iran and ors,* 471 F Supp 2d 53 (DDC 2007), ILDC 678 (US 2007).

(42.) *Lozano v Italy,* appeal judgment Case No 31171/2008, ILDC 1085 (IT 2008).

(43.) In the *Kagame* case involving immunity *ratione personae,* the Spanish Audiencia Nacional implicitly recognized that a former head of state would not enjoy immunity *ratione materiae* for genocide (at 157), cited

in Commentator, ‘The Spanish Indictment of High-Ranking Rwandan Officials’ (2008) 6 JICJ 1003.

(44.) The risk of political destabilization and consequent worsening of human rights in Chile and Chad could also have made courts reluctant to pursue a sitting head of state.

(45.) See section 2.3.1 (Statutes of international criminal courts and tribunals) below.

(46.) These are the crimes that are covered by the Statutes of the ICC, the ICTY, and the ICTR. As regards war crimes, the ICC and ICTY Statutes cover war crimes in both international and non-international armed conflicts, whereas the Statute of the ICTR is limited to violations of Art 3 Common to the Geneva Conventions and of Additional Protocol II. War crimes, crimes against humanity, and genocide are also the three categories of crime that are usually the subject of universal or extra-territorial jurisdiction in domestic statutes.

(47.) For this view, see A Orakhelashvili, *Peremptory Norms in International Law* (OUP, Oxford 2006) 340 ff. It may well be that this argument is still *de lege ferenda*.

(48.) See n 35.

(49.) *Pinochet (No 3)* (n 39).

(50.) US civil cases brought under the Alien Torts Claims Act (ATCA) include *Marcos, Cabiri,* and *Xuncax* (n 41).

(51.) *Bouterse* (n 40).

(52.) *Lozano v Italy* (n 42).

(53.) For an international court saying this, see the ICTY *Blaskic* judgment (n 34) para 41. In *Yevgeny Adamov v Federal Office of Justice,* Switzerland Federal Tribunal, First Public Law Chamber, No 1A.288/2005, judgment of 22 December 2005, ILDC 339 (CH 2005), the Swiss Federal Supreme Court removed the immunity of a former Minister of Atomic Energy to allow him to be extradited to Russia to face charges of corruption.

(54.) This was the position of Lord Hutton and Lord Browne-Wilkinson (less clearly) in *Pinochet (No 3)* (n 39); *Bouterse* (n 40) para 4.2; as well as some

US civil cases brought under the ATCA (n 41). See also the Joint Separate Opinion in the ICJ *Arrest Warrant* judgment (n 11) para 85.

(55.) *Jones v Saudi Arabia* (n 26) Lord Bingham (para 19) and Lord Hoffmann (para 72).

(56.) *Arrest Warrant* (n 11) Dissenting Opinion of Judge ad hoc van den Wyngaert, para 36.

(57.) M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Kluwer, The Hague 1999) 248–9.

(58.) ICC Statute, Arts 7(1) and 8(1).

(59.) On the facts, the acts did not constitute a war crime: *Lozano v Italy* (n 42).

(60.) *Pinochet (No 3)* (n 39). Lord Millett noted that 'the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime well before 1984'; courts could thus exercise jurisdiction without authority of statute (at 177). Lord Phillips said 'international crimes and extraterritorial jurisdiction are both new arrivals in the field of public international law' and he did 'not believe that state immunity *ratione materiae* can co-exist with them' (at 190).

(61.) B Batros and P Webb, 'Accountability for Torture Abroad and the Limits of the Act of State Doctrine' (2010) 8 JICJ 1153. The US Supreme Court in *Sabbatino* stated that given that the act of state doctrine is 'compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs': *Banco Nacional de Cuba v Sabbatino* [1964] USSC 48, 376 US 398 (1964), quoted in *Habib* [2010] FCAFC 12 para 75 (Jagot J).

(62.) *Eichmann* (n 36) 311. The court relied on Art 7 of the Charter of the Nuremberg Tribunal and Principle III of the Nuremberg Principles, which may indicate that the existence of these instruments constituted a *lex specialis*.

(63.) *Habib* (n 61). Since this was a claim brought by a citizen against his own government, the dispute did not centre on the applicability of immunity: Batros and Webb (n 61).

(64.) A Cassese, *International Criminal Law* (OUP, Oxford 2003) 264.

(65.) Ibid.

(66.) Decision by the Argentine Supreme Court of 14 June 2005, available at http://www.derechos.org/nizkor/arg/doc/nulidad.html. One of the officers, Alfredo Scilingo, was convicted of crimes against humanity in April 2005 by Spain's Audiencia Nacional: C Tomuschat, 'Issues of Universal Jurisdiction in the *Scilingo* Case' (2005) 3 JICJ 1074. It appears that Scilingo appeared in Spain voluntarily and did not raise an entitlement to immunity. His conviction was upheld by the Spanish Supreme Court's Criminal Chamber in November 2007: RJ Wilson, 'Spanish Supreme Court affirms conviction of Argentine former naval officer for crimes against humanity' (2008) 12 ASIL Insights. On 17 July 2007, the Spanish Supreme Court held that another Argentinean ex-naval officer, Ricardo Miguel Cavallo, should remain in Spain to be tried, instead of being extradited to Argentina. Nonetheless, on 28 February 2008 the Spanish government authorized his extradition to Argentina.

(67.) CAE Bakker, 'A Full Stop to Amnesty in Argentina' (2005) 3 JICJ 1106. In a similar vein, the trial of former President Frederick Chiluba was able to proceed in Zambia after the parliament voted unanimously to remove his constitutional immunity. The immunity was provided for in the Constitution of the Republic of Zambia, Part IV, Art 43, subsection 3. The vote was the result of Chiluba's unsuccessful bid for the third term, a defamation trial that he initiated which uncovered evidence of corruption, and the election of a new President Levy Patrick Mwanawasa: P Lewis, 'Shifting Legitimacy: The Trials of Frederick Chiluba' in EL Lutz and C Reiger (eds), *Prosecuting Heads of State* (Cambridge University Press, Cambridge 2009) 130, 138. The removal of immunity was upheld by the Supreme Court of Zambia: *Frederick Titus Jacob Chiluba v The Attorney-General,* Supreme Court of Zambia Case 2002/ HP/063.

(68.) Translation and paraphrasing of p 15 of the judgment by A Cassese in 'The Italian Court of Cassation Misapprehends the Notion of War Crimes: The *Lozano* Case' (2008) 6 JICJ 1077, 1083.

(69.) *Pinochet (No 3)* (n 39) 179 (in All ER).

(70.) Lord Hope observed: 'But even in the field of such high crimes as have achieved the status of *jus cogens* under customary international law there is as yet no general agreement that they are outside the immunity to which

former heads of state are entitled from the jurisdiction of foreign national courts.'

(71.) See section 3 below on the impact of the Torture Convention on the Lords' reasoning.

(72.) See text accompanying n 54 above.

(73.) *Scilingo* judgment of 19 April 2005 at 83, cited in G Pinzauti, 'An Instance of Reasonable Universality: The *Scilingo* Case' (2005) 3 JICJ 1092 fn 9. *Scilingo* judgment of November 2007, cited in Wilson (n 66).

(74.) *Arrest Warrant* (n 11) paras 56–8. This was also due to the fact the immunity at issue was immunity *ratione personae*.

(75.) Art 4 of the International Covenant on Civil and Political Rights; Art 15 of the European Convention on Human Rights; Art 27 of the American Convention on Human Rights; Art 53 of the Vienna Convention on the Law of Treaties. ILC Draft Articles on State Responsibility with commentaries, 2001 YILC Vol II(2), commentary to Art 26 para 5.

(76.) J Brunnée, 'The Prohibition on Torture: Driving *Jus Cogens* Home?' (2010) 104 ASIL Proceedings 454.

(77.) *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 6, 32.

(78.) Landmark cases include the prosecution of Slobodan Milosevic, former President of Federal Republic of Yugoslavia, at the ICTY; the prosecution of Charles Taylor, former President of Liberia, at the SCSL; the judgment against Jean Kambanda, former Prime Minister of Rwanda; and the arrest warrants issued to President Al Bashir of the Sudan and Libyan leader Muammar Gaddafi by the ICC.

(79.) The ICTY Trial Chamber has stated that '[a]ccording to customary international law, there are some acts for which immunity from prosecution cannot be invoked before international tribunals' (*Prosecutor v Radovan Karadzic (Decision on accused's second motion for inspection and disclosure: immunity issue)* IT-95-5/18-PT (17 December 2008) para 17). The ICJ's *Arrest Warrant* judgment noted that an incumbent state official enjoying immunity *ratione personae* may be subject to criminal proceedings before 'certain international criminal courts possessing jurisdiction' (n 11) para 61.

(80.) Charter of the International Military Tribunal at Nuremberg, Art 7; Charter of the International Military Tribunal at Tokyo, Art 6; ICTY Statute, Art 7(2); ICTR Statute, Art 6(2). See also Art 7 of the ILC Draft Code of Crimes Against the Peace and Security of Mankind.

(81.) *Arrest Warrant* (n 11) para 61.

(82.) The Statute of the Special Tribunal for Lebanon (STL) is silent as to official capacity altogether and the Tribunal will thus have to decide this issue in accordance with customary international law. W Schabas, 'The Special Tribunal for Lebanon: Is a "Tribunal of an International Character" Equivalent to an "International Criminal Court"?' (2008) 21 LJIL 513, 526.

(83.) D Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 AJIL 407.

(84.) Art 98(1) reads: 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'

(85.) P Gaeta, 'Does President Al Bashir enjoy Immunity from Arrest?' (2009) 7 JICJ 315, 317.

(86.) *Prosecutor v Slobodan Milosevic (Decision on Preliminary Motions),* IT-02-54 (8 November 2001); Van Alebeek (n 1) 283. For the sequence of events, see E Suljagic, 'Justice Squandered? The Trial of Slobodan Milosevic' in Lutz and Reiger (n 67) 176, 182. Immunities were also raised in the case concerning Radovan Karadzic, the former President of Republika Srpska, who claimed that at a meeting in 1996 he reached an 'immunity agreement' with US diplomat Richard Holbrooke according to which he would not be prosecuted by the ICTY in exchange for withdrawing from public life. Despite the terminology, the agreement is better described as an 'amnesty agreement' since it was not concerned with recognizing Karadzic's immunity *ratione personae,* but rather with promising not to prosecute him. In the event, the ICTY Appeals Chamber found that even if the alleged agreement was proven, it would not limit the jurisdiction of the Tribunal or otherwise bind it. This was based on Rule 51 of the Rules of Procedure which only allows the withdrawal of an indictment with the leave of a judge or Trial Chamber: *Prosecutor v Radovan Karadzic (Decision on Karadzic's Appeal of*

Trial Chamber's Decision on Alleged Holbrooke Agreement, IT-95-518-AR73.4 (12 October 2009), paras 40–1.

(87.) *Prosecutor v Charles Ghankay Taylor (Decision on Immunity from Jurisdiction),* SCSL-2003–01–1 (31 May 2004) paras 50–3. The SCSL did not address the question of whether a treaty-based court (as opposed to a court established pursuant to Chapter VII of the UN Charter) may remove immunity *ratione personae* of third states' officials: M Frulli, 'The Question of Charles Taylor's Immunity: Still in search of a balanced application of personal immunities?' (2004) 2 JICJ 1118.

(88.) Van Alebeek (n 1) 283–92.

(89.) Indeed, this is required by Art 21 of the ICC Statute on sources of law. The Pre-Trial Chamber's reasoning in the *Gaddafi* decision followed that of the position taken in the *Bashir* decision, but it is more brief; in particular, the Chamber does not refer to Art 27 of the ICC Statute nor does it reserve its right to change its mind at a later stage of proceedings.

(90.) Art 10 of the Statute provides: 'Nothing in this Part [II] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'

(91.) SC Res 1593 (2005) and SC Res 1970 (2011).

(92.) Akande observes that the majority view among writers in that obligations under the Charter should be regarded as taking priority over customary international law, given the nature of the Charter as a 'constitutional' document: D Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Implications on Al Bashir's Immunities' (2009) 7 JICJ 333, 348.

(93.) SC Res 1593 (2005), para 2; SC Res 1970 (2011), para 5. For a fuller version of this argument, see Akande ibid.

(94.) See A Borghi, *L'immunité des dirigeants politiques en droit international* (Helbing & Lichtenhahn, Basel 2003) 66. Others take the view that these treaties contain no provisions explicitly precluding immunities normally applicable in national courts: eg J Verhoeven, 'Les immunités propres aux organes ou autres agents des sujets du droit international' in J Verhoeven (ed), *Le droit international des immunités: contestation ou consolidation?* (Larcier, Brussels 2004) 92, 125.

(95.) Art IV of the Genocide Convention provides that '[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals'. Art VI, however, limits prosecution to the state with territorial jurisdiction or 'such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'.

(96.) W Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press, The Hague 2006) 91–9; W Ferdinandusse, 'The Prosecution of Grave Breaches in National Courts' (2009) 7 JICJ 723.

(97.) Geneva Convention I, Art 49; Geneva Convention II, Art 50; Geneva Convention III, Art 129; Geneva Convention IV, Art 146. See also the incorporation of this provision by reference in Additional Protocol I, Art 85.

(98.) See Opinions of Lord Browne-Wilkinson, Lord Saville of Newdigate, Lord Nicholls, Lord Hope, and Lord Millett, *Pinochet (No 3)* (n 39).

(99.) Van Alebeek (n 1) 237.

(100.) 1932 Treaty on Extradition, Chile-Peru, 5 November 1932, available at http://www.oas.org/juridico/MLA/sp/traites/sp_traites-ext-chl-per.pdf.

(101.) 'Fugitive Returned', *The Economist,* 28 September 2007, 42–3 (observing that the Chilean Supreme Court 'stuck to the letter of the country's law' rather than invoking international norms in their decision to allow extradition to Peru). The requirements under the extradition treaty that the court considered were: (1) that the crime charged carry a minimum one year sentence in the country where the accused is located at the time extradition is requested (Art II); (2) that the crimes charged do not qualify as political crimes in the country requesting extradition (Art III); (3) the statute of limitations for the charges in the country requesting extradition has not run out (Art V); (4) the country holding the accused and the country requesting extradition cannot both prosecute, convict, or acquit the accused (Art VIII). See also RE Brandes, 'Who's Afraid of Universal Jurisdiction? The Fujimori Case' (2008–2009) 15 *Southwestern Journal of Law and Trade in the Americas* 124, 132.

(102.) The Chilean Supreme Court ruled in favour of extradition on the basis of two charges of human rights violations and five charges of corruption (reduced from the original 60 cases for which extradition was sought). The

human rights charges included the death of 15 people in the *Barrios Altos* massacre and of 10 people in the *La Cantuta* killing, and the corruption charges included the embezzlement of US$15 million, bribery, and illegal wiretapping: P Noboa, 'Former Peruvian President Alberto Fujimori's Extradition Process' (2008) 14 *Law and Business Review of the Americas* 621, 629. Peru could only prosecute Fujimori for the cases the Chilean Supreme Court considered provided a basis for extradition. *Peru v Fujimori* (2007) (Supreme Court of Chile), available at http://www.scribd.com/doc/319716/Fallo-extradicion-Fujimori.

(103.) Brandes (n 101) 128.

(104.) Ibid 138.

(105.) SA Oxman, 'Comment: The Quest for Clarity' in S Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia 2004) 64, 65. Moreover, *Pinochet* concerned extradition to a third state, Spain, and there was no bilateral extradition treaty involved.

(106.) See n 15 above.

(107.) *La Cantuta v Peru,* Series C No 162 [2006].

(108.) Ibid.

(109.) C Sandoval, 'The Challenge of Impunity in Peru: The Significance of the Inter-American Court of Human Rights' (2008) 5 *Essex Human Rights Review* 1, 12–13.

(110.) Foreign States Immunities Act 1985 (Australia); Foreign Sovereign Immunities Act 1976 (US); State Immunity Act 1978 (UK); State Immunity Act 1979 (Singapore); State Immunity Ordinance 1981 (Pakistan); Foreign States Immunities Act 1981 (South Africa); State Immunity Act 1982 (Canada).

(111.) For an explanation of the machineries of justice of the common law (Anglo-American) and civil law (Continental) systems, see M Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (Yale University Press, New Haven 1986) 35, 42.

(112.) See n 41.

(113.) Codified in 28 USC § 1350. A new exception to immunity was introduced by s 221 of the Anti Terrorism and Effective Death Penalty Act 1996, which states that immunity will not be available in any case 'in which money damages are sought against a foreign State for personal injury or death that was caused by an act of torture, extra-judicial killing, aircraft sabotage, hostage-taking…'. A court will decline to hear a claim if the foreign state has not been designated by the Secretary of State as a state sponsor of terrorism under federal legislation or if the claimant/victim was not a US national at the time the act occurred.

(114.) In another context, see the US reactions to the ICJ judgments in *LaGrand* and *Avena*: B Simma and C Hoppe, 'From LaGrand and Avena to Medellin: A Rocky Road Toward Implementation' (2005) 14 Tulane JICL 7.

(115.) 630 F 2d 876 (2nd Cir 1980).

(116.) I Fuks, 'Sosa v Alvarez-Machain and the Future of ATCA Litigation: Examining Bonded Labor Claims and Corporate Liability' (2006) 106 Colum L Rev 112, 113. See also T Lininger, 'Overcoming Immunity Defenses to Human Rights Suits in US Courts' (1994) 7 Harv Hum Rts J 178. While Judges Higgins, Kooijmans, and Buergenthal, in their Separate Opinion in the *Arrest Warrant* judgment of the ICJ, saw in the United States' Alien Tort statute 'the beginnings of a very broad form of extraterritorial jurisdiction' in the civil sphere, they also noted that the United States' assertion of such jurisdiction in that statute had 'not attracted the approbation of States generally': n 11, para 48.

(117.) 124 S Ct 2739 (2004).

(118.) *Samantar v Yousuf,* No 08–1555 slip op (US 1 June 2010), ILDC 1505 (US 2010).

(119.) 28 USC § 1604.

(120.) *Samantar v Yousuf ?*(n 118) 16.

(121.) Ibid; cf *Chuidian v Philippine National Bank,* 912 F 2d 1095 (9th Cir 1990).

(122.) *Samantar v Yousuf* (n 118) 20. In February 2011, based on a recommendation from the State Department, the Court for Eastern District of Virginia held that Samantar did not benefit from immunity: Order issued on 15 February 2011 by Judge Brinkema of the Eastern District of Virginia.

An important factor was that the US Executive Branch does not currently recognize any government of Somalia and thus there was no government to assert immunity on behalf of Samantar.

(123.) Ibid 19.

(124.) One example of Executive intervention is in the famous *In re Yamashita* case (n 36). The US Supreme Court imposed liability on a Japanese military officer for misconduct by his troops during the Second World War. The immunity of the officer was not in issue because Japan had acquiesced to the trial of military officers through its acceptance of the Potsdam Declaration and its surrender (at 13). Similarly, the case brought in a US court against the estate of Ferdinand Marcos, former President of the Philippines, was able to proceed because the Philippines waived immunity (n 41) para 27.

(125.) *Kazemi v Iran and Ors* (Superior Court of Quebec 25 January 2011) paras 123, 132, 138, and 153.

(126.) *United States of America v Reyes* (Philippines, 1993); *Wylie v Rarang* (Philippines, 1992); *United States of America v Alarcon Vergara* (Philippines SC, 1990).

(127.) See US State Department, Background Note: Philippines, October 2009, http://www.state.gov/r/pa/ei/bgn/2794.htm.

(128.) Discriminatory search (*Reyes*), libel (*Wylie*), dog bites during arrest (*Alarcon Vergara*), slander by an official of the Asian Development Bank, *Liang v People* (Supreme Court, 26 March 2001). Van Alebeek (n 1) 123–5.

(129.) *Pinochet (No 3)* (n 39) 179 (in All ER).

(130.) *Pinochet (No 3)* (n 39) 163 (in All ER).

(131.) Van Alebeek (n 1) 237. *Pinochet (No 3)* (n 39) 152 (Lord Hope) and 189–90 (Lord Phillips).

(132.) ILC Draft Articles on State Responsibility, 1998 YILC Vol II(2) 64–77.

(133.) *Pinochet (No 3)* (n 39) 167 (Lord Hutton), 179 (Lord Millett), and 182, 186 (Lord Phillips of Worth Matravers).

(134.) Van Alebeek (n 1) 149.

(135.) See section 3.4 (Nature of the proceedings (civil v criminal)).

(136.) *Djibouti v France* (n 18) para 196. In the *Djibouti v France* judgment, the ICJ explained that it was the duty of Djibouti—as the state claiming its officials benefited from immunity *ratione materiae*—to show that the *procureur de la République* and the Head of National Security were its organs, agencies, or instrumentalities, and that they acted in their official capacity. Since these preconditions had not been met, the ICJ did not come to a conclusion on the immunity of the officials.

(137.) See n 118 above.

(138.) JB Bellinger, 'Ruling Burdens State Dept' *The National Law Journal,* 28 June 2010.

(139.) *Enahoro* (n 41) 881–2; *Wei Ye v Jiang Zemin,* 383 F 3d 620 (7th Cir 2004), 625 ILDC 683 (US 2004); *United States v Noriega,* 117 F 3d 1206 (11th Cir 1997) 1212; *Tachiona v US,* 386 F 3d 205 (2nd Cir 2004), ILDC 1090 (US 2004); *Fang and ors v Jiang and ors,* Ex parte application for leave to serve statement of claim and notice of proceeding outside of New Zealand, High Court of Auckland (intervention by Attorney-General), ILDC 1226 (NZ 2006).

(140.) *Ex parte Peru,* 318 US at 588. Interestingly, in the *Samantar* case the US government put forward its general views on the FSIA and the importance of Executive input on immunities, but it has declined to take a position on the immunity of Mr Samantar himself: Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar* (n 118).

(141.) In 2009, an Italian court convicted 23 agents of the US Central Intelligence Agency, including the Station Chief in Milan, for the kidnapping of an Egyptian cleric in Italy. Three other agents were protected by diplomatic immunity. The US State Department has not clearly explained whether it invoked—or indeed waived—immunity in the case. Question Taken at The November 4, 2009 Daily Press Briefing, 5 November 2009, http://www.state.gov/r/pa/prs/dpb/2009/nov/131346.htm.

When one CIA agent brought a case in a US court seeking to direct the State Department to assert immunity on her behalf in Italy, the State Department moved to dismiss the case for failure to state a claim upon which relief can be granted and for lack of subject-matter jurisdiction: Sabrina de Sousa v

Department of State, Case No 09-cv-896 (RMU), Motion to Dismiss, 31 August 2009 (DC Cir).

(142.) *Arrest Warrant* (n 11) para 58.

(143.) Section 2.3.1 (Statutes of international criminal courts and tribunals).

(144.) France Cour de cassation *Affaire Kadhafi,* judgment No 1414 (13 March 2001) 125 ILR 508–10. Cour de Cassation (Chambre Criminelle) 19 January 2010, *L'Association Fédération Nationale des victimes d'accidents collectifs 'Fenvac sos catastrophe,' L'Association des familles des victimes du 'Joola'* Arrêt No 09-84.818.

(145.) *The Hague City Party and ors v Netherlands and ors,* Interlocutory proceedings, KG 05/432, ILDC 849 (NL 2005).

(146.) USA, *Wei Ye v Jiang Zemin* (n 139); *Tachiona v United States* (n 139).

(147.) UK Bow Street Magistrates' Court, *Re Mofaz,* first instance, unreported (12 February 2004), reproduced in 53 ICLQ 771 (2004), ILDC 97 (UK 2004); UK Bow Street Magistrates' Court, *Bo Xilai* (8 November 2005) unpublished, reproduced in 128 ILR 713 (2005); UK Bow Street Magistrates' Court, *Re Mugabe,* first instance, unreported decision (14 January 2004), ILDC 96 (UK 2004). In *Pinochet (No 3)* (n 39), several Law Lords emphasized that Pinochet would have benefited from immunity if he had been the incumbent head of state at the time of the proceedings.

(148.) Belgium Court of Cassation, *Re Sharon and Yaron* final appeal, Cass no p 02 1139 F/1 (12 February 2003), ILDC 5 (BE 2003).

(149.) *Castro* case, No 1999/2723 Order (Audiencia nacional of Spain) (4 March 1999), cited in A Cassese, *International Criminal Law* (Oxford, OUP 2003) 272, fn 20; *Auto del Juzgado Central de Instruccion No 4* (Audiencia Nacional of Spain) (6 February 2008) 151–7.

(150.) *United States v Noriega* (n 139); *Special Prosecutor v Col Hailemariam and ors,* ILDC 555 (ET 1995).

(151.) *United States v Noriega* (n 139). Noriega has since served his US sentence and been extradited to France, where he was tried and sentenced to seven years for money laundering on 7 July 2010. His defence of immunity *ratione personae* was rejected: H Drouet, 'L'ex-dictateur Manuel Noriega condamné à 7 ans de prison par la justice française' *France 24* 7, July 2010.

(152.) The Executive action can nonetheless provide evidence of state practice as regards immunities in customary international law.

(153.) *Special Prosecutor v Col Hailemariam* (n 150).

(154.) A national law granting immunity was found to be void for inconsistency with international law.

(155.) Eg, UK Bow Street Magistrates' Court, *Re Mofaz* (2004), *Bo Xilai* (2005), *Re Mugabe* (2004) (n 147).

(156.) *Arrest Warrant* (n 11) para 51.

(157.) Before the *Arrest Warrant* judgment, it was not clear that even Heads of Government and Ministers for Foreign Affairs enjoyed immunity *ratione personae*: A Watts, 'The Legal Position in International Law of Heads of State, Heads of Government, and Foreign Ministers' (1994-III) 247 *Recueil des Cours* 13, 109 (saying that Heads of Government only enjoy immunity *ratione personae* when on an official overseas visit); R Jennings and A Watts, *Oppenheim's International Law* (9th edn Longmans, London 1992) 1033 (saying the Head of Government does not represent the persona of the state in the same way as the Head of State does). By shifting the rationale for immunity *ratione personae* from the 'personification of the state' to the 'effective performance of functions on behalf of the state', the ICJ has applied the immunity to a broader range of state officials.

(158.) *Adamov v Federal Office of Justice* (n 53) para 3.4.2 (in *obiter dictum*).

(159.) *Re Mofaz* and *Re Bo Xilai* (n 147). In the latter case, the UN Convention on Special Missions was the primary basis for the decision that immunity applied. In *Federal Court of Justice Germany v Bat Khurts* (City of Westminster Magistrates' Court, 18 February 2011), Judge Purdy held that the 'Head of the Executive Office of National Security Mongolia' did not benefit from immunity *ratione personae* since he was not of 'ministerial rank or above', nor was he engaged in foreign affairs (para 12). He was also not considered to be in the UK on a special mission since, among other things, there was no evidence of an invitation from the receiving state, an acceptance by the sending state, nor an agreed programme of meetings (para 11).

(160.) *'Joola'* case (n 144) 4. The warrant against the former Prime Minister of Senegal was also annulled. This decision seems to concern both immunity

ratione personae (by reference to the high rank of the ministers) and immunity *ratione materiae* (by reference to the fact they acted in their official capacity), but does not specify which type of immunity is in issue.

(161.) *Arrest Warrant* judgment (n 11) para 53.

(162.) *Jones v Saudi Arabia* (n 26).

(163.) *Belhas v Ya'alon,* 515 F 3d 1279 (DC Cir 2008), ILDC 674 (US 2006); *Matar v Dichter,* 500 F Supp 2d 284 (SDNY 2007) and 563 F 3d 9 (2nd Cir 2009); *In Re Terrorist Attacks,* 538 F 3d 71 (2nd Cir 2008), ILDC 1101 (US 2008); *Rasul v Myers,* 512 F 3d 644 (DC Cir 2008).

(164.) Ontario Court of Appeal, *Jaffe v Miller and Others* (1993) 95 ILR 446.

(165.) Section 2.5 above and 3.4 below on nature of the proceedings.

(166.) *Arrest Warrant* (n 11) para 61 (emphasis added).

(167.) P Gaeta, '*Ratione Materiae* Immunities of Former Heads of State and International Crimes: The Hissène Habré Case' (2003) 1 JICJ 189 ('in the Court's opinion the general rule on *ratione materiae* immunities, whereby States cannot exercise jurisdiction over a foreign State official for acts he or she executed in his or her public capacity, without the consent of the State to which the State official has belonged, also applies to alleged international crimes'). See also C Kress, 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime' (2009) 7 JICJ 789, 803–4.

(168.) For a survey, see A Cassese, *International Criminal Law* (OUP, Oxford 2008) 305 ff.

(169.) *Blaskic* decision (n 34) para 41.

(170.) The *Blaskic* decision mainly related to immunity from enforcement, not immunity from jurisdiction.

(171.) Judgment of the International Military Tribunal of the Trial of German Major War Criminals, Cmd 6964, Miscellaneous No 12 (1946).

(172.) *Lozano v Italy* (n 42) 15 (translated by Cassese). For a criticism of the court's understanding of war crimes, see A Cassese (n 68).

(173.) *W v Prince of Liechtenstein and ors,* Final appeal 7 Ob 316/00x, ILDC 1 (AT 2001). The case involved a person requesting a declaration of affiliation as the Prince's sister.

(174.) *Arrest Warrant* (n 11) para 58.

(175.) See nn 144–149.

(176.) 1961 Vienna Convention on Diplomatic Relations, 500 UNTS I-7310. 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UNTS 15410.

(177.) 1963 Vienna Convention on Consular Relations, 596 UNTS 8638.

(178.) 1969 Convention on Special Missions, 1400 UNTS I-23431.

(179.) 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, done in Vienna on 14 March 1975 (not yet in force). See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations,* vol II. See also Art IV of the 1946 Convention on the Privileges and Immunities of the United Nations General Assembly, resolution 22 A (I); Art v of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies General Assembly, resolution 179 (II); part IV of the 1949 General Agreement on Privileges and Immunities of the Council of Europe, CETS No 002.

(180.) Eg in the *Arrest Warrant* judgment where the ICJ observed that the Vienna Convention on Diplomatic Relations and the New York Convention on Special Missions did not contain any provisions defining the immunities of Ministers for Foreign Affairs and the Court thus had to decide on the basis of customary international law: (n 11) para 52.

(181.) GA RES 59/38, annex, UN Convention on Jurisdictional Immunities of States and Their Properties. A final understanding was reached that such immunity did not extend to criminal proceedings, which is embodied in paragraph 2 of the resolution. See also DP Stewart, ‘The UN Convention on Jurisdictional Immunities of States and Their Properties’ (2005) 99 AJIL 194, 205. As of July 2011, there were 11 ratifications; 30 are needed for the Convention to come into force (Art 30).

(182.) CK Hall ‘UN Convention on State Immunity: the Need for a Human Rights Protocol’ (2006) 55 ICLQ 411.

(183.) *Fang v Jiang* (n 139) para 65.

(184.) *Jones v Saudi Arabia* (n 26) para 8, citing Aitkens J in *AIG Capital Partners Inc v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), [2006] All ER 284, 310 para 80. See also Lord Bingham para 26 and Fox (n 4) 383.

(185.) *Jones v Saudi Arabia* (n 26) Lord Bingham para 9.

(186.) Section 2.5 (Nature of the proceedings (civil v criminal)).

(187.) *Jaffe v Miller* (n 164) (kidnapping).

(188.) *Jones v Saudi Arabia* (n 26) Lord Bingham para 16.

(189.) *Fang v Jiang* (n 139) paras 31–2, 69–71.

(190.) *Habib* (n 61) paras 85 and 112–13 (Jagot J) (noting that the conduct of torture could be protected from judicial scrutiny by a ‘valid claim for sovereign immunity’); para 36 (Perram J).

(191.) See Chapter 4.

(192.) *Jaffe v Miller* (n 164) 458–9.

(193.) See *Jones v Saudi Arabia* (n 26) paras 19 and 31.

(194.) *In re Grand Jury Proceedings,* 613 F 2d 501, 505 (5th Cir 1980).

(195.) See also Batros and Webb (n 61).

(196.) The litigation is pursued under the ATCA and TVPA.

(197.) *Jones v Saudi Arabia* (n 26) para 20; *Arrest Warrant* (n 11) Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal, para 48. Nonetheless, the idea of universal civil jurisdiction dates back to the eighteenth century. As Lord Mansfield noted in *Mostyn v Fabrigas,* 98 Eng Rep 1021, 1032 (1774): ‘as to transitory actions, there is not a colour of doubt but that every action that is transitory may be laid in any county in England, though the matter arises beyond the seas’ (cited in *Filártiga v Peña-Irala,* 630 F 2d 876 (2nd Cir 1980)).

(198.) See Breyer J's Opinion in *Sosa v Alvarez-Machain,* 542 US 692 (2004), 762–3; Written comments by Redress, Amnesty International, Interights and Justice in *Jones v UK* (App No 34356/06) and *Mitchell v UK* (App No 40528/06) before the ECtHR, 6.

(199.) Written comments by Redress et al, ibid 4, citing *Saorstat and Continental Steamship Co v Rafael de las Morenas* [1945] IR 291, ILR 97 98 (SC).

(200.) In *Pinochet (No 3)* Lord Phillips had stated that a state would be impleaded in civil proceedings against its official; a factor that should militate against lifting immunity in civil suits. In the English Court of Appeal in *Jones v Saudi Arabia* he instead found that a state would not be impleaded because '[i]t is the personal responsibility of the individuals, not that of the state, which is in issue': EWCA Civ 1394, 28 October 2004, para 128.

(201.) Van Alebeek (n 1) 243.

(202.) *Jones v United Kingdom,* ECtHR, App No 34356/06.

(203.) See, eg, the close and frequent attention and citation of the ICJ *Arrest Warrant* judgment by domestic courts: *Enahoro* (n 41); *Jones v Saudi Arabia* (n 26); *Re Mofaz* (n 147); *Lozano v Italy* (n 42).

(204.) Eg the US ATCA and TVPA.

(205.) Eg does the silence of the various State Immunity Acts as to a human right exception indicate that there is *no* such exception?

(206.) *Lozano* (n 42); the Opinion of Lord Millet in *Pinochet (No 3)* (n 39).

(207.) *Arrest Warrant* (n 11); Opinions of Lord Browne-Wilkinson and Lord Hope in *Pinochet (No 3)* (n 39).

(208.) See text accompanying n 55 above.

(209.) See text accompanying n 58 above.

(210.) *Congo v Rwanda* (n 77) para 64.

(211.) Akande makes the point that the obligation to prevent genocide is derived from the prohibition on genocide, but that does not mean it overrides all other obligations that states may have that may hinder such cooperation:

D Akande, ‘Yet More on Immunity: Germany brings case against Italy before the ICJ’ EJIL: Talk! 26 December 2008.

(212.) Hall (n 182) 412.

(213.) Hall (n 182) 412 fn 5 (quoting Hafner).

(214.) ICJ Statute, Art 38(1)(d). Members include judges of international and national courts: see http://www.idi-iil.org/idiE/navig_members.html.

(215.) *Institut de droit international,* Napoli Session 2009, Third Commission (Rapporteur: Lady Fox), Art III(1). Art IV notes that the provisions are ‘without prejudice to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State’.

(216.) M Frulli, ‘Immunity versus Accountability for Private Military and Security Companies and their Employees: Legal Hurdles or Political Snags?’ EUI Working Paper AEL 2009/24, 1, available at http://cadmus.eui.eu/dspace/bitstream/1814/12960/1/AEL_2009_24.pdf.

(217.) Ibid.

(218.) For critiques of the formalistic substantive-procedural distinction, see L McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty’ (2007) 18 EJIL 903; A Orakhelashvili, ‘State Immunity and Hierarchy of Norms: Why the House of Lords got it wrong’ (2007) 18 EJIL 955. As Fox has observed, whether one sees a conflict or not between different rules is a matter of interpretation: Fox (n 4) 155.

(219.) *Arrest Warrant,* Joint Separate Opinion of Judges Higgins, Kooijmans, and Buergenthal (n 11) para 75.

(220.) Indeed, this can be seen as a search for the most effective method of human rights protection: T Rensmann, ‘Impact on the Immunity of States and their Officials’ in MT Kamminga and M Scheini (eds), *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009) 151, 166–7.

Hierarchy in International Law: The Place of Human Rights
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On the Hierarchy between Extradition and Human Rights

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Abstract and Keywords

A requested state will be confronted with conflicting obligations stemming from extradition treaties and treaties on human rights, whenever the applicant faces a real risk that his or her fundamental rights will be violated by the requesting state. These conflicts are not easily solved. With the exception of torture, international law does not acknowledge the general primacy of human rights over extradition. States have applied different avoidance techniques — rule of non-inquiry, reliance on assurances, and local remedies — to evade these conflicts. However, the European Court of Human Rights in particular has accentuated the human rights standards and has admonished states parties to take these rights seriously.

Keywords: extradition, human rights, jus cogens, rule of non-inquiry, local remedies

1. Introduction

1.1 On clashes and hierarchy

Within the context of extradition, conflicts between a treaty-based obligation to extradite and an obligation to observe the human rights of the requested person, stemming from human rights conventions, are likely to emerge. The stakes are clear. In order to extend their capacity to prosecute crimes, states engage in treaty relations, compelling them to surrender fugitives on a reciprocal basis. By the same token, contracting states expose the fugitive to foreign criminal justice which may fall short of human rights

standards. According to the case law of the European Court of Human Rights (ECtHR), the requested state, party to the European Convention on Human Rights (ECHR), may incur state responsibility for extraditing a person to another state, if that person faces a substantial risk that the latter would violate his or her human rights under the Convention.[1] The requested state will usually have difficulties estimating the risk, as the actual infringement occurs in another state and the violation still has to take place. How can it predict whether the risk will materialize? And how is the requested state to verify whether the violation has in fact occurred? The requested state thus faces a real 'Catch-22' situation. Whichever way it chooses, it will flout treaty obligations. If it decides to refuse the extradition request out of concern for the prospective fate of the requested person, it will elicit the wrath of the requesting state that may choose to retaliate in kind by denying extradition in similar situations. If, on the other hand, the requested state decides to take the risk and surrenders the fugitive, the state may turn out to be co-responsible for violating human rights, not only vis-à-vis the victimized individual but also towards its contracting partners of a human rights convention.[2] After all, by entering into such an international agreement, states have solemnly declared **(p. 149)** to observe and guarantee the fundamental rights of all persons residing in their territory.[3]

This short exposé already reveals that, in the context of extradition, states may face conflicts between treaty obligations in the narrow sense of the word.[4] Different from the situation in which a state has to balance its right to grant or deny access to its territory with its obligation to observe the principle of 'non-refoulement' to refugees, in the case of extradition states have no option to circumvent the conflict of obligations by abstaining from exercising their rights.[5]

This quandary raises the question as to whether there is a clear-cut hierarchy between the obligations and normative standards as expounded above. Arguably, the issue of hierarchy cannot be resolved in the abstract, as it begs the question which human rights, if any, should prevail over the obligation to extradite. The strongest case for 'primacy' can obviously be made for protection against (potential) torture or inhuman and degradingtreatment (Article 3 of the ECHR; Article 7 of the International Covenant on Civil and Political Rights (ICCPR)). Section 3 of this chapter discusses, after some reflections on the general relationship between human rights and extradition in section 2, whether the *jus cogens* character of torture indeed has the

effect that extradition obligations must yield in case of substantial risks that the fugitive will be tortured in the requesting state.

Other human rights of the fugitive may be jeopardized by extradition (proceedings) as well. It should be stressed in this respect that violations of human rights may be at issue both during extradition proceedings in the requested state and within the context of criminal proceedings in the requesting state. As far as the former is concerned, extradition proceedings in the requested state might fall short of the accepted standards of a fair trial, as expounded in Article 6 of the ECHR and Article 14 of the ICCPR. Moreover, as detention prior to extradition implies by definition a deprivation of liberty, habeas corpus rights and the guarantees of Article 5 of the ECHR are involved.[6]

On his or her return, the fugitive may face violations of several human rights. The criminal proceedings may fall short of the guarantees of a fair trial in the sense of Article 6 of the ECHR and Article 14 of the ICCPR. He or she may be exposed to application of *ex post facto* law, as prohibited by Article 7 of the ECHR and Article 15 of the ICCPR, and he or she may be denied access to an 'effective remedy' in the sense of Article 13 of the ECHR. Finally, the physical removal which is **(p. 150)** inherent to extradition may curtail his or her rights to family life (Article 8 of the ECHR).

As these human rights do not necessarily have the same status as the prohibition on torture, section 4 of this chapter investigates to what extent they may impede extradition and, if so, how their supremacy is construed.

The sole reference to the European Convention on Human Rights and the emphasis on the case law of the European Court of Human Rights in the subsequent sections may easily arouse the objection that this chapter is rather 'euro-centric'. The point is that potential and concrete conflicts between extradition obligations and human rights have rarely been assessed by *other* regional human rights bodies.[7] Although the Inter-American Commission of Human Rights and Inter-American Court of Human Rights have delivered highly interesting and relevant opinions on the hierarchical supremacy and even *jus cogens* character of essential human rights in general, these views have not been rendered within the specific legal context of extradition.[8] The contributions of other regional bodies to the topic under scrutiny in this chapter have therefore been slight, if not negligible.

1.2 On ‘avoidance techniques’

The short survey above of the human rights which may be at stake in the context of extradition presumes that a conflict is inevitable and that the collision of standards will force the requested state to forsake one of its obligations. In actual practice, however, states attempt to avoid such conflicts as much as possible. The reason for this is simple: states exhibit a natural proclivity to maintain harmonic international relations and this obviously prompts them to reconcile conflicting obligations or to deny outright that such conflicts exist. The specific context of extradition offers states a number of ‘avoidance techniques’ which all boil down to the crucial notion that human rights violations are prospective. First of all, states have simply alleged that ‘the principle of confidence’ or ‘the rule of non-inquiry’ impedes them from probing into the requesting state's administration of criminal justice (section 5 of this chapter). Secondly, and furthermore, states have relied on their counterparts’ assurances that they will abide by accepted standards and will observe the fugitive's fundamental rights, including that he or she will not be tortured, that he or she will receive the benefits of a fair trial, and that he or she will not be exposed to capital punishment (section 6). Thirdly, states have been placated by the other state's guarantee that even if the person's human rights were to be infringed, he or she would be entitled to obtain redress, either by starting appellate proceedings in a domestic court or by submitting a complaint to an international human rights body (section 7). Fourthly and finally, states may require the **(p. 151)** fugitive to hand over abundant evidence buttressing his or her apprehensions, preferably including proof that he or she has been targeted or maltreated before (section 8).

These four modes of ‘avoidance technique’ have a different purpose. In the first approach, the state squarely ignores the problem by hiding behind a veil of non-competence, thus denying both knowledge and—consequently—responsibility. In the other situations the state acknowledges at least the potential of human rights violations (and its concomitant co-responsibility), but trusts that they will not happen or that the other state will provide adequate remedies. Essentially, what these approaches have in common is that they are all predicated on a central consideration which is typical for extradition (and—to a certain extent—also for expulsion) and which governs the entire discussion on the proper relationship between human rights and other treaty obligations in this field: a refusal directly involves state responsibility, while a violation of human rights is merely an eventuality

which can be mitigated by an unfaltering trust in the other state's good behaviour, corroborated by the latter's assurances.

The objective of this chapter is not to resolve these highly complex legal issues, nor does it aspire to discuss in-depth the several tools just expounded.[9] It merely intends to canvass, on the basis of exemplary national and international case law, whether and to what extent these approaches indeed exemplify ‘avoidance techniques’ which tend to weaken the supposed primacy of absolute rights, like the prohibition on torture. At this juncture it should be emphasized that a state may equally incur responsibility under human rights treaties for expelling a person to another state where he or she faces a real risk of flagrant violations of his or her human rights, although the conflict with other international law standards is less pronounced in such cases.[10] As similar issues relating to the threshold of seriousness and evidence arise in this context, the chapter will occasionally refer to case law on deportation. A more comprehensive and thorough review is undertaken by Geoff Gilbert in this volume.

2. Do human rights prevail over extradition?

Attempts have been made to defend the primacy of human rights over extradition and expulsion in general terms.[11] Article 30 of the Vienna Convention on the Law of Treaties (VCLT), which governs the hierarchy between international standards **(p. 152)** originating in treaty obligations, has been invoked for that purpose.[12] This provision starts by referring to Article 103 of the UN Charter, which postulates the primacy of Charter obligations over obligations under any other international agreement.[13] The supremacy of human rights over extradition obligations has been defended on the basis of the argument that Article 55 of the UN Charter qualifies the promotion of universal respect for, and protection of, human rights and fundamental freedoms as one of the major purposes of the United Nations.[14] It is questionable, however, whether such a broadly phrased ‘declaration of intent’ could sustain the general hierarchical superiority of human rights, as it fails to mention which human rights should prevail and what level of infringement is required. The proposition to restrict the supremacy of human rights to peremptory norms of general international law (*jus cogens*) obviously begs the question which rights belong to that sacred realm, while it does not provide an answer to the issue of how conflicts between extradition obligations and other potential human rights violations should be resolved.[15] As long as one does not abuse this point of view to restrict *per argumentum*

a contrario the scope of human rights in extradition law, it serves as a good starting point.

Article 30, section 2 of the Vienna Convention continues by considering that treaties may regulate their mutual hierarchical relationship themselves.[16] Older international instruments on extradition, like the European Convention on Extradition, do not contain sweeping statements acknowledging the primacy of human rights. The European Convention only refers to specific situations like discriminatory persecution and imminent capital punishment as constituting impediments to extradition.[17] Moreover, the exception-clause on capital punishment **(p. 153)** does not entail (the supremacy of) the human right to life of the fugitive, but rather reflects the considerations for contracting parties' *ordres publics*.

Such silence need not surprise us. The engagement in extradition treaties is predicated on mutual confidence in each other's administration of justice. The incorporation of a clause questioning this mutual trust would appear to be self-contradictory, while invoking such a clause would naturally cause embarrassment and grief.

Nevertheless, and undoubtedly spurred by the vigorous attitude of human rights courts and monitoring bodies, international instruments of more recent date explicitly and generally pledge allegiance to human rights. After all, the UN Human Rights Committee has followed the ECtHR's case law by equally finding that extradition may be in violation of the International Covenant on Civil and Political Rights if there is a real risk of a violation of the rights under the Covenant of the person concerned.[18] Paragraph 12 of the Preamble to the Council Framework Decision on the European Arrest Warrant declares that 'this Framework Decision respects fundamental rights and observes the principles recognized by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof'. And in order to avoid all misunderstanding, the subsequent paragraph 13 adds that: 'No person shall be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.'[19]

One should be careful not to consider such provisions as solid evidence of an acknowledgement by the contracting parties of the hierarchical supremacy of human rights over extradition obligations. They merely indicate and limit the scope of obligations those contracting parties are prepared to enter into

on a reciprocal basis and can be compared to similar clauses like the political offence exception and the non-extradition of nationals.

On the basis of the previous analysis, one may conclude that a general supremacy of all human rights over extradition obligations does not exist. A more specific inquiry into the question whether the *jus cogens* character of the prohibition of torture is invoked to trump extradition obligations, if the extradition treaty is silent on the matter, may shed further light on the hierarchy issue.

3. The minor importance of *jus cogens*

3.1 International human rights courts and *jus cogens*

According to the European Court of Human Rights, the prohibition against torture and inhuman or degrading treatment is absolute.[20] Article 3 makes no **(p. 154)** provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation.[21] The activities of the individual in question, however undesirable or dangerous, cannot be a material consideration, and his or her risk of being tortured should therefore not be balanced against national security interests.[22]

Moreover, the ECtHR has explained what kind of treatment is covered by the prohibition and should therefore serve as an impediment to extradition. On several occasions the ECtHR has elucidated that harsh forms of criminal punishment might amount to inhuman or degrading treatment in the sense of Article 3 of the ECHR.

Apart from the well-known dictum on the death row phenomenon in *Soering,* the Court

> does not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under Article 3 of the Convention…Consequently, it is likewise not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention.[23]

Although the ECtHR does not explicitly refer to *jus cogens,* it is clear that by qualifying the prohibition of torture as ‘absolute’ and ‘non-derogable’,

the Court confers Article 3 a special status by virtue of which it is capable of trumping extradition obligations. It is even questionable whether the depiction of the prohibition of torture as *jus cogens* would have much added value. In the *Al-Adsani* case the Court acknowledged that the prohibition of torture has achieved the status of a peremptory norm in international law, but continued that

> notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.[24]

In other words: the overriding power of *jus cogens* norms should not be exaggerated.[25] According to Article 53 of the Vienna Convention on the Law of Treaties, **(p. 155)** peremptory norms take precedence over all other international agreements lacking such status, and void any—prior and subsequent—treaties which are in violation of the *jus cogens* norm. The provision demonstrates that the legal effects of the qualification are limited and rather crude. It would be somewhat far-fetched to assume that states enter into extradition treaties in order to expose fugitives to torture.[26] One could, however, also argue that Article 53 of the Vienna Convention can have a more modest and subtle effect by absolving a state from performing a treaty obligation which is contrary to *jus cogens*. In that case, the wholesale nullity of the treaty is not in issue.[27]

What is important is that the ECtHR apparently makes a distinction within the realm of human rights, identifying norms with superior status which should take precedence over extradition obligations, while other rights may not have this overriding power. In this sense, the Court acknowledges an internal hierarchy within the corpus of human rights.

It is interesting that both the Inter-American Commission and the Inter-American Court of Human Rights have qualified fundamental human rights as *jus cogens*. Both human rights bodies have concluded that the principle of non-discrimination belongs to the realm of *jus cogens*.[28] The Inter-American Commission has pondered on the natural law roots of *jus cogens* and has explicitly included torture or other cruel, inhuman, or degrading treatment or punishment in the list of ‘commonly cited examples of rules of customary law that have attained the status of *jus cogens* norms’.[29] Nevertheless, as

already indicated in the Introduction, these opinions have been rendered outside the context of extradition. They mainly serve to confirm that the superior status of some human rights, including the prohibition of torture, surpasses the geographical scope of Europe.

3.2 Domestic courts and *jus cogens*

Domestic courts have equally been reluctant to accept the claim that extradition or expulsion should yield to the prohibition on torture, because of the *jus cogens* character of the latter. The Hong Kong High Court denied that the norm of non-refoulement had acquired the status of *jus cogens,*[30] while the New Zealand Supreme Court held more specifically that the prohibition on refoulement to **(p. 156)** torture had not obtained the status of a peremptory norm.[31] In *Suresh v Canada,* the Canadian Supreme Court acknowledged that there were compelling reasons for considering the prohibition on torture as a peremptory norm, but it did not pursue the investigation as it was not decisive for the outcome.[32]

Nonetheless, domestic courts have prohibited extradition or expulsion in case of substantial risks of torture, usually referring to the relevant provisions in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) (Article 3), the European Convention on Human Rights, the Charter of Fundamental Rights and Freedoms (Article 7, paragraph 2), or the International Covenant on Civil and Political Rights.[33] These human rights treaties do not need to have been formally incorporated in the domestic legal order to take precedence over extradition obligations. The Czech Constitutional Court deduced the priority of ‘the right to be protected against torture’ over an international obligation to extradite from the general ‘respect and protection of fundamental rights which are defining elements of the substantively understood state governed by the rule of law’.[34] In a similar vein, the New Zealand Supreme Court in the *Zaoui* case held that Article 3 of the CAT and Articles 6 and 7 of the ICCPR precluded refoulement where there were substantial grounds for believing that the person faced a real risk of being subjected to torture or to the arbitrary deprivation of life.[35]

Although domestic courts have followed the European Court of Human Rights and human rights monitoring bodies in their principled stance to give priority to the protection against torture over extradition obligations, they have sometimes been inclined to restrict the scope of that protection. In particular, courts have adapted (and downplayed) the concept of ‘inhuman

and degrading treatment' and balanced it against the 'beneficial purpose of extradition'. Apparently, those courts exploit the very wording of the European Court that 'ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3'.[36] Accordingly, in the case of *Bary and Al Fawwaz,* who faced surrender to the United States on the suspicion of having been involved in the synchronized bombings of **(p. 157)** the US embassies in Nairobi and Dar Es Salaam, the court quoted with approval Lord Hoffmann who had expressed in the *Wellington* case his opinion that:

> The desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the 'minimum level of severity' which would make it inhuman and degrading. Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account.

Following this track, the court concluded that:

> Neither SAMs (Special Administrative Measures) or life without parole cross the article 3 threshold in the present case. Although near to the borderline the prison conditions at ADX Florence, although very harsh do not amount to inhuman or degrading treatment either on their own or in combination with SAMs and in the context of a whole life sentence. Whether the high article 3 threshold for inhuman or degrading treatment is crossed depends on the facts of the particular case. There is no common standard for what does or does not amount to inhuman or degrading treatment throughout the many different countries in the world. The importance of maintaining extradition in a case where the fugitive would not otherwise be tried is an important factor in identifying the threshold in the present case.[37]

Such cases emphatically demonstrate that the supremacy of human rights over extradition obligations may be an empty shell if courts harbour an overly rigid interpretation of what torture or inhuman and degrading treatment exactly entails.

4. The hierarchical relationship between extradition and other human rights

(Potential) violations of other human rights, which do not necessarily enjoy the same elevated status as the prohibition of torture, may also preclude extradition. As explained in the introduction, such violations may come to the fore both during the extradition proceedings in the requested state and —prospectively—within the context of criminal proceedings in the requesting state. The former have mainly been addressed by the ECtHR, while the latter have also emerged in domestic case law.

4.1 Case law of the European Court of Human Rights

Theoretically, the extradition proceedings in the requested state themselves might be in contravention of accepted standards of a fair trial, as incorporated in Article 6 of the ECHR. However, the European Court of Human Rights has, on several occasions, held that:

> **(p. 158)** The words ‘determination…of a criminal charge’ in Article 6 § 1 of the Convention relate to the full process of examining an individual's guilt or innocence in respect of a criminal offence, and not merely, as is the case in extradition proceedings, to the process of determining whether or not a person may be extradited to a foreign country.[38]

As detention prior to extradition implies by definition a deprivation of liberty, the ECtHR has been seized to assess the compatibility of extradition detention with the guarantees of Article 5 of the ECHR. For one thing, the detention preceding extradition proceedings may be unduly protracted, infringing the right to be tried by a court of law within a reasonable time or to be set free pending proceedings (Article 5(3) of the ECHR). Obviously, the evil of protracted detentions should be balanced against countervailing factors, like national security interests. In the case of *Chahal v United Kingdom,* the European Court felt that:

> Mr. Chahal has undoubtedly been detained for a length of time which is bound to give rise to serious concern. However, in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5 § 1 (f).[39]

Far more serious situations emerge if it appears that the detention lacks a lawful title, if the detainee is kept in the dark about the charges against him or her, and if, contrary to Article 5, he or she is bereft of access to a court of law which should assess the lawfulness of his or her detention. In the case of *Garabayev v Russia,* the applicant challenged the legality of his arrest and subsequent detention, as he could simply not be extradited in view of his Russian nationality.[40] This information had already been available to the competent authorities at the time of the applicant's arrest and the European Court therefore considered that 'the procedural flaw in the order authorizing the applicant's detention was so fundamental as to render it arbitrary and ex facie invalid'. In the above-mentioned case of *Chahal,* the UK authorities invoked national security measures as an excuse for depriving the fugitive of the most essential rights. He was not entitled to legal representation before an advisory panel, he was only given an outline of the grounds for the notice of intention to deport, the panel had no power of decision and its advice to the Home Secretary was not binding, nor was it disclosed. Although the Court displayed some understanding for the national authorities' predicament, it held that 'neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr. Chahal before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5, § 4'.[41] The most essential aspect of Article 5 of the ECHR is that those who have been deprived of their liberty should have access to a court which should test the legality of the detention. In the case of *Dzhurayev v* **(p. 159)** *Russia,* the European Court concluded that 'throughout the term of the applicant's detention pending a decision on his extradition he did not have at his disposal any procedure for a judicial review of its lawfulness' and held that therefore there had been a violation of Article 5, paragraph 4 of the Convention.[42]

For the purpose of the present chapter it is more relevant to investigate which rights of the fugitive may be jeopardized in the *requesting* state and which level of infringement is required for the denial of extradition (or expulsion).

The requirements in respect of 'seriousness' are more demanding than in the case of torture or inhuman and degrading treatment. The language of the European Court of Human Rights in *Soering* is remarkably cautious: '*it cannot be ruled* out that an issue might *exceptionally* arise under Article 6 of the Convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a *flagrant* denial of a fair trial

in the requesting country'.[43] In the case of *Al-Moayad* the Court took the opportunity to elaborate on the *Soering* standard:

> A flagrant denial of a fair trial, and thereby a denial of justice, undoubtedly occurs where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release…Likewise, a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial within the meaning of Article 6 §§ 1 and 3 c.[44]

The *Al-Moayad* case confirms that the requirements for a prospective violation of fair trial rights which would impede extradition are quite demanding. The European Court has until now never accepted such a claim.

4.2 Domestic courts

The UK House of Lords has corroborated that the applicant has to satisfy a high threshold if he or she invokes a provision of the ECHR other than Article 3 as ground for resisting expulsion or extradition.[45] In the case under scrutiny, the applicants, who had submitted that the freedom of religion, as guaranteed by Article 9 of the Convention, would be impaired after deportation, did not succeed in convincing the Lords that they would face a flagrant, gross, or fundamental breach of Article 9 such as to amount to a denial or nullification of the rights conferred by it.[46]

And even if the courts are inclined to bar an extradition or expulsion on the grounds that the fugitive faces a real risk of a flagrant denial of a fair trial, they **(p. 160)** emphasize the preceding violation of Article 3 which calibrates the poor quality of the trial rather than the defects of the trial process itself. In an exemplary case, a UK Court of Appeal observed that 'the use of evidence obtained by torture is prohibited in Convention law not just because that will make the trial unfair, but also and more particularly because of the connection of the issue with article 3, a fundamental, unconditional and non-derogable prohibition that stands at the centre of the Convention protections'. The court censured the Special Immigration Appeals Commission (SIAC) for being 'wrong not to recognize this crucial difference

between breaches of article 6 on this ground and breaches of article 6 based simply on defects in the trial process or in the composition of the court'.[47]

In other words: deficiencies in the fairness of the criminal proceedings boil down to and are wrapped in the cloth of a violation of Article 3 of the ECHR.

Occasionally, domestic courts are seized to address the issue of whether the formal removal which is inherent to extradition would violate the fugitive's right to family life in the sense of Article 8 of the ECHR. In a case before the Constitutional Court of the Czech Republic, the applicant indeed relied on this provision, stating that he had a wife and son in the Czech Republic and arguing that his family life would be shattered by the extradition.[48] As the court had prohibited the extradition in view of the risk of torture, it was not necessary to consider the interference with other rights.

This decision is not surprising: the need to address the family life of the fugitive is obviated by any refusal to grant extradition, while the claim of respect for family life on its own might not be sufficient to sustain a refusal, as extradition by definition often entails an infringement of family life which would meet the permissible grounds as mentioned in section 2 of Article 8.

5. On 'presumed confidence'

The postulated primacy of the protection against torture over extradition obligations suggests that the requested state should have the power to investigate the human rights record of the requesting state in general and to check in particular the risk of the fugitive being exposed to human rights violations. This, however, has been a matter of controversy, both in common law and in civil law systems, at least as far as the competence of the courts was concerned. This section addresses mainly the United States and the Dutch legal practice. These jurisdictions have been selected because they have explicitly founded the incompetence of the judiciary to inquire into the human rights situation in the requesting state on the separation of powers doctrine.[49] However, as will transpire in section 5.3, other jurisdictions have followed suit. **(p. 161)**

5.1 United States legal practice

In US case law the so-called 'rule of non-inquiry' was explicitly put in as the key of the separation of powers doctrine. Deference to the executive's privilege to conduct international relations precluded the courts from inquiring into the administration of justice in another state. By implication,

the courts could not adjudicate on the constitutionality of an executive's decision to surrender a person to that state.[50] However, in the leading case of *Gallina v Fraser,* the Court of Appeals submitted that the 'rule of non-inquiry' might yield under certain egregious circumstances. In Italy the applicant had been convicted *in absentia* for armed robbery and would face immediate imprisonment after repatriation. The court first affirmed the general rule by holding that 'the authority that does exist points clearly to the proposition that the conditions under which a fugitive is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the government'. Next, however, the court alluded to an exception: 'We can imagine situations where the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency as to require re-examination of the principle.'[51] The court's position was remarkable, as the bilateral treaty with Italy did not contain any exception, allowing refusal of extradition in case of verdicts which had been rendered *in absentia*. The court thus left the framework of the extradition treaty and acknowledged the priority of human rights.

The *Gallina* dictum anticipated and corresponded with US courts' inclination to censure US officials' colluding with foreign authorities to curtail constitutional guarantees. In a mirror situation where a criminal court sat in judgment over a fugitive whose custody had been obtained by irregular means and with the involvement of US officials, the court held that 'we view due process as now requiring a court to divest itself of jurisdiction over the person of the defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights'.[52] While the court in this case admitted that a state could incur state responsibility for extra-territorial human rights violations in which its officials had been involved, the threshold as to the heinousness of such activities was extremely high. In the well-known *Alvarez-Machain* case, in which the involvement of US Drug Enforcement Administration agents in the abduction of the suspect was both obvious and notorious, the Supreme Court held that the forcible abduction did not preclude the suspect from standing trial in a US court.[53] Apparently, the agents' conduct did not amount to a 'deliberate, unnecessary and unreasonable invasion of the suspect's constitutional rights'. This standard, which was defined in the *Toscanino* case, expresses a laudable and **(p. 162)** principled stance, but has in actual practice never resulted in the court declining jurisdiction.

5.2 Dutch legal practice

In Dutch extradition law, the ‘rule of non-inquiry’ also features in the guise of the ‘principle of confidence’. It dictates that the judiciary is not to question the once expressed confidence of the Dutch government in the administration of justice in a foreign state, solidified in an extradition treaty, by checking whether human rights are sufficiently respected in that state.[54] The qualification ‘principle of confidence’ is slightly misleading, if not a misnomer, as the confidence is by no means absolute. For one thing, courts have attached importance to the requesting state having ratified a human rights convention, thus flouting the mere existence of an extradition treaty as a sufficient and exclusive guarantee.[55] And even in that case, an initial confidence could be betrayed if

> it appeared that the requested person, after extradition, would be exposed to such a risk of a flagrant breach of one of his rights, protected by Article 6 ECHR, that the obligation on the part of the Netherlands, resulting from Article 1 ECHR, to guarantee these rights would impede the fulfillment of the obligation which ensues from the extradition treaty.[56]

Secondly, a formal admittance of the extradition by the courts does not preclude the executive from refusing the request, if it harbours doubts about the requesting state's performance in the realm of human rights.[57] In other words, the principle of confidence serves as a presumption which can be refuted by both the executive and, exceptionally, the courts. Like the ‘rule of non-inquiry’, the principle essentially reflects the doctrine of separation of powers and is sustained by more practical considerations as well. The executive, which is commissioned by Article 90 of the Dutch Constitution to promote the development of the international legal order and would be in a better position to assess the human rights situation in the requesting state, can negotiate with its foreign counterpart if necessary and may obtain assurances that the human rights of the fugitive will be respected after the extradition. This topic will be discussed in the next section.

The ‘division of labour’ between the courts and the executive, predicated on the latter's superior capacities to prevent embarrassing treaty conflicts, explains the Dutch courts’ standing practice to refuse extradition whenever a violation of human rights can no longer be redressed. Such a situation would, for instance, **(p. 163)** occur if, due to lapse of time, criminal proceedings in the requesting state would inevitably exceed the ‘reasonable time’

limits of Article 6 of the ECHR.[58] Likewise, the Dutch courts are inclined to deny extradition if the requested person is to stand trial for an offence in respect of which he or she has on previous occasions suffered torture.[59] By implication, if the requested person still has a ‘local remedy’ in the sense of Article 13 of the ECHR, the courts decline to refuse extradition categorically.[60]

The Dutch courts are recovering some of the ground within the framework of the two-pronged extradition procedure, but are still quite careful not to trespass on the privileges of the executive.

5.3 Other jurisdictions

The principle of confidence has been invoked by domestic courts in other states as well. The Czech Constitutional Court, though acknowledging that grave infringements of the fugitive's due process rights or a genuine threat of him or her being tortured would preclude surrender, added that ‘such is not the case for the European arrest warrant’.[61] The Constitutional Court reasoned that a citizen's rights would not be ‘significantly affected due to the fact that his criminal matter will be decided in another Member State of the (European) Union, as each EU Member State is bound by a standard of human rights protection, which is equivalent to the standard required in the Czech Republic’.[62] Slightly paradoxically, the court submitted that the requested person could lodge a complaint with the Constitutional Court, seeking suspension or even prohibition of his or her surrender, in case of a real risk of human rights violations, as the Framework Decision on the European Arrest Warrant itself recognized the subordination of the arrest warrant to human rights.[63] A divisional court in the United Kingdom, confronted with a challenge of a European Arrest Warrant which had been issued by Poland, opined that ‘if it was assumed that a fellow European country would from time to time be found to be in breach of Article 6 of the European Convention on Human Rights, that was not giving full faith and credence to each other's legal and judicial systems’.[64]

Moreover, the procedural translation of the principle of confidence into a ‘division of competence’ between the executive and the courts, assigning the latter only a modest place, is coined by other jurisdictions as well. A Canadian court, for instance, held that ‘the extradition judge has no jurisdiction to inquire into Canada's obligations under an extradition treaty or to examine whether the extradition **(p. 164)** requirements are fulfilled’.[65] In a similar vein, the South African Constitutional Court held that the President's

discretion to extradite a person was essentially a foreign policy decision which limited the review powers of the courts.[66] And the Court of Appeal in New Zealand made it equally clear that, according to New Zealand's domestic legislation, the Minister alone had the discretionary power to refuse surrender on humanitarian grounds.[67]

The deeper rational for such two-pronged extradition procedures, which apparently are universally applied, is that conflicts between treaty obligations might best be outsourced to the executive, which is responsible for foreign relations and might be able to negotiate with its counterparts in order to prevent mischief. The dark side of the construction is that principled questions of hierarchy are sacrificed to expediency and the courts are deprived of the possibility of firmly upholding the priority of human rights in risky situations which do not allow for gambling.

6. Assurances

States frequently seek assurances from the requesting state that the human rights of the fugitive will be respected. This practice reveals the acknowledgement on the part of the requested state of a slumbering conflict between extradition and human rights obligations and a concomitant recognition of rendering priority to human rights considerations. The obtaining of assurances serves to reassure the requested state that the conflict will not materialize, and can thus be qualified as a prime example of ‘conflict avoidance’.

The pertinent question is, of course, how much weight should be attached to such assurances, in view of the consideration that any qualms about the extradition decision are inspired by the doubtful reputation of the requesting state in the first place. The following survey of international and domestic case law serves to demonstrate that the cogency of assurances is partially dependent on the nature of the potential violations involved. A distinction is made between imminent capital punishment and risk of torture, on the basis of the hypothesis that the promise that capital punishment will not be executed in practice is easy to verify, while similar claims that the authorities will refrain from torture should not always be taken at face value. After all, torture is shrouded in a veil of ominous secrecy and rarely openly admitted.
(p. 165)

6.1 International jurisprudence

In respect of threats of torture, the European Court of Human Rights has attached importance to previous performance in its assessment of the value of assurances. In the case of *Al-Moayad v Germany,* the latter had obtained assurances from the requesting state—the United States—that the fugitive would not be transferred to one of the detention facilities outside the United States in respect of which interrogation methods at variance with the standards of Article 3 had been reported. In combination with the observation that it had not been Germany's experience that assurances given to them in the course of proceedings concerning extradition to the United States had not been respected in practice or that the suspect was subsequently ill-treated in US custody, the court held that ‘the assurance obtained by the German Government was such as to avert the risk of the applicant's being subjected to interrogation methods contrary to Article 3 following his extradition’.[68]

One might object that the Court's decision reveals an overly timid approach, as it only demands guarantees in respect of one particular person, while apparently condoning dubious interrogation methods. One should not forget, however, that the ECtHR has no competence to assess the human rights situation in a state which is not a party to the Convention. It can only censure contracting parties’ complicity in third states’ violations of human rights.[69]

In the case of *Saadi v Italy,* the Court reached a diametrical opposite conclusion from the one reached in *Al-Moayad*. In response to queries of the Italian authorities on the prospective fate of the fugitive, the Tunisian Minister of Foreign Affairs had observed that Tunisian law guaranteed prisoner's rights and that Tunisia had acceded to the relevant international treaties and conventions. The Court countered that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle were not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the instant case, reliable sources had reported practices manifestly contrary to the principles of the Convention. Furthermore, so the Court continued, even if the Tunisian authorities had given the diplomatic assurances, that would not have absolved the instant court from the obligation to examine whether such assurances provided a sufficient guarantee that Saadi would be protected against the risk of ill-treatment.[70]

The availability of monitoring mechanisms which might enable the authorities of the requested state to verify whether their colleagues live up to their promises is an important parameter, sustaining the value of assurances. In the case of *Agiza v Sweden,* the Committee against Torture (CAT) found that 'the procurement of diplomatic assurances, which, moreover, provided no mechanism for **(p. 166)** their enforcement, did not suffice to protect against the manifest risk of torture'.[71] Similarly, the European Court of Human Rights opined in the case of *Ryabikin v Russia* that

> even accepting that such assurances were given, the Court notes that the reports cited above noted that the authorities of Turkmenistan [the requesting state] systematically refused access by international observers to the country, and in particular to places of detention. In such circumstances the Court is bound to question the value of the assurances that the applicant would not be subjected to torture, given that there appears to be no objective means of monitoring their fulfillment.[72]

Although the obtaining of assurances in the context of fair trial and prevention of torture is a delicate affair, its relevance within the realm of capital punishment should not be underestimated. The UN Human Rights Committee in particular has made a significant volte face in acknowledging that the *failure* to ask for assurances that the death sentence will not be imposed triggers *eo ipso* facto the responsibility of the requested state for violation of the Covenant. In the 1990s, the Human Rights Committee still held that the obligations arising under Article 6(1) of the ICCPR did not require a state to refuse extradition without assurances that the death penalty would not be imposed, adding, however, that if the decision to extradite without assurances had been taken arbitrarily or summarily, this would have violated the requested state's obligations under Article 6.[73] In *Judge v Canada,* the Committee changed its course. It noticed the changes in international opinion on the moral and legal admissibility of capital punishment and observed that the Covenant should be interpreted as a living instrument, taking those developments into account.[74] The Committee continued that countries which had abolished the death penalty were under an obligation not to expose a person to the real risk of its application. As Canada had abolished the death penalty, that state party violated the author's right to life under Article 6, paragraph 1, by deporting him to the United States, where he was under sentence of death, *without ensuring that the death penalty would not be carried out*.[75]

6.2 Domestic courts

Domestic courts have subscribed to the view that, as far as assurances are concerned, a distinction should be made between torture and capital punishment. In *Suresh v Canada,* the Canadian Supreme Court explicitly addressed the point by referring to

> the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of **(p. 167)** its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.[76]

It stands to logic that domestic courts are rather demanding in their assessments of the quality of assurances that the fugitive will not be exposed to torture. A German court refused the extradition of Mr Kaplan, the leader of a banned Islamist fundamentalist group to Turkey, arguing that diplomatic assurances would not alleviate the German concerns:

> Such formal guarantees in an extradition proceeding can only provide sufficient protection in favour of the prosecuted person if their correct implementation through the institutions of the requesting state—in this case the independent Turkish judiciary —can reliably be expected. This is not the case here.[77]

In respect of capital punishment, some domestic courts had already anticipated the UN Human Rights Committee's decision in *Judge v Canada*. In the case of *United States v Burns,* the Canadian Supreme Court held that the government must seek assurances, in all but exceptional cases, that the death penalty would not be applied prior to extraditing an individual to a state where he or she faces capital punishment.[78]

Other domestic courts have followed suit by deciding that the surrender of persons to the authorities of the requesting state without first obtaining an undertaking from the government that the death sentence would not be imposed on them, or, if imposed, would not be executed, violated their fundamental human rights.[79]

An interesting case in this context is *Short v The Netherlands*.[80] The Dutch Supreme Court held that the surrender of a US serviceman to the US NATO Forces under the Status of Forces Agreement (SOFA) would amount to a tort towards the fugitive, if the requesting party did not offer guarantees that the death penalty would not be imposed. As the SOFA did not contain an exception-clause allowing the refusal of surrender in case of imminent capital punishment, the Dutch court was confronted with a conflict of treaty obligations. The Supreme Court invoked the Sixth Protocol to the ECHR by virtue of which contracting parties are obliged to refrain from imposing capital punishment, and thus explicitly gave priority to the human rights instrument. Short was eventually surrendered after the United States had offered sufficient guarantees.

Such decisions reveal that domestic courts take human rights seriously, by investigating whether assurances are indeed trustworthy. **(p. 168)**

7. Local remedies

An issue which is related to the one discussed in the previous section concerns the availability of local remedies against human rights violations in the requesting state. As will be demonstrated below, both international human rights organs and domestic courts seem to be more inclined to allow extradition if they are informed that the requested person can obtain redress for a wrong. The rationale appears to be that a violation of human rights has not fully materialized as long as the aggrieved person still has a legal remedy.

7.1 International jurisprudence

International human rights courts and bodies have confirmed that the availability of a local remedy against human rights violations in the requesting state may relieve the requested state from responsibility under human rights conventions, if the latter decides to surrender the fugitive. In this way, the UN Human Rights Committee has denied that extradition to the United States, where the requested person faced the imposition of a life-long sentence, would amount to inhuman and degrading treatment in the sense of Article 7 of the Covenant, if the person could still appeal the verdict:

> As to whether the State party's extradition of the author to serve a sentence of life imprisonment without possibility of early release violates articles 7 and 10 of the Covenant, the Committee observes,…that the author's conviction

> and sentence are not yet final, pending the outcome of the resentencing process which would open the possibility to appeal against the initial conviction itself. Since conviction and sentence have not yet become final, it is premature for the Committee to decide, on the basis of hypothetical facts, whether such a situation gave rise to the State party's responsibility under the Covenant.[81]

7.2 Domestic courts

Domestic courts have followed the international human rights bodies in attaching importance to the question of whether the fugitive might find proper legal redress for his or her impaired rights. This practice both divulges a recognition that extradition obligations should be subject to human rights considerations and serves to corroborate the confidence in the requesting state's administration of justice. Both aspects are nicely illustrated in a decision of the Dutch Supreme Court, which held that:

> In cases in which both the requesting and the requested State are parties to the ECHR, the confidence that the requesting state will respect the provisions under this convention implies that it should be taken for granted that the requested person, in case of a violation of any right allotted by the Convention, will have, after being extradited, an effective local remedy in the sense of Article 13 ECHR before a court of law in that state. It implies that the contractual obligation to extradite should only yield to the obligation imposed on **(p. 169)** the Netherlands by Article 1 ECHR to guarantee the rights of the Convention, if (a) the requested person appears to be exposed by his extradition to the risk of a flagrant infringement of his rights to enjoy a fair trial, and (b) it transpires, on the basis of a sufficiently substantiated defence, that he will not have the benefits of local remedy to repair such an infringement.[82]

In a similar vein, a Divisional Court of the United Kingdom held that the extradition to the United States of two men suspected of involvement in terrorist activities did not constitute a breach of either man's rights under Article 3 of the ECHR in respect of the likely conditions of their detention in prison pending trial and post-conviction in the United States, one of the considerations being that ‘there was access to the US courts if the prison authorities acted unlawfully’.[83]

The conviction of the courts deciding on the extradition request that the requesting state will indeed offer appropriate remedies against any injustice is fuelled by the confidence in their counterparts' administration of justice. In the case of *Gomes v Trinidad and Tobago,* the applicants argued that their extradition would be unjust or oppressive because of undue delays of the proceedings. The UK House of Lords held that:

> Trinidad and Tobago was to be assumed to have the necessary safeguards against an unjust trial,…even in countries where extradition arrangements were a little more ad hoc, the presumption should be that justice would be done despite the passage of time and that the burden should be on the accused to establish the contrary.[84]

The final case demonstrates that the likelihood of local remedies being available is indeed strongly based on the presumption of confidence, as discussed in section 4.

8. The question of evidence

One of the most difficult issues of the proper relationship between extradition and human rights—in view of the inherent uncertainty of human rights violations and the political sensitivities involved—concerns the evidence which should be adduced to tip the balance in favour of human rights considerations. This section contains a survey of relevant standards which have been developed in international case law and in some domestic courts' decisions.

8.1 International jurisprudence

As already indicated in the introduction to this chapter, the European Court of Human Rights set the benchmark in *Soering* by holding that the requested state **(p. 170)** would incur responsibility for breach of the Convention if that state would 'knowingly surrender a fugitive to another State where there were *substantial* grounds for believing that he would be in danger of being subjected to torture'.[85]

Elaborating on the *Soering* standard, the UN Committee Against Torture has clarified that there must be *specific* reasons for believing that the person concerned is *personally* in danger of being subjected to torture. The CAT elucidated its opinion by adding that:

> The existence in the requesting State of a consistent pattern of gross, flagrant or mass violations of human rights is not of itself a sufficient reason, while, conversely, the absence of such a pattern does not mean that a person is not in danger of being subjected to torture in his or her specific case.[86]

The existence of a real risk must be decided in light of the information that was known, or ought to have been known, to the state's authorities at the time of the extradition, and does not require proof of actual torture having subsequently occurred, although information as to subsequent events is relevant to the assessment of initial risk.[87]

Nonetheless, the ECtHR is prepared to take into account that the applicant belongs to a particularly vulnerable (political) group and takes a high profile position within that group.[88] Any personal activities or features of the applicant within that group, making him or her a specific target of hatred, may bolster the opinion that he or she would run a substantial risk of treatment contrary to Article 3.[89]

The threshold may be high, but the standard of proof should be applied consistently. The ECtHR does not allow any bargaining, in the sense that the standard can be conveniently lowered whenever this would serve the interests of criminal policy. Human rights should thus not be sacrificed to political expediency. In the very principled decision of *Saadi v Italy,* the Court held that

> the argument on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of ‘risk’ and ‘dangerousness’ in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject on return. For that reason it would be incorrect to require a higher standard **(p. 171)** of proof, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a risk.[90]

The risk of torture need not necessarily derive from public officials themselves. Article 3 of the Convention also applies where the danger emanates from non-state actors.[91] Obviously, in those cases the assessment of risk should be geared to the personal circumstances of the fugitive as well. It must be shown that 'the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'. A general situation of violence (in Colombia) did not entail, in itself, a violation of Article 3.[92]

In respect of possible violations of the right to a fair trial, provided for in Article 6 of the ECHR and Article 14 of the ICCPR, courts and human rights bodies generally apply similar standards of proof, demanding from applicants that they adduce ample and concrete evidence for their allegations. In *Cox v Canada,* the UN Human Rights Committee requested the complainant to substantiate that his rights to a fair trial were likely to be violated, and that there would not be a genuine opportunity to challenge such violations in the courts of the country concerned.[93] The evidence must be substantial and must reveal a risk of blatant violations of fair trial rights.

Apparently, the threshold is rather high and the onus of proof on the part of the complainant rather demanding.

8.2 Domestic courts

The *Soering* standard of 'substantial grounds' has also served as a point of reference for domestic courts assessing the likelihood that the fugitive would face torture or inhuman and degrading treatment. In the United Kingdom, courts have explicitly endorsed this standard, censuring applicants for lowering the standard to 'on the balance of probabilities'.[94] Nevertheless, the erroneous reference to the 'balance of probabilities' test was of no consequence if the district judge had applied his mind to the requisite test (of 'substantial grounds'), concluding that 'he did not believe that there was a real risk of violence at the hands of prison officers or of bad faith or abuse of process'.[95]

(p. 172) That the review—in the context of extradition proceedings—of the existence of a danger that the person will be subjected to inhuman treatment is indeed very demanding was confirmed by the Constitutional Court of Slovenia.[96] The review should inquire whether the subjective fear is so objectively concretized that the person is in fact threatened, and should

include an assessment of the general situation in the requesting state as well.[97]

In other respects, domestic courts have been guided by the case law of the international human rights organs. In the case of *Scattergood v Attorney General,* the Supreme Court of Cyprus has corroborated the holding of the ECtHR that extradition should equally be refused if the threat of violence does not emanate from the state, but from non-state actors which the state is apparently unable to control.[98]

Obviously, the onus of proof for the applicant is considerably relaxed if he succeeds in adducing evidence that he has been tortured or maltreated on previous occasions, especially if this has occurred in respect of the same offence for which his extradition is sought. In the Netherlands, such evidence is even capable of thwarting the nearly sacrosanct division of competence between the courts and the executive, in that the courts are allowed to refuse the extradition forthwith.[99]

This admittedly short survey of national case law illustrates that domestic courts may not deviate very much from the standards as developed by international human rights organs.

9. Some final reflections

Conflicts between extradition obligations and obligations stemming from human rights treaties emerge whenever the requested person, after being surrendered, faces a real risk that his or her rights will be impaired in the requesting state. Moreover, the fugitive's right not to be arbitrarily deprived of his or her freedom and his or her right to family life may be jeopardized by the very extradition procedures in the requested state.

The above analysis reveals that human rights do not as a matter of principle prevail over extradition obligations. Some extradition treaties provide that the human rights of the requested person should be taken into account and that extradition should even be refused if the protection of those rights is not properly guaranteed. At first sight, such clauses may appear to resolve the conflict and even evince an acknowledgement of the supremacy of human rights. However, these clauses do not clarify which human rights should prevail or what level of infringement is required. Nor do they indicate the standard of probability which is required to tip the balance in favour of human rights. Furthermore, most extradition treaties **(p. 173)** do not contain

such human rights exceptions, as they question the confidence on which mutual extradition relations are predicated.

Both international human rights courts and domestic courts *do* agree, however, that extradition obligations should yield if there is a substantial risk that the requested person will be tortured or will face inhuman or degrading treatment in the requesting state. The hierarchical supremacy of the prohibition on torture over extradition obligations is not explicitly buttressed by a reference to its *jus cogens* character, but its special status within the realm of human rights as an absolute right, allowing no derogation, is widely acknowledged. Beyond the scope of torture, international human rights courts and monitoring bodies are slightly more inclined than domestic courts to find that the (imminent) violation of other rights, like the right to family life and the right to a fair trial, should preclude extradition. This should come as no surprise. The adequate protection of human rights is the prime concern of international human rights organs; they are less interested in the question of whether the states parties' observance of human rights might interfere with the latter's other obligations. Domestic courts, on the other hand, cannot afford the luxury of ignoring the state's other responsibilities, because, in case of conflict, a magnanimous preference for human rights implies that the state will default on its extradition obligations.

The emphasis on protection against torture and the right to a fair trial within the context of extradition proceedings is not difficult to understand. Extradition by definition serves to assist states in the enforcement of criminal law. A fair trial and a decent detention regime are the litmus test for a criminal law system, and serious defects in these respects will naturally raise the concerns of states which are called upon to contribute to the enforcement of criminal law in the requesting state.

As states have an obvious interest in maintaining smooth relations in the realm of international cooperation in criminal matters, domestic courts are inclined to avoid conflicts between treaty obligations as much as possible. It has been emphasized several times that the specific legal context of extradition creates ample room for the application of such 'avoidance techniques'. The consideration that a violation of human rights is usually prospective and therefore uncertain fuels the hope that it will eventually not materialize and that a conflict can be avoided.

As has been discussed in section 5, presumed confidence in the quality of justice meted out by the requesting state is still a mighty stronghold behind which states can conveniently hide themselves. This confidence is invoked as

a pretext for cursory investigations into allegations that the requesting state does not observe human rights.

The ‘principle of confidence’ and the ‘rule of non-inquiry’ are highly dubious legal constructions, especially where they prevent the judiciary from checking whether this confidence is warranted. The sheer occurrence of serious violations of human rights after surrender proves that such confidence can never be absolute. The *Soering* decision, in combination with the right to an effective legal remedy, as expressed in Article 13 of the ECHR, dictate that the requested person should have the possibility to refute the presumed confidence before a court of law.

(p. 174) Other ‘techniques of avoidance’ are more subtle and sophisticated. The requested state may seek to obtain assurances that the human rights of the fugitive will be observed (section 6), or that, if his or her rights are violated, he or she will have a proper legal remedy (section 7). Furthermore, courts may raise a high threshold, requiring the claimant to provide solid evidence that he or she runs a substantial risk of being tortured or maltreated (section 8).

Whether such ‘avoidance techniques’ are warranted in view of the postulated supremacy of the prohibition of torture is, of course, dependent on the particular circumstances of each case and their application. If assurances can be verified, or if the fugitive indeed has access to the courts which can remedy violation of his or her rights, the requested state may be justified in granting extradition. On the other hand, an ‘effective legal remedy’ in the requesting state may be a poor consolation if the fugitive is exposed to torture or inhuman treatment after his or her surrender. Moreover, the onus of proof on the fugitive should not be so demanding and cumbersome as to render his or her chance of success in meeting the ‘substantial risk’ standard virtually non-existent.

One inevitable consequence of the widespread employment of avoidance techniques is that they reduce the practical relevance of the supremacy of human rights in general and the prohibition on torture in particular. If the ‘substantial risk’ threshold is hardly ever met, the hierarchical supremacy of the prohibition of torture will serve as a normative point of reference which sustains the application of avoidance techniques, but which will not be used to trump an extradition in actual practice. The preponderance and popularity of these techniques entails a certain risk, as they may obscure the fact that sometimes a risk of flagrant human rights violations is imminent and real.

In such cases, the conflict should be faced and cannot be redeemed by negotiations.

In view of alarming reports covering the harsh treatment of suspects of terrorism, international human rights bodies in general and the European Court of Human Rights in particular have tightened their grip over states parties. For one thing, the European Court has made short shrift of the ‘rule of non-inquiry’ by holding that the state party's responsibility to guarantee the fundamental rights of the fugitive inevitably requires an investigation into the substance of the allegations.[100] Secondly, the Court has confirmed that (diplomatic) assurances may be of questionable value, if they derive from states with a poor human rights record. Thirdly, the Court has decided that interim measures, suspending extradition or expulsion pending further inquiries into the risk of human rights violations, are binding on states parties.[101] Fourthly, the Court has rendered a broad definition of **(p. 175)** Article 3 by acknowledging that disproportionately long detention under appalling conditions may amount to ‘inhuman and degrading treatment’. And, finally, the Court has definitely relaxed the burden of evidence by recognizing that states may offer insufficient protection to persons who are exposed to threats emanating from non-state actors and by holding that the applicant's belonging to a dissident political group augments the risk of him or her being targeted.

Such findings serve as normative guidelines and should be internalized and applied by domestic courts which might, sometimes, be too inclined to assume that all conflicts can be avoided and that all is quiet on the other front.

Notes:

(1.) *Soering v United Kingdom* Series A No 161 (App no 14038) (1989).

(2.) Cf M Byers, ‘Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules’ (1997) 66 *Nordic Journal of International Law* 211, 235.

(3.) The responsibility of a state party to the European Convention on Human Rights which extradites or expels a person to another state where he runs a real risk of a flagrant violation of fundamental human rights is predicated on the states parties’ basic obligation to guarantee those rights within the confines of their sovereign power (ECHR, Art 1). By removing a person from their territory, states forsake such essential protection.

(4.) See Chapter 1 (Introduction).

(5.) See Chapter 7 (Geoff Gilbert).

(6.) Art 5 explicitly refers to detention, anticipating extradition:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:…(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(7.) The author has been able to identify only one case of the Inter-American Court of Human Rights (IACtHR) which explicitly dealt with the issue: IACtHR, 28 May 2010, *Resolución de la Corte Interamericana de Derechos Humanos de 28 de Mayo de 2010; Solicitud de Medidas Provisionales Presentada por la Comisión Interamericana de Derechos Humanos Respecto de la Republica del Perú; Asunto Wong Ho Wing.*

(8.) On this case law of the Inter-American Human Rights bodies, see D Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) AJIL 291, 313.

(9.) For more or less exhaustive accounts of the topic, see for instance J Dugard and C Van den Wyngaert, 'Reconciling Extradition with Human Rights' (1998) 92(1) AJIL 1, 87; C Van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' (1990) 39 ICLQ 757; G Gilbert, *Responding to International Crimes* (Martinus Nijhoff, Leiden 2006) 138–92; AHJ Swart, 'Human Rights and the Abolition of Traditional Principles' in A Eser and O Lagodny (eds), *Principles and Procedures for a new Transnational Criminal Law* (Freiburg im Bresgau, Max Planck Institut für auslandisches und internationales Strafrecht 1992) 505–35; and A Smeulers, *In staat van uitlevering* (PhD thesis, University of Maastricht 2003).

(10.) In *Chahal v United Kingdom,* (App No 22414/93) (1996), 23 EHRR 473, the European Court of Human Rights confirmed the application of *Soering* to deportation.

(11.) See especially W Kälin, *Das Prinzip des Non-Refoulement* (P Lang, Bern 1982) 166. See also, though more reluctant and nuanced, AHJ Swart, 'De Rechten van de mens in het uitleveringsrecht' (Human Rights in Extradition

Law) in *Volkenrechtelijke aspecten van het uitleveringsrecht* (Public International Law Aspects of Extradition Law), Preadviezen Nederlandse Vereniging voor Internationaal Recht (Preliminary Reports of the Dutch Society of International Law) no 85, Deventer 1982, 87, 107 and Van den Wyngaert (n 9, 1990), 762.

(12.) See authors in previous footnote. Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331.

(13.) Art 103 of the UN Charter: '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.'

(14.) Kälin (n 11) 166.

(15.) The *jus cogens* issue has been hotly debated in German academic circles, Vogler vigorously defending the point of view that extradition obligations should only yield to imminent inhuman treatment in the sense of Art 3 of the ECHR, in the case of trial in absentia and in the case of pending conviction on the basis of a retroactive law: T Vogler, *Auslieferungsrecht und Grundgesetz* (Duncker Humblot, Berlin 1970) 221–3. The International Criminal Tribunal for the former Yugoslavia (ICTY) has explicitly corroborated that the obligation to forestall the occurrence of torture, cruel, inhuman, or degrading treatment and the concomitant prohibition of exposing someone to such treatment is part of *jus cogens*: *Prosecutor v Furundžija,* Case No IT-95-17/1-T, Judgment, 10 December 1998, para 147.

(16.) The provision stipulates that 'when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'.

(17.) European Convention on Extradition, Strasbourg, 13 December 1957, CETS No 24, Art 3, s 2, stipulates that extradition shall not be granted 'if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of those reasons'.

Art 11 of the Convention provides:

If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out.

(18.) *Judge v Canada,* (829/1998) 5 August 2002, UN doc CCPR/C/78/D/829/1998, para 10.9.

(19.) Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Proceedings between Member States, OJ L 190/1, 18 July 2002.

(20.) *Soering v United Kingdom* (n 1) para 88. In respect of expulsion, this absolute prohibition has been recognized by the Court in the case of *Vilvarajah and others v United Kingdom,* (App No 45/1990/236/302-306) (1991), 14 EHRR 248, para 108.

(21.) *Ireland v United Kingdom,* (App No 5310/71) (1978), Series A no 25, para 163.

(22.) *Ahmed v Austria,* (App No 71/1995/577/663) 24 EHRR 278, para 41 and *Chahal v United Kingdom* (n 10) para 80.

(23.) *Einhorn v France,* (App No 71555/01) (2001), ECHR 2001-XI, para 31.

(24.) *Al-Adsani v United Kingdom,* (App No 35763/97) (2002), 34 EHRR 11, para 61. Some of the judges, however, fiercely disagreed with the majority's opinion. Judges Rozakis and Caflisch (joined by judges Wildhaber, Costa, Cabral Barreto, and Vajić), for instance, held that '[t]he acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of its actions'. Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by judges Wildhaber, Costa, Cabral Barreto, and Vajić, para 3.

(25.) See also D Shelton, 'Human Rights and the Hierarchy of International Law Sources and Norms' (2001) 65 Sask L Rev 301, 326, arguing that the reference to *jus cogens* by tribunals in most cases serves only a rhetorical purpose.

(26.) Cf Shelton ibid 328 arguing that '[t]hus, the "value added" of declaring torture to be a norm *jus cogens* would appear to be to void any treaties that two or more states might decide to enter into, foreseeing the commission or condoning of torture'.

(27.) See the Dissenting Opinion of Judges Rozakis and Caflisch in the *Al-Adsani* case (n 24) para 1: 'The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.'

(28.) *Juridical Condition and Rights of the Undocumented Migrants,* Advisory Opinion, IACtHR, Series A No 18 (2003), paras 47 and 100.

(29.) *Michael Domingues* (United States), Case 12.285, IACtHR, Report No 62/02, OEA/Ser.L/V/II.117, doc 1, rev1 (2003), para 49.

(30.) *C and others v Director of Immigration,* (2008) 2 HKC 165; ILDC 1119 (HK 2008), para 135, analysis by Firew Kebede Tiba.

(31.) *Attorney-General v Zaoui and Inspector-General of Intelligence and Security,* (2005) NZSC 38, ILDC 81 (NZ 2005), para 51, analysis by Claudia Geiringer. If one accepts that the prohibition of torture is a peremptory norm of international law, this finding is peculiar, as the prohibition encompasses the obligation not to 'expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture' (Art 3, s 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

(32.) *Suresh v Canada (Minister of Citizenship and Immigration) and Attorney General of Canada,* (2002) 1 SCR 3, ILDC 186 (CA 2002), paras 62–5, analysis by Gillian MacNeil.

(33.) The Czech Constitutional Court has even expressed the sweeping statement that in the event of a collision between obligations arising from human rights treaties and other international obligations, the protection of a human right would always prevail: *Recognition of a Sentence Imposed by a Thai Court, Constitutional Complaint,* 21 February 2007, I US 601/04; ILDC 990 (CZ 2007), analysis by Jan Kratochvil.

(34.) Constitutional Court of the Czech Republic, 15 April 2003, 'Danger of Torture', available at http://www.unhcr.org/refworld/docid/403a1884f.html (last accessed 3 October 2011).

(35.) *Attorney-General v Zaoui* (n 31) para 79.

(36.) *Vilvarajah and others v United Kingdom* (n 20) para 107.

(37.) *R (on the application of Bary) v Secretary of State for the Home Department,* [2009] WL 2392232.

(38.) *Mamatkulov and Askarov v Turkey,* (App Nos 46827/99 and 46951/99), ECHR 4 February 2005, RJD, 2005-I, para 82 and *Al-Moayad v Germany* (App No 35865/03), ECHR 20 February 2007, para 93 (not yet published).

(39.) *Chahal v United Kingdom* (n 10) para 123.

(40.) *Garabayev v Russia* (App No 38411/02) (2009) 49 EHRR 12. Domestic legislation bars the extradition of Russian nationals.

(41.) *Chahal v United Kingdom* (n 10) para 132.

(42.) *Dzhurayev v Russia* (App No 38124/07), ECHR 17 December 2009, para 63 (not yet published).

(43.) *Soering v United Kingdom* (n 1) para 113 (emphasis added).

(44.) *Al-Moayad v Germany* (n 38) para 101.

(45.) *Regina v Special Adjudicator ex p Ullah, Do v Secretary of State for the Home Department, Conjoined Appeal,* (2004) UKHL 26; ILDC 103 (UK 2004), with analysis by Roger O'Keefe, para 24.

(46.) Ibid para 70.

(47.) *OO (Jordan) v Secretary of State for the Home Department,* 9 April 2008, 2008 WL 833661.

(48.) Constitutional Court of the Czech Republic, 15 April 2003 (n 34).

(49.) See, on United States' legal practice and opinions, L Andersen, 'Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception' Transnational Aspects of Criminal Procedure (1983) Michigan YBILS 153, 163–4; on Dutch legal practice, AHJ

Swart, *Nederlands Uitleveringsrecht* (Dutch Extradition Law) (Tjeenk Willink, Zwolle 1986) 92–4.

(50.) In *Peroff v Hylton,* 563 F2d 1099 (US Ct of Apps (4th Cir) 1977), the court explicitly held that the 'rule of non-inquiry' only applied to the judiciary and did not affect the executive discretion to deny a person's extradition to the requesting state in view of reprehensible policies and practices displayed by that state.

(51.) *Gallina v Fraser,* 278 F2d 77 (US Ct of Apps (2d Cir), 1960).

(52.) *United States v Toscanino,* 500 F2d 267, 276–80 (US Ct of App (2d Cir), 1974).

(53.) *United States v Alvarez Machain,* 504 US 655 (1992).

(54.) Cf Dutch Supreme Court (S Ct), 1 July 1985, NJ (Nederlandse Jurisprudentie 'Netherlands Law Reports') 1986, 162.

(55.) S Ct, 28 May 1985, NJ 1985, 892; S Ct, 1 July 1986, NJ 1987, 256 and S Ct, 2 December/17 February 1987, NJ 1987, 516.

(56.) S Ct, 29 May 1990, NJ 1991, 467; S Ct, 9 April 1991, NJ 1991, 696.

(57.) The *Kesbir* case (S Ct, 7 May 2004, NJ 2007, 276) provides an example of this kind. Swart has correctly observed that tying the principle of confidence exclusively to the existence of an extradition treaty would beg the question whether the executive would not be equally bound to respect the terms of the extradition treaty: AHJ Swart, annotation to S Ct, 1 July 1985, 35 *Ars Aequi* (Dutch law journal) (1986), 138.

(58.) S Ct, 27 March 1984, NJ 1984, 611.

(59.) S Ct, 15 October 1997, NJ 1997, 533.

(60.) S Ct, 7 September 2004, NJ 2004, 595, annotation by Klip.

(61.) Constitutional Court of the Czech Republic, 3 May 2006, 'European Arrest Warrant', Pl US 66/04, para 85.

(62.) Ibid para 86.

(63.) Ibid paras 90–1.

(64.) *Krzyzowski v Poland,* 23 November 2007, [2007] EWHC 2754 (Admin.); [2008] Extradition LR 19.

(65.) *Czech Republic v Moravek,* Appeal judgment, 8 November 2004, ILDC 641 (CA 2004), analysis by Stéphane Beaulac. Australian extradition law similarly marginalizes the courts' position: see *Vasiljkovic v Australia and others,* Constitutional complaint procedure, 3 August 2006, ILDC 530 (AU 2006), analysis by Rosemary Rayfuse.

(66.) *Geuking v President of South Africa and others,* Final Judgment of the Constitutional Court, 12 December 2002, ILDC 283 (ZA 2002), paras 27–30, analysis by HA Strydom.

(67.) *Yuen Kwok-Fung v Hong Kong Special Administrative Region of the People's Republic of China,* Appeal Judgment, [2001] 3 NZLR 463, 13 June 2001; ILDC 218 (NZ 2001), analysis by Claudia Geiringer.

(68.) *Al-Moayad v Germany* (n 38) paras 67–71.

(69.) Cf *Soering v United Kingdom* (n 1) para 86: 'Further, the Convention does not govern the actions of States not parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.'

(70.) *Saadi v Italy,* (App No 37201/06) (2008), 27 February 2008, paras 147/148 (not yet published).

(71.) *Agiza v Sweden,* 24 May 2005, CAT/C/34/D/233/2003, para 13.8.

(72.) *Ryabkin v Russia,* (App No 8320/04) (2008), 19 June 2008, 48 EHRR 55.

(73.) *Kindler v Canada,* (470/1991), 30 July 1993, UN Doc CCPR/C/48/ D/470/1991, para 14.

(74.) *Judge v Canada* (n 18) para 10.3.

(75.) Ibid para 10.6 (emphasis added).

(76.) *Suresh v Canada* (n 32) para 124.

(77.) Kaplan, 4 Aus (a) 308/02-147-203-204.03111, 27 May 2003; cited in: Office for Democratic Institutions and Human Rights (ODIHR), *Background*

Paper on Extradition and Human Rights in the Context of Counter-terrorism, ODIHR.GAL/22/07, 20 March 2007, 7.

(78.) *United States v Burns,* [2001] 1 SCR 283.

(79.) Constitutional Court of South Africa, 28 May 2001, *Mohamed and another v President of the Republic of South Africa and others,* CCT 17/01, para 3.1.1.

(80.) Dutch Supreme Court, 30 March 1990, NJ 1991, 249.

(81.) *Sholam Weiss v Austria,* 8 May 2003, UN Doc CCPR/C/77/D/ 1086/2002, para 9.4.

(82.) S Ct, 11 March 2003, NJ 2004, 42; confirmed in S Ct, 7 September 2004, NJ 2004, 595.

(83.) *R (on the application of Bary) v Secretary of State for the Home Department,* [2009] EWHC 2068 (Admin) Times, 14 October 2009, Official Transcript.

(84.) *Gomes v Trinidad and Tobago,* House of Lords, 29 April 2009, 2009 WL 1096085.

(85.) *Soering v United Kingdom* (n 1) para 88.

(86.) CAT, 16 December 1998, *Chipana v Venezuela,* CAT/C/21/D/110/1998, para 6.3.

(87.) UN Human Rights Committee, 31 July 2008, *Maksudov, Rakhimov, Tashbaev and Pirmatov v Kyrgyzstan,* CCPR/C/93/D 1461, 1462, 1476 and 1477/2006, para 12.4.

(88.) See, for instance, *Chahal v United Kingdom* (n 10), where the Court considers that ‘it must be borne in mind that the first applicant is a well-known supporter of Sikh separatism’, para 98.

(89.) Cf *N v Finland,* (App No 38885/02) (2006) 43 EHRR 12: ‘The Court considers that decisive regard must be had to the applicant's specific activities as an infiltrator and informant in President Mobutu's special protection force, reporting directly to very senior-ranking officers close to the former President.’

(90.) *Saadi v Italy* (n 70) para 139. Compare similarly UN Human Rights Committee, *Maksudov et al v Kyrgyzstan* (n 87) para 12.4: 'This principle [that no one should be exposed to torture etc. by way of their extradition, expulsion or refoulement] should not be subject to any balancing with considerations of national security or the type of criminal conduct an individual is accused or suspected of.'

(91.) *HLR v France,* (App No 11/1996/630/813) (1998) 26 EHRR 29.

(92.) *HLR v France* concerned the threat of reprisals by drug traffickers, possibly seeking revenge for prior statements made by the fugitive.

(93.) UN Human Rights Committee, 31 October 1994, UN Doc CCPR/C/52/D/539/1993, para 10.3.

(94.) *AS (Lybia) v Secretary of State for the Home Department* [2008] EWCA Civ 289, [2008] HRLR 28; *Miklis v Lithuania,* 11 May 2006, 4 All ER 809 [2006].

(95.) *Bite v Latvia,* Divisional Court, 6 October 2009, [2009] EWHC 3092 (Admin) Official Transcript.

(96.) Constitutional Court of Slovenia, 29 June 2000, Official Gazette RS, No 66/2000, para 15.

(97.) Ibid.

(98.) Supreme Court of Cyprus, 21 January 2005, *Scattergood v Attorney General,* Appeal decision, Civil Appeal No 12/2005; ILDC 921 (CY 2005), analysis by Aristotle Constantinides.

(99.) Dutch Supreme Court, 15 October 1996, NJ 1997, 533.

(100.) *Soering v United Kingdom* (n 1) para 88.

(101.) *Mamatkulov and Askarov v Turkey* (n 38). In a similar vein, the CAT held that '[t]he State party's action in expelling the complainant in the face of the Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.' *Brada v France,* 24 May 2005, CAT/C/34/

D/195/2002, para 13.4. Moreover, in the case of *Wong Ho Wing* (n 7), the Inter-American Court of Human Rights requested Peru to postpone the extradition until the Inter-American Commission had investigated whether the guarantee of the requesting state that the applicant would not face capital punishment was sufficiently substantiated.

Hierarchy in International Law: The Place of Human Rights

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Human Rights, Refugees, and Other Displaced Persons in International Law

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Abstract and Keywords

This chapter discusses the conflict between human rights and expulsion in the context of international refugee law and considers the constraints placed upon states by international human rights law with respect to their right to control entry and deportation. While human rights bodies regularly reiterate the right of states to control who can enter and reside in their territory, the Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol apparently provide an international exception. For states parties, there is an obligation not to refoule a person who qualifies as a refugee. Nonetheless, this constraint on states' sovereign powers gives rise to several issues pertaining to hierarchies and regime interaction. The chapter demonstrates that there arises regime interaction between various international instruments, while a clear human rights hierarchy is not yet emerging.

Keywords: refugees, human rights, non-refoulement, normative hierarchy, regime interaction

1. Introduction

In this era of global migration, states’ territorial borders are one of the strongest reminders of the Westphalian paradigm. For the purposes of this chapter, which looks at how the international protection of refugees, broadly defined, fits into any proposed hierarchical framework, that poses a significant problem. Is state sovereignty the fundamental position with respect to which all international law represents a limitation? If that is the

case, then to argue that international refugee law represents a limitation on the state's power to control entry to or expulsion from its territory is a mere truism. On the other hand, if state sovereignty itself is only established as a rule of international law,[1] then do constraints on the full exercise of those concomitant powers indicates a hierarchy of norms?[2]

It is usual to see international protection of transnationally displaced persons as fragmented between international refugee law and international human rights law within debates on complementary protection,[3] but this chapter's originality stems **(p. 177)** from the fact that it also looks to place international protection into a hierarchy with the state's power to control entry to expel persons from its territory. In a time where there is mass movement of people across frontiers for a wide variety of reasons, the significance of the status of the refugee's rights, particularly to non-refoulement, cannot be underestimated. The very existence of any such limitation as has been suggested on states' powers in international law is fundamental, while the source and extent of the protection, found in international refugee law and international human rights law, are secondary to the primary question regarding the state's assertion of its absolutist powers. The conceptual framework for this question can better be understood if one asks: do states need immigration laws as an explicit assertion of control over entry and residence[4] or if allnon-nationals are automatically excluded? The consequence of such a finding would be that any relaxation of that absolutist position is not an example of a hierarchy, but a voluntary concession, even if it manifests itself in the ratification of the 1951 Convention Relating to the Status of Refugees.[5] As will be seen, this chapter adopts the position that international refugee law does limit the rights of states in relation to entry to and residence in their territory and, in that sense, it is an example of the broad definition of norm conflict, as discussed in the introductory chapter.

Where the right of the state is vitiated by the voluntary ratification of a treaty, the norm conflict has, *de jure,* been permanently avoided, although there are more interesting questions regarding any so-called hierarchy where the obligation that affects the right of the state derives not from treaty, but from custom. Moreover, unlike some other areas of law considered in this collection, such as extradition law for example, it will be suggested that one is more often than not dealing with a case of different regimes that operate alongside each other, rather than a head-on collision between conflicting international obligations. States have no duty to expel or refuse entry to a non-national, so international refugee law and international human

rights law simply lay down limits on the exercise of a power rather than assert hierarchical superiority over other norms—a broad norm conflict. Equally, however, those parallel and overlapping regimes[6] sometimes interact to produce a further internal hierarchy/interaction with respect to the aforementioned constraints on the state's power. If international refugee law and international human rights law act in parallel to limit the state's power, they equally interact, sometimes along with international criminal law, to shape the development of these separate **(p. 178)** legal regimes: the concept of non-refoulement in refugee law helped broaden the understanding of the prevention of torture in international human rights law so as to ensure that individuals were not deported to where their freedom from torture was at risk, extradition law's political offence exception was used to explain the serious non-political crime of Article 1Fb of the 1951 Convention, and international human rights law in general has been fundamental to the analysis of persecution in international refugee law. That is not to say that there are not times when the international protection of the individual can be achieved through international human rights law where refugee status is denied—such is not an example of a hierarchy, but of parallel and discrete regimes of protection.

Finally, it is worth noting in this introductory section that courts dealing with applications for refugee status rarely explain this issue in terms of a conflict between immigration law and refugee law, but instead it is implicit that if the applicant fails, he or she would be subject to deportation. Even more so, the courts do not describe the parallel operation of international refugee law and international human rights norms as a hierarchical relationship. Framing both those issues in these terms, therefore, represents a more overarching and, equally, pervasive analysis of the various regime interactions than is normally undertaken in the literature.[7]

2. Sovereignty, entry, expulsion, and their limits

Given that the definition of a state includes references to its population and its territory,[8] it is hardly surprising that the state's powers include the right to control who might enter into and reside within the state.[9] Indeed, even UN human rights treaty bodies have repeatedly affirmed that states have the right to decide who can enter their territory. Moreover, the European Court of Human Rights (ECtHR) held that:

> 73. Contracting States have the right, as a matter of well-established international law and subject to their treaty

> obligations including the Convention, to control the entry, residence and expulsion of aliens.[10]

(p. 179) There is also ECtHR jurisprudence relating to how the right to a family life does not incorporate an obligation on the state to allow the family a free choice as to the country in which it wishes to reside.[11] Therefore, it is clear for the purposes of international law that states are at liberty to control immigration and even to have special rules for certain nationalities, such as visa requirements.[12]

On the other hand, states can enter into agreements to limit their power to exclude or expel. For instance, states may create a free travel area for their respective populations, such as exists along the land border between the Republic of Ireland and Northern Ireland. The European Union allows for free movement of people between member states.[13] Furthermore, other overarching norms of international law may restrict those powers to exclude and expel. It is this topic that is central to the hierarchy of norms pertaining to control of entry, expulsion, and human rights, *lata sensu*.

As such, there are three threads to the following discussion: the constraint on states' powers to expel as set out in international refugee law and international human rights law; the interaction between international refugee law and international human rights law where the latter is used to clarify the scope of the former; and the interaction between international refugee law, international criminal law, and international human rights law where the latter two shape the limits and extent of the first.[14] Needless to add, these threads are not always easy to separate out and keep discrete. **(p. 180)**

3. The protection of refugees in international law

The offer of refugee status to displaced persons is found in many cultures around the world, but it is at the discretion of the state. At the end of the First World War, though, the international community, in the shape of the League of Nations, responded to the displacement of various groups in the light of the post-war division of the Austro-Hungarian and Ottoman empires and the 1917 Russian Revolution.[15] In the inter-war period, however, the commitment to protect refugees, even from the specified groups, was not always upheld by member states of the League of Nations. A universal international legal obligation can only definitely be asserted with the promulgation of the 1951 Convention Relating to the Status of Refugees ('1951 Convention'),[16] and even that was initially potentially limited to Europe.[17] With the coming into force of the 1951 Convention in 1954, states

parties undertook an obligation under Article 1A.2 to recognize as a refugee someone who has a

> well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In and of itself, the definition of a refugee has little consequence for the state's control over its borders. However, Articles 31 and 33 of the 1951 Convention impose obligations on the state vis-à-vis refugees as defined in Article 1A.2. Furthermore, **(p. 181)** since refugee status is declaratory, not constitutive,[18] as soon as someone applies for refugee status, then the rights set out in Articles 31 and 33 apply to him or her.[19] Article 31 limits the state's right to penalize illegal entry or to restrict the refugee's movement within the state,[20] while Article 33.1 establishes the fundamental guarantee of protection to those seeking refugee status—non-refoulement.

> Article 33 Prohibition of expulsion or return (*refoulement*)
>
> 1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Thus, while there is no right to asylum in international law,[21] Article 33.1 provides that a refugee shall not be returned to where his or her life or freedom would be threatened.[22] To that extent, a state's power to refuse admission to and to expel **(p. 182)** non-nationals is limited. However, the scope of that limitation needs to be understood. There are several constraints on the overreaching power of Article 33.1. First, a state can always send qualifying Convention refugees to another state where their life or freedom would not be threatened: that is, a safe third country. Even if the safe third country will not itself threaten the life or freedom of the refugee, there are, though, other concerns, such as whether it will admit the refugee in the first place and whether or not it might subsequently send him or her on to another state that is not safe for any reason.[23] Secondly, it would

appear that states can refuse entry as long as they do not do it on their own territory; one cannot make an extra-territorial application for refugee status, so non-refoulement is not applicable in such circumstances. The UK House of Lords, in *R v Immigration Officer at Prague Airport and another,* ex parte *European Roma Rights Centre and others,*[24] held that the Article 33.1 obligation did not apply with respect to persons refused by a British immigration official authorizing permission to board a flight to the United Kingdom at Prague Airport. As explained by Lord Hope of Craighead:

> 70…Grahl-Madsen, *The Status of Refugees in International Law* (1972), p 94 states that the prohibition of *non-refoulement* may only be invoked in respect of persons who are already present in the territory of the contracting state, and that article 33 does not oblige it to admit any person who has not set foot there.[25] **(p. 183)**

However, those two issues—safe third countries and extra-territorial application—do not challenge the view that non-refoulement is a limitation on the broad approach to a hierarchy of norms in the area of ordinarily self-evident powers that are part of a state's prerogative. They go to the scope of the limitation based on such a hierarchy, not to the existence or otherwise of any such hierarchy.

The final constraint to be discussed in relation to Article 33.1, however, goes to the very essence of hierarchies in the area of refugee status determination. If there is a hierarchy of norms in this area of law, then it must obtain because certain norms have a higher priority than the state's right to admit whichever non-nationals it wants and to expel whichever non-nationals it wants; as such, this would fit with the broad definition of norm conflict in international law. Putting aside questions as to any fundamental guarantee that states should in no circumstances act in an arbitrary fashion, is it a matter of hierarchies where a state limits its own powers through ratification of a treaty, the 1951 Convention Relating to the Status of Refugees?[26] Of course, if the obligation not to refoule derives with respect to a particular state from customary international law, then it is easier to assert such a hierarchy, but the obligation in Article 33.1 of the 1951 Convention is self-imposed upon states parties. Although customary obligations are consensual too, since a state can persistently object, the hierarchy is more apparent where a state has to deliberately opt out lest the obligation be imposed than if it has intentionally ratified a treaty that imposes the obligation.

The question is further complicated, though, because the 1951 Convention has no treaty monitoring body, like the Human Rights Committee for the International Covenant on Civil and Political Rights. While Article 35 of the 1951 Convention grants the United Nations High Commissioner for Refugees a supervisory role with respect to the Convention,[27] there is no universal supranational body through which an applicant might challenge the decision of a state that he or she does not qualify as a refugee. Determination of refugee status, therefore, is carried out at the domestic level in national courts around the world with no mechanism to unify interpretation of the 1951 Convention. The power in Article 38 of the 1951 Refugee Convention for a state to challenge application or interpretation of the Convention by another state party before the International Court of Justice (ICJ) is, for all intents and purposes, **(p. 184)** illusory.[28] The consequence is that if there is a hierarchy of norms relating to a state's inherent right to govern admission to and expulsion from its territory with respect to non-nationals based on refugee status under the 1951 Convention, then it will not be straightforward to determine its scope, since one would need to have regard to the various decisions made at refugee status determination hearings throughout the world. According to Lord Steyn in *Adan*:

> In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. *And there can only be one true meaning [of the Convention]*.[29]

Furthermore, one would also need to explore, first, how far non-refoulement, at minimum of the 1951 Convention obligations, constitutes customary international law binding on all states regardless of whether or not they have ratified the 1951 Convention and, secondly, the degree to which customary non-refoulement exceeds the obligation set out in Article 33.1 that is imposed on states parties. Moreover, if a hierarchy does exist that limits states’ rights to refuse admission or to expel in consequence of obligations imposed by international refugee law, then how does that fit in with other branches of international law, such as international human rights law,[30] the international law of armed conflict, and international criminal law, and how far have national courts applied such norms? In particular, how far have domestic courts applied international human rights law to constrain the state's power to refuse admission or to expel separate from any guarantees emanating from international refugee law? As is apparent from that series of questions, the issue of hierarchies in the area of international refugee

law is not as straightforward as it is in other areas that are considered in these essays, where a state's obligations under one area of international law conflict directly with those existing under international human rights law. **(p. 185)**

3.1 A customary norm of non-refoulement

Lauterpacht and Bethlehem have conclusively shown that non-refoulement is a norm of customary international law.[31] The debate centres on the scope of this customary norm. It is argued that as a consequence of its relationship to the prevention of torture, refoulement is absolutely prohibited where the Convention refugee or other displaced person would face a real risk of torture or cruel, inhuman, or degrading treatment or punishment. In the view of the Human Rights Committee:

> 9.…States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.[32]

As will be examined below, it is possible that someone who falls within the definition set out in Article 1A.2 of the Convention may yet be excluded from refugee status or lose his or her protection from refoulement under the Convention. Thus, it is impor **(p. 186)** tant to remember that the guarantee provided through customary international law may be relevant to states parties to the 1951 Refugee Convention, too.

The Cartagena Declaration,[33] a regional refugee instrument of the Organization of American States (OAS), expressly acknowledges that non-refoulement generally should be recognized as a peremptory norm of international law.

> III.5 To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.

While the Inter-American Court of Human Rights has not had a chance to address whether the American Convention on Human Rights would prevent

refoulement,[34] the European Court of Human Rights has consistently held that no one can be sent back to where they would face torture or inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention on Human Rights (ECHR).[35] Whether that makes non-refoulement to face torture or inhuman or degrading treatment or punishment a regional peremptory norm in its own right or part of the peremptory norm prohibiting torture is, ultimately, irrelevant since all European countries (bar Belarus) are parties to the ECHR and have granted a right of individual petition, so anyone within the jurisdiction of a member state of the Council of Europe can seek the protection of the Court under Article 3, a universal treaty obligation in the Council of Europe space.

Lauterpacht and Bethlehem categorically state that '[on] the basis of the preceding analysis, the salient elements of the customary international law of *non-refoulement* in a human rights context are [that]…(f) it is not subject to exception or limitation for any reason whatever'.[36] At the domestic level, according to Lauterpacht and Bethlehem, Switzerland has asserted that non-refoulement is *jus* **(p. 187)** *cogens*.[37] In *Spring v Switzerland,*[38] while finding against the applicant on the facts, the court held that non-refoulement embodies 'an inalienable human right' under 'present-day law'. The Gujarat High Court, in *Ktaer Abbas Habib Al Qutaifi and Another v Union of India and others,*[39] quoted an earlier edition of Goodwin-Gill when proclaiming as follows:

> All member nations of the United Nations including our country are expected to respect for international treaties and conventions concerning Humanitarian law. In fact, Article 51(c) of the constitution also cast a duty on the State to endeavour to 'foster respect for international law and treaty obligations in the dealing of organised people with one another'. It is apt to quote S. Goodwin Gill from his book on 'The Refugees in International Law,' thus,
>
> 'The evidence relating to the meaning and scope of *nonrefoulement* in its treaty since also [*sic*.] amply supports the conclusion that today the principle forms part of general international law. There is substantial, if not conclusive, authority that the principle is binding on all states, independently of specific assent.'

This is particularly pertinent, since India is not a state party to the 1951 Refugee Convention or its 1967 Protocol.

The Canadian Supreme Court held that, ordinarily, deportation to torture is prohibited in international law.[40]

> 75 We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under the [Canadian Charter of Rights].

On the other hand, the Supreme Court then went on to balance the prohibition against Canada's national security interests.[41] Moreover, the New Zealand Supreme Court, in *Attorney-General v Zaoui et al,*[42] held that while the prohibition of torture was a *jus cogens* norm, non-refoulement to a real risk of torture had **(p. 188)** not achieved that status;[43] there was a lack of support for such a proposition in the 'state practice, judicial decisions or commentaries'. With all due respect, even if one could distinguish between the prohibition of torture and putting someone in a situation where they faced a real risk of torture, that is not the issue. The question is whether, if there is a real risk of torture on return to the territories of a state by any means, the returning state would be in breach of its international obligations, and there exists clear evidence to that effect: the peremptory status of the customary norm is of little consequence unless the state can show it is a persistent objector, since customary international law already binds all states except persistent objectors. The scope of protection offered is related to the norm's content, not to its particular status in international law.

Where the applicant for refugee status would not face torture, or cruel, inhuman, or degrading treatment or punishment, the extent of the customary obligation is not so clear, but prospective violation of other human rights might impose an obligation not to refoule if there would be a flagrant denial of the right. According to the House of Lords in *Ullah*:[44]

> 24. The correct approach in cases involving qualified rights such as those under articles 8 and 9 [of the ECHR] is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in *Devaseelan v Secretary of State for the Home Department* [2002] IAT 702, [2003] Imm AR 1, paragraph 111:
>
> 'The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case—where the right will be completely denied or nullified in the destination

> country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state'.
>
> .?.?. **(p. 189)**
>
> 50. It will be apparent from the review of Strasbourg jurisprudence that, where other articles may become engaged, a high threshold test will always have to be satisfied. It will be necessary to establish at least a real risk of a *flagrant* violation of the very essence of the right before other articles could become engaged (emphasis added).

Therefore, as might be expected, the customary norm of non-refoulement is founded in international refugee law and international human rights law, both civil and political rights, and economic, social, and cultural rights.[45] The two regimes asserting a hierarchy over the state's power to refuse admission or expel—international refugee law and international human rights law—operate in parallel, based on treaty obligations and custom. Thus, to summarize, customary non-refoulement derives from both international refugee law and international human rights law and both constrain the state's power to refuse admission or expel: both exert a hierarchy in this regard. On the other hand, as will be seen below, the scope of the customary norm under international refugee law and international human rights law is not identical and this gives rise to regime interaction when seeking to protect the individual.

In closing this section, it needs to be borne in mind throughout the following analysis that while non-refoulement is a recognized principle of customary international law binding on all states that cannot show that they are persistent objectors,[46] refugee status determination hearings take place in domestic courts and tribunals with no supervisory supranational refugee court to apply directly any relevant international law. The domestic courts and tribunals will almost certainly apply any human rights guarantees that operate in the state alongside domestically implemented refugee law, but relying on customary international law per se may not be straightforward before a domestic court or tribunal in a state party to the 1951 Convention or its 1967 Protocol, let alone a non-state party, and will depend on how each state incorporates international law within its national legal system.[47]

3.2 The scope and content of the restrictions and their interplay: non-refoulement and exclusion

It is in regard to the scope and content of the restrictions on the state's power to refuse admission to or expel non-nationals that the various hierarchies from international refugee law and international human rights law, as well as the international law of armed conflict and international criminal law, are most evident. However, there is so much interplay of various branches of international law that the reference to ‘hierarchies’ may be less helpful than considering the situation of providing an individual with international protection to be one **(p. 190)** of regime interaction—the various branches of international law mentioned, interacting to assert a hierarchy over the state's power. Moreover, even though there is no duty on a state to refuse entry to or expel non-nationals, that does not mean that there is less of a clash between non-refoulement obligations and the state's *mere* power. Courts in states such as the United States, Australia, and the United Kingdom have defined refugee status in a very narrow manner, in such a way that the duty not to refoule under the 1951 Convention rarely arises: judge-led conflict avoidance. Indeed, one might put forward an argument that the development of any *jus cogens* norm of non-refoulement building upon international human rights law obligations is a direct consequence of this narrow interpretation of international refugee law. Nevertheless, judges have been cautious in their development of the norm lest they seem to be challenging the executive's prerogative in this area. The interplay of the various branches of international law will be explored first with respect to exclusion in refugee law and then more generally as regards protection; it should be noted that exclusion is a term of art in international refugee law and refers to the powers as set out in Articles 1F and 33.2 of the 1951 Convention, discussed in detail below, either to deny someone refugee status outright or to refoule them after a successful refugee status determination.

As stated, there is an absolute bar on returning someone to a territory where they face a real risk of torture or cruel, inhuman, or degrading treatment or punishment under international human rights law; the bar is not absolute with respect to other derogable rights. However, the 1951 Refugee Convention provides for a status in international law that has always been restricted to the ‘deserving’ refugee. Under Articles 1F and 33.2, the 1951 Convention allows for two routes by which an individual might lose the guarantee of non-refoulement, even if that would result in his or her torture, or cruel, inhuman, or degrading treatment or punishment. Article 1F excludes an applicant for refugee status from all the protections of the

Convention, while Article 33.2 withdraws the guarantee of Article 33.1 from qualifying refugees. When Nigeria granted asylum to Charles Taylor, the former President of Liberia who had been indicted by the Special Court for Sierra Leone, two victims of the Revolutionary United Front's brutality were deemed to have *locus standi* by the Federal High Court to bring an action based on the continuing denial of justice arising from Taylor's undeserved protection in Nigeria.[48] While Taylor remained in Nigeria, the victims had a cause of action against him and several government officials.

Although there will need to be some examination of the substantive refugee law relating to exclusion, this section of the chapter will focus on examples of hierarchies and regime interaction, especially between international refugee law, international human rights law, the international law of armed conflict, and international criminal **(p. 191)** law.[49] Article 1F excludes certain persons from the Convention, while Article 33.2 only removes the guarantee against refoulement.[50]

> Article 1F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) He has been guilty of acts contrary to the purposes and principles of the United Nations.
>
> Article 33. Prohibition of expulsion or return (‘*refoulement*’)
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

From the perspective of hierarchies, questions arise as to the meaning of several of the terms used in Articles 1F and 33.2 and whether they ought to be accorded a particular meaning for the purposes of international refugee law, or whether they should be interpreted in line with other international law regimes.

With respect to Article 1Fa of the Convention, this provides that the three listed crimes must be ones 'as defined in the international instruments drawn up to make provision' for them.[51] Under such an approach, it might seem that refugee law was conforming to the international laws of armed conflict and international criminal law laid down by treaty, but that would be to overlook the prominent role of customary international law in this field. Regard is now had to the Rome Statute of the International Criminal Court (ICC),[52] but that is not the sole source of law in this area and not all states are parties thereto. Nevertheless, it does confirm under Article 8 **(p. 192)** that individual criminal responsibility can attach to crimes committed during a non-international armed conflict. Common Article 3 to the four Geneva Conventions of 1949[53] and Additional Protocol 2 of 1977[54] do not provide for individual criminal responsibility, although customary international law has long recognized it.[55] As the Dutch Council of State noted in *A v Minister of Immigration and Integration*:

> In its decision of 10 August 1995 in the *Tadic* case (IT-94-I-T) the International Criminal Tribunal for the Former Yugoslavia found that common Article 3 should be regarded as a rule of international customary law and that violations thereof during an armed conflict give rise to war crimes irrespective of whether the armed conflict is of international or internal nature.[56]

Thus, technically, exclusion under Article 1Fa should have been limited only to crimes committed in international armed conflicts, since no *international instrument* provided for individual criminal responsibility in non-international armed conflicts. This position is even more stark with respect to crimes against humanity. The Geneva Conventions of 1949[57] had at least provided for individual criminal responsibility for grave breaches committed in times of international armed conflict, but there was no Crimes Against Humanity Convention.[58] Crimes against humanity were provided for in Article 6 of the Charter of the International Military Tribunal at Nuremberg.

> 6.…(c) Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane

> acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[59]

(p. 193) Furthermore, crimes against humanity would definitely include the crime of genocide as set out in the Genocide Convention of 1948.[60] In more recent times, the Statutes of the two ad hoc tribunals for the former Yugoslavia and Rwanda have provided definitions, and Article 7 of the Rome Statute of the ICC is the latest iteration,[61] but there are differences even between these three versions of the law relating to crimes against humanity dating from the 1990s.[62] However, the customary understanding of crimes against humanity that had developed between the late 1940s and the 1990s was technically inapplicable when trying to shed light on exclusion under Article 1Fa, because it was not as defined in an international instrument. Nevertheless, despite the wording of Article 1Fa and its explicit reference to crimes as defined in international instruments alone, courts dealing with refugee status determination have been prepared to draw on customary international law in order to develop an autonomous meaning for certain concepts within the subclause, suggesting that it is more a case of regime interaction than strict hierarchy between the international law of armed conflict and international criminal law on the one hand and international refugee law on the other.

Article 1Fb excludes persons with respect to whom there are serious reasons for considering that they have committed a serious non-political crime. The concept of the political crime comes from extradition law, which is part of international criminal law. How far international refugee law is bound to follow the developments **(p. 194)** in extradition law is not really the issue, because there could be no explicit hierarchy in these circumstances.[63]

> [87] Extradition involves a process of removal under statutory powers on the application of a foreign government. The process is in accordance with a treaty. There is nothing in the text of the Convention that refers to extradition law or indicates an intention that a non-political crime under art 1F(b) is the same concept. There is no definition of when a serious crime is ‘non-political’. The focus of the Convention is on the seriousness of the crime as well as whether it was of a non-

> political nature. It is not on whether particular conduct could be the subject of extradition proceedings.[64]

However, equally, it would be less than useful for the two strands of law to develop wholly separately, given that they might be applicable in parallel proceedings to the same individual; the applicant for refugee status whose case raises issues of exclusion for having committed a serious non-political crime might simultaneously be the object of a request that he or she is challenging on the basis that the same crime is of a political character for the purposes of extradition law—if granted refugee status, though, it would be that status that would prevent extradition, not the findings as to the political character of the crime.[65]

Article 1Fc raises interesting questions relating to hierarchies in international law as well. Exclusion arises where there are serious reasons for considering that **(p. 195)** the applicant 'is guilty of acts contrary to the purposes and principles of the United Nations'. Article 103 of the United Nations Charter provides:

> 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.

Thus, Article 1Fc reflects this Charter-based obligation.[66] The question is whether the purposes and principles extend beyond what is found in the Preamble and Articles 1 and 2 of the Charter. Is it arguable that the General Assembly or the Security Council can add to the purposes and principles and thereby extend the limitation in Article 1Fc to a humanitarian provision? While academically interesting, however, there is little to be gained from exploring the issue further here, since any expansion by either organ can be explained in terms of providing a gloss to the purposes and principles as set out in the Charter—for instance, when the Security Council indicated that international terrorism was contrary to the purposes and principles of the United Nations, it was in the context of a Chapter VII resolution passed in order to maintain international peace and security.[67] Thus, if a court carrying out a refugee status determination were to hold that an international terrorist was excluded under Article 1Fc, then that is foursquare within Article 1.1 of the Charter.[68]

(p. 196) Therefore, on its face, having first limited a state's right to refuse admission or to expel, the 1951 Convention then limits the Article 1A.2 exception to the state's general power and does so in line with other

branches of international law, raising issues of hierarchies and certainly providing the framework for regime interaction, as seen in the case law above. On the other hand, going beyond the mere text of the Convention, it is equally clear that as regards exclusion, and in other ways, other branches of international law interact with international refugee law in such a way as to re-establish limits on the state's power to refuse admission or expel.

4. Regime interaction

4.1 Exclusion

Continuing with exclusion before exploring broader protection issues, in terms of regime interaction not only are the international law of armed conflict and international criminal law relevant to interpreting sub-paragraphs (a) to (c) of Article 1F: international human rights law challenges the very idea of denying individuals protection.

When the 1951 Refugee Convention was concluded, there was no extant international human rights treaty in force. The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), a regional mechanism, came into force in 1953, and the Universal Declaration of Human Rights of 1948, is, as its title makes clear, a mere declaration of the General Assembly—in and of itself, it is not binding in international law.[69] In the intervening period of almost 60 years, however, international human rights law has undergone the most dramatic development.

However, judges interpreting the 1951 Convention in domestic hearings have been less willing to expand on the thinking of the original drafters. This is evident in cases dealing with exclusion under Articles 1F and 33.2, but more generally in the way protection is afforded to those seeking asylum. It might be argued that the 1951 Convention confers a status and a plethora of rights beyond those accorded by international human rights treaties to all individuals within the jurisdiction of a state party thereto, but given the parallel nature of the regimes and questions about hierarchies in some circumstances, international refugee law should not fall too far out of step. It is here that the nature of refugee *status* might be advanced as a reason for the distinction, but it is not that simple. To be sure, recognizing someone as a refugee is more than merely according them certain treaty rights, but excluding someone where they face a real risk of torture or cruel, inhuman, or degrading treatment or punishment on return is contrary to a customary norm of international law that implements the *jus cogens* right to be free

from torture, inhuman, or degrading treatment or punishment.[70] Thus, the 1996 case of *Chahal v United* **(p. 197)** *Kingdom*[71] concerned a person alleged to be seeking to establish an independent Sikh state, Khalistan, in Punjab through means of terrorist acts aimed at destabilising Indian rule in the area. His presence was deemed not conducive to the public good and he was issued with a deportation order. Activities in which he was said to be involved would plainly have allowed him to be excluded under Article 1F. Nevertheless, the European Court of Human Rights decided that if he returned to India, even if to a different part of India than Punjab, he faced a risk that his rights under Article 3 of the ECHR would be breached.

> 79. Article 3 enshrines one of the most fundamental values of democratic society (see the above-mentioned *Soering* judgment, p. 34, ß 88). The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.

The Court went on to say that expulsion to inhuman or degrading treatment or punishment was ‘equally absolute’.

> 80…In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.[72]

Even after the re-evaluation of exclusion in international refugee law post-11 September 2001, the European Court of Human Rights prioritized Article 3 over alleged links to terrorism.[73] The decision of the Hong Kong Court of Final Appeal **(p. 198)** in *Secretary for Security v Prabakar*[74] was that the protection available under Article 3 of the Convention Against Torture was broader than that offered by the 1951 Convention, in part because there was no exclusion clause in the later instrument. In that regard, the Canadian Supreme Court's decision in *Suresh*[75]—that national security might override the obligation not to refoule to torture—was criticized by the Human Rights Committee.[76] This should not be, and is not, surprising. What does need to be considered, however, is why international refugee law has not developed since 1951 to limit exclusion based on the type of treatment the applicant for

refugee status would face if refouled.[77] As the House of Lords made clear in *Adan*:[78]

> It is clear that the signatory States intended that the [1951] Convention should afford continuing protection for refugees in the changing circumstances of the present and future world. In our view, the Convention has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the [ECHR] is so regarded.[79] **(p. 199)**

Moreover, in relation to Article 33.2 of the 1951 Convention, the need for a purposive and dynamic approach is even more compelling. Article 33.2 provides as follows:

> 33.2 The benefit of [Article 33.1, non-refoulement] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Thus, someone who qualifies as an Article 1A.2 refugee can lose the benefits of non-refoulement, the most important of the Convention guarantees, if that person is a danger to the security of the country or, having been convicted of a particularly serious crime, he or she constitutes a danger to the community. Although there are several elements to Article 33.2 that allow for balancing, the possible treatment the refugee will face is not one of them, no matter if it were to fall within the definition of torture.[80] A strict legal purist might mount an argument that excluding from refugee status where there is a safety net provided through international human rights law still manages to recognize the fundamental obligation not to return someone to face torture or cruel, inhuman, or degrading treatment or punishment. However, Article 33.2 does not affect refugee status: it simply removes the fundamental guarantee of non-refoulement and, as such, should provide for double balancing. It is equally evident that international refugee law does not internalize the hierarchy pertaining to non-return to face torture—at best, there is a reliance on regime interaction and parallel protection regimes.

Thus, with respect to exclusion, one might try to assert that international human rights law exercises a hierarchy over international refugee law and provides protection where the latter failed to do so, but that would be a superficial analysis. The two regimes operate in parallel and interact in some respects, but it is not the case that domestic courts find that international

refugee law is overruled by international human rights law: rather, that both regimes are applied and both are held to be internally valid. Like a pair of water-skiers being towed separately but in parallel across a lake, the wake from one speedboat will affect the skier behind the other boat, but both continue on their chosen course. The fact that the applicant is protected by international human rights law does not mean that he or she receives refugee *status* from which he or she was excluded by international refugee law. There is no hierarchy and the regime interaction has limited effect, but to the extent that judges in Council of Europe member states know that international human rights law in the shape of the ECHR provides a safety net, the lack of development of Article 1F to reflect *jus cogens* norms regarding freedom from torture is explicable, if regrettable. **(p. 200)**

4.2 Beyond exclusion

More generally, international refugee law and international human rights law provide different but parallel avenues of protection.[81] On the basis that international human rights law protects individuals regardless of whether they fall within the definition of a refugee in Article 1A.2, it can prevent expulsion or deportation in a broader range of cases. Thus, in *Jabari v Turkey,*[82] an Iranian woman could not be returned to Iran despite the fact that Turkey has a reservation under Article 1B of the 1951 Convention and only recognizes refugees from Europe. Further, given that paragraphs 164–6 of the UNHCR Handbook[83] hold that a person fleeing armed conflict will not normally be considered a refugee, the decision in *NA v United Kingdom,*[84] where the court held that in certain cases a person might be able to rely on indiscriminate violence to show that return would amount to a breach of Article 3 of the ECHR, reveals again how other norms of international law might provide protection where international refugee law would not. However, this does not reveal a hierarchy of norms where international human rights law supervenes over international refugee law: it is a case of regime interaction, where the two ways of protecting the refugee operate distinctly.

> 115. From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a

> real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.[85] **(p. 201)**

In *HJ and HT,*[86] the United Kingdom Supreme Court dealt with the approach courts should take to applicants who would not suffer interference with their rights in the state of refuge, but would not enjoy that degree of protection in their country of nationality. In so doing, the Supreme Court in *HJ and HT* explored the relationship between granting refugee status and human rights standards in the country of nationality.

> 35(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

The Supreme Court went on to hold that it is not possible to deny refugee status by asking the applicant to live his life in his country of nationality denying his sexual identity.

> 113.…[Refugee] status cannot be denied to a person who on return would [have to] forfeit a fundamental human right in order to avoid persecution…An interpretation of article 1A(2) of the Convention which denies refugee status to gay men who can only avoid persecution in their home country by behaving discreetly (and who say that on return this is what they will do) would frustrate the humanitarian objective of the Convention and deny them the enjoyment of their fundamental rights and freedoms without discrimination. The right to dignity underpins the protections afforded by the Refugee Convention:…

In one more respect, there is evidence of regime interaction beyond exclusion. Refugee law has been interpreted in such a way as to allow for return to another part of the applicant's state of nationality if that would

be safe—the so-called internal flight or protection alternative.[87] In *Sufi and Elmi,*[88] the European Court of Human Rights applied its own Article 3 jurisprudence in *MSS v Belgium and Greece*[89] to assess whether the United Kingdom's approach under its refugee law had been correct.

This all provides clear evidence of the way regimes sometimes interact, rather than forever clash in some artificial hierarchy, in the area of international refugee law. There can be hierarchies, but there are, frequently, either parallel protection pathways or a simple symbiotic development of protection standards. Like the water- **(p. 202)** skiers on the lake once again, in this case the wake from one boat, 'the good ship *International Human Rights Law*', is sufficiently influential that it causes the other skier to take account of its effects in his or her own path: international refugee law thus develops internally to reflect principles from international human rights law. Furthermore, the wake from both water-skiers eventually reaches the shores of the lake and, over time, has an influence on its terrain—the sovereignty of the state.

4.3 Regime interaction and the Qualification Directive

On the other hand, a clearer example of hierarchies might be evident within the European Union as a result of the European Community Qualification Directive (ECQD) of 2004,[90] although it will be suggested below that once again it is better to view it in terms of regime interaction. The Qualification Directive requires European Union states to pass implementing domestic legislation. Furthermore, under Articles 68 and 234 of the EC Treaty, reference can be made to the European Court of Justice (ECJ) to give a ruling as to the meaning of the Directive. Therefore, how the ECJ interprets the Qualification Directive will determine in a hierarchical fashion how domestic courts should interpret it and, thus, the 1951 Convention on which it is based.[91] While references will reflect the scope of regime interaction before the ECJ, arguably the effect will be to create a hierarchy for domestic courts dealing with the same issue. As such, the ECJ ruling on the reference by the German Federal Administrative Court[92] in relation to Article 12.2 of the Qualification Directive dealing with exclusion will bind courts in the European Union determining cases under Article 1F of the 1951 Convention, despite the glosses put on Article 1F by Article 12.2. The reference from the German Federal Administrative Court raised issues as to how far international criminal law and international human rights law should be used in interpreting the scope of the exclusion clauses.[93] Indeed, the reference itself refers to **(p. 203)** Security Council resolutions for the purpose of deeming international

terrorism to be contrary to the purposes and principles of the United Nations.[94]

At present, there is little jurisprudence from the ECJ on the Qualification Directive vis-à-vis refugees, but it is worth noting in relation to subsidiary protection that it has dealt with a case involving the international law of armed conflict. In a case based on Article 15c[95] that had been referred by the Netherlands, *Elgafaji,*[96] the ECJ did not decide whether the meaning of 'international or internal armed conflict' was the same as provided for in the law of armed conflict.[97] **(p. 204)** The Court of Appeal in the United Kingdom has, however, held that Article 15c is not limited by the international law of armed conflict.[98]

> 35. We therefore accept the proposition, on which the parties before us and the intervener agree, that the phrase 'situations of international or internal armed conflict' in article 15(c) has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*. The Home Secretary in *KH* accepted that there was currently an armed conflict in Iraq, and the AIT proceeded on that acceptance.

In so deciding, it rejected the reasoning of the Asylum and Immigration Tribunal in *KH (Article 15(c) Qualification Directive) Iraq CG*.[99] However, the Supreme Administrative Court of the Czech Republic has adopted an analysis based on the laws of armed conflict.[100]

The rightness or wrongness of the reasoning in any of these cases is not important, but one cannot ignore the fact that regime interaction is inevitable and that chaos will ensue if issues are not addressed. There needs to be 'one true meaning'[101] for the sake of those fleeing persecution. Whether that is based on some supposed hierarchy of norms is debatable in this area of international law, but the interaction of international refugee law, international human rights law, the international law of armed conflict, and international criminal law is unavoidable and should be confronted. **(p. 205)**

5. Conclusion

There are undoubtedly norms of *jus cogens* that have priority in international law, and some aspects of international refugee law might reflect them in such a way as to constrain the state's power to refuse admission to or

expel non-nationals. As such, there ought to be hierarchies of norms to that extent. However, it is a very limited part of international refugee law. On the other hand, there are several branches of international law that interact in this context. That interaction is well recognized and applied, although not done so uniformly. Rather than a vertical hierarchy, this review of the law has demonstrated a more horizontal framework of regime interaction between different branches of international law that is still undergoing development.[102] Sometimes, that interaction allows for regimes to adopt new understandings of their internal norms, while other cases reflect the fact that the regimes operate in parallel (even in the same hearing) and protection is achieved in one but not in another, even knowingly and in conformity with the international law pertinent to each regime.

Notes:

(1.) See the UN Charter, Art 2.4 and 2.7. See also the United Nations General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN, 1970, UNGA Res 2625 (XXV). Given that international law regulates the behaviour and interaction of co-equal sovereign states, then aspects of sovereignty must be part of international law, especially given that the receiving state's obligations towards Convention refugees will arise from the mistreatment of refugees by their state of nationality.

(2.) Cf see *Chae Chan Ping v United States,* 130 US 581, 606–7 (1889).

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers…The *power* of the government to exclude foreigners from the country whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never

> denied by the executive or legislative departments (emphasis added).

(3.) See G Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd edn OUP, Oxford 2007); J Hathaway, *The Rights of Refugees under International Law* (CUP, Cambridge 2005); J McAdam, *Complementary Protection in International Refugee Law* (OUP, Oxford 2007); A Hurwitz, *The Collective Responsibility of States to Protect Refugees* (OUP, Oxford 2009).

(4.) The corollary of an individual's human right to freedom of movement.

(5.) 189 UNTS 137; see also the 1967 Protocol, 606 UNTS 267. The 1951 Convention was also limited to those who were refugees as a result of events occurring before 1 January 1951. While a broad view of the long-term effects of certain events before 1 January 1951 was adopted, it was only with the 1967 Protocol that this temporal limitation was removed.

(6.) The comparison may be a little arcane, but think of it in terms of a chicane on a Scalextric™ track—the normally parallel metal guides for each car cannot cross each other, but the chicane can mean that the cars come in contact with each other and influence the outcome. A slightly less obscure representation of parallel systems interacting is to picture two water-skiers behind two speedboats crossing a lake side by side—the two wakes will cross each other and the water-skiers following the boats will be influenced by the passage of the other boat.

(7.) For example, B Gorlick, ‘The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees’ (1999) 11 IJRL 479; T Clark and F Crépeau, ‘Mainstreaming Refugee Rights: the 1951 Convention and International Human Rights Law’ (1999) 17 NQHR 389; cf McAdam (n 3). See also Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law, Arusha, Tanzania, 11–13 April 2011, paragraphs 1–3, published in 23 IJRL 860 (2011) at 861.

(8.) See Art 1 of the Montevideo Convention on the Rights and Duties of States 1933, 165 LNTS 19; 28 AJIL Supp.75 (1934).

(9.) This chapter is not going to consider how states determine who should qualify as a national and any constraints on the exercise of that power.

(10.) See *Chahal v United Kingdom* (70/1995/576/662), European Court of Human Rights, 15 November 1996, para 73. See also the decision of the Human Rights Committee in *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius,* Communication No 35/1978, UN Doc CCPR/C/OP/1, 67 (1984):

> 9.2(b) 2 (ii) 3…Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them therefrom for security reasons, the Committee is of the view that the legislation which only subjects foreign spouses of Mauritian women to those restrictions, but not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements.
>
> The Committee Against Torture has also acknowledged this point in *Agiza v Sweden,* Communication No 233/2003, UN Doc CAT/C/34/D/233/2003 (2005):
>
> 13.1…The Committee acknowledges that measures taken to fight terrorism, including denial of safe haven, deriving from binding Security Council Resolutions are both legitimate and important. Their execution, however, must be carried out with full respect to the applicable rules of international law, including the provisions of the Convention, as affirmed repeatedly by the Security Council (United Nations Security Council Res.1566 (2004), at preambular paragraphs 3 and 6, Res.1456 (2003) at paragraph 6, and Res.1373 (2001) at paragraph 3(f)).

(11.) See the debate in D Harris, M O'Boyle, and C Warbrick, *Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 418–22.

(12.) This chapter will not address the very specialized set of questions arising from interception of migrants on the high seas. See, for example, the events surrounding the *MV Tampa,* a Norwegian-registered container ship that in 2001 rescued several hundred persons from Asia, including Afghanistan and Sri Lanka, who were on board a small vessel between Indonesia and north Australia. The ship wanted to put the persons ashore on Christmas Island, but the then Australian government refused. Eventually, after intensive negotiations, New Zealand and Nauru agreed to let them enter for processing. See CM-J Bostock, ‘The International Legal Obligations owed to the Asylum Seekers on the MV Tampa’ (2002) 14 IJRL 279; A Schloenhardt, ‘To Deter, Detain and Deny: Protection of Onshore Asylum

Seekers in Australia' (2002) 14 IJRL 302; M Pallis, 'Obligations of States towards Asylum Seekers at Sea: Interactions and Conflicts Between Legal Regimes' (2002) 14 IJRL 329; E Willheim, 'MV Tampa: The Australian Response' (2003) 15 IJRL 159; A Edwards, 'Tampering with Refugee Protection: The Case of Australia' (2003) 15 IJRL 192; T Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia' (2004) 16 IJRL 53. See also, Goodwin-Gill and McAdam (n 3) 246–50 and 371–4. In addition, have regard to *JHA v Spain,* CAT, 21 November 2008, Communication no 323/2007, and C Wouters and M den Heijer, 'The *Marine I* case: a Comment' (2010) 22 IJRL, 1–19.

(13.) Eg Art 39 of the EC Treaty.

(14.) More generally, see M Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP, Oxford 2009).

(15.) See J Hathaway, 'The Evolution of Refugee Status in International Law: 1920–50' (1984) 33 ICLQ 348; D Matas, 'A History of the Politics of Refugee Protection' in P Mahoney and K Mahoney (eds), *Human Rights in the 21st Century: A Global Challenge* (Martinus Nijhoff, Dordrecht 1993) 619 ff; G Loescher, *The UNHCR and World Politics: A Perilous Path* (OUP, Oxford 2001) 21–34. The first High Commissioner for Refugees, Fridtjof Nansen, spent the early years in his office organizing the cross-repatriation of Pontic Greeks and Slav Muslims between Greece and Turkey—see C Meindersma, 'Population Exchanges: international Law and State Practice—Part 1' (1997) 9 IJRL 335; 'Part 2' (1997) 9 IJRL 613.

(16.) Above n 5.

(17.) Above n 5.

> Article 1B.1 For the purposes of this Convention, the words 'events occurring before 1 January 1951' in article 1, section A, shall be understood to mean either (a) 'events occurring in Europe before 1 January 1951'; or (b) 'events occurring in Europe or elsewhere before 1 January 1951'; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

See now Art 1.3 of the 1967 Protocol.

> The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol.

As at 12 March 2010, Congo (Brazzaville), Madagascar, Monaco, and Turkey retained the European limitation.

(18.) See UNHCR Handbook, 1979, reprinted 1992, HCR/1P/4/Eng/Rev.2.

> 28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

(19.) The same is not true of all the rights set out in the 1951 Convention. Some apply only to refugees ‘lawfully in’ the territory of the receiving state (eg Art 18, self-employment) and others to those ‘lawfully staying in’ that territory (eg Art 21, Housing)—see UNHCR, ‘Lawfully Staying’—A Note on Interpretation (1988) (copy with the author). Technically, whether someone applies or not for refugee status, if they would qualify then they obtain the guarantee set out in Art 33.1, but the onus must be on the applicant to make the state aware that there might be an issue if entry is not granted.

(20.) Art 31—Refugees unlawfully in the country of refuge:

1. (1.) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present

in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. (2.) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

See GS Goodwin-Gill, 'Article 31 of the Convention Relating to the Status of Refugees 1951: non-penalization, detention, and protection' in E Feller, v Türk, and F Nicholson (eds), *Refugee Protection in International Law* (CUP, Cambridge 2003) 185–258.

(21.) Art 14 of the Universal Declaration of Human Rights, 1948, to the extent that it might reflect customary international law, merely provides for a right to seek and enjoy asylum.

(22.) See Lauterpacht and Bethlehem (n 31) paras 122–35. The guarantee in Art 33.1 only applies to Art 1A.2 refugees. Nevertheless, in *Zanbech W/ Yohannes Belcha, 71 other Petitioners v Ministry of Internal Affairs, Tribunal for Judicial Review of Detention of Illegal Immigrants,* Tel Aviv District Court sitting as a Court for Administrative Matters, AdmAp 2028/05, ILDC 290 (IL 2006), the court was dealing with a petition for a stay of deportation where the petitioners were not refugees, there being no well-founded fear of persecution in Ethiopia at the time, but were seeking resettlement in Canada through the UNHCR. The Court refused to interfere in the Minister's discretion, but made the following telling statement:

> 19 Therefore, I must say that I have no way of creating a category of illegal aliens who are not 'refugees' but who are entitled to temporary protection on the basis of an unsubstantiated claim of a fear of persecution in their own country.
>
> 20 Nevertheless, I must point out that in many cases the courts, both the Supreme Court and the Administrative Affairs Court, have used their powers to offer a temporary remedy and delay the deportation from Israel of illegal residents, when the delay was required for a short and defined period of

> time at a time when it emerged that there was a reasonable chance for their resettlement within the time frame, in any third country. This approach is likely to resemble the ancient rule of 'forcing into the measurement of Sodom'* leading to a situation in which the decision of the authority may appear to be contrary to its own policy, without being so flexible as to undermine the policy.

* Trans Note: the rabbinic legend is that the residents of Sodom would put visitors on a bed that was a sort of rack. If the visitor was too short they would stretch him out and if he were too long they would cut off his feet. The meaning has thus come to be making something fit, but fit badly.

(23.) See *Re Musisi, ex parte Bugdaycay* [1987] AC 514, 532, per Lord Bridge; see also, *R v Secretary of State for the Home Department, ex parte Adan and Aitseguer* [2001] 2 AC 477, available at http://www.publications.parliament.uk/pa/ld200001/ldjudgmt/jd001219/adan-1.htm.

(24.) [2004] UKHL 55. See also, *Sale and ors v Haitian Centers Council, Incorporated and ors,* 509 US 155 (1993). Cf Blackmun J dissenting at 188 ff esp 193:

> Article 33.1 is clear not only in what it says, but also in what it does not say: It does not include any geographical limitation. It limits only where a refugee may be sent 'to,' not where he may be sent from. This is not surprising, given that the aim of the provision is to protect refugees against persecution.

(25.) NB. The applicants succeeded in their claim that the practice breached the United Kingdom's Race Relations legislation—see the opinion of Baroness Hale, paras 72–105.

It is arguable that there is a broader remit for non-refoulement than is stated in the text. Non-refoulement would guarantee that no one was sent back to the frontiers of territories where their life or freedom would be threatened and that responsibility could be engaged by a state with respect to persons seeking refugee status who are outside the territory of their country of nationality, but not yet in the territory of this second state. However, given that Art 1A.2 of the 1951 Convention defines a refugee as someone outside the territory of their country of nationality, the obligation could not arise while the applicant was still therein, for example if he or she simply enters an embassy or consulate. See Goodwin-Gill and McAdam (n 3) 244 ff.

(26.) As argued previously, all international law may be viewed as a constraint on the power of sovereign states, such that to determine that non-refoulement represents a hierarchy vis-à-vis state sovereignty is simply to create a ‘straw man’ to be knocked down. Is the only ‘hierarchy’ in this area of law one between the different norms that guarantee non-refoulement to a greater or lesser extent? However, on the basis that all states must have a population, a state cannot deny entry and residence to every individual. Therefore, it is obliged to define who can enter its territory and reside therein. It is the contention of this paper that the obligation not to refoule a refugee reflects a hierarchy as regards the state's power to define those who have the right to enter and reside.

(27.) Art 35—Co-operation of the national authorities with the United Nations:

1. (1.) The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

(28.) Art 38—Settlement of disputes:

> Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

See also Lord Steyn in *Adan* (n 23) 516–17.

> It follows that, as in the case of other multilateral treaties, the Refugee Convention must be given an independent meaning derivable from the sources mentioned in articles 31 and 32 and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts,…

(29.) Above n 23, at 517 (emphasis added).

(30.) See generally I Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia, Antwerp 2001). See also Kamminga and Scheinin (n 14).

(31.) E Lauterpacht and D Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion' in Feller, Türk, and Nicholson (n 20) 87–179, esp 140 ff.

> 216. The view has been expressed, for example in *The Encyclopaedia of International Law,* that 'the principle of *non-refoulement* of refugees is now widely recognised as a general principle of international law.' In the light of the factors mentioned above, and in view also of the evident lack of expressed objection by any state to the normative character of the principle of *non-refoulement,* we consider that *non-refoulement* must be regarded as a principle of customary international law (p 149. Footnote omitted).

For a fuller picture, see also paras 219 and 253. To that extent, it would be more important to view the state practice of non-states parties to see whether they uphold non-refoulement (see *North Sea Continental Shelf* cases, [1969] ICJ Rep 3, 43). In that regard, Thailand's forcible repatriation of Hmong refugees back to Laos would at first sight indicate that the norm is more honoured in the breach than in its observance. However, the Thai government did carry out a form of refugee status determination for the Hmong in the camp, although there are claims it was flawed, and obtained assurances from Vientiane that certain Hmong would be pardoned on their return, suggesting that Bangkok wanted to be seen to be abiding by the norm of non-refoulement. See BBC News website at http://news.bbc.co.uk/1/hi/8432094.stm (28 December 2009), http://news.bbc.co.uk/1/hi/8433299.stm (29 December 2009), and http://news.bbc.co.uk/1/hi/8434203.stm (30 December 2009). On the other hand, the UNHCR condemned Cambodia's deportation of 20 Chinese Uighers who had fled to Cambodia in July 2009 after ethnic riots. China has referred to the group as criminals—BBC News website at http://news.bbc.co.uk/1/hi/8422022.stm (19 December 2009).

(32.) Human Rights Committee, General Comment 20, UN Doc HRI/GEN/1/Rev 1, 30 (1994), para 9. Sitting as an ad hoc judge on the International Court of Justice in *Application of the Convention on the Prevention and*

Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, Sir Elihu Lauterpacht contended with respect to genocide that its *jus cogens* character meant that it overrode all treaty obligations, even Art 103 of the UN Charter—see his Separate Opinion at para 100.

> The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of noms—extend to a conflict between a Security Council resolution and *jus cogens*.
>
> On *jus cogens,* non-refoulement, and torture, see Lauterpacht and Bethlehem (n 31) 151–2, para 222. See generally Goodwin-Gill and McAdam (n 3) 306 ff.

(33.) Cartagena Declaration on Refugees, adopted at a colloquium entitled '*Coloquio Sobre la Protecciín Internacional de los Refugiados en Américan Central, México y Panamá: Problemas Jurídicos y Humanitarios*' held at Cartagena, Colombia from 19–22 November 1984. It was endorsed at the 20th Anniversary in 2004 in Mexico City: Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, (2005) 17 IJRL 802–17. See also Goodwin-Gill and McAdam (n 3) 212 and 218.

(34.) Although some of the Separate Opinions of Judge Cançado Trinidade that link international human rights law, the international law of armed conflict, and international refugee law in terms of their *jus cogens* character suggest that the Court would protect those fearing expulsion or deportation under Art 5 of the Convention—see, eg, para 9 of his concurring opinion in *Order of the Inter-American Court of Human Rights of July 5, 2004, Provisional Measures regarding Colombia, Matter of Pueblo Indígena de Kankuamo*. Nb In *Report No 51/96, decision of the [Inter-American Commission of Human Rights] as to the Merits of Case 10.675, United States,* 13 March 1997, the Commission dealt with claims by Haitians regarding the interdiction policy of the US as regards their obligations under the American Declaration on the Rights and Duties of Man, 1948. The Commission found that Art 33 of the 1951 Convention applied to persons interdicted on the high seas (paras 156–7), but, more significantly for present arguments, that the

right to security of the person in Art 1 included not sending people back to countries where it left ‘them exposed to acts of brutality by the [authorities]’.

(35.) See *Chahal* (n 10).

(36.) Above n 31 at 162–3, para 251.

(37.) Above n 31 at 141, fn 116. See also E de Wet, ‘The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law’ (2004) EJIL 97, 101 ff.

(38.) Federal Supreme Court, Bündesgerecht, Court reports 126 II 145–69; ILDC 351, para 4(c)(bb) (CH 2000) 21 January 2000.

(39.) 1999 CRI.L.J. 919, para 18.

(40.) *Suresh v The Minister of Citizenship and Immigration and the Attorney General of Canada* [2002] SCC 1.

(41.) Ibid para 129. For a similar approach, see the High Court of Kenya at Nairobi in *Adel Mohammed Abdulkadir Al-dahas v Commissioner of Police et al* Misc Crim App 684 of 2003 [2003] e-KLR, and Misc Civ App 1546 of 2004 [2007] e-KLR. It is worth noting that the Kenyan courts still let the applicant reside in Kenya while the UNHCR sought his resettlement in a safe third country. See also, Goodwin-Gill and McAdam (n 3) 301, esp fn 120.

(42.) [2005] NZSC 38, para 51.

> [51] A final argument goes a step beyond the amendment contention. It is that the prohibition on refoulement to torture has the status of a peremptory norm or *ius cogens* with the consequence that article 33.2 would now be void to the extent that it allows for that: see article 64 of the Vienna Convention. While there is overwhelming support for the proposition that the prohibition on torture itself is *ius cogens,* there is no support in the state practice, judicial decisions or commentaries to which we were referred for the proposition that the prohibition on refoulement to torture has that status. So far as state practice and the commentators are concerned the position appears clearly in the legislation mentioned earlier and the papers prepared for, and the statements emerging from, the 2001 UNHCR consultation. They set out the absolute propositions about torture and arbitrary death distinctly from

> the requirements of article 33: the obligations are successive, not merged.

(43.) Similarly, the European Court of Human Rights held in *Al-Adsani v United Kingdom,* App No 35763/97 (Grand Chamber) 21 November 2001, that the prohibition of torture did not override the immunity of states from civil suit in other jurisdictions.

> 66. The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.
>
> Cf the dissenting judgment of Judge Ferrari Bravo.

(44.) *R (on the application of Ullah) v Special Adjudicator*; *Do v Secretary of State for the Home Department,* [2004] UKHL 26, per Lords Bingham and Steyn. See also *C v Australia* Comm No 900/1999, UN Doc CCPR/C/76/D/900/1999, 13 November 2002, para 8.5, and Goodwin-Gill and McAdam (n 3) 301 ff esp 308.

In the related area of extradition, courts in France, the Netherlands, and Switzerland have used a broader range of rights than simply torture or inhuman or degrading treatment or punishment—see French *Conseil d'Etat* in *Galdeano, Ramirez and Beiztegui,* 26 September 1984, Rec 307, [1985] Pub Law 328; Dutch courts in *McF and GK,* 100 ILR 414; and *Dharmarajah,* cited in A Drzemczewski, 'The Position of Aliens in relation to the ECHR: A General Survey' H/COLL (83)8. This is a paper presented to the Colloquy on 'Human Rights of Aliens in Europe' held at Funchal, Madeira, Portugal (17–19 October 1983) 32–3. For other examples, see the Report of the 67th Conference of the International Law Association, Helsinki 1996, Committee on Extradition and Human Rights, 214 ff, esp 229–31. See also Goodwin-Gill and McAdam (n 3) 259–62.

(45.) See, eg, *Gashi and Nikshiqi v Secretary of State for the Home Department,* Appeal No 13695 HX-75677-95, HX/75478/95, IAT 1996.

(46.) In *C and ors v Director of Immigration,* First instance, (2008) 2 HKC 165, ILDC 1119 (HK 2008), the Hong Kong Court of First Instance held that there was a customary norm of non-refoulement not amounting to a peremptory

norm (para 136), but that it did not apply to Hong Kong because it had refused to acknowledge the rule through 'consistent and long-standing objection'—Summary of Findings, para 194(iii).

(47.) See Goodwin-Gill and McAdam (n 3) 218 ff.

(48.) See *Egbuna v Taylor et al, Anyaele v Taylor et al,* Ruling on preliminary objection, SUIT No FHC/ABJ/M/216/2004; SUIT No FHC/ABJ/M/217/2004; ILDC 163 (NG 2005).

(49.) For a full examination of exclusion under the 1951 Convention, see G Gilbert, 'Current issues in the application of the exclusion clauses' in Feller, Türk, and Nicholson (n 20) 425–85. See also UNHCR Guidelines on Exclusion, HCR/GIP/03/05, 4 September 2003—with Background Note; the Special Supplementary Issue of the *International Journal of Refugee Law,* vol 12, Autumn 2000, on 'Exclusion from Protection: Article 1F of the UN Refugee Convention and Article 1[5] of the OAU Convention in the Context of Armed Conflict, Genocide and Restrictionism'; J Hathaway and C Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 34(2) Cornell ILJ 257–320.

(50.) Of course, once refouled, it is arguable that Art 1C on cessation might be applicable, but that is far from clear. See also Art I.4(f) and (g) of the 1969 OAU, as it then was, Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45.

> I.4. This Convention shall cease to apply to any refugee if:
> …(f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this Convention.

(51.) See generally Background Note on the Application of the Exclusion Clauses (n 49) paras 23–36.

(52.) 1998, in force 1 July 2002, 2187 UNTS 90; 37 INT.LEG.MAT.999 (1998) —as corrected by the *procés-verbaux* of 10 November 1998 and 12 July 1999, available at http://www.icc-cpi.int/Menus/ASP/Publications/. See also A Cassese, P Gaeta, and J Jones, *The Rome Statute of the International Criminal Court: A Commentary* (OUP, Oxford 2002).

(53.) See 75 UNTS 31, 85, 135, and 287.

(54.) 1125 UNTS 609.

(55.) See *Duško Tadíc, aka 'Dule,' Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction before the Appeals Chamber of ICTY,* Case No IT-94-1-AR72 (2 October 1995).

> 134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, … and for breaching certain fundamental principles and rules regulating means and methods of combat in civil strife.
>
> 137. In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 [of the Statute of the ICTY] as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied.
>
> See also JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (CUP, Cambridge 2005).

(56.) Highest administrative appeal, Administrative Law Division of the Council of State, 200408765/1; ILDC 848 (NL 2005), para 2.4.2.

(57.) Above n 53.

(58.) For a comprehensive review as at 2002 of the custom, see K Ambos and S Wirth, 'The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000' (2002) 13 Crim LF 1.

(59.) Cited in the International Military Tribunal at Nuremberg's Judgment, which may be found in vol XXII, pp 413–14, of *Trial of the Major War Criminals before the International Military Tribunal* (1948). See also (1947) 41 AJIL 172.

(60.) 78 UNTS 277.

(61.) Above n 52; for an example of how the Rome Statute definition is gaining primacy, see *R (JS (Sri Lanka)) v SSHD* [2010] UKSC 15, and *SK*

(Zimbabwe) v SSHD [2010] UKUT 327. See also Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), UN Doc S/25704, 36, annex (1993) and S/25704/Add 1 (1993), adopted by Security Council on 25 May 1993, UNSC Res 827 (1993) and may be found in (1993) 32 ILM 1192; the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (ICTR), is to be found in UNSC Res 935 and 955 (1994), reprinted in (1994) 5 Crim LF 695.

(62.) See *Prosecutor v Kunarac, Kovac, Vukovic,* Case No IT-96-23-T and IT-96-23/1-T, 22 February 2001.

> 410. The expression 'an attack directed against any civilian population' is commonly regarded as encompassing the following five sub-elements:
>
> 1. ((i)) There must be an attack.
> 2. ((ii)) The acts of the perpetrator must be part of the attack.
> 3. ((iii)) The attack must be 'directed against any civilian population'.
> 4. ((iv)) The attack must be 'widespread or systematic'.
> 5. ((v)) The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack. (footnotes omitted)

Affirmed by Appeals Chamber, Case No IT-96-23-A and IT-96-23/1-A, 12 June 2002, paras 85–9. The Appeals Chamber went on to confirm that the use of the word 'population' did not mean the entire population—paras 90 ff.

(63.) The 1950 Statute of the United Nations High Commissioner for Refugees, UNGA Res 428(V) Annex, UNGAOR Supp (No 20) 46, UN Doc A/1775, 14 December 1950, para 7(d), makes explicit reference to extradition treaties, while Art 1Fb of the 1951 Convention does not include such language.

> 7. Provided that the competence of the High Commissioner as defined in paragraph 6 above shall not extend to a person:
>
> (d) In respect of whom there are serious reasons for considering that he has *committed a crime covered by the provisions of treaties of extradition* or a crime mentioned in article VI of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights (emphasis added).

(64.) *A-G (Minister of Immigration) v Tamil X and RSAA* [2010] NZSC 107.

(65.) It is worth noting that the leading case on the political offence exemption in English law is a case dealing with exclusion under Art 1Fb—see *T v Secretary of State for the Home Department* [1996] 2 All ER 865. See also *Ahani v Minister for Employment and Immigration* [1995] 3 FC 669, and *Singh v Minister for Immigration and Multicultural Affairs* [2000] FCA 1125 (Australian Fed Ct). Of course, a refugee might be extradited, either to a third country where they did not face any threat of persecution or even the state from which they fled if the circumstances would not amount to refoulement. In *Németh v Minister of Justice of Canada* [2010] SCC 56, the Supreme Court, relying on Canada's treaty obligations, its Constitution, and its domestic refugee law, held that extradition could not vitiate the obligation not to refoule.

> [86]…The Refugee Convention has an ‘overarching and clear human rights object and purpose’ and domestic law aimed at implementing the Refugee Convention, such as s. 44(1)(*b*) [Extradition Act], must be interpreted in light of that human rights object and purpose: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, at para. 57. Section 44(1)(*b*), when applied to the situation of a refugee whose extradition is sought, must be understood in the full context of refugee protection.
>
> [102]…I would read the closing words of s. 44(1)(*b*) broadly as protecting a refugee against *refoulement* which risks prejudice to him or her on the listed grounds in the requesting state whether or not the prejudice is strictly linked to prosecution or punishment.

See also UNHCR, Guidance Note on Extradition and International Refugee Protection, April 2008, available on RefWorld at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain.

(66.) See Lauterpacht J in the *Genocide* case (n 32) where he gives paramountcy to Security Council Resolutions under Chapter VII vis-à-vis treaty obligations, such as the 1951 Convention in this context, but not over norms of *jus cogens* if such apply with respect to non-refoulement to torture.

(67.) For example, UNSC Res 1377 (2001):

Declares that acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century.

See also, Chapter 3 (Antonious Tzanakopoulos).

(68.) That is not to say, though, that Art 1F is simply an anti-terrorism measure. There still needs to be careful consideration as to whether one can attribute *guilty acts* to the applicant. In *KJ (Sri Lanka) v SSHD,* [2009] EWCA Civ 292, the court considered whether mere membership of an organization that in part engaged in acts of terrorism should exclude the applicant:

> 38. However, the LTTE, during the period when KJ was a member, was not…an organisation [engaged solely in terrorism]. It pursued its political ends in part by acts of terrorism and in part by military action directed against the armed forces of the government of Sri Lanka. The application of Article 1F(c) is less straightforward in such a case. A person may join such an organisation, because he agrees with its political objectives, and be willing to participate in its military actions, but may not agree with and may not be willing to participate in its terrorist activities. Of course, the higher up in the organisation a person is the more likely will be the inference that he agrees with and promotes all of its activities, including its terrorism. But it seems to me that a foot soldier in such an organisation, who has not participated in acts of terrorism, and in particular has not participated in the murder or attempted murder of civilians, has not been guilty of acts contrary to the purposes and principles of the United Nations.
>
> 40.…The word 'complicit' is unenlightening in this context. In my judgment, the facts found by the Tribunal showed no more than that [KJ] had participated in military actions

> against the government, and did not constitute the requisite serious reasons for considering that he had been guilty of acts contrary to the purposes and principles of the United Nations.

See also *MH (Syria) v SSHD* [2009] EWCA Civ 226, and *SSHD v DD (Afghanistan)* [2010] EWCA Civ 1407, paras 55–65.

(69.) Given the date of its adoption by the General Assembly, 10 December, one might like to think of it as Eleanor Roosevelt's wish list to Father Christmas for 1948. Never before or since, though, has a 'wish list' had such a spectacular impact in the world as regards both states and individuals.

(70.) See Art 3 of the Convention Against Torture 1984, UNGA Res 39/46, annex, 39 UNGAOR Supp (No 51), 197, UN Doc A/39/51 (1984).

> No State Party shall expel, return ('*refouler*') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(71.) Above n 10.

(72.) In *Minister for Immigration Affairs and Integration v A,* Administrative appeal, 200410057/1; JV 2005/375 m nt BPV (Administrative Law Division); ILDC 546 (NL 2005), the Dutch Council of State held that finding the applicant was excluded under Art 1F did not exempt the Minister from investigating whether Art 3 of the ECHR protected the applicant (para 2.3.2).

(73.) See *Saadi v Italy,* App No 37201/06, European Court of Human Rights (Grand Chamber), 28 February 2008.

> 127. As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct (see *Chahal,* cited above, § 79), the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3 (see *Indelicato v Italy,* no. 31143/96, § 30, 18 October 2001, and *Ramirez Sanchez v France* [GC], no. 59450/00, §§ 115–16, 4 July 2006).
>
> 148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to

> examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see *Chahal,* cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.

See also *Sufi and Elmi v UK,* App Nos 8319/07 and 11449/07, European Court of Human Rights (Fourth Section) 28 June 2011, esp paras 252 ff, a case dealing with expulsion of two men seeking to prevent their return to Somalia for fear they would face persecution having allegedly committed serious offences in the United Kingdom.

(74.) [2004] HKCFA 43, [2005] 1 HKLRD 289, 8 June 2004, ILDC 1121 (HK 2004), paras 56–61.

(75.) Above n 40.

(76.) Concluding Observations of the Human Rights Committee, Canada, UN Doc CCPR/C/CAN/CO/5 (2006).

> 15. The Committee is concerned by the State party's policy that, in exceptional circumstances, persons can be deported to a country where they would face the risk of torture or cruel, inhuman or degrading treatment, which amounts to a grave breach of article 7 of the Covenant.
>
> The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant. No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.

(77.) On double balancing with respect to Art 1F, see Gilbert (n 49) 450–5. Article 1F allows for the court to use one level of balancing inclusion against

exclusion in its use of terms like ‘serious’ and ‘reasonable’. However, the suggestion here and below is that courts need to read in another level of balancing into this humanitarian treaty so as not to exclude even where that would be technically justified because of the treatment the applicant for refugee status would face if excluded and returned to her or his country of nationality.

(78.) Above n 23.

(79.) The German Federal Administrative Court has in paras 32 and 33 of its reference (BVerwG 10 C 48.07, to the European Court of Justice on exclusion under Council Directive 2004/83/EC, of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive)), raised this issue, but under that parallel protection regime.

> In this Court's opinion, the exclusion clauses are fundamentally mandatory, and leave the authorities in charge no room for discretion. The requirements of constituent fact are founded on an abstract proportionality test. If the requirements of constituent fact are met, it must be assumed that the individual is not deserving of refugee status. Nevertheless, the application of the exclusion clauses in a given case cannot contravene the principle of proportionality recognised in international and European law. This principle requires that every measure must be suitable and necessary, and in reasonable proportion to the intended purpose…[Primarily] the misconduct charged against the individual must be weighed against the consequences of exclusion.

The ECJ rejected the argument—see *Judgment of the Court (Grand Chamber) of 9 November 2010 (reference for a preliminary ruling from the Bundesverwaltungsgericht—Germany)—Bundesrepublik Deutschland v B (C-57/09), D (C-101/09),* para 3 of the operative part of the judgment.

(80.) See the New Zealand Supreme Court in *Zaoui* (n 42) para 42.

(81.) Of course, this assumes that complementary protection is available before the domestic courts carrying out status determination under the 1951 Convention. In the United Kingdom, eg, courts will apply the ECHR alongside the 1951 Convention and in the United States, CAT is used.

However, Australia only started the process of implementing complementary protection in 2009, under the Rudd government.

(82.) App No 40035/98, European Court of Human Rights (Fourth Section), 11 July 2000.

(83.) Above n 18.

(84.) App No 25904/07, European Court of Human Rights (Fourth Section), 17 July 2008.

(85.) The Court went on to look at this in the context of targeted groups.

> 116.—Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned (see Saadi v. Italy, cited above, §132). In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (see Salah Sheekh, cited above, § 148). The Court's findings in that case as to the treatment of the Ashraf clan in certain parts of Somalia, and the fact that the applicant's membership of the Ashraf clan was not disputed, were sufficient for the Court to conclude that his expulsion would be in violation of Article 3.
>
> 117.—In determining whether it should or should not insist on further special distinguishing features, it follows that the Court may take account of the general situation of violence in a country. It considers that it is appropriate for it to do so if that general situation makes it more likely that the authorities (or any persons or group of persons where the danger emanates from them) will systematically ill-treat the group in question (see Salah Sheekh, § 148; Saadi v. Italy, §§ 132 and 143;

and, by converse implication, Thampibillai, §§ 64 and 65; Venkadajalasarma, §§ 66 and 67, all cited above).

See also *Sufi and Elmi* (n 73).

(86.) *HJ (Iran) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action; HT (Cameroon) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action* [2010] UKSC 31 (forever to be known as the Kylie and exotically coloured cocktails case—para 78).

(87.) *Januzi, Hamid, Gaafar and Mohammed v Secretary of State for the Home Department* [2006] UKHL 5 and *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49.

(88.) Above n 73 at paras 265 ff esp paras 283 and 291.

(89.) App No 30696/09, European Court of Human Rights (Grand Chamber), 21 January 2011.

(90.) Above n 79.

(91.) Moreover, it should be noted that despite the universal character of the 1951 Convention and the requirement not to discriminate between refugees in Art 3 of that Convention, courts dealing with claims for refugee status within the European Union will rely on the Qualification Directive that only applies to nationals of third states. See Hurwitz (n 3) 223–50.

(92.) Above n 79.

(93.) There are five questions in the reference, four of which are pertinent:

1. (1.) Does a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12 (2) b and c of Council Directive 2004/83/EC of 29 April 2004 exist if the applicant has belonged to an organisation that appears on the list of persons, groups and entities annexed to the Council Common Position on the Application of Specific Measures to Combat Terrorism, and that applies terrorist methods, and the applicant actively supported the armed struggle of that organisation?

2. (2.) In the event that Question 1 is to be answered in the affirmative: Does the exclusion from refugee status under Article 12 (2) b and c of Directive 2004/83/EC presuppose that the applicant still represents a danger?
3. (3.) In the event that Question 2 is to be answered in the negative: Does the exclusion from refugee status under Article 12 (2) b and c of Directive 2004/83/EC presuppose a proportionality test referred to the individual case?
4. (4.) In the event that Question 3 is to be answered in the affirmative: a) Should the proportionality test take into account that the applicant benefits from protection against deportation under Article 3 of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, or under national law? b) Is exclusion disproportionate only in special cases?

(94.) Above n 79, para 26.

> With reference to terrorist activities, the Security Council of the United Nations, in the introductory recitals to Resolution 1269 of 19 October 1999, pointed out that the suppression of acts of international terrorism, including those in which States are involved, is an essential contribution to the maintenance of international peace and security. In the introductory recitals to Resolution 1373 of 28 September 2001 it reaffirmed that any act of international terrorism constitutes a threat to international peace and security, and then 'acting under Chapter VII,' declared that acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations, as are knowingly financing, planning and inciting terrorist acts (see Item 5 of Resolution 1373). From this it can be gathered that the Security Council evidently assumes that acts of international terrorism, whether or not a state is involved, are in general contrary to the purposes and principles of the United Nations.

See paragraph 1 of the operative part of the ECJ judgment in *B and D*.

(95.) Art 15 Serious harm:

> Serious harm consists of:

> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

(96.) *Elgafaji v Staatssecretaris van Justitie,* Case C-465/07, (ECJ Grand Chamber) 17 February 2009; (Reference for a preliminary ruling under Arts 68 EC and 234 EC from the Raad van State (Netherlands), made by decision of 12 October 2007, received at the Court on 17 October 2007). Interestingly, the European Court of Human Rights in *Sufi and Elmi* (n 73) para 226, held that while Art 15b of the Directive refers to 'torture or inhuman or degrading treatment or punishment', Art 15c would also fall within the scope of Art 3 of the ECHR as set out in *NA v UK,* App No 25904/07, European Court of Human Rights (Fourth Section), 17 July 2008.

> 226. The jurisdiction of this Court is limited to the interpretation of the Convention and it would not, therefore, be appropriate for it to express any views on the ambit or scope of article 15(c) of the Qualification Direction. However, based on the ECJ's interpretation in *Elgafaji,* the Court is not persuaded that Article 3 of the Convention, as interpreted in *NA,* does not offer comparable protection to that afforded under the Directive. In particular, it notes that the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there.

As such, the ECHR and ECQD can be seen to interact and influence a parallel but discrete development.

(97.) Above n 96.

> 35. In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place—*assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred*— reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country

> or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive (emphasis added).

(98.) *QD (Iraq) v Secretary of State for Home Department,* [2009] EWCA Civ 620. See also the decision of the Upper Chamber (Immigration and Asylum Chamber) in *HM et al (Article 15(c)) Iraq CG* [2010] UKUT 331 (IAC):

> 89. 'Armed conflict' must mean something other than unpredictable and short lived outbreaks of deadly criminality however indiscriminate or the lone gunman on the rampage. *Armed conflict and indiscriminate violence are not terms of art governed by IHL,* but are terms to be generously applied according to the objects and purpose of the Directive to extend protection as a matter of obligation in cases where it had been extended to those seeking to avoid war conflict zones as a matter of humanitarian practice (emphasis added).

(99.) [2008] UKAIT00023.

(100.) I am grateful to David Kosar for this summary that he supplied to the Berlin meeting of the European Chapter of the International Association of Refugee Law Judges (October 2009).

> Term 'internal armed conflict' includes both the so-called vertical conflicts and the so-called horizontal conflicts.
>
> An internal armed conflict within the meaning of international humanitarian law exists at any rate if the conflict meets the criteria of Art. 1(1) of Additional Protocol II of 1977. Conversely, it does not exist if the exclusionary conditions of Art. 1(2) of Additional Protocol II of 1977 are present.
>
> Conflicts falling in between these two boundaries fall within the ambit of Art. 15(c) QD if they satisfy the so-called *Tadic* criteria: protracted armed violence and organization of armed groups [two following cases provide particularly helpful guidance as to the content of these two criteria: *Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj,* Case No IT-04-84-T, Trial Chamber, Judgment of 3 April 2008, paras 49 and 60; and *Prosecutor v Ljube Boskoski and Johan Tarculovski,*

Case No IT-04-82-T, Trial Chamber, Judgment of 10 July 2008, paras 177–8 and 199–203].

(101.) Lord Steyn in *Adan* (n 23) 517.

(102.) See also A Orakhelashvili, ‘The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?’ (2008) 19 EJIL 161.

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Resolving Conflicts between Human Rights and Environmental Protection: Is there a Hierarchy

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Abstract and Keywords

This chapter examines the jurisprudence of domestic and international courts dealing with the tensions between obligations pertaining to human rights and environmental protection. Environmental protection requires controlling human activities that unsustainably use natural resources, disrupt natural processes, or pollute the air, water, and soil upon which life depends. Like many other types of governmental regulation, measures of environmental protection almost inevitably restrict the scope of individual freedom to act, as well as have the potential to limit the enjoyment of human rights guaranteed by international or domestic law. This may result in norm conflicts between, on the one hand, legislation designed to protect nature and on the other, constitutional or treaty-based human rights, especially those concerning property rights, indigenous peoples, and freedom of movement. The chapter illustrates, however, that the various concerns are not intrinsically incompatible, because environmental law is also concerned with human well-being.

Keywords: human rights, environment, human well-being, property rights, indigenous peoples

1. Introduction

Environmental protection requires controlling human activities that unsustainably use natural resources, disrupt natural processes, or pollute the air, water, and soil upon which life depends. Like many other types

of governmental regulation, measures of environmental protection thus almost inevitably restrict the scope of individual freedom to act and have the potential to limit the enjoyment of human rights guaranteed by international or domestic law: the creation of a nature preserve may include restricting human access and thus freedom of movement; endangered species laws usually limit or prohibit the taking or possession of protected animals or plants, some of which may be vital to religious practices or cultural survival; zoning restrictions and licensing requirements may create green belts or otherwise restrict the exercise of property rights; development projects may be limited or halted to serve ecological interests. As Professor Alan Boyle has commented, human rights law is anthropocentric, while environmental law is or should be ecocentric and based on the intrinsic value of nature.[1] In sum, we may have normative conflicts between, on the one hand, legislation designed to protect nature and, on the other hand, constitutional or treaty-based human rights, especially those concerning property rights, indigenous peoples, and freedom of movement.[2]

(p. 207) The two concerns are not intrinsically incompatible, however, because environmental law is also concerned with human well-being. Indeed, environmental protection may reinforce or even be a prerequisite to the enjoyment of other rights. The rights to life and to the highest attainable standard of health depend upon ensuring the absence or, at a minimum, a safe level of hazardous or toxic substances in the human environment. The rights to food, safe drinking water, housing, and sanitation, increasingly recognized in international and domestic law, are dependent upon the quality of the environment. These linkages have led a growing number of states and international institutions to recognize the right to a safe and healthy environment itself as a human right.[3] Whensuch a right is included in the catalogue of protected rights, conflicts may still arise between measures to ensure it and the guarantees inherent in other rights, which then must be interpreted harmoniously or balanced, using doctrines like proportionality. The only hierarchical principle that has been proposed can be found in a unique Inter-American Commission on Human Rights (IACHR) report—not involving the environment—which suggested that derogable rights not only may, but must, be limited where necessary to ensure the enjoyment of non-derogable rights like the right to life.[4] *Jus cogens* has played no role in judicial decisions on the environment and human rights; nor have courts resorted to conflict rules like *lex posterior* or *lex specialis*.

Some courts have avoided potential conflicts by implying new environmental rights and incorporating governmental obligations to protect the

environment within existing civil, political, economic, and social rights.[5] The issue to be **(p. 208)** examined, then, may be less one of a conflict between environmental protection and human rights than one about balancing or reconciling competing human rights, especially given the international recognition—though still controversial—of the right to development.

Various international legal instruments speak to each state's permanent sovereignty over its own natural resources.[6] In potential tension with this doctrine (and with each other) are the common concerns of human rights and environmental protection.[7] All economic activities involve the utilization of natural resources, and hence the environment, and as noted above can either promote or hinder the enjoyment of human rights. Laws and other measures to protect nature may conflict with human rights and be criticized for their negative impacts on the rights of marginalized individuals and groups. Those persons who suffer the greatest burdens from environmental deterioration tend to be also the most vulnerable to human rights abuses. In many cases, it appears that both human rights and the environment have been harmed by government action or inaction in the face of public or private economic activities.

Despite the potential for conflict between environmental law and human rights guarantees, it is very rare to find an instance in international treaty law where a state's compliance with an environmental agreement would inevitably lead it to breach its human rights obligations. Several reasons account for this reality. First, many environmental agreements are directed at human well-being and tend to reinforce human rights guarantees rather than conflict with them; this is especially the case with respect to agreements that aim to combat pollution. A growing number of environmental agreements even contain provisions drawn from human rights law, guaranteeing the rights to information, public participation, and redress for environmental harm.[8] Secondly, most environmental agreements are written to **(p. 209)** require the states parties to achieve specific objectives, leaving them broad discretion to meet these goals in a manner consistent with other obligations, including those in the field of human rights. Thus, while conservation agreements may call for the establishment of nature preserves or protected wetlands, they do not generally demand that such areas be created on the ancestral lands of indigenous peoples or by taking private property without compensation.[9] Thirdly, in circumstances where a potential conflict is evident, treaty drafters have taken into account human rights law and provided specific language to minimize or avoid the conflict. Thus, the International Whaling Convention,[10] like many domestic endangered species

acts, provides an exception to preserve the whaling rights of indigenous communities whose cultural and sometimes physical survival depends upon the continued subsistence hunting of whales. Finally, the concept of sustainable development, comprising the three ‘pillars’ of economic development, social development, and environmental protection, provides an umbrella that avoids notions of hierarchy, in theory.[11]

Even without confronting conflicting treaty obligations, states have had to answer complaints that the environmental measures they have enacted violate human rights law, especially the right to property, but also freedom of religion and the right to culture.[12] Most of the jurisprudence, however, involves allegations that the state has *failed* to take action to protect the environment, leading to a breach of *both* human rights and environmental law. A growing caseload is elaborating environmental rights and examining their enforcement in the face of governmental decisions to favour economic development projects.

The expanding jurisprudence offers the possibility to examine how economic development projects, environmental protection, and human rights are viewed **(p. 210)** in terms of hierarchy when conflicts allegedly arise. The courts may find that no conflict exists, by merging all the goals under an overarching concept like sustainable development, or by finding that the law itself provides a means to avoid the conflict. In human rights law, the right to property, for example, is by no means absolute. Instead, human rights instruments generally refer to long-standing international norms on expropriation, which allow deprivations of property in the public interest provided just compensation is paid and the taking is non-discriminatory. Such limitations clauses are usually adequate to accommodate land use restrictions for environmental purposes. Limitations clauses are also attached to the right of freedom of movement and residence, allowing ‘green belts’ and protected areas to be created consistent with human rights norms.[13]

If a conflict is found to exist, the legal system may establish a hierarchy requiring priority to be given to one body of law over another, allowing human rights law or environmental law to ‘trump’. This is most likely to occur when a specialized court has been established to enforce a particular body of law. Not surprisingly, human rights courts enforce human rights law and the World Trade Organization (WTO) dispute settlement bodies apply trade law. National courts of general jurisdiction are more likely to find contradictory legislative or constitutional provisions of equal normative value and thus face the task of reconciling them or otherwise resolving

the conflict. This chapter will examine the jurisprudence of domestic and international courts where these issues have been addressed. One question to be considered will be whether or not the inclusion of a right to a safe and healthy environment among human rights guarantees makes a difference. Does it elevate environmental protection to a superior position, like that enjoyed by other constitutional or treaty-based rights?[14] Absent such a guarantee, is environmental protection deemed subordinate to human rights guarantees? **(p. 211)**

2. The interpretive methodology applied to human rights

It is important to note at the outset that international human rights tribunals use expansive modes of interpreting human rights instruments, insisting that the rights must be made real and effective. While all tribunals refer to the Vienna Convention on the Law of Treaties (VCLT), regional human rights instruments contain specific provisions on interpretation. Article 53 of the European Convention on Human Rights (ECHR), for example, provides that nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any contracting party or under any other agreement to which it is a party.[15] The ACHR goes further, safeguarding not only rights recognized by domestic laws and other agreements, but also the American Declaration of the Rights and Duties of Man and 'other international acts of the same nature' as well as 'other rights or guarantees that are inherent in the human personality…'.[16] The African Charter of Human and Peoples' Rights contains the broadest mandate, calling on its Commission to draw inspiration from international law on human and peoples' rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, and the provisions of instruments adopted by specialized agencies.[17] As subsidiary means to determine the relevant principles of law, the Commission is directed to take into consideration other general or special international conventions, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states, and legal precedents and doctrine.[18]

The broad interpretive mandates of regional bodies have led to the practice of finding and applying the most favourable rule to petitioners appearing before the courts and commissions.[19] In addition, human rights tribunals have developed various canons of interpretation that reinforce these mandates and the VCLT rules of treaty interpretation, allowing them to make

broad use of environmental laws, principles, and standards. Limitations clauses are interpreted and applied narrowly, and the burden of proof is on the government to justify any restrictions, based on the terms of the agreement.[20] This is important in environmental litigation. Human rights tribunals and domestic courts generally find environmental protection to be a legitimate governmental aim and in the public interest, but they may scrutinize the measures carefully to ensure that they are established by law and are proportional. The measures will be upheld only if they are consistent with human rights, using this analytical methodology. **(p. 212)**

Using the VCLT, human rights bodies acknowledge the primacy of the texts of human rights treaties, but focus more intently on their basic purpose, which is the protection of the rights on the individual. Based on this purpose, tribunals interpret the rights guaranteed in an expansive and dynamic manner. Neither the Inter-American Commission on Human Rights nor the Inter-American Court of Human Rights adheres to a static or 'originalist' interpretation of the texts. Instead, both institutions have held that the provisions of regional human rights instruments must be interpreted and applied by taking into account 'developments in the field of international human rights law since those instruments were first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged'.[21] The Inter-American Court insists on 'evolving American law' and the need to interpret legal instruments in the light of contemporary standards.[22] The jurisprudence of the Inter-American system reveals that relevant developments in the corpus of international human rights law may be drawn from the provisions of other international and regional instruments.[23]

The European Court of Human Rights (ECtHR) has also determined that it must have regard to the changing conditions within its contracting states generally and must respond to evolving convergence as to the standards to be achieved. The ECtHR maintains this dynamic and evolutionary approach because it finds it is 'of critical importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'.[24] Such an approach benefits environmental rights, which might be excluded from consideration using an 'originalist' interpretation of human rights agreements, because most of the latter were written before environmental law developed and thus environmental conditions were not contemplated by the treaty drafters.[25] **(p. 213)**

In respect of the environment, the ECtHR has indicated that the scope of guaranteed rights is affected by the ‘growing and legitimate concern both in Europe and internationally about offenses against the environment’.[26] It thus has increasingly read together human rights norms and laws and treaties on environmental protection. In one case, the Court concluded that governments may adjust the amount of permissible bail that can be demanded and the length of pretrial detention according to the particular circumstances and seriousness of an environmental disaster.[27] In reaching this conclusion, the Court took into account the 1982 Convention on the Law of the Sea and its provisions on offences against the marine environment, the MARPOL Convention,[28] and European law on environmental crimes and liability.[29]

In 2008, the ECtHR described its interpretive methodology in detail. *Demir and Baykara v Turkey,*[30] a case concerning trade union freedoms, reveals the Court's agreement that other legal instruments and general principles are relevant where the European Convention is silent or lacking precision. The Turkish government argued against reliance on international instruments other than the Convention, on the ground that such reliance would risk wrongly creating, by way of interpretation, new obligations not contained in the Convention. In particular, the government contended that an international treaty to which the party concerned had not acceded could not be relied upon against it, by reference to VCLT, Article 31(3)(c).[31] The Court disagreed.

To start, the Court confirmed that the principal VCLT rules of interpretation are mandatory to determine the meaning of the terms and phrases used in the Convention.[32] As such, ‘the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn’.[33] Article 32 of the VCLT allows recourse to supplementary means of interpretation, either to confirm a meaning **(p. 214)** or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable.[34]

The Court referenced VCLT, Article 31(3)(c) in particular, in adding that it

> has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.[35]

The Court also cited to its earlier jurisprudence on the Convention as a ‘living instrument’, which ‘must be interpreted in the light of present-day conditions’, taking into account ‘evolving norms of national and international law in its interpretation of Convention provisions’.[36]

The remainder of the Court's analysis pointed to the variety of sources that are relevant to this general approach, first looking to other international treaties ‘that are applicable in the particular sphere’,[37] and then to ‘general principles of law’ as mentioned in Article 38 paragraph 1(c) of the Statute of the International Court of Justice.[38] According to the ECtHR, general principles of law may be identified in texts of universal and regional scope (not only human rights treaties) and in the jurisprudence of international[39] and domestic courts[40] that apply these instruments. In addition, the Court may use ‘intrinsically non-binding instruments of Council of Europe organs, in particular recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly’.[41] The Court may **(p. 215)** further ‘support its reasoning’ by reference to norms emanating from other Council of Europe organs, whether supervisory mechanisms or expert bodies.[42]

In sum, the ECtHR considers the text of the Convention provisions, but

> it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty.[43]

When common ground among the norms is found, the Court will not distinguish between sources of law according to whether or not they have been signed or ratified by the respondent state.[44] It is sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member states of the Council of Europe and show, in a precise area, that there is common ground in modern societies.

The broad interpretive approach utilized by the ECtHR is certainly dynamic and progressive. It reflects the Court's view of the European Convention as setting, and at the same time reflecting, evolving common values among the

European states. Where the Court finds broad consensus, it may require the one or few states lagging behind to accept the views of the large majority. While this result may assist some governments to overcome domestic opposition to reform, it is difficult to reconcile with the traditional consent-based view of international law. In addition, it may cause some states to withhold ratification of human rights treaties if the instruments create courts and commissions that can evolve norms in unanticipated and unacceptable ways.

The methodology described by the ECtHR, similar to that adopted by other human rights tribunals, allows it to incorporate and either reconcile or balance the rights invoked with other values, like environmental protection, that are not expressly guaranteed by the Convention and its protocols. The jurisdiction of the Court, however, is limited to human rights, and it must reject cases raising environmental issues if the issues do not immediately and directly affect human well-being. Thus pollution cases may be decided, but nature protection cases are excluded.

3. Human rights given priority over environmental protection

One approach to potential conflicts between human rights and environmental protection is to affirm and enforce human rights, whether international or constitutional, as superior to ordinary law, including environmental protection **(p. 216)** measures. This occurs most often when enforcement of human rights is found not to threaten the underlying goals of environmental protection. Such priority may be enacted into law or may be implied by courts. As noted earlier, the parties to the International Whaling Convention provided an exception to the Convention's regulations, allowing indigenous peoples to continue whaling provided that traditional hunting and taking methods are used and no commercial exploitation is involved. The rationale is the preservation of indigenous peoples, including their cultures, but it is also obvious that the critical losses in whale populations are not the result of indigenous whaling. Thus, the priority afforded the rights of the indigenous peoples might be an exception to the positive law, but it does not undermine the overall goals of the environmental law.

3.1 International jurisprudence

International human rights bodies receive petitions in which the applicants assert that one or more rights have been violated by the failure to protect the environment. Cases invoking minority rights under Article 27 of the

International Covenant on Civil and Political Rights (ICCPR) have had limited success on the merits, at least where the government has consulted with the group in question.[45] The state's interest in resource use and the right to development of the larger community override the concerns of the minority who inhabit the environment or ecosystem in question. The Human Rights Committee seems to equate the procedural rights of the minority with the substantive economic rights of the majority, allowing projects to go forward provided the minority community was consulted.

Some petitioners have successfully invoked human rights to challenge government regulations adopted to protect natural resources. The ICCPR communication *Haraldsson and Sveinsson v Iceland*[46] set forth a conflict between livelihood and environmental protection, alleging discrimination in violation of Article 26 of the ICCPR by Iceland.[47] Professional fishermen challenged the Icelandic Fisheries Management Act that was adopted when the level of commercial fishing became unsustainable in the 1970s. The government asserted the ecological necessity of protecting the fish stocks and noted the international legal regime codified in the United Nations Convention on the Law of the Sea. It asserted:

> The danger of over-fishing in Iceland is real and imminent, due to advancement in fishing technology, higher catch yields and a growing fishing fleet. A collapse of fish stocks would have disastrous consequences on the Icelandic nation, for which fishing has been a fundamental occupation since the earliest times. Measures to prevent over-fishing by means of catch limits are a necessary element in the protection and rational utilisation of fish-stocks. **(p. 217)** Therefore, public interest demands that restrictions be imposed on the freedom of individuals to engage in commercial fishing.

It further argued the existence of reasonable and objective grounds for the decision of the Icelandic legislature to restrict and control fish catches by means of a quota system. It noted that a comparison of various fisheries management systems in Iceland and abroad and the research findings of scientists in marine biology and economics have unequivocally concluded that a quota system such as the Icelandic one is the best method of achieving the economic and biological goals of modern fisheries management systems. The Committee addressed the issue as one of possible discrimination in violation of Article 26 of the Covenant. Recalling that not every distinction constitutes discrimination in violation of Article 26, the Committee reiterated that distinctions must be justified on reasonable

and objective grounds, in pursuit of an aim that is legitimate under the Covenant.[48] The aim of protecting its fish stocks, a limited resource, was held to be a legitimate one, but the Committee concluded that the creation of a property entitlement to a specific quota was not based on reasonable grounds and was therefore discriminatory. Thus, the divided opinion acknowledged the state's environmental needs, but insisted that these be implemented consistent with the applicants' human rights.

The ECtHR has consistently held to the view that nature protection as such is not part of the Convention's guarantees and thus human rights must trump if there is a conflict; if there is no conflict, the Court will lack jurisdiction to consider the environmental measure.[49] In *Kyrtatos v Greece,*[50] the applicants complained of tourist development projects near their home, which was adjacent to a protected area. The complaints were considered insufficient to bring the case within the scope of Article 8, because the applicants had not asserted any deleterious consequences or serious impacts to them or their property from the projects. The Court seemed convinced, probably correctly, that the applicants' main claim concerned 'interference with the conditions of animal life in the swamp' which, in the Court's view, could not constitute an attack on the private or family life of the applicants. The Court referred to the fact that the applicants did not own the protected area. Thus, even though they alleged that the area had lost all its scenic beauty and had changed profoundly in character from a natural habitat for wildlife to a tourist development filled with noise and light, the Court denied the Article 8 claim, reasoning that

> even assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 sec. 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained **(p. 218)** of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being.[51]

As the dissent noted, it is entirely unclear why the destruction of a forest would count for more than the destruction of a protected swamp, insofar as the applicants' Article 8 rights are concerned.

In February 2010, the African Commission on Human and Peoples' Rights insisted on the priority to be afforded to the rights of the indigenous Endorois in Kenya over the government's claim of ecological need.[52] The complaint alleged that the Government of Kenya forcibly removed the Endorois from their ancestral lands without proper prior consultations or adequate and effective compensation when the government created game reserves in 1973 and 1978. Parts of the Endorois' ancestral land was allegedly demarcated and sold by the state to third parties, and concessions for ruby mining were granted to a private company. The complaint alleged that the evictions severed the Endorois' spiritual, cultural, and economic ties to their lands in violation of national law, Kenyan constitutional provisions, and rights guaranteed in the African Charter, including the right to property, the right to free disposition of natural resources, the right to religion, the right to cultural life, and the right to development.

After first unsuccessfully contesting admissibility of the complaint and the characterization of the Endorois as an indigenous group, the government asserted that its creation of the game reserves was for the purposes of conserving the environment and wildlife and was necessary to conserve some of the areas which had been threatened by encroachment due to modernization. The government did not deny that the Endorois had been removed for this purpose.

Turning first to the claim of religious liberty, the African Commission agreed that in some situations it may be necessary to place limited restrictions on a right protected by the African Charter, but the raison d'être for a particularly harsh limitation on the right to practise religion, such as that experienced by the Endorois, must be based on exceptionally good reasons. It is for the respondent state to prove that such interference is not only proportionate to the specific need on which it is predicated, but is also reasonable. The African Commission was 'not convinced that removing the Endorois from their ancestral land was a lawful action in pursuit of economic development or ecological protection'. Instead, it found that allowing the Endorois to use the land to practise their religion would not detract from the goal of conservation or developing the area for economic reasons.

The government also argued that the game reserve, under the wildlife laws of Kenya, has the objective of ensuring that wildlife is managed and conserved to yield—to the nation in general and to individual areas in particular—optimum returns in terms of cultural, aesthetic, and scientific gains, as well as economic **(p. 219)** gains incidental to proper wildlife

management and conservation.[53] The African Commission rejected these justifications, concluding that the Endorois' property rights were encroached upon by the expropriation and the effective denial of ownership of their land. The Commission pointed out that encroachment on property rights in itself is not a violation of Article 14 of the Charter, as long as it is 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'.

The question was whether the encroachment 'in the interest of public need' was proportionate to the point of overriding the rights of indigenous peoples to their ancestral lands. In this respect, the Commission found that the 'public interest' test has a 'much higher threshold' in the case of indigenous land than in regard to individual private property. Any limitation must be the least restrictive measure possible. The African Commission concluded that in the pursuit of the legitimate aim of creating a game reserve, the upheaval and displacement of the Endorois from their ancestral lands and the denial of their property rights were disproportionate to any public need served by the game reserve.

According to the Commission, the legitimate aim could have been accomplished by alternative means proportionate to the need. The evidence demonstrated that the community was willing to work with the government in a way that respected their property rights in creating the game reserve. To instead deny the Endorois all legal rights in their ancestral land and to evict them violated 'the very essence' of the right to property and could not be justified with reference to 'the general interest of the community' or a 'public need'. In fact, carrying out forced evictions was found to constitute a per se violation of Article 14's test of being done 'in accordance with the law'. This provision must mean, at the minimum, that both Kenyan law and the relevant provisions of international law were respected. Two further tests had to be met in order for a limitation on the right to property to be 'in accordance with the law': consultation and compensation. Since no effective participation was allowed for the Endorois, no reasonable benefit was enjoyed by the community, and no prior environment and social impact assessment was carried out, the absence of the three elements was held 'tantamount to a violation of Article 14' under the Charter. It also amounted to a violation of the right to development. **(p. 220)**

The Commission ultimately held that there was no conflict between upholding human rights and the government's stated conservation goals, for several reasons: (a) the Endorois—as the ancestral guardians of the

land in question—are best equipped to maintain its delicate ecosystems; (b) the Endorois are prepared to continue the conservation work begun by the government; (c) no other community has settled on the land in question; (d) the land has not been destroyed or degraded; and (e) continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois, a consequence which the Commission found tips the proportionality argument on the side of indigenous peoples under international law. The Commission thus found that the cultural activities of the Endorois community pose no harm to the ecosystem of the game reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.

The international cases that have held in favour of human rights and against a state's environmental measures have generally accepted that environmental protection is a legitimate aim in the public interest. The rejected measures have been found to overreach in achieving this aim, however, in most instances because the tribunal appears convinced that the individuals or groups involved will themselves be adequate stewards of the natural resource in question. This is especially the case when indigenous peoples are involved.

3.2 Domestic laws and jurisprudence

In the absence of explicit or implied environmental rights, the right to property and other rights guaranteed by treaty or constitutional law are likely to be given priority if statutes or regulations aimed at environmental protection conflict with the exercise of the guaranteed rights. A growing number of constitutions and regional treaties avoid this hierarchy by including a right to a healthy environment. In addition, some courts, such as the Supreme Court of India,[54] have implied environmental protection as part of existing rights, such as the right to life. Whether a right is expressly guaranteed or implied, the issue of hierarchy between a right and a lower status environmental law or regulation disappears, and instead it becomes necessary to balance or reconcile rights when they are seen to compete. Some examples follow.

In Fiji, sea turtles have been protected as part of the Fisheries Regulations since 1995,[55] but customary fishing rights are a property right protected from extinction by the Constitution.[56] Given this legal framework, the government's total moratorium on taking sea turtles could be challenged as an unconstitutional regulation, because no exception is provided for

native fishing.[57] In Commonwealth countries, **(p. 221)** jurisprudence indicates that a legal native title is presumed to continue unless it has been expropriated by legislative act, which has not been done in the case of Fiji. Thus, customary title is presumed to run as far as the fringing reef.[58]

Among the human rights that may conflict with environmental protection, a few constitutions guarantee the right to safe drinking water, a right which explicitly places basic human needs above ecological considerations or decisions to give priority to agricultural or other water uses.[59] Uruguay's 2004 Constitution, for example, provides: ‘Access to drinking water and access to sanitation are fundamental human rights.’[60] Other examples include South Africa and Colombia. In South Africa, the Constitutional Court held that the government was under an obligation to provide access to water, with priority given to the most needy. The court ordered a municipality to install within three months 20 taps and 20 permanent toilets.[61]

One of the most significant cases involving a conflict between environmental protection and human rights is the Botswana case of *Sesana and Others v Attorney General, High Court,*[62] a case that parallels the African Commission case concerning the Endorois. The Botswana case concerned the Central Kgalagadi Game Reserve (CKGR), a protected area created in 1961. At the time of its creation, it was the largest game reserve in Africa. In 1985, the government appointed a Fact Finding Mission, whose mandate was to ‘study the potential conflicts and those situations that were likely to adversely affect the Reserve and the inhabitants of the area’. The government subsequently adopted regulations to ban access to the CKGR and relocate the San or Boswara people, an indigenous group whose traditional lands included the area where the reserve is located. The High Court unanimously held that the group constituted an indigenous people with rights under international law and that the government in enforcing its measures had violated the rights of the San, despite the legitimate goals of having a game reserve in Africa.

On appeal, the Court of Appeal upheld the right of the San to free movement in the CKGR, but reversed the lower court which had denied water rights to the applicants.[63] The government unsuccessfully argued that whatever hardships the **(p. 222)** appellants faced were ‘of their own making inasmuch as they freely chose to go and live where there is no water’. The court held that lawful occupiers of land such as the appellants must be able to get underground water for domestic purposes, otherwise their occupation would be rendered meaningless. Moreover, the court found that the deprivation of

water by the government, which had denied the San permission to access a borehole closed by the government in the CKGR, constituted degrading treatment in violation of the Constitution. On this point, the court quoted from General Comment 20 of the Committee on Economic, Social and Cultural Rights on the right to water and cited a July 2010 General Assembly resolution[64] that recognizes the right to safe and clean drinking water as a fundamental human right that is essential for the full enjoyment of life and all human rights.

Conflicts have arisen in the application of Multilateral Environmental Agreements (MEAs) between economic rights and protected species. In *National Resources Conservation Authority v Seafood and Ting* (Court of Appeal, Jamaica, 1999)[65] and *Fishermen and Friends of the Sea v Atlantic LNG* (Trinidad and Tobago, 2003), the courts denied enforcement of MEAs under a dualist approach that requires ratified treaties to be incorporated into domestic law by an Act of Parliament. The courts' judgments protected the economic interests of commercial fishing operations over the ecological interests asserted by the governments.

Finally, scholars claim that at least one key decision of the Israeli Supreme Court, which found no protection afforded for a level of 'appropriate environmental quality', 'implicitly clarifies that property rights…will invariably trump a claim to an "appropriate" level of environmental protection as a constitutional matter where a conflict between property rights and "appropriate" environmental quality exists'.[66]

In the domestic context, it seems that a hierarchy is clear between the higher status of human rights guarantees and the lesser status afforded to legislation and regulations. This means that the absence of environmental rights, whether express or implied, is likely to result in human rights being successfully used to limit the reach of environmental law. **(p. 223)**

4. Environmental rights incorporated into existing human rights to avoid a conflict

As noted above, human rights bodies and domestic courts have expanded the content of various guaranteed rights to incorporate some environmental considerations into the substance of existing guarantees, like the right to life or the right to health. This is another method of giving priority to human rights: one which seeks to minimize conflicts by finding that environmental protection is part of human rights law.

4.1 International jurisprudence

The incorporation of some measures of environmental protection through interpretation has expanded the scope of several human rights, especially the rights to life, health, privacy, and home life. These are the rights whose enjoyment is most negatively affected by environmental degradation. International human rights bodies have recognized and responded to this situation. The International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, provides that each person has a right to the 'highest attainable standard of physical and mental health'.[67] In 2000, the Committee on Economic, Social and Cultural Rights (ESC Committee) adopted General Comment No 14,[68] which extended the right to health to 'the determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, [and] healthy occupational and environmental conditions'.[69] Subsequent to adopting General Comment No 14, the then UN Commission on Human Rights appointed a Special Rapporteur to study the connection between health and environment. The Special Rapporteur agreed that the right to health is an 'inclusive right, extending not only to timely and appropriate healthcare… but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation'. Thus, the environment must be protected to ensure health. While the emphasis is on human health, the potential impact is much broader because all improvements in water quality benefit other species and the environment generally.

A healthy environment figures prominently in efforts to achieve a higher quality of life and individual safety, linking it to other socio-economic rights, such as **(p. 224)** the right to food.[70] The ESC Committee has also found the right to an adequate supply of safe and potable water implicit in the Covenant's guarantees, not only in General Comment No 14 which interprets the right to health, but also expansively in General Comment No 15 on the right to water.[71] Among the many obligations stemming from recognition of this right, the duty to combat pollution is one that benefits not only human well-being but also the environment in general.[72]

Article 11 of the ICESCR guarantees the basic right to shelter, housing, and sanitation. ESC General Comments No 4 and 7 interpret the right to adequate housing, with General Comment No 4 identifying the core obligations that a state must satisfy in this respect.[73] Adequate housing includes access to safe drinking water, energy, and sanitation.[74] Again, the

emphasis on safe conditions for housing, including water, soil, and air, can benefit the environment generally and not only human living arrangements.

At the regional level, the Inter-American Commission and Court have articulated a right to an environment of a quality that permits the enjoyment of all guaranteed human rights, despite a lack of reference to the environment in nearly all Inter-American normative instruments. In petitions and cases presented to these institutions, applicants have asserted violations of the rights to life, health, property, culture, and access to justice, but some have also cited guarantees of freedom of religion and respect for culture.[75] The Inter-American Commission's general approach to environmental protection has been to recognize that a basic level of environmental health is not linked to a single human right, but is required by the very nature and purpose of human rights law:

> The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.[76]

According to the Commission, governments may be required to take positive measures to safeguard the fundamental and non-derogable rights to life and physical **(p. 225)** integrity, in particular to prevent the risk of severe environmental pollution that could threaten human life and health, or to respond when persons have suffered injury. The Commission also directly addressed concerns for economic development, noting that the Convention does not prevent or discourage it, but requires that it take place under conditions of respect for the rights of affected individuals. Thus, while the right to development implies that each state may exploit its natural resources, ‘the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention’.[77] The Commission concluded that

> [c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering

> on the part of the local populace, are inconsistent with the right to be respected as a human being…The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse.[78]

In sum, economic development must take place consistent with respect for human rights, including the right to adequate environmental quality.

The European Convention on Human Rights contains no right to environmental quality, but most cases have concerned assertions that the level of protection afforded by law and practice nonetheless violates human rights standards. In ECtHR judgments, if no specific environmental quality is guaranteed by a state's constitution or applicable treaty, the judges tend to accord considerable deference to the level of environmental protection enacted by state or local authorities.[79] Thus, noise pollution cases often turn on compliance with local environmental laws. Where the state conducts inspections and finds that the activities do not exceed permissible noise levels established for the area, at least in the absence of evidence of serious and long-term health problems, the Court is unlikely to find that the state failed to take reasonable measures to ensure the enjoyment of Article 8 rights.[80]

Concern about environmental protection and the impact of degraded environments on the enjoyment of human rights have brought environmental protection into contact with human rights law. Generally, the two goals reinforce each other. Where human rights are enforced, there is often a spill-over to better environmental protection.

4.2 National jurisprudence

The Indian Supreme Court has been the most active in implying environmental protection as part of constitutional rights guarantees, giving effect to **(p. 226)** environmental laws and agreements as part of the right to life.[81] The absence of a specific right-to-environment provision has nonetheless limited the types of cases that succeed to those where specific harm to individuals can be demonstrated. In *KM Chinnappa, TN Godavarman Thirumalpad v Union of India & Others,*[82] the applicant brought an intermediate appeal on behalf of the flora and fauna in and around Kudremukh National Park, a part of the Western Ghats.[83] The defendant

mining company defended itself by invoking the workers' right to work and the company's existing contracts, and argued that it had taken all possible steps to preserve and conserve nature. The court pointed to the constitutional requirements that the 'State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country'[84] and improve public health as a primary duty. It also noted that the Constitution imposes 'a fundamental duty' on every citizen of India to protect and improve the natural environment, including forests, lakes, rivers, and wildlife, and to have compassion for living creatures.

The court further considered the need for environmental protection as part of Article 21, the right to life, because 'it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence.'[85] Therefore, there is a constitutional imperative for all levels of government not only to ensure and safeguard a proper environment, but also an imperative duty to take adequate measures to promote, protect, and improve the man-made and natural environment.

The court acknowledged that no development is possible without some adverse effect on the ecology and environment. Since projects of public utility cannot be abandoned, it is necessary to strike a balance between the public interest and the necessity to maintain the environment. Where a commercial venture or enterprise would bring extremely useful benefits to the people as a whole, as here, the difficulties of a small number of people have to be 'bypassed'.[86] However, detrimental impacts can be minimized by the use of 'two salutary principles which govern the law of environment':[87] (i) the principles of sustainable development; and (ii) the precautionary principle. These are found in the Convention on Biological **(p. 227)** Diversity, to which India is a party. The court expressly noted the rule of judicial construction that regard must be had to international conventions and norms in construing the domestic law, and called for measures of mitigation.

Similarly, in *Rural Litigation and Entitlement Kendra v State of Uttar Pradesh,*[88] the court insisted that natural resources have to be tapped for the purpose of social development, but this has to be done with requisite attention and care so that ecology and the environment may not be affected in any serious way. Specifically, there may not be any depletion of water resources and long-term planning must be undertaken to keep up the natural wealth of the nation.

India, like most other developing countries, recognizes the right to development as a bundle of economic rights that must be balanced with other rights, some of which encompass environmental protection. In nearly all domestic cases, the Indian Supreme Court has deferred to the government in determining the appropriate balance of rights. Implicit in this approach is an understanding that the task of balancing rights is a political question that should largely be left to the government. In the famous *Narmada Dam* case,[89] the Indian Supreme Court addressed a challenge to the construction of a large hydroelectric plant. An environmental clearance had been given for the project, and construction commenced despite civil society objections that the forced displacement of tribal and other subsistence farmers violated their fundamental rights under the Indian Constitution and International Labour Organization (ILO) Convention 107. The court held that there was no violation of indigenous and tribal rights because they would be given land at least as good and they would be better off being gradually assimilated into mainstream society. The dam itself outweighed competing interests because of the critical need for water, inherent in the right to life guarantee in the Constitution. Thus, alleviating the problems of a drought-prone region of the country would be good for human rights and also for the environment. The court was less attentive to the claims of the indigenous people, who were paying the price through forced removal.

In a similar case litigated several years after the *Narmada* matter, challenges to the Tehri Dam hydroelectric project came before the Indian Supreme Court.[90] In this instance the core issue was characterized as whether the project was compatible with a proper balance between the right to environment and the right to development. The court determined that the right to a clean environment was a guaranteed fundamental right, as was the right to development, as a component of the right to life. All environment-related developmental activities should benefit people, while maintaining environmental balance. The court relied on the concept of sustainable development as a way of broadening the right to development to encompass other fundamental rights.[91] Because of the possibility that the **(p. 228)** reservoir's large body of stagnant water would increase the risk of disease, the court also recalled the right to health as a fundamental right, linked to a clean environment. The health consequences would have to be seriously scrutinized and strict compliance demanded with the conditions in the environmental clearance. The court did not find evidence that the conditions were not being complied with, but transferred the case for further monitoring.

Other national courts have adopted the same approach as that of the Indian courts. In the case of *Dr M Farooque v Bangladesh,* the Appellate Division held that the constitutional right to life encompasses the protection and preservation of the environment, and ecological balance free from pollution of air and water.[92] The Supreme Court of Pakistan has come to a similar conclusion regarding Article 9 of the Constitution of Pakistan[93] and pointed in particular to the right to have unpolluted water.[94] Nepal[95] and Costa Rica[96] can also be cited. The right to development becomes the umbrella concept for encompassing and balancing economic, social, and environmental rights.

5. Environmental protection trumps human rights

In some instances, the community's interest in environmental protection overrides individual property or other rights. Regulatory measures may be upheld, even when they restrict property uses, without constituting an expropriation that requires compensation to be paid. Such an approach is particularly prevalent in those states which have constitutional provisions expressly allowing measures to limit the use or possession of property for the purpose of environmental protection. At the international level, the cases reflect the limitations expressly written into the right to property.

5.1 International jurisprudence

At the United Nations, the Human Rights Committee has upheld restrictions on human rights for purposes of protecting natural resources. The Committee's decision in *Apirana Mahuika et al v New Zealand*[97] emphasized ‘that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question **(p. 229)** have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy’. The complicated process of consultation undertaken by the government was held to comply with this requirement, because the government paid special attention to the cultural and religious significance of fishing for the Maori.

In the case of *Fägerskiöld v Sweden,*[98] the ECtHR heard a challenge to the building of wind turbines near the applicants’ property. The couple alleged that the turbines violated their rights under Article 8 (privacy and home life) of the European Convention and Article 1 (the right to property) of Protocol 1. The Court rejected the claim. It cited World Health Organization (WHO) guidelines on noise pollution[99] in rejecting the admissibility of the

application. The Court noted that the guidelines are set at the level of the lowest adverse health effect associated with noise exposure. It also referred to even lower maximum levels adopted by most European countries. The Court found that the levels of noise did not exceed the WHO guidelines and were minimally above the recommended maximum level in Sweden. Therefore, the environmental nuisance could not be found to reach the level of constituting severe environmental pollution.

The Court also rejected the applicants' claims that their property rights were violated because the wind turbines decreased the value of their property. Assuming that there was an interference with property rights, the Court found that it was justified on several grounds, one of them being that the operation of the wind turbines was in the general interest as it is an environmentally friendly source of energy which contributes to the sustainable development of natural resources. It considered whether these beneficial environmental consequences were sufficient to outweigh the negative impact on the applicants. The Court reiterated that the negative consequences were not severe, while the availability of renewable energy is beneficial for both the environment and society. Moreover, the government had taken measures to mitigate the negative impacts on the applicants. In sum, the alleged interference was proportionate to the aims pursued and no violation of property rights occurred.

5.2 Domestic jurisprudence

In most instances, cases that give priority to environmental protection come from countries in which there is a guaranteed constitutional right to a healthy environment. In one instance, however, the Supreme Court of Costa Rica ruled that a law prohibiting the hunting of green turtles was unconstitutional because it not only violated the constitutional guarantee, but also violated the Convention on International Trade in Endangered Species.[100] Several years later the same court repudiated timber licences granted by the government in a habitat of the **(p. 230)** endangered green macaw.[101] In order to provide further protection for endangered turtles, the court struck down a municipal zoning regulation that would have allowed construction in the Leatherback National Park and ordered the government to expropriate private lands within the park that the owners sought to develop for tourism.[102] As in the ECtHR, cases generally involve balancing the benefits to society as a whole with the burdens on particular individuals or groups. If the burden is disproportionate in comparison to the benefits, the measures will be struck down.

6. Environmental protection as an expressly guaranteed human right

Since 1972, it has been estimated that more than one-half of all UN member states have added constitutional guarantees concerning the environment, many by declaring or adding an explicit right to a specified quality of the environment.[103] Within the United States alone, researchers have counted 207 state constitutional provisions in 46 state constitutions that refer to natural resources and the environment.[104] The constitutional provisions vary in the chosen description of the environmental quality that is protected. While many of the older provisions refer to a ‘healthy’ or ‘healthful’ environment, more recent formulations add references to ecology and/or biodiversity to the guarantee, although the right may be stated in a limited manner.[105] The French Constitution, amended to add a Charter of the Environment in 2005,[106] affords the right to live in a ‘balanced environment, favourable to human health’.[107] The French *Conseil Constitutionnel* has used the Charter to review legislative enactments,[108] finding that the Charter constitutes **(p. 231)** a ‘fundamental freedom’ of constitutional value allowing for the suspension of an administrative decision under French procedural law.[109] European countries formerly dominated by the Soviet Union have also altered or changed their constitutions since the fall of communism to include a substantive right to the environment, and courts have found these rights justiciable.[110] In Latin America, Article 19 of the 1980 Constitution of Chile provides for a ‘right to life’ and a ‘right to live in an environment free of contamination’ and establishes that certain other individual rights may be restricted to protect the environment.[111] The Government of Chile is required to ‘ensure that the right to live in an environment free of contamination is not violated’ and to ‘serve as a guardian for and preserve nature/the environment’.[112]

The specific language used is often determinative of whether or not the environmental rights provision is justiciable. If it is, the constitutional protection afforded the environment elevates it in the legal hierarchy, with the result that governmental measures that pose substantial risk of harm to the environment may be strictly scrutinized and the burden placed on the government to justify the measures by showing a compelling need.

6.1 International texts and jurisprudence

Internationally, environmental rights have been proclaimed in two regional human rights treaties,[113] various environmental instruments,[114] and

international **(p. 232)** declarations.[115] Apart from the African Commission on Human and Peoples' Rights, however, no international human rights tribunal monitors compliance with an explicit treaty-based 'right to environment' provision, because no such right was written into UN human rights treaties or the European[116] and American[117] Conventions. Instead, UN treaty bodies and the Inter-American and European tribunals hear complaints about failures to enforce national environmental rights[118] or, as discussed previously, about environmental degradation that violates one or more of the guaranteed rights in the agreements over which they have jurisdiction.[119]

6.2 Domestic jurisprudence

Where national courts enforce constitutional environmental rights, sometimes with reference to national and international environmental standards, greater environmental protection usually results. Development projects are more strictly reviewed and may be halted. For example, Article 24 of the South African Constitution provides that:

> Everyone has a right to (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[120]

The South African Constitutional Court has given substantive content to this constitutional guarantee. *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*[121] addressed the nature and **(p. 233)** scope of the obligations environmental authorities have when they make decisions that may have a substantial detrimental impact on the environment. The court characterized the case as one that required the integration of the need to protect the environment with the need for social and economic development. In the court's view, the international principle of sustainable development provided the applicable framework for reconciling these two needs.[122]

Sustainable development 'recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources', but it envisages that decision-makers 'will ensure

that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments'.[123] In the court's view, the National Environmental Management Act (NEMA), which was enacted to give effect to section 24 of the Constitution, embraces the concept of sustainable development, defined to mean 'the integration of social, economic and environmental factors into planning, implementation and decision-making for the benefit of present and future generations'. In turn, this broad definition of sustainable development integrates environmental protection and socio-economic development, and incorporates the internationally recognized principle of inter-generational and intra-generational equity.[124]

(p. 234) The court saw a second objective inherent in the constitutional and legislative guarantees: to identify and predict the actual or potential impact of development and to consider ways of minimizing negative impact while maximizing benefit. Thirdly, and finally, the court pointed out that the National Environmental Management Act requires application of the precautionary approach, 'a risk averse and cautious approach', which takes into account the limitation on present knowledge about the consequences of an environmental decision. This precautionary approach was seen to be especially important because NEMA requires that the cumulative impact of a development on the environmental and socio-economic conditions be investigated and addressed.[125] The precautionary principle required the authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. 'This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development. Water is a precious commodity; it is a natural resource that must be protected for the benefit of present and future generations.'[126]

The court thus set aside the decision of the environmental authorities and required reconsideration consistent with the judgment. As to the role of the courts in giving effect to environmental rights, the court was clear:

> The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in

> trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the court to ensure that this responsibility is carried out.[127]

7. Conclusions

Human rights instruments were largely written before environmental law emerged as a widespread concern. Not surprisingly, most human rights instruments do not discuss the environment as a human rights issue. National constitutions, in contrast, have been widely amended to include a new right to a safe and healthy environment. The cases show that such a change in the law makes a difference. The right to a safe and healthy environment elevates environmental protection to a **(p. 235)** status equivalent to other rights, meaning, as the Supreme Court of Costa Rica has said, that '*in dubio, pro natura*'—any doubt about the interpretation or application of a law should be resolved in favour of nature protection.[128]

Without a constitutional environmental right, property and other human rights tend to be given preference in case of a conflict. This has been especially true where indigenous rights to ancestral lands and territories are concerned. Underlying the results may be an assumption that indigenous peoples have historically acted as stewards of the lands, and maintaining their ownership and control is consistent with the conservation of flora and fauna that sometimes provides the pretext for excluding indigenous ownership.

Most courts will try to avoid a conflict. Some courts do this by implying environmental rights in other constitutional or treaty-based human rights, in effect eliminating any hierarchy through interpretation. They often explicitly recognize that the goals of environmental protection and human rights are largely compatible, both having an aim to ensure human well-being. Human rights treaties often provide the specific language that allows environmental controls on land use or other property interests. Provided there is a public interest and the measures are proportionate and established by law, courts will often uphold environmental protection laws and regulations even where applicants claim that the measures constitute a violation of their property rights.

Overall, a look at the intersection of environmental law and human rights protections suggests that environmental law is increasingly a part of human rights law, triggering the potential for conflict and the need for reconciling

or balancing guaranteed rights. In the increasingly rare instances where no environmental rights are recognized, courts appear to give human rights a higher status, particularly where indigenous peoples are concerned. The importance of the environment to modern societies is in fact reflected in the growing codification of the environment as a human right itself, to be respected and ensured.

Notes:

(1.) A Boyle, ‘Relationship between International Environmental Law and Other Branches of International Law’ in D Bodansky et al (eds), *Handbook of International Environmental Law* (OUP, Oxford 2006) 125.

(2.) As an example, the Convention on Biological Diversity calls for in situ conservation of biological resources by each state party, including through the creation of protected areas and species. A report prepared by the Secretariat for the Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples has emphasized that ‘it is essential to take the existence of indigenous peoples in isolation and in initial contact and the problems they face into account in developing and implementing international legal frameworks concerning the environment, primarily the Convention on Biological Diversity’. A/HRC/EMRIP/2009/6, para 40.

(3.) Since 1972, environmental rights, including the right to a safe and healthy environment, have been proclaimed in two regional human rights treaties, numerous constitutions, various environmental instruments, and international declarations. Principle 1 of the Stockholm Declaration on the Human Environment declares that man has a fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being. In Resolution 45/94 the UN General Assembly recalled the language of Stockholm, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts to ensure a better and healthier environment. In early 2010, the General Assembly explicitly affirmed the right of each person to a healthy environment, A/RES/64/157 (8 March 2010). On the regional level, in 1981, the African Charter on Human and Peoples’ Rights became the first human rights treaty to proclaim a right to environmental quality, followed by the 1988 OAS Protocol of San Salvador to the American Convention on Human Rights. The Preamble to the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) states that ‘every

person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'. Within Europe, numerous texts of the European Union as well as the jurisprudence of the European Court of Human Rights and instruments of the UN Economic Commission for Europe proclaim substantive and procedural rights related to the environment. For further discussion and citations, see section 6 below.

(4.) IACHR, Report on the Situation of Human Rights in the Republic of Guatemala, OAS Doc, OEA/Ser.L/V/II.53, doc 21, rev 2, 13 October 1981, paras 9–10. In respect of inter-regime conflicts, the Inter-American Court of Human Rights has suggested that human rights obligations are superior to other international obligations. In *Sawhoyamaxa Community v Paraguay,* the government's third defence to allegations that it breached its obligations under the American Convention on Human Rights (ACHR) was that it was complying with a bilateral commercial treaty with Germany. The Court rejected the defence, concluding that the enforcement of such a treaty could not justify non-compliance with obligations under the American Convention, but had to be compatible with human rights. According to the Court, a multilateral treaty on human rights 'stands in a class of its own', para 140.

(5.) See section 4 below.

(6.) See, eg, Permanent Sovereignty over Natural Resources, GA Res 1803 (14 December 1962); Permanent Sovereignty over Natural Resources, GA Res 3171 (17 December 1973); Charter of Economic Rights and Duties of States, GA Res 3281 (12 December 1974); Convention on Biological Diversity (Rio de Janeiro, 5 June 1992).

(7.) References to the environment or parts thereof as a common concern or interest of humanity can be found as early as the 1946 International Convention for the Regulation of Whaling (Washington, 2 December 1946), and also appear in the Antarctic Treaty (Washington, 1 December 1959) and its Madrid Protocol on Environmental Protection (4 October 1991). The Convention on Biological Diversity (Rio de Janeiro, 5 June 1992) proclaims the conservation of biological diversity as a common concern and similar language about the adverse effect of climate change appears in the UN Framework Convention on Climate Change (New York, 9 May 1992).

(8.) Eg Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992), Art 9; Convention on Civil Liability

for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993), Arts 13–16; North-American Agreement on Environmental Co-operation (13 September 1993), Art 2(1)(a); International Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (Paris, 17 June 1994), Preamble, Arts 10(2)(e), 13(1)(b), 14(2), 19, and 25; Convention on Co-operation and Sustainable Use of the Danube River (Sofia, 29 June 1994), Art 14; Energy Charter Treaty, Lisbon (17 December 1994), Arts 19(1)(i) and 20; Amendments to the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona, 10 June 1995), Arts 15 and 17; Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995), Art 19; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (10 September 1998), Art 15(2); Protocol on Water and Health to the 1992 Convention on the Protection and use of Transboundary Watercourses and International Lakes (London, 17 June 1999), Art 5(i); Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000), Art 23; International Treaty on Plant Genetic Resources for Food and Agriculture (3 November 2001).

(9.) There remains the potential for conflict, however. The Convention on Biological Diversity, for example, calls for in situ conservation as the preferred method of maintaining diversity among species and ecosystems. Where the habitat of species is limited to particular areas, complying with the requirement of in situ conservation could confront individual or collective property claims of those living within the habitat area.

(10.) International Convention for the Regulation of Whaling (n 7).

(11.) The Brundtland Commission confirmed the need to integrate development and the environment, coining the term ‘sustainable development’. One of the four main parts of Agenda 21, the Rio programme of action, concerns the socio-economic dimensions of sustainable development. A decade later, the World Summit for Sustainable Development held in Johannesburg, South Africa, in August 2002, determined that ‘poverty eradication, changing consumption and production patterns and protecting and managing the natural resource base for economic and social development are overarching objectives of and essential requirements for sustainable development’. Johannesburg Declaration on Sustainable Development, A/CONF 199/20, para 11.

(12.) See, eg, *Yanomami Case,* Res No 12/85, Case 7615 (Brazil), in Annual Report of the IACHR 1984–1985, OEA/Ser.L/V/II.66, doc 10, rev 1 (1985), 24; *Maya Indigenous Communities of the Toledo District v Belize,* Report No 40/04, Case 12.053 (Merits), 12 October 2004; *Case of the Saramaka People v Suriname,* judgment of 28 November 2007. See also the African Commission *Endorois* case, discussed below.

(13.) In *Fredin v Sweden* the applicant argued that nature protection was an inadequate reason to revoke a licence to extract gravel on his property and therefore was a violation of Art I, Protocol 1. The Court found no violation, noting that the protection of the environment is an increasingly important consideration. *Fredin v Sweden,* App No 12033/86, 13 EHRR 784 (1991). The Court similarly found no violation of the same provision in *Pine Valley Developments Ltd v Ireland,* where permission to carry out construction in a green belt area was revoked on grounds of environmental protection. *Pine Valley Devs Ltd v Ireland,* App No 12742/87, 14 EHRR 319 (1992). The most difficult and contentious cases in this respect have concerned travellers or gypsies, whose lifestyle may bring them into contact with modern land use planning. The European Court has repeatedly refused to override local zoning restrictions, especially the creation of green belts, in order to ensure a permanent home for this minority group. See *Buckley v United Kingdom,* 1996-IV ECtHR 1271 (1996); *Smith v United Kingdom,* App No 25154/94, 33 EHRR 712 (2001); *Lee v United Kingdom,* App No 25289/94, 33 EHRR 677 (2001); *Chapman v United Kingdom,* App No 27238/94, 33 EHRR 399 (2001), *Beard v United Kingdom,* App No 24882/94, 33 EHRR (2001).

(14.) Absent the right to a safe and healthy environment, the right to property, for example, may limit the range of allowable environmental protection measures, unless the property is expropriated with compensation and other guarantees observed.

(15.) ECHR, Art 53.

(16.) ACHR, Art 29.

(17.) African Charter, Art 60.

(18.) Ibid para 61.

(19.) See, eg, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism,* Advisory Opinion OC-5/85 of 13 November 1985, 5 IACtHR (Ser A) (1985), para 52, finding that if the ACHR and another

international treaty are applicable, the rule most favourable to the individual must prevail.

(20.) See generally P van Dijk et al, *Theory and Practice of the European Convention on Human Rights,* ch 5 ('The System of Restrictions') (4th edn Intersentia, Antwerp 2006); AC Kiss, 'Permissible Limitations on Rights' in L Henkin (ed), *The International Bill of Rights* (New York, Columbia University Press 1991) 290.

(21.) See Advisory Opinion OC-10/89 (n 22) para 37; IACtHR, Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law,* 16 IACtHR (Ser A) (1999) ('Advisory Opinion OC-16/99'), para 114 (endorsing an interpretation of international human rights instruments that takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions); Report No 52/02, Case No 11.753, *Ramón Martinez Villareal* (United States), Annual Report of the IACHR 2002, para 60.

(22.) *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,* Advisory Opinion OC-10/89 of July 14, 1989, 10 IACtHR (Ser A) (1989), citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) Advisory Opinion ICJ Rep 1971, 16 and 31.

(23.) See Advisory Opinion OC-10/89 (n 22) para 37; Advisory Opinion OC-16/99 (n 21) para 115; Report No 52/01, Case 12.243, *Juan Raul Garza* (United States), I/A Comm, Annual Report 2000, paras 88, 89 (confirming that while the Commission does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

(24.) *Christine Goodwin v The United Kingdom* (GC), App No 28957/95, judgment of 11 July 2002, 35 EHRR 18 (2002), para 74.

(25.) Recall that the VCLT allows recourse to the drafting history (*travaux préparatoires)* as a subsidiary means of interpretation (Art 32) only if the application of Art 31 leaves the meaning absurd or ambiguous.

(26.) See *Mangouras v Spain,* App No 12050/04, 8 January 2009, para 41 (referred to a Grand Chamber 5 June 2009). Increased concern with the

environment has also proved important in cases where states have taken measures to protect the environment and the actions are resisted on the grounds that they interfere with the right to property. See the cases cited above at n 13.

(27.) *Mangouras v Spain* ibid.

(28.) International Convention for the Prevention of Pollution from Ships, 2 November 1973 (MARPOL 73/78) and the Protocol thereto adopted 17 February 1978.

(29.) The Court cited two European Community directives, Directive 2004/35/CE of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, and Directive 2005/35/EC of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements.

(30.) *Demir and Baykara v Turkey,* App No 34503/97, 12 November 2008 (GC) (‘*Demir and Baykara*’).

(31.) Ibid para 55.

(32.) Although the VCLT by its own terms is not retroactive to govern an agreement written in 1950, the Court accepts that the VCLT rules of interpretation reflect customary international law. See, eg, *Golder v the United Kingdom,* Series A No 18 (21 February 1975) para 29; *Johnston and Others v Ireland,* Series A No 112 (18 December 1986) paras 51 ff; *Lithgow and Others v the United Kingdom,* Series A No 102 (8 July 1986) paras 114 and 117; and *Witold Litwa v Poland,* App No 26629/95, Reports 2000-III, paras 57–9.

(33.) *Demir and Baykara* (n 30) para 65, citing *Golder,* para 29; *Johnston and Others,* para 51; and Art 31 para 1 of the VCLT.

(34.) Ibid citing *Saadi v the United Kingdom* (GC), App No 13229/03, Reports 2008-…para 62.

(35.) Ibid para 67, citing *Saadi,* para 62; *Al-Adsani v the United Kingdom* (GC), App No 35763/97, Reports 2001-XI, para 55; and *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (GC), App No 45036/98, Reports 2005-VI, para 150.

(36.) Ibid para 68, citing *Soering v the United Kingdom,* Series A No 161 (7 July 1989), para 102; *Vo v France* (GC), App No 53924/00, Reports 2004-VIII, para 82; and *Mamatkulov and Askarov v Turkey* (GC), App Nos 46827/99 and 46951/99, Reports 2005-I, para 121.

(37.) Ibid para 69, noting that the Court has interpreted Art 8 of the Convention in the light of the United Nations Convention on the Rights of the Child of 20 November 1989 and the European Convention on the Adoption of Children of 24 April 1967 in *Pini and Others v Romania,* App Nos 78028/01 and 78030/01, ECHR 2004-V, paras 139 and 144; and *Emonet and Others v Switzerland,* App No 39051/03, ECHR 2007-..., paras 65–6. In *Siliadin v France,* App No 73316/01, ECHR 2005-VII, paras 85–7, the Court, in order to establish the state's positive obligation concerning 'the prohibition on domestic slavery', took into account the provisions of the ILO Forced Labour Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, and the International Convention on the Rights of the Child.

(38.) Statute of the International Court of Justice, Art 38(1). The European Court noted that the Legal Committee of the Consultative Assembly of the Council of Europe foresaw in August 1950 that 'the Commission and the Court [would] necessarily [have to] apply such principles' in the execution of their duties and thus considered it to be 'unnecessary' to insert a specific clause to this effect in the Convention (Documents of the Consultative Assembly, working papers of the 1950 session, Vol III, no 93, p 982, para 5).

(39.) Eg judgment of the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v Furundzija,* Case IT-95–17/1 (Appeals Chamber), 121 Intl L Rep 213 (2002).

(40.) Eg *Regina v Bartle, Bow Street Stipendiary Magistrate & Commissioner of Police, ex parte Pinochet (No 3),* House of Lords, 24 March 1999, 2 WLR 827, 38 ILM 581 (1999).

(41.) *Demir and Baykara* (n 30) para 77.

(42.) Ibid.

(43.) Ibid para 80.

(44.) Ibid para 78.

(45.) Communication No 511/1992, *Ilmari Lansman et al v Finland,* Human Rights Committee, Final Decisions, 74, CCPR/C/57/1 (1996). Other cases involving Sami reindeer breeders include Communication No 431/1990, *OS et al v Finland,* decision of 23 March 1994, and Communication No 671/1995, *Jouni E Lansmann et al v Finland,* decision of 30 October 1996.

(46.) UN Doc CCPR/C/91/D/1306/2004; IHRL 2745 (UNHRC 2007).

(47.) The International Covenant on Civil and Political Rights and the Optional Protocol entered into force for Iceland on 22 November 1979.

(48.) See Communications No 1314/2004, *O'Neill and Quinn v Ireland,* Views adopted on 24 July 2006; No 1238/2004, *Jongenburger-Veerman v The Netherlands,* Views adopted on 1 November 2005; No 983/2001 *Love et al v Australia,* Views adopted on 25 March 2003.

(49.) If such a guarantee exists under national law, however, there may be a separate claim for failure to enforce that law, pursuant to Art 6 of the ECHR.

(50.) *Kyrtatos v Greece,* App No 41666/98, Reports 2003-VI (22 May) (extracts).

(51.) Ibid para 53.

(52.) African Commission HPR, Case 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.

(53.) Communities living around the National Reserves are permitted in some instances to drive their cattle to the reserve for the purposes of grazing, so long as they do not cause harm to the environment and the natural habitats of the wild animals. According to the government, ‘The Forests (Tugen-Kamasia) Rules’ enable the inhabitants of the Baringo District, including the Endorois, to enjoy some privileges of access for some purposes: to collect dead wood for firewood, pick wild berries and fruits, take or collect the bark of dead trees for thatching beehives, cut and remove creepers and lianes for building purposes, take stock, including goats, to watering places as may be approved by the District Commissioner in consultation with the forest Officer, enter the forest for the purpose of holding customary ceremonies and rites, so long as no damage is done to any tree, graze sheep within the forest, graze cattle for specified periods during the dry season with the written permission of the District Commissioner or the Forest Officer, and to retain or

construct huts within the forest by approved forest cultivators, among others. The government argued that the Rules ensure that the people could obtain food and building materials, as well as run some economic activities, such as beekeeping and grazing livestock, in the forest.

(54.) The Indian courts' approach and case law are discussed in section 4.

(55.) Fiji Islands Government Gazette, Legal Notice No 32 of 1995.

(56.) Constitution Amendment Act 1997, s 40.

(57.) See K Chambers, 'Environmental Management in South Pacific SIDS' in *Environmental Protection and Small Island States, European Environmental Law Series No 1* (North Finchley, UK, ESPERIA Publications 2008) 29, 34.

(58.) Ibid 35. For cases, contrast *Tokyu Corp v Mago Island Estate Ltd,* Fiji High Court (1992) FJHC 76; [1992] 38 FLR 24 (24 February 1992) and *Ag for Fiji v Mocelutu* [2002] FJHC 264 with *Commonwealth v Yarmirr* [2001] HCA 56 (Kirby J paras 264 and 286); *Ngati APa v AG for NZ* [2003] NZCA 117 (Elias CJ).

(59.) The African Convention on the Rights and Welfare of the Child contains an obligation for the 37 states parties to take the measures necessary to 'ensure the provision of adequate nutrition and safe drinking water'. The language is repeated in the 2003 Protocol to the African Charter on Human and Peoples' Rights, on the Rights of Women. See Henri Smets, 'The Right to Water in National Legislations', AFD, 2006.

(60.) Constitution of Uruguay, art 47. See also, inter alia, the constitutions of: South Africa (1996), s 27.1; Colombia (1991), art 366; Ecuador (1998), art 23, in Smets ibid 44.

(61.) *Government of RSA and Others v Grootboom and Others*. In Colombia, see the Constitutional Court Cases T-578 (1992), T-140 (1993), and T-207 (1995).

(62.) *Sesana and Others v Attorney General,* High Court, Misc No 52 of 2002; ILDC 665 (BW 2006), Judgment of 13 December 2006.

(63.) *Matsipane Mosetlhanyane & Gakenyatsiwe Matsipane v The Attorney General, Court of Appeal of the Republic of Botswana,* 27 January 2011.

(64.) The Human Right to Water and Sanitation, GA Res 64/292 (28 July 2010).

(65.) In *NRCA v Seafood and Ting & DYC Fishing Lts,* the NRCA appealed an injunction which had mandated the agency to issue permits to the respondents to export meat of the Queen Conch (*strombus gigas*) from Jamaica. The permits were necessary because the creature is listed in Appendix II of the Convention on International Trade in Endangered Species (CITES). Jamaica became a party to CITES in 1997. The Court of Appeal dismissed the appeal and re-affirmed the award of export permits. The court decided that the NRCA had unlawfully refused the permits because the Jamaican Parliament had yet to enact local legislation implementing CITES. Moreover, during the proceedings claims were made that the country did not voluntarily ratify the Convention, but was forced to do so in order to maintain the conch trade with states that are parties to CITES.

(66.) T Levinson and TJ Page, 'A Constitutional (or Basic Law) Right to "Minimum Environmental Quality"' (2004) 6(1) Intl Envtl L Newsletter (ABA Section of Energy, Environment and Natural Resources) 24, 25 (discussing *Adam, Teva ve'Din (Human Being, Nature, and Law) v Prime Minister of Israel et al* (2004) No 4128/02, 16 March 2004, Supreme Court of Israel).

(67.) International Covenant on Economic, Social and Cultural Rights (16 December 1966), Art 12.

(68.) UN Econ & Soc Council (ECOSOC), Committee on Economic, Social and Cultural Rights, General Comment No 14: The Right to the Highest Attainable Standard of Health, para 11, UN Doc E/C.12/2000/4 (11 August 2000), available at http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument (last accessed 26 April 2006) ('General Comment No 14').

(69.) General Comment No 14, para 11 ('The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health').

(70.) ESC Committee, General Comment No 12: The Right to Adequate Food, paras 10 and 15; UN Doc E/C.12/1999/5 (1999) ('General Comment No 12'). The Special Rapporteur on the right to food has insisted that states parties

must not take any measures that result in preventing existing access to food; they must ensure that enterprises, individuals, or entities do not deprive individuals of access to adequate food, and they have a duty to implement and practise activities designed to strengthen and increase people's access to and utilization of natural resources.

(71.) ESC Committee, General Comment No 15: The Right to Water, UN Doc E/C.12/2002/11 ¶ 21 (2003) ('General Comment No 15').

(72.) Ibid paras 23–4.

(73.) See ESC Committee, General Comment No 4: The Right to Adequate Housing, UN Doc 13/12/91 (1991) ('General Comment No 4').

(74.) Ibid para 8(b).

(75.) See the *Yanomami, Awas Tingni* and *Saramaka* cases, above. See also *Moiwana Community v Suriname,* Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2004, IACtHR, Ser C No 124.

(76.) IACHR, *Report on the Situation of Human Rights in Ecuador,* OAS doc OEA/Ser.L/V/II.96, doc 10 rev 1, 24 April 1997, 92 ('Report on Ecuador').

(77.) Ibid 89.

(78.) Ibid 92, 93.

(79.) See, eg, *Hatton and Others v the United Kingdom,* (GC) App No 36022/97, Reports 2003-VIII.

(80.) See, eg, *Leon and Agnieszka Kania v Poland,* App No 12605/03 (21 July 2009), para 102; *Borysewicz v Poland,* App No 71146/01 (1 July 2008), para 55.

(81.) In addition to the cases discussed in the text, see *LK Koolwal v State of Rajasthan and Others,* 1988 AIR (Raj), 2 (High Court of Rajasthan, 1988) (preservation of the environment falls within the purview of Art 21, and Jaipur City thus violated its citizens' right to life by failing to provide adequate sanitation); *Vellore Citizens Welfare Reform v Union of India,* 1996 AIR (SC) 2715 (1996). See also the cases cited in A Rosencranz and S Rustomjee, 'Citizens' Rights to a Healthful Environment under the Constitution of India' (1995) 25 EPL 324.

(82.) *KM Chinnappa, TN Godavarman Thirumalpad v Union of India & Others,* [2002] INSC 453 (30 October 2002).

(83.) The forests in the area are among 18 internationally recognized 'hotspots' for biodiversity conservation.

(84.) Art 48-A in Part IV (Directive Principles) of the Constitution of India, 1950 amended by the Constitution (42nd Amendment) Act, 1976,

(85.) *Chinnappa* case (n 82).

(86.) For a similar analysis, see *Saemangeum* case (2006), 2006 DU 330 (Supreme Court of the Republic of Korea) (because both the environment and development enjoy constitutional protection they must be balanced by considering the economic interests of the national community and the environmental interests of individuals).

(87.) *Chinnappa* case (n 82).

(88.) AIR 1987 SC 359.

(89.) *Narmada Bachao Andolan v India and Ors,* AIR 2000 SC 3751, ILDC 169 (IN 2000).

(90.) *Jayal and anor v India and Ors,* (2004) 9 SCC 363; ILDC 456 (IN 2003).

(91.) The court's approach is consistent with the conclusions of the World Summit on Sustainable Development, which described sustainable development as consisting of three pillars: social, economic, and environmental.

(92.) J Razzaque, 'Human Rights and the Environment—National Experiences' (2002) 32(2) EPL 101.

(93.) *Shala Zia v WAPDA,* PDL (1994) SC 693.

(94.) *General Secretary, West Pakistan Salt Miners Labor Union Khwra, Khelum v The Director, Industries and Mineral Development,* Punjab, Lahore, Human Rights Case No 120 of 1993, 1994 SCMR 2061.

(95.) *LEADERS, Inc v Godawi Marble Industries,* (Supreme Court of Nepal, 31 October 1995).

(96.) *Carlos Roberto Mejia Chacon v Municipalidad de Santa Ana,* Judgment No 3705–93 (Supreme Court, Constitutional Chamber, 30 July 1993).

(97.) Communication No 547/1992, *Apirana Mahuika et al v New Zealand,* CCPR/C/70/D/547/1993, views issued 16 November 2000.

(98.) *Fägerskiöld v Sweden,* no 37664/04, (admissibility), 26 February 2008.

(99.) World Health Organization, 'Guidelines for Community Noise' (Geneva 1999).

(100.) Decision 01250/99, *Caribbean Conservation Corp et al v Costa Rica* (Executive Decree No 14535/A, enacted May 26, 1983), Expediente 98/003684, 8 March 2002.

(101.) Expediente 01-011865-0007-CO, Resolution 2002–486, Constitutional Chamber, Supreme Court of Justice.

(102.) *A Cederstav and Others v National Technical Secretary for the Environment, Municipality of Santa Cruz and Others,* Expediente 05-002756-0007-CO, Res No 2008007549, 30 April 2008, Constitutional Chamber, Supreme Court of Justice.

(103.) Earthjustice, 'Environmental Rights Report 2007: Human Rights And The Environment' app (2007) (containing constitutional provisions concerning the environment from 118 countries), available at http://www.earthjustice.org/news/press/007/earthjustice-presents-2007-environmental-rights-report-to-un.html.

(104.) See B Adams et al, 'Environmental and Natural Resources Provisions in State Constitutions' (2002) 22 J Land Resources & Envtl L 73.

(105.) The Quebec provincial Charter, for example, provides that: 'Every person has a right to live in a healthful environment in which biodiversity is preserved, to the extent and according to the standards provided by law.' Quebec Charter of Human Rights and Freedoms, RSQ, ch C-12, s 46.1.

(106.) Charter for the Environment, art 1, available at http://www.legifrance.gouv.fr/html/constitution/const03.htm. See generally O Pedersen, 'European Environmental Human Rights and Environmental Rights: A Long Time Coming?' (2008) 21 Georgetown Int'l Env L Rev 73; D Marrani, 'The Second Anniversary of the Constitutionalisation of the French Charter for the Environment: Constitutional and Environmental Implications' (2008)

10 Env L Rev 9; JR May, ‘Constituting Fundamental Environmental Rights Worldwide’ (2005–2006) 23 Pace Env L Rev 113, 113–14.

(107.) Legifrance, Charter for the Environment, art 1, available at http://www.legifrance.gouv.fr/html/constitution/const03.htm.

(108.) See, eg, Conseil Constitutionnel decision no 2005–514DC, 28 April 2005, R 305 (*Loi relative à la création du registre international français*); Marrani (n 106).

(109.) See Marrani (n 106) 21–2.

(110.) The Hungarian Constitution, for example, states: ‘Hungary recognizes and implements everyone's right to a healthy environment.’ A Magyar Küztársaság Alkotmánya [Constitution] art 18 (Hung), translated in Constitutions of the Countries of the World (Oceana Law Online); see also G Badni, ‘The Right to Environment in Theory and Practice: The Hungarian Experience’ (1993) 8 Connecticut JIL 439.

(111.) Constitution of Chile, art 19 paras 1, 8.

(112.) Ibid art 19 para 8. In 1988, the Supreme Court of Chile held that the constitutional-environmental provisions established a substantive right. Residents of the village of Chanaral filed suit against a government-run copper mine to restrain the company from continuing to discharge tailings on local beaches and coves. Based on a site visit, the court found much of the shore and local waters inert and enjoined further dumping within one year. *Pedro Flores y Otros v Corporacion Del Cobre, Codeloco,* Division Salvador. Recurso de Proteccion, (1988) 12.753.FS 641 (Chile), summary available at http://www.unescap.org/drpad/vc/document/compendium/ch1.htm.

(113.) The African Charter of Human and Peoples’ Rights provides that ‘[a]ll peoples shall have the right to a general satisfactory environment favorable to their development’. African Charter of Human and Peoples’ Rights (27 June 1981), Art 24 (‘African Charter’). The Additional Protocol to the American Convention on Human Rights provides that ‘everyone shall have the right to live in a healthy environment and to have access to basic public services’. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (17 November 1988) (‘ESC Protocol’).

(114.) In addition to the numerous provisions in many environmental agreements referring to rights of information, public participation, and access to justice, some of which are listed in n 3 above, the Preamble to the Aarhus Convention recognizes that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself'. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (25 June 1998), Doc ECE/CEP/43 ('Aarhus Convention').

(115.) Declaration of the UN Conference on the Human Environment, principle 1 (16 June 1972) UN Doc A/Conf. 48/14/Rev.1 (1973); UN Conference on Environment and Development: Rio Declaration on Environment and Development, UN Doc. A/Conf.151/5/Rev.1 (1992), reprinted in 31 ILM 874; Draft Declaration of Principles on Human Rights and the Environment, UN HRC (16 May 1994). See also UN GA Res 45/94, in which the General Assembly recognizes that 'all individuals are entitled to live in an environment adequate for their health and well-being…'. *Need to Ensure a Healthy Environment for the Well-Being of Individuals,* GA Res 45/94 (1990).

(116.) European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) (ECHR).

(117.) American Convention on Human Rights (22 November 1969) (ACHR).

(118.) In many of the cases the applicants cite to constitutional provisions guaranteeing the right to a safe and healthy or other quality environment. See, eg, *Okyay v Turkey,* App No 36220/97, ECtHR Reports of Judgments and Decisions ('Reports') 2005-VII (12 July), 43 EHRR 788 (2006) and *Kyrtatos v Greece,* App No 4666/98, Reports 2003-VI (22 May) (extracts) discussed at n 50.

(119.) Most commonly invoked are the rights to life, health, property, culture, information, privacy, and home life. See D Shelton, 'Human Rights And The Environment: What Specific Environmental Rights Have Been Recognized?' (2006) 35 Denver JILP 129.

(120.) South African Constitution, ch IV, para 24.

(121.) Case no CCT 67/06; ILDC 783 (ZA 2007). The case arose out of a decision by a provincial Department of Agriculture, Conservation and Environment to grant private parties permission to construct a filling station.

(122.) Ibid paras 56–7.

(123.) Ibid para 58.

(124.) Ibid para 59. In addition, NEMA sets out some of the factors that are relevant to decisions on sustainable development. These factors largely reflect international experience. But as NEMA makes it clear, these factors are not exhaustive. The court quoted the factors set forth in the domestic National Environmental Management Act, s 2(4)(a):

> Sustainable development requires the consideration of all relevant factors including the following:

1. ((i)) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
2. ((ii)) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
3. ((iii)) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
4. ((iv)) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;
5. ((v)) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
6. ((vi)) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
7. ((vii)) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
8. ((viii)) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

(125.) NEMA, s 24(7)(b) provides:

> Procedures for the investigation, assessment and communication of the potential impact of activities must, as a minimum, ensure…investigation of the potential impact, including cumulative effects, of the activity and its alternatives on the environment, socio-economic conditions and cultural heritage, and assessment of the significance of that potential impact.

(126.) Ibid para 98.

(127.) Ibid para 102.

(128.) Case No 5393 of 1995, Constitutional Chamber, Supreme Court of Costa Rica.

Hierarchy in International Law: The Place of Human Rights

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Human Rights Dimensions of Investment Law

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Abstract and Keywords

This chapter is concerned with conflicts between human rights and investment law. It argues that the instances of (supposed) conflicts is on the rise, particularly given the wide range of institutions that are authorized to resolve disputes which could implicate both human rights and investment. The rubric, however, has rarely caused courts or arbitral tribunals to opt for one norm — say the right to life — at the complete expense of foreign investment. The chapter shows that in cases of conflict, the dispute resolution body has plenty of legal tools to help redefine the debate to avoid the conflict in the first instance.

Keywords: human rights, investment, investor-state arbitration, property, indigenous communities, norm hierarchy

1. Introduction

Courts and tribunals are becoming more engaged in disputes that implicate both human rights and investment principles. Arguments based on human rights norms are appearing with increased regularity in investor-state arbitrations, whether in defence of state action to regulate the investment[1] or even by aggrieved investors who claim that state action violates their human rights.[2] Regional human rights courts are frequently sitting in judgment in cases that involve investment.[3] Municipal courts are issuing judgments that address both investment and human rights issues.[4]

The fact that the law applicable to a dispute derives from both investment and human rights norms poses substantial challenges to dispute resolution if the norms clash, or even if they appear to clash. The court or tribunal could be forced to choose the human rights principle over the investment one, or vice versa. Yet, few **(p. 237)** decisions of courts and tribunals manifest a direct conflict. The absence of conflict is not due to chance. The norms reflected in a bilateral investment treaty (BIT) or free trade agreement (FTA) and those promoted in a human rights treaty may be compatible, or at least reconcilable, as this chapter argues. For example, certain human rights treaties recognize the right to property,[5] and this right has influenced some of the protective measures contained in investment treaties.[6] Human rights principles have shaped the right to fair and equitable treatment or the minimum standard of treatment; they have also affected the prohibition of expropriation.[7]The overlap is worth addressing even in the context of a book devoted to hierarchy, as it challenges assumptions and clarifies issues.[8]

But states may find that complying with obligations owing to an investor can only be accomplished by breaching human rights obligations.[9] Or, in a broader sense, a conflict could arise when protecting the investor frustrates the objectives of human rights.[10] For example, a state's obligations under an investment treaty could interfere with the state's duty to provide resources essential to life, such as water. Or, a state's duty to protect the ancestral land and traditions of an indigenous community could conflict with its obligation to respect concession contracts it has entered into with investors covering the same land. In these situations, do human rights norms trump investment norms? If human rights have priority over investment norms, what is the legal basis for the priority? The priority reflects a rule of hierarchy, or what could be considered the legal rationale for preferring one norm over the other.[11]

Also, how is the rule of hierarchy applied in cases of conflict? Do courts and tribunals simply identify a legal conflict, a narrow or broad one, and rely on the more compelling norm in reaching the result while rendering the less compelling norm a nullity? One would think that an arbitral tribunal would likely apply a *jus cogens* norm even if the parties' choice of law or the applicable legal standards of an investment treaty would dictate application of a conflicting norm.[12] **(p. 238)**

Or is the reasoning more nuanced? Do courts and tribunals skirt the hierarchy issue when investment protections and human rights appear to

be on a collision course? If so, what techniques do they use to avoid the conflict?

A recent book examines legal sub-systems to provide important insight into potential and actual conflicts between investment and human rights norms.[13] This chapter takes a different approach to the conflict issue by focusing more on norm hierarchy. Also, it uses a comparative approach by discerning general practices and principles based on cases decided by international and national courts and tribunals. As this chapter's analysis establishes, defining the rule of hierarchy regarding human rights and investment—one that is comprehensive—is challenging, particularly given the distinct functions of specialized regional human rights courts and investor-state tribunals. One conclusion of this chapter is that, to a certain extent, the rule of hierarchy depends on the body deciding the dispute. The conclusion should not be too surprising given the obligation of courts and tribunals to follow their mandate, the *lex specialis.* For example, as discussed in this chapter, human rights courts focus on the relevant human rights treaty in resolving disputes; investment arbitral tribunals give considerable respect to the relevant applicable investment treaty.

This chapter first dissects human rights and investment norms in an effort to establish the overlap between them. The heart of the chapter then follows. It examines judgments of courts and tribunals to discern whether there is a rule of hierarchy and, if so, to determine how it is applied. Included in the analysis is a proposal for a disciplined approach to dealing with conflict,[14] one that recognizes and gives effect in a structured way to the role of human rights in investment. A disciplined approach is important for two reasons. First, international law is largely based on a state's consent to be bound to certain commitments, whether through express agreements or general, consistent practices. If human rights norms could impose an obligation on a state that hosts investment without the state's consent or without regard to any other recognized legal basis, then the system would lack legitimacy. **(p. 239)** Secondly, absent guiding standards derived from an accepted legal method, the system would be disorderly and lack the critical element of predictability.

2. The not-so fragmented world of investment and human rights

At first glance, investment law appears far removed from the legal principles establishing and giving effect to an individual's rights against the state based

on his or her status as a person. Investment largely concerns corporations seeking to maximize economic returns by investing in resource-rich areas or in places with lower marginal production costs. Investment treaties make little, if any, direct reference to human rights principles in the protections they afford foreign investors and their investments. Human rights concepts, while appearing more frequently in investor-state disputes, are not yet controlling the results of the arbitrations.[15]

The human rights regime, on the other hand, appears to be separate from the realm of investment. The Universal Declaration of Human Rights (UDHR) speaks of the ‘equal and inalienable rights of all members of the human family’, the ‘dignity and worth of the human person’, and ‘human beings’, and does not expressly mention corporations, let alone profit-seeking investors.[16] The major UN human rights treaties focus on the responsibility of states with little focus on the obligations of legal entities.[17]

Yet labelling regimes as human rights or investment ones, ‘pigeon-holing’ them as Martti Koskenniemi has described it,[18] begs the conclusion that the two are on different paths with conflict inevitable, or at least more likely. Also, to suggest they are ships that pass in the night is not entirely accurate. Investment affects the human dimension, ranging from the investor's treatment of local workers to the consequences of investment on a local community, such as the possibility of environmental degradation or even an improvement of the environment. And the inter-relationship is not only a one-way street in which individuals avail themselves of their human rights in an effort to protect against or shape investment. Human rights principles can buttress the investor's expansive wishes, such as enabling the investment in the first place, based on the notion of a ‘right’. Also, both are ‘sub- **(p. 240)** systems’ of general principles of international law[19] and they have more in common than what may be readily apparent.

2.1 The human right to investment

The need for an expansive approach to understanding the relationship between human rights and investment is evidenced by the treaties at issue before courts and tribunals. Human beings need tangible and intangible items to survive and fully develop themselves; accordingly, certain human rights treaties, in addition to the UDHR,[20] address this need by recognizing a right to property.[21] Article 21 of the American Convention on Human Rights (ACHR), for example, states, in relevant part:

> Article 21. Right to Property

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.[22]

Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) recognizes every natural or legal person's entitlement to the ‘peaceful enjoyment of his possessions’ and no deprivation of possessions can occur unless in the public interest and under the law, including ‘general principles of international law’.[23] Although Article 1 of Protocol 1 does not refer to a ‘right’ to property, it has been interpreted to give rise to such in the same sense that other provisions of the ECHR set forth rights.[24] Explicit reference to a ‘legal person’ means that corporations enjoy the right to property, and, indeed, cases under the ECHR have involved corporations asserting claims under Article 1 of Protocol 1.[25]

The right to property under the ECHR, however, cannot interfere with the state's right ‘to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties’.[26] Article 1 of Protocol 1 does not require compensation for deprivation of the possession, as set out in ACHR, Article 21, although **(p. 241)** compensation is widely recognized when the state takes an alien's property.[27] The European Court of Human Rights (ECtHR) has held that Article 1 of Protocol 1 consists of three rules: (1) everyone has the right to *peaceful enjoyment* of property; (2) a *deprivation* can only occur if it is in the *public interest* and in conformance with the rule of law; and (3) a state may *control the use of property* in accordance with the *general interest.*[28] The rules are ‘inter-connected’ with the second and third ones as examples of interference with the peaceful enjoyment of property.[29]

In addition to the property protections under Article 1 of Protocol 1, the Charter of Fundamental Rights of the European Union (Charter) recognizes the right of ‘everyone’ to ‘own, use, dispose of and bequeath his or her lawfully acquired possessions’ and any deprivation can only be made ‘in the public interest’ and subject to law, including fair compensation.[30] Fundamental rights are part of the law of the European Union.[31] The European Court of Justice (ECJ) has recognized an obligation to protect

these rights and it does so by frequent reference to the ECHR.[32] According to Marius Emberland, ‘corporate claims make up a large part of the fundamental rights litigation brought before the [ECJ]’.[33] The property right under the Charter corresponds to Article 1 of Protocol 1 and it is to be given the same meaning and scope as the latter.[34] Under the Treaty of Lisbon, the Charter's ‘rights, freedoms and principles’ are to be given the ‘same legal value as’ the Lisbon Treaty and the Treaty on the Functioning of the European Union Convention.[35]

The treaty provisions establishing the right to property and other aspects of the Conventions may temper the right. Under Article 29(b) of the ACHR, for example, no ACHR provision can be interpreted to restrict a right or freedom arising under domestic law or another treaty.[36] Article 29(b) has been held to allow for consideration of other international treaties and ‘related developments in International Human Rights Law’ in giving effect to the right.[37] Similarly, Article 60 of the ECHR does not authorize the ECHR to limit or derogate from ‘any of the human rights and fundamental freedoms’ under domestic law or any other agreement.[38] **(p. 242)**

The ACHR and ECHR arguably place investment within the realm of human rights jurisprudence, as investment is a form of property and also a possession.[39] State action, such as a regulatory measure, could interfere with the right. Or, the right could be impaired when another investor claims a right to property, such as when a state, pursuant to a concession agreement, gives access to natural resources to a foreign investor and a local indigenous community claims the natural resources based on its ‘human’ right to property.

The human rights treaties evidence a certain, perhaps unclear, hierarchy as to the right to property. In the first place, the right is not absolute. It is subject to the broader social or public interests as reflected in Article 21 of the ACHR and Article 1 of Protocol 1. Also, the right to property cannot impair rights or freedoms under national law or another treaty.

2.2 Human rights aspects of investment treaties

BITs and other investments treaties, such as FTAs, set forth protections for foreign investment, such as national treatment, most favoured nations treatment, and a minimum standard of treatment, and a prohibition against expropriation absent due process and compensation. The host state's duties to the investor are not couched as human rights obligations. Indeed, in

contrast to the human rights conventions which predominantly focus on the individual or groups within a state, and sometimes legal persons, the duties owing under the investment treaties concentrate more on the obligations of the other state party to the treaty, which has given rise to a tenuous argument that the investor sits as a sort of 'secondary right holder'.[40] BITs are the most common form of investment treaty.[41] In addition to providing investment protections, many BITs authorize an investor to bring a claim for damages in arbitration directly against the host state due to its failure to protect the investment as required under the BIT.[42] In this regard, the investor has an express right under the BIT. Investor-state arbitrations are occurring frequently, with many of the resulting arbitral awards in the public domain.

Generalizing about investment treaties is risky because each is unique, although some treaties, such as BITs to which the United States or Canada is a party, are cookie-cutter conventions developed by the respective state's trade or foreign ministry. The model a state uses for its BIT may change depending on the objectives of the states parties to the treaty. The United States, for example, has been re-examining its 2004 US Model BIT with an apparent focus on the protection **(p. 243)** of workers' rights, both in the United States and abroad, and on environmental standards.[43]

Although BIT protections do not mirror the protections in human rights treaties, the principles underlying them could implicate human rights norms, or at least the latter could be used to elucidate the protections. Some convention language may be more obvious and compelling than other wording in terms of its implications for human rights. Also, some of it may be embedded in the substantive provisions of the investment treaty, as opposed to in the preamble or objectives section, and thus has the potential to be more influential.

Understanding how human rights norms could conflict or be in sync with the burgeoning number of BITs and FTAs and the arbitration of disputes arising under them requires an appreciation of the relationship between investment treaties and general international law, and the role of the dispute resolution process typically offered under the treaties. Investment treaties appear to be stand-alone agreements between states. But general principles of international law could have, and indeed have had, some role in giving effect to the obligations under the treaties. In fact, some BITs and FTAs expressly provide that they are to be construed in accordance with applicable international legal principles.[44] Matters become more

complicated if the investor has entered into an agreement with an agency of the host state that includes a choice of law clause, including host state law, which authorizes or even mandates the host state's conduct or at least prioritizes the relevant norms. For example, the Constitution of Argentina recognizes that the Constitution, the laws of the nation as enacted by Congress, and treaties are the supreme law of the land. A later amendment to the Constitution provided that treaties have supremacy over laws, and that certain international human rights treaties are on the constitutional hierarchical level.[45] In investor cases filed against it under various BITs, Argentina has argued that investment protections cannot compromise basic human rights due to the latter's privileged status under Argentine law.[46]

Also, the investor-state arbitration itself may be subject to rules, such as those set forth in Article 42 of the Convention on the Settlement of Investment Disputes Between States and Nationals of other States (ICSID Convention), which provides that if the parties to the dispute have not selected the governing law, 'the Tribunal shall apply the Law of the Contracting State party to the dispute (including its rules **(p. 244)** on the conflict of laws) and such rules of international law as may be applicable'.[47] The references in the investment treaties and arbitration rules to international law have allowed human rights principles to become part of the investor-state dialogue, even though to date they appear not to have shaped the outcome of an award in a substantial way. In 2006, the ICSID Arbitration Rules were amended to give the tribunal the discretion, after consulting with the parties, to allow non-parties to the arbitration to file a written submission.[48] NAFTA tribunals constituted under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) have allowed amici curiae submissions setting forth human rights arguments.[49]

And finally, in interpreting investment treaties, Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) requires that, together with the treaty context, effect should be given to 'any relevant rules of international law applicable in the relations between them'.[50] Can or does Article 31(3)(c) act as a '?"master key" to the house of international law' so that in case of a 'systemic problem' and if 'no other interpretative means provides a resolution, then recourse may always be had to that article'?[51]

2.2.1 Broad reference to non-investment norms

BIT preambles typically focus on investment objectives, yet some go beyond investment and refer to other social issues. For example, the preamble to the 2006 Canada–Peru BIT recognizes that the investment protection afforded investors from another party in the territory of the other party 'will be conducive to…the promotion of sustainable development', in addition to promoting business activity and economic cooperation.[52] Or, as another example, the preamble to the 2004 US–Uruguay BIT, based on the 2004 US Model BIT, indicates that the investment objectives should be achieved 'in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights'.[53] The Japan–Viet Nam BIT recognizes that the treaty's investment **(p. 245)** objectives 'can be achieved without relaxing health, safety and environmental measures of general application'.[54]

Some BITs and trade agreements move beyond preamble language to fortify substantive duties into which human rights claims and defences could be couched. The Canada–South Africa BIT recognizes the right of the state to adopt, maintain, or enforce measures to ensure that the investment 'is undertaken in a manner sensitive to environmental concerns' and to adopt or maintain measures 'necessary to protect human, animal or plant life or health'.[55] Similarly, NAFTA's Chapter 11 provides that 'it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures'.[56] In other words, the host state's ability to regulate in certain areas essential to the maintenance of basic standards is protected. The 2004 US Model BIT also contains provisions in which the states parties 'recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in' domestic environmental laws and labour laws.[57]

An investment or free trade treaty may contain a clause that allows the host state to take certain actions essential to protect security interests. For example, the US–Argentina BIT provides that it does not prevent a state party from applying 'measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests'.[58] The Germany–India BIT likewise Provides that it does not prevent a state party 'from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants'.[59] These

clauses, while not expressly stating an exception for ‘human rights’, are worded broadly perhaps to protect related state action.

Treaty references to safety, health, labour, and the environment signal that investment treaties are not in a lock-box. The language reflects some priority regarding norms. They also give tribunals a foundation to employ interpretive techniques to avoid a conflict.[60] **(p. 246)**

2.2.2 Specific measures to protect investment

The BIT and FTA language referenced above largely seeks to ensure that host states maintain regulatory measures that serve the welfare of their citizens, while promoting other objectives. The specific investment protections set out in the treaties can also reflect or be sources of human rights norms, ones which arguably empower investors and, perhaps, others who are affected by the investment.

2.2.2.1 The customary international law minimum standard of treatment, including protection against denial of justice

Many BITs require the host state to provide covered investments ‘fair and equitable treatment’ and some form of ‘full protection and security’ as the minimum standard of treatment.[61] The NAFTA's minimum standard in Article 1105(1), for example, provides for treatment of investments of investors of another party ‘in accordance with international law, including fair and equitable treatment and full protection and security’.[62] In 2001, the United States, Mexico, and Canada issued a formal ‘Interpretation’ of the NAFTA[63] due to conflicting arbitral awards construing Article 1105(1). Under the Interpretation, ‘fair and equitable treatment’ and ‘full protection and security’ under Article 1105(1) ‘do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens’.[64] Further, the Interpretation established that a breach of another NAFTA provision or of any other international agreement in itself is not a violation of Article 1105(1).[65]

The NAFTA states, through the Interpretation, and the United States in recent FTAs and BITs, along with its treaty partners, now agree that the customary international law minimum standard applies to covered investment, and the standard expressly includes fair and equitable treatment and full protection and security.[66] In treaty annexes, the states agreed that the minimum standard ‘refers to all customary international law principles that protect the

economic rights and interests of aliens'.[67] The US–Uruguay BIT elaborated on fair and equitable treatment and an aspect of it, denial of justice, as follows:

> 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world;…[68] **(p. 247)**

The use of the word 'includes' is important, as denial of justice is an element of the customary international law minimum standard of treatment.

The concept of denial of justice derives from the system of private reprisals that existed from the fourteenth to the eighteenth centuries, in which an alien who claimed an injustice in a foreign land relied on self-help in an attempt to rectify the wrong.[69] With the rise of the modern state, the aggrieved alien was forced to deal with the host state and the 'legal processes' it had established within its territory.[70] Vattel in *The Law of Nations* argued that, in this situation, the alien's home state had a right under international law to protect its own subject who claimed injury abroad.[71] Denial of justice does not concern the substantive obligation that the host state owes the alien but instead concerns an 'act of an authority of the government, not redressed by the judiciary, which denies to the alien that protection and lawful treatment to which he is duly entitled'.[72] The international wrong arises due to 'fundamental unfairness' in local process.[73]

The critical issue is, what standard could the home state demand of the host state in its treatment of the foreign national? In relatively recent times the developed world's ideas of justice and fairness became part of the standard, a so-called international one, even though local communities in the foreign lands may not have shared the developed world's values.[74] According to the late Professor Sir Robert Jennings:

> That so-called 'minimum' standard for the treatment of 'aliens' was the product of the European and North American States wishing to demand a standard for the treatment of their nationals in foreign countries, which they called 'minimum,' but was nevertheless thought to be higher than the local *national* standard in some defendant countries, and which national standard those countries claimed sufficed for the purposes of international law.[75]

Of note, during the nineteenth and early twentieth centuries, the claims of aliens based on denial of justice were largely focused on security issues for

individuals, as opposed to property protection. For example, the decision of the Mexico–US General Claims Commission in *Neer* dealt with Mexico's failure to investigate **(p. 248)** and prosecute the murder of a US national.[76] *Roberts* and *Chattin* concerned the treatment of US nationals under Mexican criminal law.[77] The jurisprudence of these cases is 'an important parallel with the later human rights movement' as it 'anticipate[d] later prohibitions' in the ICCPR.[78]

The fairness aspect of the claim for denial of justice is akin to that protected under the major human rights treaties, such as the right to a fair trial which is protected under Article 6(1) of the ECHR, and also found in Article 8 of the ACHR and Article 14(1) of the ICCPR.[79] As Jan Paulsson has written, the standards set forth in human rights instruments 'include norms which must be respected by any judicial system aspiring to international legitimacy'.[80] Petitioners typically rely on treaty protections concerning fairness of process, and not denial of justice, as the latter would 'be redundant in the light of the *lex specialis,* but its substantive tenor is not invalidated'.[81]

In fact, in *Mondev v United States,* an arbitral award under NAFTA, Chapter 11, the tribunal considered ECtHR decisions in rejecting a Canadian investor's claim of denial of justice under NAFTA, Article 1105(1).[82] Among the many issues before the tribunal was the investor's allegation that the immunity afforded the Boston Redevelopment Authority under Massachusetts law denied the investor access to a court to sue the agency.[83] The tribunal quoted the ECtHR's decision in *Fogarty v United Kingdom,* which interpreted Article 6(1) of the ECHR, in holding that the principle of a 'right to a court' could not be used to create a substantive claim that Massachusetts does not recognize.[84] The tribunal sought 'guidance by analogy' from the jurisprudence of the ECtHR to give effect to the meaning of NAFTA, Article 1105(1).[85] And it rightfully looked to ECtHR jurisprudence due to the 'inevitable cross-pollination' between denial of justice and certain human rights treaty provisions.[86] **(p. 249)**

2.2.2.2 Expropriation

BITs and FTAs routinely prohibit host states from directly or indirectly nationalizing or expropriating covered investments or taking measures tantamount to nationalization or expropriation absent certain conditions, such as the taking can only occur for a public purpose, it cannot be discriminatory and must afford due process, and there must be compensation.[87] The human rights dimension of expropriation looms large. First, human rights instruments and treaties generally recognize the right of

every individual to use and enjoy property and not to be deprived of property absent certain protections.[88] In general, arbitral tribunals have not seized on the human rights aspect in analysing the investor's property rights. An exception is *Técnias Medioambientales, Tecmed SA v Mexico,* in which the tribunal relied on jurisprudence of the ECtHR and the Inter-American Court of Human Rights (IACtHR) to determine whether state action, a resolution of an agency within Mexico's federal environment ministry that denied the investor's request to renew a permit to operate a landfill, constituted expropriation of the investment without compensation.[89] The tribunal in *Tecmed* used the ECtHR's approach that considers whether the deprivation of property served a legitimate aim in the public interest and whether the means used bears 'a reasonable relationship of proportionality' to that aim.[90] The tribunal in *Azurix Corp v Argentina* looked favourably upon the approach of the *Tecmed* tribunal.[91]

The reluctance of investment tribunals to rely on human rights jurisprudence in shaping the contours of expropriation is probably due to the fact that the property rights are readily set out in the investment treaties and investment law.[92] Also, the state and the investor have typically entered into contracts which specified the applicable law. The contract, investment treaty, and rules of the arbitration forum (eg ICSID) set forth the law applicable to the arbitration. As a result, an arbitral tribunal could reach a result on expropriation that could not be reconciled with a decision of a human rights court.[93]

(p. 250) Secondly, although the property right is established both in investment law and in certain human rights treaties, that right is subject, in certain instances, to state taking, so long as compensation and other protective measures are in place. The tension between the obligation of the state to regulate, particularly with regard to the environment and health matters or in the case of an emergency, such as Argentina's action in response to its economic crisis of 1999–2002, and the human rights claims of local citizens, is perhaps the most fertile area for the convergence, or perhaps the clash, of investment and human rights norms. Indeed, the takings area has been the focus of the non-governmental organization (NGO) community and other interested local citizens in a host state, as they have sought to inject themselves in investor-state disputes to ensure that the regulations or acts of the host state are not undermined. The cases of *Methanex Corp v United States*[94] and *Biwater Gauff (Tanzania) Ltd v Tanzania,*[95] in which amici curiae were allowed to present human rights-based arguments in support of the regulations of the host states, and other

awards, illustrate the possible tension, even though the tribunals did not adopt the human rights arguments in their final awards.[96]

The assumption that human rights conventions and investment treaties are wholly separate legal regimes is short-sighted and not well grounded in fact. The inter-relationship between the two legal sub-systems should not be ignored in considering norm hierarchy, as it raises questions about the existence of a conflict in the narrow sense, and even perhaps in a broader manner.

3. Court judgments and arbitral awards: an examination

3.1 Introduction

This section builds on the previous one by examining judgments and awards in an effort to identify the rules of hierarchy and explain their application. The interaction between human rights norms and investment norms is evidenced at the municipal level in court judgments, at the regional level in the decisions of the European Court of Human Rights, the European Court of Justice, and the Inter-American Court of Human Rights, and at the international level, mainly in awards of arbitral tribunals.

The judgments and awards are placed in one of three categories based on their treatment of the norms: (1) a focus on human rights over investment; (2) a priority given to investment over human rights; and (3) a relatively balanced view of both norms. The overlap between human rights and investment **(p. 251)** principles, discussed in the previous section, makes categorizing the decisions difficult. Also, a decision's reasoning may reflect a heightened focus on one set of norms over another, yet the result may not reflect the priority. This is true particularly in arbitration cases in which the tribunal recognizes human rights norms as bearing some relevance to the dispute, even though the result may not rest on the human rights argument. The categorization is then used to support the analysis that follows, which discusses the rule of hierarchy that has been employed.

The analysis first examines a series of IACtHR cases involving the rights of indigenous communities or tribes to land, including the right to live on the land and to develop their cultures in a broad sense, against competing claims of the state, private companies, citizens, or even other indigenous communities. The principal IACtHR cases, as well as a case from the ECJ, involve the claimants’ right to property, established under a human rights

treaty, in conflict with investment rights. The right to property as a ‘human right’ has generated norm conflict in regional courts because enforcing the right is more likely to affect competing investment rights, or at least has a greater likelihood of implicating commercial matters, as opposed to enforcement of other human rights, such as the right to vote or the right to a fair trial. The analysis of the regional court cases, coupled with a review of arbitration awards and municipal judgments, establishes a norm priority to human rights over investment, but not one that is absolute. The courts and tribunals recognize the tension, as opposed to ignoring or denying it; yet, their solutions are expansive. Various techniques are employed, including involving all affected parties, the imposition of balancing tests, and the use of proportionality tests when rights are being restricted.

The second focus—one that examines decisions in which investment is favoured over human rights—is largely on investor-state arbitration, although decisions of municipal courts are also analysed. The arbitral tribunals have been slow to embrace human rights arguments used to counter claimants’ challenges to state regulation, yet they do not ignore the arguments. Instead, in most cases they cleverly acknowledge the argument and then either find the human rights issue not relevant or find a way to balance both investment and human rights objectives.

The third category, one that includes cases that use a more balanced approach, examines a judgment of the ECtHR and a judgment of the Constitutional Court of South Africa. Both cases, while employing some of the techniques used by courts and tribunals in either of the first two categories, strongly emphasize the link between economic development and human rights.

3.2 Human rights v investment norms

3.2.1 A focus on human rights v investment norms

Human rights principles have been given preference over investment norms in a variety of IACtHR cases, particularly ones in which indigenous communities have sought to protect ancestral lands and property, and also in a case in which members of civil society claimed that the right to freedom of thought and expression entitled **(p. 252)** them to information about a foreign investment project involving deforestation.[97] In the ECJ, internet users’ privacy rights were given heightened respect over the interests of music intellectual property (IP) right-holders. In investor-state arbitrations, some

tribunals have acknowledged human rights norms and given effect to them in final awards, yet none has done so in a way that materially influenced the award. Similarly, finding a direct conflict in national courts, one in which human rights override investment concerns, has been a challenge, but some South African cases give heightened respect to human rights.

The IACtHR jurisprudence is grounded in *Ivcher Bronstein v Peru,*[98] the seminal case on the right to property under Article 21 of the ACHR. Peru had stripped Baruch Ivcher Bronstein of his nationality after his media company had investigated corruption in the Peruvian government.[99] A Peruvian court suspended Ivcher's ability to exercise his majority shareholder rights, divested him of leadership positions in the company because under Peruvian law only a Peruvian national could own shares in a telecommunications media company, and ordered a board meeting to implement the court's measures.[100] The IACtHR held that the suspension 'obstructed Mr. Ivcher's use and enjoyment of' the rights in his shares and thus deprived him of his property.[101] Peru presented no evidence or arguments that the suspension was based on public utility or social interest; the evidence was that the state deprived Ivcher of his property interest[102] and did so without affording due process and compensation.[103]

The *Ivcher Bronstein* case defined property broadly. In addition to consisting of material objects, property includes 'any right that may form part of a person's patrimony', including movables and immovables, and any intangible object with value.[104] This expansive definition paved the way for claims under Article 21 by indigenous or ethnic communities, including *Mayagna (Sumo) Awas Tingni Community v Nicaragua*[105] and, recently, *Moiwana Village v Suriname,*[106] *Yakye Axa Indigenous Community v Paraguay,*[107] *Saramaka People v Suriname,*[108] and *Sawhoyamaxa Indigenous Community v Paraguay*.[109] In *Mayagna,* the IACtHR found that Nicaragua violated Article 21 by denying the Awas Tingni Community 'the use and enjoyment of their property' based on the state's granting of logging concessions to third parties to use 'property and resources located in an area which *could* correspond, fully or in part, to the lands which must be delimited, demarcated, and titled'.[110] The Awas Tingni lacked title to the land they inhabited, which was rich in natural resources, yet their possession of the land was sufficient for 'official recognition' of the property **(p. 253)** right.[111] Community members were held to 'have a communal property to the lands they currently inhabit, without detriment to the rights of other indigenous communities'.[112] The Court did not resolve the competing claims; instead, it ordered the state to conduct delimitation, demarcation, and titling of the

territory, and until that was completed, the state and any party acting with ‘its acquiescence or its tolerance’ could not impair the property located in the relevant geographic area.[113] The judgment's focus was the state's authority ‘to organize public power so as to ensure the full enjoyment of human rights by the persons under its jurisdiction’.[114] A similar result was reached in *Moiwana Village v Suriname,* in which an ethnic community claimed a right to property even though its members or the community itself lacked title to the land and had been violently forced off of it.[115] Suriname was found to have violated Article 21 as Moiwana members had once inhabited the lands with neighbouring communities respecting their possession.[116] As in *Mayagna,* the Court ordered delimitation, demarcation, and titling of the land, and this was to be done in cooperation with neighbouring villages and communities.[117] Suriname was ordered not to act to ‘affect the existence, value, use or enjoyment of the property located in the geographical area where the Moiwana community members [had] traditionally lived’.[118] In addition, Suriname, including its agents or third parties acting with its ‘acquiescence or tolerance’, was ordered to pay reparations, both on an individual basis to community members and into a development fund, as well as moral damages.[119] In *Mayagna* and *Moiwana Village,* the Court found a violation of the property rights of the respective community and ordered the state to work with the community and other interested parties in establishing title to the lands.

The IACtHR developed an even more expansive view of communal property rights in *Yakye Axa Indigenous Community v Paraguay,* which also dealt with a conflict between private property owners and indigenous community members. At stake were the latter's ancestral rights, considered essential to the community's ‘cultural identity’ and ‘economic survival’.[120] When there is a ‘real or apparent contradiction’ between two groups, restrictions on property rights are permissible if established by law, necessary, and proportional, and if their purpose ‘must be to attain a legitimate goal in a democratic society’.[121] Elaborating on the test, the Court noted that restrictions should be aimed at ‘satisfying an imperative public interest’ rather than merely having ‘a useful or timely purpose’.[122] As for proportionality, the restriction must be ‘closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right’.[123] And the restrictions ‘must be justified by collective objectives’, important ones that ‘clearly prevail over the necessity of full enjoyment of the restricted right’.[124] Applying this standard to ‘clashes between private property and claims for ancestral property by the members of indigenous communities’, the Court recognized that a private individual's

right to property can be restricted ‘to attain the collective **(p. 254)** objective of preserving cultural identities in a democratic and pluralistic society’ and that the restriction ‘could be proportional, if fair compensation is paid to those affected’.[125] The Court did not rush to judgment by holding that the communal property right always trumps a private individual's property right. However, if a state cannot ‘adopt measures to return the traditional territory and communal resources to indigenous populations’ it should compensate the community ‘guided primarily by the meaning of the land for them’.[126]

Two major factors drove the reasoning of *Yakye Axa*: Article 29(1) of the ACHR and the unique status of indigenous groups. Under Article 29(b), in interpreting Article 21, the Court must give effect to conventions and the other legal obligations of Paraguay.[127] Paraguay is a signatory to the International Labour Organization (ILO) Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries.[128] ILO Convention No 169 links the rights of indigenous people to economic, social, and cultural rights, particularly as to their relationship to the land.[129] Also, Paraguay has given domestic effect to ILO Convention No 169.[130] Paraguay's Constitution recognizes indigenous peoples and grants them specific rights.[131]

An even broader reading of the Article 21 right to property is in *Saramaka People,* in which the Saramaka people challenged Suriname's claim of ownership of territory inhabited and used by the people and Suriname's awarding of logging and mining concessions on the same territory.[132] Suriname claimed that, as owner of the territory, it could allow the Saramaka people and others access to and use of the natural resources.[133] The Saramaka people claimed that their survival depended on access to and use of the territory that they had traditionally used and occupied, including access to all natural resources within the territory that the people have traditionally used.[134] Suriname is not a party to ILO Convention No 169 and had not enacted domestic laws to protect indigenous communities.[135] Drawing on the earlier cases involving indigenous people, the Court held that a tribal community, like an indigenous one, depends on control and use of natural resources to maintain ‘their very way of life’, their survival in a physical and cultural sense.[136] It thus held that the natural resources within the territory that the tribe traditionally used and needed for it to survive, develop, and continue are protected under Article 21.[137]

Identifying the protected natural resources proved difficult. Extraction of a mineral that the tribe did not use for subsistence (gold, for example) could nevertheless affect subsistence resources.[138] All natural resources

within the territory were thus arguably protected under the people's right to property. The right, however, ‘is not absolute’,[139] so the Court crafted three safeguards—obligations of the state—to balance the people's right with the state's interests: (1) any ‘development, **(p. 255)** investment, exploration or extraction plan’ must involve the ‘effective participation’ of the Saramaka people; (2) the plan must provide a ‘reasonable benefit’ to the people; and (3) no concession will be issued absent a ‘prior environmental and social impact assessment’ performed by ‘independent and technically capable entities, with the State's supervision’.[140] By involving the people in the allocation of the resources, the safeguards allow them to shape the right to property.[141] As none of the safeguards was in place when Suriname entered into the logging and mining concessions, it was held to have breached the Saramaka people's property rights, even as to concessions awarded to Saramaka members.[142] In addition to awarding damages to the people, which were to be put into a development fund, the Court ordered the delimitation, demarcation, and granting of title to the people's territory ‘without prejudice to other tribal and indigenous communities’.[143] Activities under existing concession agreements were to be put on hold absent the people's consent.[144]

In *Sawhoyamaxa,* an indigenous community claimed the right to ancestral lands that other titled owners had held for many years.[145] The Court advised Paraguay to apply the balancing test of *Yakye Axa* to resolve the competing claims.[146] An additional twist was Paraguay's argument that requiring it to return the lands to the indigenous community would run afoul of its obligations under a BIT with Germany, which protected foreign third parties from state expropriation.[147] The argument was not developed in full but it caught the attention of the Court, which stressed that the BIT obligations should be harmonized with the ACHR obligations. The Court emphasized that the ACHR ‘is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States’.[148] Harmonization was possible as ‘the BIT permitted expropriation in the public interest (and presumably on payment of compensation)’ and ‘this “could justify land restitution to indigenous people”?’.[149]

Of note, in each case involving an indigenous community and competing rights to property based on the holding of title or access to resources through concession agreements, the IACtHR found that the state practice violated the community's right to property. Little mention is made of attempting to protect the rights of the third parties, including those benefiting from mining

and logging concessions, presumably because their interests were not represented in the proceeding. In none of the cases, however, did the Court find that the indigenous communities' property rights trump the investors' rights at all costs. The Court instead sought **(p. 256)** to balance competing interests, although the purpose and effect of the balancing tests were to protect the local communities. For example, the Court ordered the states to delimit, demarcate, and title the territory, and in the *Moiwana Village* case, made express reference to having other participants involved in this process. The intended results are far from clear, although in *Saramaka People* it was apparent that the tribe would be given the territory that it had already inhabited. In *Yakye Axa,* the Court set forth a test that property restrictions needed to be 'established by law, necessary, and proportional' and to promote legitimate goals in a democratic society. Even in *Saramaka People,* the Court was not prepared to cancel ongoing concession agreements due to the violation of Article 21. The agreements were to be abated unless the tribe thought otherwise. And the state was obligated to work with the tribe on future investment projects, so at least the Court contemplated new investment.

In a different context, the IACtHR faced a conflict between a right to freedom of thought and expression under Article 13 of the ACHR[150] and the need, allegedly to promote investment, to keep certain information confidential. In *Claude-Reyes,* Chilean citizens had requested information from Chile's Foreign Investment Committee (FIC) concerning investors, two foreign companies, and one Chilean company, and their deforestation project. The project had been subject to substantial debate owing to its environmental consequences.[151] The citizens sought information from the FIC 'to contribute to and ensure enhanced community involvement and information "so as to ensure the maximum social responsibility of private companies in the context of the major public investments promoted and authorized by the State"?'.[152] The FIC, part of Chile's Ministry of Economy, Development and Reconstruction, is the only Chilean agency charged with allowing foreign capital into the country and it is also responsible for establishing contract terms and conditions.[153] It gave confidential treatment to information from investors as 'its disclosure could constitute a violation of the privacy of the owners of the information, irresponsibly endangering the results of the investors' activities in [Chile]'.[154] In response to the citizens' request the FIC provided some, but not all, of the requested information.

Without giving a detailed assessment of the privacy concerns associated with the requested documents, the Court determined that the information

that the FIC had not produced ‘was of public interest’ as it concerned foreign investment involving a forestry exploitation project that had caused public debate.[155] The Court set out the grounds for a broad interpretation of the right of access to state-held information, particularly with regard to the promotion of democracy and the ability of the public to participate in ‘public administration through social control’.[156] The right could be impaired if a restriction provided by law fit within one of the ACHR **(p. 257)** exceptions and the restriction was also found to be necessary for a democratic society.[157] The exceptions are limited, however, to ‘respect for the rights or reputations of others’ or ‘the protection of national security, public order, or public health or morals’.[158] Chile had not made any arguments to support an exception. Accordingly, it was held to have violated the petitioners’ rights under Article 13.

Claude-Reyes further illustrates the IACtHR's deference to human rights norms over investment ones, and it acknowledges the priority in a more substantial way than in the indigenous community cases. The FIC had assumed that the investor information should not be disclosed because it ‘could harm legitimate business interests’. No provision of Chilean law, however, restricted access to information in the FIC's possession. The Court could have at least asked the FIC to categorize the requested information so that sensitive financial information could be segregated from project operations relevant to the land itself. Or, it could have focused on the business interests that were possibly jeopardized by the production of sensitive project information. It could also have attempted to link the information to be produced to a specific aspect of democratic participation. Instead, the Court broadly held that Article 13 of the ACHR was violated because not all documents were produced upon the citizens’ request.

Like the Inter-American Court, the European Court of Justice and the European Court of Human Rights have faced conflicts of norms in cases involving the right to property and other human rights. Two cases in particular, *Productores de Música de España (Promusicae) v Telefónica de España SAU*[159] (‘*Promusicae*’) and *Hatton v United Kingdom,*[160] illustrate how these courts address conflicts. Both cases are instructive in terms of defining and understanding the hierarchy of human rights norms within the European Union, with *Promusicae* showing a strong respect for human rights and *Hatton,* discussed later in this chapter, illustrating a more balanced approach.

In *Promusicae,* the right to respect for a private life and the right to protection of personal data were pitted against corporations' claims of deprivation of intellectual property (IP) rights. The rights at issue, whether privacy-based or IP rights, are fundamental rights under the Charter and the ECHR, so the case involved a conflict between human rights norms. However, the corporations' IP rights are also protected under the enforcement regime contemplated under TRIPs (Agreement on Trade-Related Aspects of Intellectual Property Rights), which is not generally understood as a human rights treaty.[161] For this reason alone the case demonstrates the difficulty of analysing the hierarchy issue using the conventional dichotomy of human rights versus investment.

The case arose out of Promusicae's request that Telefónica disclose to it the personal data of Telefónica customers who use the internet.[162] Promusicae sought the information because its members, who were IP right-holders, alleged that Telefónica customers were accessing the KaZaA file exchange program and thus engaging in unfair **(p. 258)** competition and infringing IP rights.[163] The Commercial Court No 5 in Madrid issued preliminary measures in favour of Promusicae and Telefónica appealed, arguing that under national law, which implemented various EU directives, the data could only be produced in a criminal investigation or to safeguard public security and national defence.[164] The Madrid court had strictly respected the IP rights without regard to other rights and effectively recognized that the duty to communicate the data also arose in a civil matter. In other words, the IP rights of Promusicae's members appeared to have trumped the privacy concerns of Telefónica's customers. The Madrid court then asked the ECJ for a preliminary ruling interpreting various directives concerning electronic commerce, copyright, and enforcement of IP rights, and Articles 17(2) (the right to IP) and 47 (the right to an effective remedy) of the Charter.[165]

The ECJ homed in on the implications of the Madrid court's ruling on the right to protection of personal data and the right to a private life under the Charter, particularly given that one of the directives at issue, Directive 2002/58/EC, sought to 'ensure full respect' of these rights.[166] The directive sets out rules for the lawful processing of personal data and identifies appropriate safeguards.[167] The ECJ was also influenced by other directives which recognized limits to the enforcement of IP rights, and the fact that the directives were given effect in member states through national laws. The result was a balancing test. In this respect, member states are not required to impose 'an obligation to communicate personal data in order to ensure

effective protection of copyright in the context of civil proceedings'. The member states were instructed as follows:

> Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.[168]

In other words, in the case of a conflict between the protection of IP rights —a fundamental right under the Charter as well as a right protected under other laws—and other fundamental rights, such as the right to privacy, the national court should apply a 'fair balance' test. A restriction of rights must be proportional to the means employed and the objective sought. The holding defused the norm conflict by guiding national authorities in shaping municipal law yet giving them some flexibility.

Non-investment norms have even had some effect on how investor-state tribunals enforce investment protection measures contained in investment treaties. For example, tribunals have recognized that foreign investment procured through corruption or fraud is not entitled to treaty protection.[169] While not mentioning **(p. 259)** that these investments run afoul of human rights norms, the awards have focused on the international obligation to act in good faith and the principle that courts should not aid a plaintiff who has engaged in illegal or immoral conduct.[170] They have also emphasized the importance of 'respect for the law'.[171] Corruption is linked to a decline in social, economic, and political development.[172] At least one scholar has recognized the human right to corrupt-free governance.[173] It is hard to imagine that tribunals would not apply the same reasoning to an investment procured by violations of human rights: 'If human rights law is considered essential to the international public order, then an investment established in breach of human rights law is arguably not an investment under international investment law.'[174]

In a somewhat similar vein, states have drawn on principles outside an investment treaty's four corners to defend state action that is claimed by an investor to breach the treaty. For example, in *Sempra Energy International v Argentina,*[175] Argentina appears to have defended emergency legislation to deal with the 1999–2002 economic crisis on the grounds that its human rights obligations mandated the law. The international legal scholar Professor W Michael Reisman, an expert witness whom the investor called to testify, was asked by counsel for Argentina, 'Would Argentina have been compelled because of the Inter-American Convention to maintain its constitutional order towards the end of 2001, 2002, and afterwards?' and he responded by stating 'Yes'.[176] The implication of the exchange is that Argentina owed a competing duty under a human rights treaty to maintain its constitutional order. Also, that duty arguably supported Argentina's argument that its action fit within Article XI of the BIT, which recognized that Argentina could apply measures to maintain order or security. Professor Monica Pinto, an expert witness in the *Impregilo v Argentina* case, has opined that '[n]o arbitration on the protection of investments may overlook the fact that one of the parties to the dispute is the State which cannot set aside the issues relating to public law affected by such negotiation, and this includes human rights issues'.[177]

Indeed, a handful of tribunals in investor-state cases have recognized that Argentina's conduct was protected by Article XI of the BIT.[178] So far none of the **(p. 260)** tribunals reviewing claims arising from Argentina's economic crisis has expressly relied on principles set out in human rights treaties to support the conclusion. The tribunal in *Continental Casualty* did apply the principle of 'significant margin of appreciation' in assessing Argentina's conduct, based on ECtHR jurisprudence.[179] Also, in examining the investors' argument that Argentina breached the fair and equitable treatment clause in the US–Argentina BIT, the tribunal noted that enactment of legislative measures 'is by nature subject to modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*'.[180] Hence, human rights principles are slowly finding their way into arbitral awards that are interpreting investment law, although their involvement is quite limited.

In addition to regional courts and arbitral tribunals, national courts have suggested a priority for human rights over investment norms, or if the investment norm is considered a human rights norm, then a priority among human rights norms that favour certain human rights over property interests. The Constitutional Court of South Africa appears to have done so in *Kaunda*

v President of the Republic of South Africa,[181] which at least one lower court, the High Court, Transvaal Provisional Division, in *Van Zyl v Government of Republic of South Africa,*[182] was not prepared to accept or found a reason not to follow. Another lower court, however (North Gauteng High Court, Pretoria), relied on *Kaunda*.[183] The cases concern the right of South Africans to have their home state invoke diplomatic protection as to alleged wrongful acts of foreign states. The cases do not involve a direct conflict between human rights and investment norms, but the outcomes illustrate a possible priority for human rights. In *Kaunda,* 69 South Africans imprisoned in Zimbabwe faced extradition to Equatorial Guinea, where they could be subjected to the death penalty and allegedly an unfair trial and harsh treatment.[184] The court held that under Section 3 of the South African Constitution, South African citizens have the right 'to request the protection of South Africa in a foreign country in case of need' and 'to have the request considered and responded to appropriately'.[185] Driving the judgment was the court's focus on human rights, both within the Constitution and as part of customary international law. As Chief Justice Arthur Chaskalson wrote, '[t]here may thus be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms'.[186] The court in *Kaunda* accepted the appeal, recognizing that courts can review the government's actions in response to a request for dip **(p. 261)** lomatic protection, yet it deferred to the executive's handling of the matter.[187] The High Court in *Von Abo,* in addressing a South African citizen's claim arising out of Zimbabwe's taking of his farmland, enforced a previous court order requesting government officials to explain the steps taken to support the citizen's request for diplomatic protection and awarded damages due to the 'breach of their constitutional duties'.[188] *Von Abo* thus appears to have put the investment interests of the South African citizen on at least an equal, and perhaps a higher, footing than the human rights interests of the detainees in *Kaunda*.[189] Before the Supreme Court of Appeal of South Africa, however, the *Von Abo* case was reversed on the grounds set forth in *Kaunda*.[190]

In contrast to *Kaunda* and *Von Abo,* the High Court in *Van Zyl* refused to exercise judicial review over the denial of diplomatic protection to South African investors in Lesotho who alleged that Lesotho had illegally confiscated their mining interests.[191] *Van Zyl* is distinguishable on a number of grounds, as the applicants included corporations, not individuals, and it appears that at least one of the applicants was registered in Lesotho, some of the applicants were individual shareholders in the companies, and local remedies may not have been exhausted. The differences aside

(and they are material), the court in *Van Zyl* suggests a priority for human rights over investment issues: 'in any application of the Kaunda principles, one must ensure some measure of caution because different emphases are discernible since the present matter is about alleged breaches of the applicants' property rights by the [Government of Lesotho] and certainly not an egregious and material infringement of international human rights'.[192] The Supreme Court of Appeal of South Africa dismissed the appeal of the decision.[193]

The recognition in *Kaunda* of the importance of human rights and the fact that the court in *Van Zyl* expressly noted that a dispute as to property rights did not raise a serious concern signal that special treatment should be given to human rights claims. The rule is a tentative one, however, with the context of diplomatic protection further complicating matters.

3.2.2 A more heightened focus on investment over human rights norms

Other decisions of arbitral tribunals and courts tend to focus more on investment objectives than on human rights. A fertile ground for a conflict between investment and human rights norms has been in investor-state arbitration cases. The awards discussed above did not dismiss human rights arguments outright. In most cases, however, arbitral tribunals have been very reluctant to embrace human rights arguments. For example, non-parties to disputes have sought to inject **(p. 262)** human rights norms to support state regulation that the investors are challenging. *Glamis Gold Ltd v United States,*[194] decided by a NAFTA Chapter 11 tribunal, is a recent example of a tribunal avoiding human rights issues raised in the case: ones that conflicted with the objectives of the investor, a Canadian mining company. The arbitration arose out of the regulation by the US federal government and the State of California of the investor's mining rights in federal land in southeastern California.[195] The proposed mining project was near land designated as Native American lands and cultural areas.[196] Numerous federal regulations concerning mining, land use, and Native American culture, as well as state regulations on these issues, came into play and ultimately the requisite approval for the mining project was not granted. The investor alleged that the federal government inappropriately delayed project approval and, when approval appeared forthcoming, California passed laws and regulations that made the project economically unviable.[197] In addition to alleging expropriation, the investor made several arguments arising from the alleged arbitrariness of the state conduct, which it claims violated NAFTA, Article 1105(1).

The Quechan Indian Nation was allowed to file a non-party submission. The Nation argued that the federal and state regulations and practices must conform to international norms, arising under customary international law and general principles of international law, regarding protection of cultural heritage and sacred sites.[198] According to the Quechan Indian Nation, the tribunal was obliged to consider human rights norms given the NAFTA's mandate that the tribunal should consider 'applicable rules of international law' in deciding the dispute.[199] The norms, in large part, shape the meaning of expropriation and the customary international law minimum standard of treatment under the NAFTA. Accordingly, if Glamis Gold prevailed in its investment claim under the NAFTA, the Quechan Indian Nation would have been denied their human rights.

After acknowledging that the 'interests of indigenous peoples', along with other social issues, 'were extensively argued in this case and considered', the tribunal boldly stated that the controversial issues need not be decided.[200] In upholding the regulatory measures and action, no analysis was provided of the Nation's human rights arguments.[201] The tribunal's conclusion thus effectively protected the Nation's human rights, but the rationale for the result is based on investment principles. Human rights norms and other non-investment principles, such as environmental concerns, are to have a limited role in NAFTA Chapter 11 investment disputes:

> The Tribunal observes that a few awards have made statements not required by the case before it. The Tribunal does not agree with this tendency; it believes that its case-specific **(p. 263)** mandate and the respect demanded for the difficult task faced squarely by some future tribunal instead argues for it to confine its decision to the issues presented.[202]

The tribunal in *Glamis Gold* could have expressly addressed the human rights norms to support the conclusion it reached. For example, a simple reference to the fact that the decision's holding reconciled the BIT objectives with human rights ones would have given some guidance on priority of norms. Rather than open the Pandora's box, however, the tribunal cautiously promoted the objectives of human rights in its holding without mentioning the norms in the rationale.

The NGOs in *Biwater Gauff (Tanzania) Ltd v Tanzania*[203] took a more nuanced approach to the human rights issues. The UK investor had claimed that actions of agencies of the Republic of Tanzania in repudiating a water and sewerage lease contract awarded to the investor's two shareholders, a UK

company and a German company, constituted expropriation and breached the fair and equitable treatment provision in the applicable BIT.[204] The project had difficulty from its inception and the shareholders sought to renegotiate it, with Tanzania ultimately taking over the project. Rather than arguing that the host state's regulatory regime and actions were essential to the protection of human rights, as the Quechan Indian Nation argued in *Glamis Gold,* the NGOs in *Biwater Gauff* focused on the duties of the investor and urged that its conduct be evaluated in light of recognized human rights norms. The norms at issue concerned access to clean water, which also implicated the right to health.[205] According to the NGOs, the human rights norms 'condition the nature and extent of the investor's responsibilities, and the balance of rights and obligations between the investor and host state'.[206] In other words, for the investor to seek relief under international law, it should have had 'the highest level of responsibility to meet [its] duties and obligations'.[207] The tribunal acknowledged the NGOs' argument and found it 'useful', yet did not fully embrace the notion that the BIT imposed human rights duties on the investor.

In both *Glamis Gold* and *Biwater,* non-parties to the dispute relied on human rights norms to support the host state's regulations and conduct, and their pleas largely fell on deaf ears or the tribunals were at least sophisticated enough to deal with the issues in a way that did not run afoul of those norms in their holdings. Are tribunals more attuned and engaged with human rights arguments when the host state, as opposed to non-parties, raises them to support its position? The answer appears to be a guarded 'yes'. The heightened attention to human rights arguments, however, has not necessarily translated into arbitral awards that have deferred to those arguments, and in at least one case the tribunal flatly refused to do so.

In particular, in a series of cases, investors have filed claims against Argentina arising out of water and sewage privatization activities that had begun in the 1980s. The investors typically entered into concession agreements with local provinces. In **(p. 264)** response to the financial crisis, Argentina enacted austerity measures that caused a substantial depreciation of the Argentine peso. The depreciation reduced the tariff paid to foreign investors for the water, which the investors had used to service foreign loans in US dollars. In one of the cases, *Suez v Argentina,*[208] the investors alleged that the province should have merely adjusted the tariff and other operating conditions, particularly given that the investment had led to a substantial increase in available drinking water.[209] The province, on the other hand, tried to renegotiate the concession contract to force the investors to

put more resources into the investment.[210] In response to the investors' claim for breach of the fair and equitable treatment clause under the BITs, Argentina argued that the state's actions were needed to safeguard an essential interest, the health and well-being of the people in the province.[211] Argentina's argument was readily rejected as it appeared that Argentina and the province could satisfy the essential interest by means other than violating the BIT's fair and equitable treatment provision.[212] Argentina also made a related argument, characterized as follows:

> Argentina has suggested that its human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs and the existence of the human right to water also implicitly gives Argentina the authority to take actions in disregard of its BIT obligations.[213]

That defence was also readily dismissed on the grounds that, although Argentina is bound to both obligations (the human rights obligation and the obligations under the applicable BITs), it can comply with them both as they 'are not inconsistent, contradictory or mutually exclusive'.[214] According to the tribunal, Argentina could have met the water needs of the poor by allowing a staggered tariff based on income.[215] Or, the province could have worked with the investors in trying to resolve the situation.[216]

Certain national courts have sided with investors when faced with human rights arguments. For example, Agri SA and an individual filed separate lawsuits against South Africa's Minister of Minerals and Energy, alleging that the Minerals and Petroleum Resources Development Act (MPRDA) no 28 of 2002 constituted an unlawful taking of mineral rights in violation of Section 25 of the South African Constitution.[217] Under the MPRDA, mineral and petroleum resources became the property of the South African people overnight, with the state their custodian.[218] Domestic and foreign mineral owners became required to apply to convert their old prospect and mining interests, which had been held under a system that **(p. 265)** recognized private ownership, into new ones, under which the state is custodian of all mineral resources.[219] As part of the conversion process, mineral owners were also required to comply with the Mining Charter, which provides certain black economic empowerment (BEE) measures, including the transfer of 15% of assets of mining assets or equity to BEE groups or individuals by a certain date.[220] The legislation is part of South Africa's effort to redress economic disparity from apartheid and to promote the development of mineral resources in a more equitable and sustainable way.[221] The court in *Agri SA* denied the Ministry's motion to dismiss the case

on the pleadings, noting that under the MPRDA ‘holders will be deprived of their rights and that such deprivation coupled with the State's assumption of custody and administration of those rights constitute expropriation thereof’.[222] A hearing was later held in the *Agri South Africa* case and the High Court of South Africa (North Gauteng, Pretoria) ruled that the MPRDA ‘legislated out of existence’ the investor's coal rights; its very enactment violated section 25(1) of the Constitution.[223] The High Court gave little weight to the argument that the MPRDA was designed ‘to redress the effects of pass racial discrimination’ and that the purpose and means are ‘internationally accepted’.[224] As the High Court wrote, ‘the purpose of an act of deprivation cannot change that which is a deprivation into not being a deprivation’.[225] Hence, the investment rights prevailed over the countervailing considerations of equal access to resources and the human rights considerations underlying the MPRDA and BEE.[226]

The Supreme Court of India, like the courts of South Africa, has also tackled conflicts between investment objectives and human rights arising in a single case. In *Balco Employees Union v India,*[227] workers challenged the divestment of the company for which they worked (a government agency) on the grounds that they had not received notice of hearing before the divestment. The workers alleged that as government employees they have certain fundamental rights, protected under the Constitution of India, such the right to equality, equal pay for equal work, non-discrimination, and the right to inquiry before dismissal, and that the **(p. 266)** divestment process denied them of these rights.[228] The court refused to second-guess the government's economic decision to divest:

> Process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to trial and error as long as both trial and error are bona fide and within limits of authority.[229]

The court stated, further, that the workers had no right to notice of hearing: ‘There is no principle of natural justice which requires prior notice and hearing to persons who are generally affected as a class by an economic

policy decision of the government.'[230] It also found that the existence of the right to protection under the Constitution 'cannot possibly have the effect of vetoing the government's right to disinvest'.[231] The decision is profound for its stark deference to the government's analysis of economic considerations without regard to the workers' constitutional rights.

The cases that favour investment norms do not ignore the competing human rights norm. Nevertheless, they are not too concerned about any conflict; they tend to stridently dispose of the merits of the human rights issue in an effort to define away the conflict in the first instance. If the conflict must be dealt with, they recognize that other means short of harming the investment can address human rights concerns.

3.2.3 A more balanced approach

Some of the decisions already discussed in this chapter make broad references to 'balance', yet the decisions themselves signal a preference for one norm over the other. Two cases have employed a balancing technique that resulted in decisions that resolve the conflict in a less predetermined way. For example, in *Hatton v United Kingdom,* families who lived near Heathrow Airport complained that the noise from flights at night violated Article 8 (right to respect for private and family life and home) of the ECHR.[232] A public authority cannot interfere with the right under Article 8 except 'as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the *economic well-being of the country*…'.[233] The Chamber of the ECtHR held that the United Kingdom had interfered with the families' Article 8 rights as it had not done 'a proper and complete investigation' before the project was implemented that would 'find the best possible solution which would, in reality, strike the right balance' between the families' rights and the community's interests as a whole.[234] **(p. 267)** Also, a 'mere reference to the economic well-being of the country' was insufficient to outweigh the families' rights under Article 8.[235]

The Grand Chamber in *Hatton* disagreed and held that the UK authorities did not overstep 'their margin of appreciation by failing to strike a fair balance between the right of the individuals affected' by the flight regulations and the conflicting interests of others and the community.[236] The critical issue was whether the margin of appreciation was to be wide, as the case concerned matters of general policy, or narrow, due to the 'intimate' nature of the right.[237] The Court applied the normal wide margin, given that the

regulation at issue was not alleged to be unlawful and the matter was one of general policy that was not aimed at the specific families who had filed suit.[238] It deferred to the state authorities' assessment of data regarding the level of noise disturbance, which was a measure of the effect of the flights on the Article 8 rights.[239] In evaluating the economic interests at stake, the Court acknowledged the UK authorities' argument that the interest of the airlines and other related enterprises, including their clients, and the 'economic interests of the country as a whole', should be considered.[240] The authorities had evaluated substantial evidence relating to the value of the night flights to the economy as a whole.[241]

Another case that illustrates a more neutral approach to human rights and investment norms is *Fuel Retailers Association of Southern Africa v Director-General Environmental Management,*[242] decided by the Constitutional Court of South Africa. In *Fuel Retailers,* the court tackled the application of Section 24 of the South African Constitution, which gives everyone the right 'to an environment that is not harmful to their health or well-being'.[243] The provision also gives everyone the right to an 'environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that…secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.[244] Although it is labelled in the Constitution as an environmental clause, Section 24 has substantial implications for human rights. The Constitutional Court of South Africa has recognized that 'socio-economic rights that are set out in the Constitution are indeed vital to the enjoyment of other human rights guaranteed in the Constitution'.[245] The case arose in an interesting context because the Department of Agriculture, Conservation and Environment had granted an application for a filling station to a family trust. Of note, a trade association of fuel retailers—not a neighbourhood, or environmental group, or **(p. 268)** concerned citizens—challenged the granting of the authorization.[246] The basis for the challenge was that the environmental authorities were alleged not to have considered all aspects of the socio-economic impact of the station, including its effect on the sustainability of existing filling stations.[247] In other words, in assessing whether a single new station should be allowed, the agency must take into account a wide range of factors, including the effect of the new station on existing stations and the jobs at those stations, as well as the environmental consequences if a station is closed.[248] The court agreed, and recognized that the agencies must examine 'the impact of the proposed development on the environment and socio-economic conditions'.[249] The approach should be a balanced one:

> Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed. It requires those who enforce and implement the Constitution to find a balance between potentially conflicting principles. It is found on the notion of proportionality which enables this balance to be achieved. Yet in other situations, it offers a principle that will facilitate the achievement of the balance. The principle that enables the environmental authorities to balance development needs and environmental concerns is the principle of sustainable development.[250]

Both *Hatton* and *Fuel Retailers* used legal constructs to ensure a relatively balanced approach to analysing the conflict of norms. In *Hatton,* the conflict between the right to a private life and home and the protection of the enormous investment that airlines and others (whether from the private or public sector) had made at Heathrow is defined by Article 8. The ECtHR set out the evidence that was presented to the UK authorities to support the night flights and applied the margin of appreciation test to uphold the practice. In *Fuel Retailers,* the Constitutional Court of South Africa used a broad interpretation of sustainable development, one that called on the state authorities to consider the human right in the context of the far-reaching economic implications of the referenced activity.

3.2.4 Human rights and investment: the rule of hierarchy and its application

Participants in investment—namely the investor, the host state, those directly affected by the investment, and other third parties, such as local citizens' groups in the host country or NGOs—have seized on human rights principles and investment norms to justify their respective positions. They have asserted their positions, whether claims or defences, in courts and arbitral tribunals that are authorized to issue binding decisions. In certain instances, the resulting decisions establish the legal rationale for one norm's priority over another or for a more balanced treatment of the norms. **(p. 269)**

The judgments and arbitral awards analysed in this chapter do not reflect a single rule of hierarchy that has been applied consistently on a widespread basis. The likely, almost basic, rule that one would have expected—that an investment that violates a *jus cogens* norm is entitled to no protection—has not clearly emerged, at least in the context of investor-state cases. However, given that tribunals have refused to protect investments procured through

fraud on public policy grounds, it would be logical that an investment that violated the most well-recognized, compelling human rights should not be protected.

The adoption of such a basic rule to deal with the *jus cogens*-investment conflict, or even one that would protect certain other important human rights not recognized as *jus cogens,* such as the right to water or to a territory, would not end the inquiry. In fact, it would be just the beginning, as the pronouncement of the rule is simple; the real test is in its application. For example, the tribunal in *Suez v Argentina* conceded the importance of the right to water yet recognized that the rights obligation is not inconsistent with the investment obligation. The ECJ in *Promusicae,* the ECtHR in *Hatton,* the Constitutional Court of South Africa in *Fuel Retailers,* and the IACtHR cases also accepted the importance of the respective human rights at issue. In nearly all of these cases, the intense factual analysis rejected the notion that one norm must necessarily 'trump' the other or that the investor only gains if human rights lose.

In a similar vein, courts and tribunals have conceded the importance, but not the primacy, of human rights, and have given effect to human rights' objectives through their decisions but have not based those decisions on human rights principles. *Glamis Gold* and *Biwater Gauff* are examples, as the human rights objectives were satisfied by awards that made little mention of human rights. The conflict was effectively defused by upholding the state action without any real mention of it having a strong human rights dimension. Such a result occurred due, in part, to the fact that the investment protection measures have a human rights dimension to them.

Even in the very hard situations, particularly the Inter-American Court cases where investors and indigenous persons are at logger-heads, the priority given to human rights is not absolute. In ordering the states to delimit, demarcate, and title land, the Court in at least one case contemplated that neighbours and other interested parties should be involved in the process. In all of the cases, any restrictions on existing property-right holders were to be proportional, with full compensation paid to aggrieved investors. In allocating natural resources, such as trees and minerals, the Court has ordered the issuance of independent assessments that would focus on the environmental and social impact of any concession.

Understanding how human rights norm fit in assessing investment, in light of investment treaties and other applicable rules, could be better understood and perhaps guided by defined rules.[251] For example, assume two states

have entered into a BIT with the standard investment protections discussed in this chapter. Assume **(p. 270)** also that a local community in the host state has alleged that the investment made under the BIT has violated human rights set out in a human rights treaty. What guiding principles should a tribunal or court consider when resolving the conflict in a way that is true to the BIT objectives yet takes into account the human rights norms? The cases discussed in this chapter, as well as other principles, suggest the following:

1. In interpreting claims arising under a treaty, such as a BIT or a human rights treaty, VCLT, Article 31(1) instructs that the tribunal would look to the ordinary meaning to be given to the treaty terms in their context and in light of the treaty's objective and purpose. The focus in certain preambles of investment treaties on sustainable development, health, safety, the environment, and labour should be given effect as providing context to the treaties.[252]
2. Customary international human rights norms could help define the investment protections set forth in the BIT, if the norms have been recognized as relevant to the protections. Either party to the treaty could invoke these norms, along with amicus curiae, if allowed under the arbitral rules, so long as the norms are not used to create new duties of protection beyond those set out in the BIT. Under this rule, due process principles, such as the right to have notice of a claim or access to a court, could be cited to establish the meaning of the customary international law minimum standard of treatment of aliens, if that protection is set forth in the BIT. Denial of justice is an element of the minimum standard and, arguably, the lack of notice of court proceedings and access to courts amounts to a denial of justice.[253] Or, as another example, the norms could be used to establish the contours of expropriation.

In cases arising under a human rights treaty, it is obvious that human rights norms are relevant to the substantive protections given the treaty's purpose. Recognized customary international law principles, even as defined by an investor-state tribunal, could be used as aides in interpreting the treaty in areas such as denial of justice.[254]
3. Customary international law principles could be used to give meaning to a defence to any claim that the host state has breached one of the investment protections. The same would hold true for

determining the measure of damages. The principles could be used in defining the scope of an investor's obligations. As under paragraph 2 above, human rights norms could help define the relevant customary standard. If the BIT does not bar the defence or damages but has its own language related to them, then the tribunal should apply the treaty terms. As Professor **(p. 271)** McLachlan has explained, if 'the customary rule lays down a stricter test [for the defence] than the treaty language, it is unlikely that there will be a need for separate resort to custom'.[255]

4. Principles of municipal law relating to human rights could be relevant if the BIT provides that they apply to resolution of the investor-state dispute and they are not otherwise excluded from the BIT. These principles should also be used consistent with paragraphs 2 and 3 above.

This approach would enable a court or tribunal to use interpretive techniques to minimize or avoid norm conflicts. Indeed, as this chapter has established, they largely do so already; a more structured approach or understanding of what in fact is occurring could perhaps provide better guidance.

4. Conclusion

The considerable discussion about the 'clash' between investment and human rights and the heightened concerns about a lack of clear rules to deal with the perceived differences have not fully taken into account the inter-related aspects of the relevant norms. They have also underestimated the ability of courts and international tribunals to use well-recognized interpretive practices and principles to reach results that have defused any tension, in certain instances, while giving substantial effect to both investment and human rights objectives. Those expecting a defined hierarchy of norms that can be applied in a programmed, clock-work way are no doubt disappointed by the lack of precision and finality. Yet, their disappointment, or perhaps frustration, could be short-lived and tempered—the guiding principles emanating from the judgments and awards illustrate the development of a rich and, remarkably, somewhat structured jurisprudence.

Notes:

(1.) See, eg, *Glamis Gold Ltd v United States* (8 June 2009) UNCITRAL Case, Award, 48 ILM 1038 ('*Glamis Gold*'); *Methanex Corp v United States* (3 August 2005) UNCITRAL Case, Award, 44 ILM 1345 ('*Methanex*') (allowing amici curiae to present human rights-based claims in support of state regulations).

(2.) See, eg, LE Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration* (Rights & Democracy, Montreal 2009) 25 (noting that claimants in *Grand River Enterprises Six Nations, Ltd v United States,* an investor-state arbitration under Chapter 11 of NAFTA (North American Free Trade Agreement), argued that their status as members of an indigenous community afforded them and their investments in the United States protections under human rights principles alleged to be part of the NAFTA investment protection measures). See also ibid 23–4 (citing *Michula v Romania,* in which the arbitral tribunal referred to the right to nationality under UDHR (Universal Declaration of Human Rights) Art 15 in denying Romania's jurisdictional challenge that questioned the investors' nationality).

(3.) See, eg, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (31 August 2001) 2001 IACtHR *reprinted in* (2002) 19 Ariz JICL 395 ('*Mayagna*') (recognizing an indigenous peoples' right to their ancestral land even though the state had granted a logging concession to a corporation to use the land and resources on it); *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 301-B ECtHR (Ser A) (holding that Greece denied a Greek investor the right to a fair trial and the right to property under the European Convention on Human Rights).

(4.) See, eg, *Sarei v Rio Tinto Plc,* 550 F.3d 822 (9th Cir 2008) (*en banc*) (examining allegations that a multinational mining company committed war crimes, crimes against humanity, racial discrimination, and environmental torts to the detriment of current and former residents of Papua New Guinea).

(5.) See, eg, Art 1 of Protocol 1 (Protocol [No 1] to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 1) (20 March 1952), 213 UNTS 262; ACHR (American Convention on Human Rights), Art 21 (22 November 1969), 1144 UNTS 123; African Charter on Human and Peoples' Rights (Banjul Charter), Art 14 (27 June 1981), OAU Doc. CAB/LEG 6713/Rev.5, 21 ILM 58 (1982). See also ICESCR (International

Covenant on Economic, Social and Cultural Rights), Art 1(2) (16 December 1966), 993 UNTS 3 (recognizing that '[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation').

(6.) See text to nn 87–96.

(7.) See text to nn 61–86.

(8.) For a discussion of the effect to be given to two or more competing treaties, see CJ Borgen, 'Resolving Treaty Conflicts' (2005) 37 George Washington ILR 573.

(9.) See Fragmentation Report (International Law Commission, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law), UN Doc A/CN.4/L.682 P 450, at para 24 (13 April 2006) (finalized by Martti Koskenniemi).

(10.) Ibid.

(11.) See D Shelton, 'Normative Hierarchy in International Law' (2006) 100 AJIL 291, 291 (describing the concept of hierarchy of norms). See also J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, Cambridge 2003) 5–12 (elaborating on the concept of a conflict of norms in international law).

(12.) See *Phoenix Action Ltd v Czech Republic* (15 April 2009) ICSID Case No ARB/06/05, Award para 78 (recognizing that 'nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs'); *Azurix Corp v Argentina* (1 September 2009) ICSID Case No ARB/01/12, Decision on the Application for Annulment of the Argentine Republic ('*Azurix Annulment Decision*') para 90 (noting that, except as to *jus cogens* norms, an investment treaty can modify customary international law governing the parties to the treaty). See also M Jacob, *International Investment Agreements and Human Rights* (INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development, Duisburg 2010) 30 (arguing that investment treaties would 'have to yield to fundamental human rights that are protected through Art. 103 of the UN Charter or preemptory norms of international law').

(13.) See PM Dupuy, F Francioni, and EU Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP, Oxford 2009).

(14.) This chapter does not address the normative role of human rights in investment law, such as a state's decision to enter into a BIT or FTA and the terms that should be included in the treaty to protect both the investment and human rights. For such a critique see J Alvarez, 'Critical Theory and the North American Free Trade Agreement's Chapter Eleven' (1996–97) 28 U Miami Inter-Am L Rev 303, 308 (describing NAFTA, Chapter 11 as a 'human rights treaty for a special-interest group', namely, foreign investors).

(15.) See C Reiner and C Schreuer, 'Human Rights and International Investment Arbitration' in Dupuy et al (n 13) 82, 96 (noting that '[t]he current trend seems to indicate that the role of human rights in investment arbitration will continue to increase').

(16.) UDHR Preamble and Art 1 (12 December 1948). It does mention, however, that 'every individual and *every organ of society*' should promote respect for and secure the rights. Ibid Proclamation (emphasis added).

(17.) See, eg, ICCPR (International Covenant on Civil and Political Rights) (23 March 1976), 999 UNTS 1; ICESCR (n 5); cf UN Sub-commission on the Promotion and Protection of Human Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) (acknowledging that states are primarily responsible for protecting human rights yet 'transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration').

(18.) Fragmentation Report (n 9) paras 21–2.

(19.) Pauwelyn (n 11) 9.

(20.) UDHR (n 16) Art 17 (right to property).

(21.) As to whether the right to property is properly a human right, see AR Coban, *Protection of Property Rights within the European Convention on Human Rights* (Ashgate, Surrey 2004) 35–78. The philosophical inquiry is beyond this chapter's scope.

(22.) ACHR (n 5) Art 21.

(23.) Art 1 of Protocol 1 (n 5).

(24.) See *Marckx v Belgium* (13 June 1979) 31 ECtHR (Ser A). See also LR Helfer, 'The New Innovation Frontier? Intellectual Property and the European Court of Human Rights' (2008) 49 Harv ILJ 1, 7–8.

(25.) See text to nn 159–68. See also OK Fauchald and J Stigen, 'Transnational Corporate Responsibility for the 21st Century: Corporate Responsibility before International Institutions' (2009) 40 George Washington ILR 1025, 1057–58 (noting corporations have filed 'numerous cases' before the European Court of Human Rights). The ACHR does not extend the right to property to a legal person; nevertheless, an individual could be an investor.

(26.) Art 1 of Protocol 1 (n 5).

(27.) Ibid. See also T Allen, 'Compensation for Property under the European Convention on Human Rights' (2007) 28 Mich JIL 287, 292 (recognizing that principles of customary international law 'require states to compensate aliens for the taking of their property').

(28.) *Sporrong and Lönnroth v Sweden* (1982) 52 ECtHR (Ser A) para 61 (emphasis added).

(29.) *James v United Kingdom* (1986) 98 ECtHR (Ser A) para 37.

(30.) Charter, Art 17(1) (7 December 2000), 40 ILM 266, 269 (2001).

(31.) *Stauder v City of Ulm,* Case 29/69 [1969] ECR 419.

(32.) *ERT v DEP,* Case C-260/89 [1991] ECR I-2925, para 41 (recognizing that 'fundamental rights form an integral part of the general principles of law' of ECJ jurisprudence and that the ECJ 'draws inspiration…from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' and this includes the ECHR, which has 'special significance'). See also SR Ratner, 'Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law' (2008) 102 AJIL 475, 501–2 (discussing ECJ jurisprudence on property rights with a focus on *Hauer v Land Rheinland-Pfalz,* a 1979 decision of the ECJ which was the first to review the right to property).

(33.) M Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP, Oxford 2006) 1–2.

(34.) Charter (n 30), Art 52(3).

(35.) Treaty of Lisbon, Art 6(1), available at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML.

(36.) ACHR (n 5) Art 29(b).

(37.) *Yakye Axa Indigenous Community v Paraguay,* (17 June 2005) IACtHR (Ser C) No 125 para 127 ('*Yakye Axa*').

(38.) ECHR, Art 60 (4 November 1950), 213 UNTS 221.

(39.) See J Webb Yackee, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties' (2008) 33 Brooklyn JIL 405, 442 (recognizing that Art 1 of Protocol 1 'provides foreign investors with an explicit guarantee that they shall not suffer expropriation in violation of the "general principles of international law" and legally binds most of Western and Eastern Europe, as well as Russia and Turkey').

(40.) *Archer Daniels Midland Co v Mexico* (21 November 2007) ICSID Case No ARB(AF)/04/05, Award para 177.

(41.) More than 2600 BITs are in force. United Nations Conference on Trade and Development, *Recent Developments in International Investment Agreements* (2008–June 2009) 2.

(42.) Ibid.

(43.) See *Report of the Subcommittee on Investment of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty* (30 September 2009).

(44.) See, eg, NAFTA, Art 1131(1) (17 December 1992) 32 ILM 289, 645 (1993) (the arbitral tribunal 'shall decide the issues in dispute in accordance with [the NAFTA] and applicable rules of international law'); ibid Art 102(2), 32 ILM at 297 (recognizing that the 'Parties shall interpret and apply the provisions of [the NAFTA] in the light of its objectives set out in paragraph 1 [of Art 102] and in accordance with applicable rules of international law'); Agreement Between the Government of Canada and the Government of the Republic of South Africa for the Promotion of Investments (27 November 1995), http://www.unctad.org/sections/dite/iia/docs/bits/canada_southafrica.pdf ('Canada–South Africa BIT'), Art XIII (7).

(45.) Constitution of Argentina, Chapter I, s 31; Chapter IV, s 75(22).

(46.) See, eg, *CMS Gas Transmission Co v Argentina* (12 May 2005) ICSID Case No ARB/01/8, Award para 114.

(47.) ICSID Convention, 18 March 1965, ch 1, § 1, art. 42, 17 UST 1270, 1273, 575 UNTS 159, 162.

(48.) ICSID Arbitration Rules (as amended 10 April 2006) Rule 37(2).

(49.) See, eg, *Glamis Gold* (n 1).

(50.) VCLT, Art 31(3)(c), 23 May 1969, 1155 UNTS 331.

(51.) Fragmentation Report (n 9) para 420.

(52.) Agreement between Canada and the Republic of Peru for the Promotion and Protection of Investments (Preamble) (2006), http://www.investmentclaims.com/subscriber_article?id=/ic/BITs/law-iic-bt014#law-iic-bt014-part-1. An earlier Canadian BIT did not include this language but instead focused on 'business initiative' and the 'development of economic cooperation'. See, eg, Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments (15 November 1990), http://www.unctad.org/sections/dite/iia/docs/bits/canada_czech.pdf.

(53.) US–Uruguay BIT (Treaty Between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment) (Preamble) (25 October 2004), 44 ILM 268 (2005). Other investment or trade treaties contain similar language. See, eg, NAFTA (Preamble), 17 December 1992, 32 ILM 289, 297 (1993) (recognizing the objective of 'improv[ing] working conditions and living standards in their respective territories', to achieve the NAFTA goals 'consistent with environmental protection and conservation', to 'preserve [the NAFTA nations'] flexibility to safeguard the public welfare', to 'strengthen the development and enforcement of environmental laws and regulations', and to 'protect, enhance and enforce basic workers' rights').

(54.) Agreement Between Japan and the Socialist Republic of Viet Nam for the Liberalization, Promotion and Protection of Investment (14 November 2003), http://www.unctad.org/sections/dite/iia/docs/bits/japan_vietnam.pdf ('Japan–Viet Nam BIT'). See also Agreement between the Government of the Republic of Finland and the Government of the People's Democratic Republic

of Algeria on the Reciprocal Promotion and Protection of Investments (Preamble) (13 January 2005) (acknowledging that a stable investment environment 'will contribute to maximising the effective utilisation of economic resources and improve living standards' and that the objectives 'can be achieved without relaxing health, safety and environmental measures of general application'), http://www.unctad.org/sections/dite/iia/docs/bits/finland_algeria.PDF.

(55.) Canada–South Africa BIT (n 44) Art XVII 2, 3(b).

(56.) NAFTA (n 44) Art 1114(2).

(57.) US–Uruguay BIT (n 53) Arts 12(1), 13(1).

(58.) Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (20 October 1994) Art XI, http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf.

(59.) Agreement Between the Federal Republic of Germany and the Republic of India for the Promotion and Protection of Investments (10 July 1995) Art 12, http://www.unctad.org/sections/dite/iia/docs/bits/germany_india.pdf.

(60.) Jacob (n 12) 29–30.

(61.) See, eg, Japan–Viet Nam BIT (n 54) Art 9.1; Canada–South Africa BIT (n 44) Art II(2).

(62.) NAFTA, Chapter 11 (n 44) Art 1105(1).

(63.) NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001), http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp ('Interpretation').

(64.) Ibid section B.2.

(65.) Ibid section B.3. The Interpretation also recognized the NAFTA does not impose a general duty of confidentiality on Chapter 11 arbitrations. Ibid section A.1, 2.a. Public access to documents submitted to or issued by the tribunal is in order except in limited circumstances. Ibid section A.1, 2.a, b.

(66.) See, eg, US–Uruguay BIT (n 53) Art 5(1).

(67.) See, eg, ibid Annex A.

(68.) Ibid Art 5(2)(a).

(69.) See, eg, AV Freeman, *The International Responsibility of States for Denial of Justice* (Longmans, Green & Co Ltd, 1970) 53–7 (discussing the practice of allowing 'an individual who was wronged in a strange land and who had there been unable to obtain reparation for this injury from the local sovereign' to seek permission from his own prince to 'initiate forceful measures to obtain that justice').

(70.) J Paulsson, *Denial of Justice in International Law* (CUP, Cambridge 2005) 14.

(71.) I Brownlie, *Principles of Public International Law* (6th edn OUP, Oxford 2003) 497; F Griffith Dawson and IL Head, *International Law, National Tribunals and the Rights of Aliens* (Syracuse University Press, Syracuse, NY 1971) 2–3.

(72.) EM Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing, New York 1915) 330. See also E Root, *President's Address,* ASIL Pro 21 (28–30 April 1910) (referring to 'a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world').

(73.) Paulsson (n 70) 5.

(74.) See, eg, M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, The Hague 2000) 138–46.

(75.) *Methanex Corp v United States,* Second Opinion of Professor Sir Robert Jennings, QC 1–2 (6 September 2001), http://naftaclaims.com/Disputes/USA/Methanex/MethanexResubAmendStateClaimAppend.pdf (emphasis in original).

(76.) *Neer (US) v Mex,* 4 RIAA 60, 3 ILR 213 (US-Mex Gen Claims Comm'n 1926).

(77.) *Roberts (US) v Mex,* 4 RIAA 77 (US-Mex Gen Claims Comm'n 1926) reprinted in 21 AJIL 357 (1927); *Chattin (US) v Mex,* 4 RIAA 282 (US-Mex Gen Claims Comm'n 1927).

(78.) J Kurtz, ‘Access to Justice, Denial of Justice and International Law: A Reply to Francesco Francioni’ (2009) 20 EJIL 1077, 1078 (observing that ‘the cases which test the customary prohibition on denial of justice in this period echo the language and strategic concern of the modern human rights movement’).

(79.) Paulsson (n 70) 133–4. See also *Barcelona Traction, Light & Power Co (Belg v Spain),* Second Phase, 1970 ICJ REP 5, 32 (para 91) (5 February) (recognizing human rights include ‘protection against denial of justice’); PM Dupuy, ‘Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’ in Dupuy et al (n 13) 45, 51 (recognizing that denial of justice corresponds to a state's obligations under ICCPR, Art 14).

(80.) Paulsson (n 70) 6.

(81.) Ibid.

(82.) *Mondev Int'l Ltd v United States* (11 October 2002) ICSID Case No ARB(AF)/99/2, Award paras 143–4 (‘*Mondev*’).

(83.) Ibid paras 139–41.

(84.) Ibid paras 143–4.

(85.) Ibid para 144.

(86.) Paulsson (n 70) 6. See also *International Thunderbird Gaming Corp v Mexico* (26 January 2006) UNCITRAL Arb, Separate Opinion of Thomas Wälde para 27 (citing ECtHR jurisprudence to support the principle that under NAFTA, Chapter 11, Art 1105(1), an investor has a protected right to investment based on expectations established by the public authority). For an additional discussion of the ECtHR and *Mondev* see F Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ in Dupuy et al (n 13) 63, 69–70.

(87.) See, eg, NAFTA, Chapter 11 (n 44) Art 1110(1); Canada–South Africa BIT (n 44) Art VIII(1).

(88.) See text to nn 20–39.

(89.) *Técnias Medioambientales Tecmed v Mexico* (29 May 2003) ICSID Case No ARB(AF/00/2) Award paras 115–21, 43 ILM 133 (‘*Tecmed*’).

(90.) Ibid para 122.

(91.) Peterson (n 2) 23 (citing *Azurix Corp v Argentina* (14 July 2006) ICSID Case No ARB/01/12, Award paras 311–12).

(92.) *Azurix Annulment Decision* (n 12) para 128 (criticizing arguments based on the ECHR and NAFTA '[a]s the extent of the protections afforded by an investment protection treaty depends in each case on the specific terms of the treaty' and noting that 'comparisons with differently-worded treaties [is] of limited utility, especially treaties outside the field of investment protection').

(93.) EM Freeman, 'Regulatory Expropriation under NAFTA Chapter 11: Some Lessons from the European Court of Human Rights' (2003) 42 Colum J Transnat'l L 177, 201–2 (arguing that the NAFTA, Chapter 11 tribunal's decision in *Metalclad Corp v Mexico,* in which a finding of expropriation was based on the decision of a governor of a Mexican state to deny the investor a permit to operate a landfill, cannot be reconciled with the jurisprudence of the ECtHR given that the governor's action was a mere 'control of use' of the property, that denial of the permit had the legitimate aim of protecting the environment and human health, and that the action was proportionate as the investor still maintained title to and rights in the property).

(94.) *Methanex* (n 1).

(95.) *Biwater Gauff (Tanzania) Ltd v Tanzania* (24 July 2008) ICSID Case No ARB/05/22, Award ('*Biwater Gauff*').

(96.) Cf JD Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 Duke JCIL 77, 83–8 (establishing that some investor-state arbitral awards cite to human rights law).

(97.) *Claude-Reyes v Chile* (19 September 2006) IACtHR (Ser C) No 151 ('*Claude-Reyes*').

(98.) *Ivcher Bronstein v Peru* (6 February 2001) IACtHR (Ser C) No 74 ('*Ivcher Bronstein*').

(99.) Ibid paras 3, 4, 62.

(100.) Ibid para 125.

(101.) Ibid para 127.

(102.) Ibid para 129.

(103.) Ibid para 130.

(104.) Ibid para 122.

(105.) *Mayagna* (n 3).

(106.) *Moiwana Village v Suriname* (15 June 2005) IACtHR (Ser C) No 124 (‘*Moiwana Village*’).

(107.) *Yakye Axa* (n 37).

(108.) *Saramaka People v Suriname* (28 November 2007) IACtHR (Ser C) No 172 (‘*Saramaka People*’).

(109.) *Sawhoyamaxa Indigenous Community v Paraguay* (29 March 2006) IACtHR (Ser C) No 146 (‘*Sawhoyamaxa*’).

(110.) *Mayagna* (n 3) para 153 (emphasis added).

(111.) Ibid paras 151–2.

(112.) Ibid para 153.

(113.) Ibid.

(114.) Ibid para 154.

(115.) *Moiwana Village* (n 106).

(116.) Ibid paras 133–5.

(117.) Ibid paras 209–10.

(118.) Ibid para 211.

(119.) Ibid paras 187, 194–96, 212–14.

(120.) *Yakye Axe* (n 37) paras 124, 131, 135.

(121.) Ibid para 144.

(122.) Ibid para 145.

(123.) Ibid.

(124.) Ibid.

(125.) Ibid paras 146, 148.

(126.) Ibid para 149.

(127.) See text to n 36.

(128.) *Yakye Axa* (n 37) para 52(a).

(129.) Ibid paras 130–1, 136.

(130.) Ibid para 130.

(131.) Ibid paras 79, 138.

(132.) *Saramaka People* (n 108) paras 99, 124.

(133.) Ibid paras 115–16.

(134.) Ibid paras 121–2.

(135.) Ibid para 93.

(136.) Ibid para 122.

(137.) Ibid.

(138.) Ibid para 126.

(139.) Ibid para 127.

(140.) Ibid para 129.

(141.) Ibid paras 130–2.

(142.) Ibid paras 142–3.

(143.) Ibid para 214 (5).

(144.) Ibid.

(145.) *Sawhoyamaxa* (n 109) paras 73, 114.

(146.) Ibid para 138.

(147.) Ibid para 140.

(148.) Ibid.

(149.) N Bankes, 'International Human Rights Law and Natural Resources Projects Within the Traditional Territories of Indigenous Peoples' (2010) 47 Alberta LR 457, 486 (quoting *Sawhoyamaxa* (n 109) para 140). See also P Nikken, 'Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights' in Dupuy et al (n 13) 246, 264 (noting that '[i]f the solution to be applied, unless justified reasons prevent it, is the expropriation of the individual owner and the restitution to indigenous peoples of their ancestral lands, it is because the latter prevails').

(150.) ACHR (n 5) Art 13(1) (providing that the right to freedom of thought and expression 'includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice').

(151.) *Claude-Reyes* (n 97) para 66.

(152.) Ibid para 48(a).

(153.) Ibid para 48(b).

(154.) Ibid.

(155.) Ibid para 73.

(156.) Ibid paras 75–87.

(157.) Ibid paras 88–91.

(158.) ACHR (n 5) Art 13(2).

(159.) Case C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España* SAU, 2 CMLR 17 (2008) ('*Promusicae*').

(160.) *Hatton v United Kingdom,* App No 36022/97, (2003) 37 ECtHR 28, para 119 ('*Hatton*').

(161.) *Promusicae* (n 159) paras 3–15.

(162.) Ibid para 30.

(163.) Ibid paras 30–1.

(164.) Ibid paras 32–3.

(165.) Ibid para 34.

(166.) Ibid paras 47, 65.

(167.) Ibid paras 21–7.

(168.) Ibid para 70.

(169.) *Plama Consortium Ltd v Bulgaria* (27 August 2008) ICSID Case No ARB/03/24, Award (‘*Plama*’); *Inceysa Vallisoletana SL v El Salvador* (2 August 2006) ICSID Case No ARB/03/26, Award (‘*Inceysa*’); *World Duty Free Co Ltd v Kenya* (4 Oct 2006) ICSID Case No Arb/00/7, Award (‘*World Duty*’).

(170.) *Plama* (n 169) paras 142–4.

(171.) Ibid para 141.

(172.) *World Duty* (n 169) para 144.

(173.) See, eg, CR Kumar, ‘Corruption, Development and Good Governance: Challenges for Promoting Access to Justice in Asia’ (2008) 16 Michigan State JIL 475, 502 (noting that ‘the human right to generally non-corrupt governance encompasses within its framework both the right to transparency in governance and the right to accountability in administration’).

(174.) MA Orellana, ‘International Decisions: Saramaka People v. Suriname’ (2008) 102 AJIL 841, 847.

(175.) *Sempra Energy Int'l v Argentina* (28 September 2007) ICSID Case No ARB/02/16, Award. The award, which ruled in favour of the investor, was later annulled. See *Sempra Energy Intl v Argentina* (10 June 2010) ICSID Case No ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 49 ILM 1445.

(176.) Ibid para 331.

(177.) *Impregilo v Argentina* (5 January 2010) ICSID Case No ARB/07/17, Supplemental Expert Report by Professor Monica Pinto para 7 (on file with author).

(178.) See *Continental Casualty Co v Argentina* (5 September 2008) ICSID Case No ARB/03/09, Award; *LG&E Energy Corp v Argentina* (23 July 2006) ICSID Case No ARB/02/01, Decision on Liability paras 237–42 (recognizing that Argentina's enactment of the Emergency Law is protected under the appropriate provision of the BIT due to an economic crisis with 'devastating' economic, political and social conditions).

(179.) *Continental Casualty* (n 178) para 181.

(180.) Ibid para 261(ii).

(181.) 2004 (10) BCLR 1009, 44 ILM 173 (2005).

(182.) 2005(11) BCLR 1106, 2005 SACLR LEXIS 13.

(183.) *Von Abo v Republic of South Africa* 2010 (7) BCLR 712 (GNP), 2010 SACLR LEXIS 10.

(184.) *Kaunda* (n 181) para 2.

(185.) Ibid paras 62–3.

(186.) Ibid para 69.

(187.) Ibid para 144 (1); 144 (11) (holding that 'applicants have failed to establish that the government's response to requests for assistance is inconsistent with international law or the South African Constitution').

(188.) *Von Abo* (n 183) para 45.

(189.) For more background on Kaunda and Von Abo, see Erika de Wet, The Status of International Law in the South African Legal Order 15–16 (on file with author).

(190.) *Gov't of Rep. of South Africa v Von Abo,* (283/10) [2011] ZASCA 65 (4 April 2011).

(191.) *Van Zyl* (n 182) para 105.

(192.) Ibid para 43.

(193.) *Van Zyl v South Africa* [2007] SCA 109.

(194.) *Glamis Gold* (n 1).

(195.) Ibid para 10.

(196.) Ibid.

(197.) Ibid para 11.

(198.) See *Glamis Gold Ltd v United States,* UNCITRAL Case, Submission of the Quechan Indian Nation, available at http://www.state.gov/documents/organization/75016.pdf.

(199.) Ibid para 8. The Nation also argued that VCLT, Art 31(3)(c) mandated application of international law.

(200.) *Glamis Gold* (n 1) para 8.

(201.) Ibid.

(202.) Ibid.

(203.) *Biwater Gauff* (n 95).

(204.) Ibid paras 359–91.

(205.) Ibid paras 370–80.

(206.) *Biwater Gauff (Tanzania) Ltd v Tanzania,* ICSID Case No ARB/05/22 Amicus Curiae Submission of Lawyers' Environmental Action Team, et al para 43.

(207.) Ibid para 53.

(208.) *Suez v Argentina* (30 July 2010) ICSID Case No ARB/03/17, Decision on Liability ('*Suez*').

(209.) Ibid paras 130–3, 185.

(210.) Ibid paras 219-22.

(211.) Ibid para 240.

(212.) Ibid para 238 (noting that 'the Province could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Santa Fe and at the same time respected its obligations of fair and equitable treatment').

(213.) Ibid para 240.

(214.) Ibid.

(215.) Ibid para 215.

(216.) Ibid.

(217.) *Agri South Africa v Minister of Minerals and Energy* (Case No 55896/2007); *Van Rooyen v Minister of Minerals and Energy* (Case No 10235/2008) (Judgment of 6 March 2009), available at http://www.saflii.org/za/cases/ZAGPPHC/2009/2.pdf. Section 25 of the Constitution prohibits deprivation of property 'arbitrarily and except in terms of law of general application'. Ibid para 6.

(218.) Ibid para 10.

(219.) See *Foresti v South Africa* (1 November 2006) ICSID Case No ARB(AF)/07/01, Request for the Registration of Arbitration Proceedings 8–10 ('Foresti Arbitration Request'). See also P Leon, 'Creeping Expropriation of Mining Investments: An African Perspective' (2009) 27 *Journal of Energy and Natural Resources Law* 597, 614. Counsel for Foresti provided the author with the Foresti Arbitration Request, in which foreign investors filed a claim under various BITs against South Africa for expropriation and other claims. The case was recently discontinued. *Foresti v South Africa* (4 August 2010) ICSID Case No ARB(AF)/07/1, Award.

(220.) Leon (n 219) 615.

(221.) Ibid 618. See also Petition for Limited Participation as Non-Disputing Parties in Terms of Arts 41(3), 27, 39, and 35 of the Additional Facility Rules submitted by the Centre for Applied Legal Studies, the Center for International Environmental Law, the International Centre for the Legal Protection of Human Rights and the Legal Resources Center in *Foresti v South Africa* para 4.1.

(222.) *Agri SA* (n 217) para 17.

(223.) *Agri South Africa v Minister of Minerals and Energy* (Case No 55896/2007) (Judgment of 28 April 2011) paras 67, 77, available at http://www.saflii.org/za/cases/ZAGPPHC/2011/62.pdf.

(224.) Ibid para 76.

(225.) Ibid.

(226.) In terms of damages, the High Court reached a figure that was 'just and equitable reflecting an equitable balance between the public interest and the interests' of the investor. Ibid para 99.

(227.) *Balco Employees Union v India,* [2001] 4 LRI 957.

(228.) Ibid para 26.

(229.) Ibid para 47.

(230.) Ibid.

(231.) Ibid para 48.

(232.) *Hatton* (n 160) paras 11–84.

(233.) Ibid para 84 (emphasis added).

(234.) Ibid para 86.

(235.) Ibid.

(236.) Ibid paras 129–30.

(237.) Ibid paras 102–4.

(238.) Ibid paras 97, 123.

(239.) Ibid para 117.

(240.) Ibid para 121.

(241.) Ibid para 128.

(242.) *Fuel Retailers Ass'n of Southern Africa v Director-General Environmental Mgmt* 2007 (10) BCLR 1059 (CC), 2007 SACLR LEXIS 2 ('*Fuel Retailers*').

(243.) Constitution of South Africa, s 24.

(244.) Ibid.

(245.) *Fuel Retailers* (n 242) para 44 (citing *Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)).

(246.) Ibid para 109 (Justice Sachs started his dissenting opinion with the observation that '[i]t is ironic that the first appeal in this Court to invoke the majestic protection provided for the environment in the Bill of Rights comes not from concerned ecologists but from an organized section of an industry frequently lambasted both for establishing world-wide reliance on non-renewable energy sources and for spawning pollution').

(247.) Ibid para 30.

(248.) Ibid para 71.

(249.) Ibid para 79.

(250.) Ibid para 93.

(251.) For a thorough discussion of the role of general principles of international law in investor-state disputes, see C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361.

(252.) VCLT (n 50), Art 31(2): McLachlan (n 251) 371.

(253.) See nn 79–86; McLachlan (n 251) 396, 399–400. Cf I Knoll-Tudor, 'The Fair and Equitable Treatment Standard and Human Rights Norms' in Dupuy et al (n 13) 310, 338 (arguing that human rights norms should not influence the merits of a claim for breach of fair and equitable treatment).

(254.) Professor McLachlan has aptly recognized that 'the promulgation of the treaty obligation, and its application by arbitral tribunals, may inform the progressive development of international law'. McLachlan (n 251) 364.

(255.) Ibid 390.

Hierarchy in International Law: The Place of Human Rights
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The Relationship between International Trade Law and International Human Rights Law

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Abstract and Keywords

This chapter explores the field of (potential) norm conflicts between international trade law, in particular World Trade Organization law, and human rights law. The case law relevant to this kind of conflict is still emerging, as a result of which the patterns as to how court decisions (regularly) resolve emerging norm conflicts between the two fields of law are difficult to establish. However, amongst those decisions that are identified, courts largely avoid acknowledging a hierarchy of norms, or resolve conflicts by means of classic conflict avoidance techniques. Domestic courts seem, first, to consider whether the separate treaty regimes for different areas of international law are directly applicable and, to the extent that they are directly applicable, to treat them as separate from one another.

Keywords: trade law, WTO, human rights, conflict avoidance techniques

1. Introduction

International human rights law and trade rules developed in isolation from each other. Human rights were placed at the centre of international legal doctrine after the Second World War and quickly became a normative cornerstone of public international law. Trade rules developed gradually, paralleling ongoing economic development and increasing international economic exchange. Following the General Agreement on Tariffs and Trade (GATT), a rather concise set of technical rules for international commerce established in the aftermath of the Second World War, the rise of trade rules

to international prominence took place with the establishment of the World Trade Organization (WTO) in January 1995.

The discussion on (potential) normative conflicts between international trade law and international human rights law has so far mostly taken place in legal doctrine,[1] in the absence of (extensive) case law on the matter. International and supranational courts and bodies, such as the WTO Appellate Body or the European Court of Justice (ECJ), have had to deal with cases in which non-economic values and trade principles have seemed to be in opposition. They have, however, rarely decided concrete cases where human rights and rules fostering international trade have been in clear contradiction. The scarcity of cases is even more significant in domestic courts. Only a very limited number of cases relating to human rights and international trade agreements have been discussed before domestic courts.[2] **(p. 273)**

Despite the limited number of known cases, this contribution aims to explore the (potential) normative conflicts between human rights obligations and obligations stemming from international trade regimes by giving an overview of the discussion from the perspective of case law, with a focus on cases before domestic courts. Significant attention is paid to the jurisprudence of the ECJ, which is a regional judicial body, but it may virtually be seen as a domestic court. This chapter also considers the decisions of the relevant international judicial bodies addressing the issues of trade liberalization, services trade, and intellectual property. Providing insights into the few existing cases, and explaining why domestic courts have in some cases been hesitant to discussperceived contradictions explicitly and concretely, may contribute to the debate on trade and human rights and help in understanding why the discussion has, until today, remained rather abstract. It may also point to where fields of more concrete interaction between human rights norms and trade principles could be expected to emerge in the future. The different character of the rules applicable to trade and human rights suggests that the anticipated conflicts will merely be of an inter-regime character. Furthermore, they will need to be assessed on the basis of a wide definition of conflicts: that is, conflicts are found wherever a state's freedom of action is constrained by either of the different regimes towards the other, or where a state's obligations under the different regimes seem to be in contradiction.[3]

The chapter begins with a short introduction on the theoretical underpinning of the discussion on trade and human rights. It then covers three main areas of trade liberalization: classical trade in goods; trade in services; and

trade-related intellectual property rights. For each of these three areas, the contribution first provides a more theoretical understanding about possible emerging normative conflicts, and then reviews practical aspects of the discussion, including relevant case law. It does not, however, discuss one rather indirect aspect of the topic of trade law versus human rights law, which is the use of trade law regimes to achieve political, non-trade related aims in third states.[4] **(p. 274)**

2. Theoretical underpinning

The discussion of trade law versus human rights law in decisions by domestic courts has two main dimensions. On the one hand, the discussion is part of the general discourse on trade and human rights which focuses on the existence and character of possible negative effects that trade liberalization rules may have on human rights. On the other hand, independent of the actual existence and precise character of normative conflicts, the question arises as to the extent these conflicts are discussed by courts. Both dimensions—the existence of normative conflicts and the discussion of these conflicts by courts—are interlinked. Courts will only be able to consider (possible) normative conflicts between trade and human rights to the extent that international treaties or domestic law provide a sufficient legal basis for this. A lack of cases may, therefore, always have at least two possible reasons: the non-existence of relevant conflicts, or the absence of a legal basis to effectively address existing conflicts before a particular court.

Human rights activists have often based their arguments on the assumption that strong normative conflicts do exist between current trade regulation and human rights law, and they have perceived a lack of adequate, available legal procedures to weigh the (allegedly) diverging norms before courts, internationally and domestically. In particular, the traditional institutional segregation of human rights law and international trade law has been criticized.[5] Given the strong impact of international economic law on the economic and social development of many countries, trade liberalization has been accused of impairing the realization of human rights and disregarding any possibly more beneficial role that trade law could play in supporting a better realization and implementation of human rights worldwide. In particular, human rights activists have often deplored the fact that trade agreements do not make explicit reference to human rights. Indeed, apart from general references in the preambles, the agreements forming the Marrakesh Agreement merely make indirect references to human rights concerns in provisions containing exceptions to the general trade principles

(Article XX of the GATT and Article XIV of the General Agreement on Trade in Services (GATS)).[6] Most regional trade agreements (RTAs) and free trade agreements (FTAs) adopt a similar approach.

Taking an opposing view, trade lawyers have found the current arrangement of separate regimes to be appropriate in an international system that mostly relies on functional separation of treaty regimes and usually manages to coordinate them without major frictions and incompatibilities.[7] Indeed, after some initial **(p. 275)** ambivalence by trade lawyers as regards the relationship of 'the law of the WTO' and international law, in which WTO law was sometimes perceived as a closed, self-contained system,[8] such separation has been clearly denied by the Appellate Body (AB), the highest judicial body of the WTO. In an important ruling in 1996, it held that the judicial organs of the WTO were to interpret the WTO agreements according to the 'customary rules of interpretation of public international law', which meant 'a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law'.[9] As such, WTO law today is to play its role as a system of international rules to regulate trade liberalization and exchange, in awareness of the existence and importance of other areas of international law, including human rights. The recognition of the co-existence of different areas of international law does not mean that trade law would merge with non-trade-related agreements in a substantive manner.

For some scholars this separation of treaty regimes is insufficient, and an engaged academic debate has been evident at least since the coming into operation of the WTO in 1995. Amongst international trade lawyers, Ernst-Ulrich Petersmann has most prominently argued for a substantive integration of human rights into international economic law, ending the paradigm of 'specialized agencies' such as the WTO.[10] His argument is mostly based on the understanding that the non-economic values of WTO law are no less important for human rights and human welfare than the economic welfare effects of trade liberalization.[11] This suggests that a competition between different values exists, to which international law should give expression by effectively integrating the possibly competing values. Ending the existence of specialized treaty regimes for trade and human rights would have enormous consequences for the enforcement of both rights, internationally and before domestic courts. For trade, the integration of individual rights, as known by human rights law, into international trade rules would bring about the direct enforcement of WTO law by individuals in domestic courts. This would mean a revolutionary deviation from the current

system of enforcement, as non-compliance with WTO rules could then be sanctioned by domestic courts. According to the supporters of a system of direct enforcement **(p. 276)** of international trade principles, this would elevate the rights of individuals to trade freely with foreigners to the level of fundamental, individual rights.[12] By the same token, such an integrated view of human rights and trade could mean the establishment of an effective mechanism for the enforcement of human rights via trade disciplines.[13]

While having led to some academic debate, these proposals have not yet resulted in any concrete implementation or a change in the system. Functionally separate treaty regimes continue to exist with comparably limited interaction. This has particular relevance for the discussion of possible normative conflicts before domestic courts. Contrary to the proposals that have been made, states today mainly object to the notion of giving WTO rules direct effect in domestic legal systems. It is perceived that the direct applicability of trade law in domestic courts could run against the legitimate wish of national legislatures to implement international treaty standards into the domestic legal system in a way they find appropriate.[14] Requesting domestic courts to apply international law (trade law or other) directly would place them in the difficult situation of bringing together international rules with domestic law and its underlying factual situation.[15] Domestic courts, therefore, usually reserve to legislatures the right of a transmittal from ‘international’ to ‘national’, and have thus been largely hesitant to apply trade law in their rulings. As such, one main reason for the scarcity of cases discussing trade and human rights matters in domestic courts can already be identified. As WTO law is a functional treaty regime created by states to regulate their trade relations, it is closed to individuals; the systemic characteristic of the regime largely rules out individuals bringing cases to discuss possible human rights concerns before domestic courts.[16] **(p. 277)** As Peter Van den Bossche underlines, at present, most WTO members refuse to give direct effect to WTO law.[17]

The persistence of separate treaty regimes and the refusal of most states to give direct effect to WTO law for individuals in their countries limit considerably the possibility for individuals to bring claims before domestic courts in cases of perceived conflicts of trade and human rights norms. However, this does not mean an end to the debate of trade law versus human rights norms. Normative conflicts may continuously demand a solution, and the existence of separate treaty regimes can bring up the question of regime interaction and conflict avoidance techniques, ie legal techniques that aim at a resolution of conflicts between separate legal

regimes. The area of possible interaction between human rights norms and trade rules is broad, illustrating the ambivalent relationship between human rights and trade. Indeed, there may sometimes be a need to clarify the competing and possibly contradictory legal regimes, but at times the regimes interact (limit one another) without a direct conflict, and every so often they may even reinforce one another mutually. Cases before domestic and international courts covering these questions, even if they might not engage in a direct discussion of trade rules versus human rights norms, can provide evidence of the manifold and occasionally difficult relationship between trade law and human rights norms.

3. Trade liberalization

Trade rules are generally composed of an internationally agreed framework to govern the exchange of goods and services. This framework stipulates certain rules of fairness and non-discrimination, and it generally aims at lowering or setting aside rules that hinder or restrict trade. With the primary goal of trade liberalization being the removal of domestic trade barriers in the form of quotas or restrictions, the initial question in a discussion of trade law versus human rights law needs to focus on understanding where the possible normative conflicts between these trade rules and human rights rules emerge. This question, at least in the typical context of classical trade rules, is not easily answered. Indeed, as rules for trade liberalization are rules fostering the exchange of goods, they are in this sense predominantly positive, granting rather than hindering access to goods and services. Today's trade law increases the free choice of consumers worldwide. In their general intent the rules are thus much in line with human rights norms: both sets of rules are based on the conviction of the existence of individual rights, whether they relate to civil, political, or other forms of human rights. The individual rights as stipulated in human rights law are mirrored by trade rules that apply when people, acting as individual consumers, freely choose the goods and services they desire. **(p. 278)**

3.1 Normative conflict v regime interaction

A typical case of a conflict between classical trade liberalization rules and human rights rules is thus not easily found. As a theoretical hypothesis, such a conflict would emerge in a situation where free trade rules led to a freedom in the exchange of goods which by their nature violated individual human rights in the country into which they were brought. Examples could include situations relating to the import of print or media products, such as

books and newspaper articles or pictures, which fall within free trade rules but possibly violate domestic rules or the rights of individuals in a country. Adolf Hitler's book ‘Mein Kampf’, not sold in Germany, could be an example, as could the work ‘Mephisto’ by Klaus Mann.[18] As a more recent example, during the negotiations for its WTO accession, Saudi Arabia requested broad exceptions from free trade principles for items such as pork products and alcohol, for religious reasons. In these and similar cases, the key conflict between human rights and trade rules could be at issue, as these cases relate to the question central to possible normative conflicts between human rights law and trade regulation: the rights of individuals not to have a certain product made available in their country, contrasting with international trade rules facilitating the free exchange of goods and possibly overriding individual rights.

Disputes over these questions leading to cases before courts are rare.[19] The main reason for their scarcity—apart from the problematic question of a direct effect of trade rules in domestic law[20]—is the different scope of human rights law and trade rules. Human rights law addresses mostly individual rights (including group rights), whereas trade rules are negotiated by states and agreed upon in multilateral treaties. Trade rules are thus in place to govern international economic exchange of relevance for states, and do not aim at the sphere of the individual. As regards human rights concerns, trade rules instead address the questions if, and to what extent, societies may have values on the basis of which the free trade of goods could or should be restricted. The different character of international trade regulation and human rights norms is the reason why a direct opposition of international trade rules and human rights law as a basis for disputes in domestic courts is exceptional.

While it is therefore important to note that there is little basis for a direct conflict of norms, it is equally true that from a broader perspective on trade and human rights, not limited to a direct opposition of the *lege lata* of international trade law and human rights law, there may indeed be room for conflict of trade regulation and human rights law. The main aspect of the discussion may thus not stem from a direct opposition of trade law rules and human rights norms, but instead be based on (perceived) indirect effects that trade liberalization may have on the situation **(p. 279)** of human rights in various countries. Here, it is not the trade rules themselves, but rather their indirect effects on the domestic economic and social developments that are the (perceived) reasons for human rights concerns.

In this discussion, trade liberalization is understood to increase competition by allowing foreign products and services to enter a country, possibly challenging national producers and service providers. The pressure exerted on domestic systems, sometimes parallel with the privatization of formerly public services and industry, can have effects on the prices and availability of the products and services offered. While economic theory generally suggests an improvement of living conditions in the case of more efficient production and service delivery, there may be concerns relating to individual cases, where particular, vulnerable groups or individuals in a society may be cut off from certain products and services.[21] To the extent that products indispensable to life are at issue, human rights questions may be at stake.

3.2 Trade liberalization rules v human rights law at the WTO

The indirect effects that trade rules may have on human rights situations have been discussed in some detail with regard to trade in services,[22] but it is a challenge to find how facilitated trade in goods should be a reason for a human rights violation. Instead of hindering access to indispensable goods, liberalization of the goods trade is known to lower prices and increase consumers' choice. It may thus be helpful to have a preliminary look at how discussions on human rights matters have been led at the WTO itself.

In situations of important, non-economic societal values contrasting with economic goals, the WTO Agreements, as well as RTAs, provide exceptions to the generally applicable rules fostering free trade. Article XX of the GATT lists wide-ranging exceptions allowing members to adopt trade-restrictive rules to protect various societal values. Of relevance for human rights concerns in particular is Article XX (a) and (b), allowing—under certain conditions of non-discrimination and without hindering trade more than necessary—the adoption of measures (a) 'necessary to protect public morals', and (b) 'necessary to protect human, animal and plant life or health'.[23] Measures may also be adopted when (e) 'relating to the products of prison labour'.

The existence of these exceptions does not mean that human rights are a widely debated topic under WTO rules, or that considerable opposition would be noted between human rights issues and trade liberalization. According to the WTO's **(p. 280)** analytical index, Article XX (a) and (e) have thus far hardly ever been relied upon by a WTO member in defence of a disputed measure. Article XX (a) was brought up in a recent case in which China defended restrictions on the free entry of media-related goods, such as films and books, as necessary to protect public morals.[24] The discussion of human

rights was not explicitly undertaken in this case but it seems apparent for human rights specialists: the question from a human rights perspective will be whether the free entry of the media products into China is supportive of or detrimental to the realization of human rights. While an in-depth discussion of this matter is outside the scope of this chapter, a tendency towards the former may be assumed, at least from a Western perspective on human rights. Consequently, and surprisingly, in the only case ever discussed under Article XX (a) of the GATT to date, trade liberalization rules prove to be rather more supportive of human rights than a hindrance to them.[25] Article XX (b) of the GATT has been discussed in some detail, foremost in *EC-Asbestos* and *US-Gasoline*.[26] The discussions in these cases relate mostly to human health and the question of whether a trade-restrictive measure taken by a WTO member could be defended and justified by human health concerns. Although health falls under the scope of human rights, observers did not perceive the matter as a typical human rights issue at the time, since 'human health' has remained a rather abstract argument with regard to trade regulation, with little relevance for any given individual case.

Finally, an electronic full-text search of all WTO cases shows that the term 'human rights' can be found in seven cases under the WTO Agreement and its predecessor, the GATT.[27] This does not mean that human rights were discussed substantively in any of these cases. None of them discuss a normative conflict between trade and human rights in essence or in detail. The term 'human rights' is mostly found in names, or pertaining to legal questions without relevance to the merits of the discussion of human rights and trade. The two AB reports in the *Hormones* case discuss, under the reference to 'human rights', the question of expert selection without relevance to the topic of this contribution.[28] In the GATT case **(p. 281)** of *Japan-Leather,* 'human rights' concerns the background of Japan's history.[29] The *Tuna* case mentions 'human rights' as relating to an extra-territorial interpretation of treaty provisions.[30] Neither the lengthy *Biotech* case, the *Stainless Steel* case, the *Tyres* case, nor the *Gasoline* case discusses a normative conflict of trade law versus human rights law in substance.[31]

3.3 Trade liberalization rules v human rights law at the regional and national level

Next to WTO law, trade exchange is governed by regional agreements and they may be a source of conflict between human rights concerns and trade liberalization requirements. Amongst regional schemes, the deep integration of the European Union (EU) makes the European situation a

special case, setting it aside from general free trade principles such as those prescribed under WTO rules or (other) regional arrangements. Since the process of European integration today reaches further than the trade liberalization aspirations at the WTO, it may exhibit some areas of interest for the discussion of possible normative conflicts between human rights law and trade law at the domestic level. The ECJ has had to decide some cases in which principles of economic exchange had to be weighed against human rights concerns. Finally, very few cases before domestic courts have been reported.

With regard to cases discussed before the ECJ, it must be noted that EU law (as with clauses in FTAs and RTAs) provides for very similar treaty language to the WTO Agreement on the exceptions to free trade principles. Quite obviously, the example given of treaty language under the GATT was taken as a model and broadly adopted in regional agreements: generally guaranteed free trade rights have been complemented by certain exceptions to apply with regard to other societal values that could have relevance for human rights issues. For the EU, Article 36 of the Treaty of Lisbon, the latest of the European integration treaties, reads as follows:

> The provisions of Articles 34 and 35 [ie quantitative restrictions on imports and exports between member states] shall not preclude prohibitions…justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[32]

(p. 282) The ECJ has referred to these principles (as in the agreements preceding the Lisbon Treaty). First, in the case *Omega Spielhallen- und Automatenaufstellungs-GmbH,*[33] the ECJ had to decide a case relating to the operation of a so-called ‘laserdome’ near the German city of Bonn. The games played in this leisure centre consisted of firing submachine gun-type laser targeting devices at sensory tags, which were also placed on jackets worn by players. There were protests against this game in Bonn, as it essentially simulated the murder of humans. After the authorities prohibited the playing of this game and the matter was brought before the German courts, the German Federal Administrative Court (*Bundesverwaltungsgericht*) referred the question to the ECJ, as it perceived a possible normative conflict

between human rights-oriented rules that were relied upon by the authorities as a basis for prohibiting the game,[34] and fundamental freedoms guaranteed by the EC Treaty, such as the freedom to provide services and the free movement of goods. In the decision, the ECJ admitted there was a conflict between free market principles and human rights, and decided that in the given case the prohibition of the game on grounds of human dignity was justified under the Treaty. It stated:

> Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.[35]

In addition, the issue of road blockage has been discussed in several cases in Europe and in South America. In two relatively similar cases, the ECJ was asked to decide on the legality of a road blockage by protesters. In these cases, the rights of individuals concerning freedom of expression and the right to assembly had to be weighed against free market principles: here, the free movement of goods. The cases had slightly different backgrounds and led to different rulings. In the *Schmidberger* case, the Austrian government had granted permission for a demonstration against pollution of the Alps to temporarily block the Brenner motorway as a means of protest.[36] The German company Schmidberger was engaged in transporting goods from Germany via Austria to Italy, and argued that the closure of the Brenner Pass interfered with the free movement of goods, as the company was unable to reach Italy via the main Austrian passage. The ECJ recognized that the closure of the Brenner Pass restricted the free movement of goods and then explored possible justifications, by means of exceptions as provided for under the EC Treaty. To that end, the ECJ also included in its analysis the relevant provisions of the European Convention on Human Rights (ECHR) on freedom of expression and freedom of **(p. 283)** assembly.[37] In its ruling, the ECJ found the restriction on the free movement of goods to be justified.[38]

The ECJ decided differently in a case between the European Commission and France, in which the Commission (joined by Spain and the United Kingdom) accused France of not having protected the free movement of goods sufficiently in a series of violent acts by French individuals against foreign trucks, their drivers, and the agricultural goods being transported.[39] The incidents related to several campaigns, led by French farmers, against agricultural products produced outside France and delivered to French

retailers. Transportation was hindered by road blockage, threats, and even acts of violence against the foreign truck drivers. In this ruling, which preceded the *Schmidberger* case, human rights were not an issue, even though the case had a certain human rights dimension as regards freedom of expression and freedom of assembly, as did *Schmidberger*. The ECJ held, without reference to human rights, that France was in violation of its obligations under the EC Treaty by failing to adopt all necessary and proportionate measures to prevent the free movement of goods from being obstructed by the actions of private parties.[40]

Interestingly, a similar matter was discussed in South America under the Mercosur Agreement. In a dispute between Argentina and Uruguay over the construction of a pulp mill on a river bed next to the Argentine border, the Argentine population, outraged by the actions of the Uruguay government,[41] blocked bridges between the two countries. This blockage included the bridge nearest to the project site, forcing commercial and tourist traffic to detour, to the disadvantage of towns in Uruguay. Uruguay initiated a complaint under the Mercosur procedures on the common market, in which a Mercosur ad hoc arbitration tribunal found the blockades incompatible with Argentina's obligations to guarantee the free circulation of goods and services.[42]

In another ECJ case—known as *Familiapress*—a classical issue of free movement of goods and quantitative restrictions (which are, respectively, measures that have an equivalent effect) arose where periodicals were sold by a German publisher **(p. 284)** to Austrian consumers across the border.[43] These periodicals included competitions for prizes which were alleged to distort the market and threaten the diversity of the press in Austria, as the local press was unable (due to its limited economic power) to compete with the prize competitions of the foreign journals. The ECJ ruled that in the specific case, restrictions on the free movement of goods were justified in order to maintain press diversity in the country.[44] However, the Court also elaborated on the importance of the fundamental rights at issue in this case, and saw freedom of expression threatened by the restriction. It held that the restrictions were only justified if they could be reconciled with the freedom of expression.[45]

The exceptions to free trade and free market principles have therefore, under EU law, usually been discussed with respect to the trade restrictions that were taken in order to protect specific human rights. The primary goal of trade rules involving guaranteed market access has generally been

construed as limited by human rights obligations. Interestingly, free market issues and human rights have, in a few cases, been discussed as opposing legal norms that needed to be balanced, such as in *Schmidberger,* but in *Familiapress,* human rights norms were relied upon in order to limit the application of a trade-restrictive measure, ie the restriction of the free exchange of goods for reasons of market distortion. In this sense, human rights norms and free market principles were seen as compatible and mutually supportive.

Lastly, a peculiar case has been reported from the United States. In *Totes-Isotoner Corp v United States,* an importer of men's gloves made an equal-protection challenge on the basis of the different tariff rates applicable to men's gloves (14% added value) and women's gloves (12.6% added value) in the harmonized tariff schedule of the United States.[46] While the plaintiff did not claim a discriminatory intent, he believed the difference in tariffs to have a discriminatory effect. The US Court of Appeals for the Federal Circuit did not follow this argument. It recognized that there was no equal protection violation, mainly because the person who was directly affected was the importer (which could be a man or a woman), not the end consumer.[47] The court's argument could be an example of the different scope of human rights law and trade rules. Trade rules governing international economic exchange are perceived as distant from human rights, and as long as no discriminatory intent can be perceived, similar products that are available for the different **(p. 285)** sexes can be treated differently for matters of international economic exchange, ie import and export.

In conclusion, actual cases in which human rights and trade rules for trade in goods liberalization have been in contradiction are rather rare and somewhat scattered. On a multilateral level (WTO law), there is little to be found in terms of a substantive discussion of normative conflicts. Exceptions to trade rules that may have a certain human rights dimension are discussed, but they are not clear-cut human rights cases. A few cases can be found on a regional or inter-state level, the most interesting of which is the EU, where the most detailed arguments weighing human rights and free trade principles have been undertaken. The reason for this may lie in the broad competencies of the Court, which guarantees the adherence to common market principles (and thus oversees free trade principles, much like the WTO system), and is currently (unlike WTO dispute settlement) accessible to individuals where the direct effect of a measure can be established for the individual. On the basis of the ECJ cases discussed, it is interesting to note that the relationship between trade and human rights is not always in opposition, and these two

areas of international law, different as they are, can be on the same page. Both areas of law have their own regulatory intent: in some cases, these may be supportive of each other.

4. The liberalization of services and economic and social rights

Another example of the perceived opposition between human rights and trade arises in the area of trade liberalization of services, specifically where sectors of importance for the realization of economic rights (the right to water, right to food etc) undergo a process of liberalization and privatization. It has been argued that the basic principle of market liberalization, through sectoral market access rights, is particularly dangerous in this respect.[48] Before exploring this and reviewing cases in domestic courts, a few characteristics of the GATS and trade in services should be recalled.

The GATS was negotiated as part of the Marrakesh Agreement and became a cornerstone of the WTO's international trading system after the entry into force of the Agreement in January 1995. The inclusion of trade in services in the Agreement (together with the negotiation of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and other aspects of trade regulation) was seen as a major success. For the first time, a comprehensive multilateral agreement had been concluded in the area of services, covering (at least potentially) all kinds of services,[49] and it was binding on all WTO members.

(p. 286) The GATS generally establishes a framework in which the WTO members can negotiate and implement their commitments to services liberalization.[50] The agreement aims ‘to establish a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization’.[51] The key elements of services regulation are the same as are applied to all aspects of trade regulation under the WTO and are basically non-discrimination rules, ie national treatment and most-favoured nation (MFN) treatment. MFN treatment applies generally as part of the rules applying to measures affecting trade in services.[52] National treatment applies to those commitments that have been made by members in the respective sectors.[53] Part IV of the GATS prescribes that WTO members shall enter into ‘successive rounds of negotiation’,[54] with ‘a view to progressively achieve a higher level of liberalization’.[55] The character of the GATS is, thus, hybrid: on the one hand, it constitutes a set of rules applicable to the

regulation of trade in services. On the other hand, it has a built-in agenda, meaning that it provides for a system to continuously negotiate services liberalization towards the aim of a higher degree of liberalization. This agenda may arguably constitute the element of highest importance for matters of trade and human rights within the GATS Agreement. Indeed, while the Agreement has been praised by trade lawyers for its comprehensive scope, the commitments that members had made by the time of negotiation were, and still are in many respects, at a comparably low level. However, the pressure to move forward and increase trade in services liberalization has an important effect of opening up services markets in the future, and will increase competition and privatization in these sectors. Much of the discussion about the GATS and its effects on human rights thus relates to its implied (but not yet realized) effect in terms of future trade in services liberalization. It is important to note that once a service is liberalized under the GATS by the inscription of the relevant sector into the GATS' schedule, the liberalization is 'locked in', meaning that it is a binding commitment to the international membership of the WTO, and can in principle no longer be withdrawn.

Not surprisingly, the GATS Agreement has been criticized for being overly complicated, opaque, and ultimately difficult to control for member states.[56] The Agreement categorizes services into four types, according to their mode of supply: cross-border supply, consumption abroad, commercial presence, and presence of natural persons.[57] The commitments of members are inscribed in comprehensive schedules of commitments, listing in great detail the categories and subcategories of the various services.[58] As a point of particular relevance, a close inter-connection **(p. 287)** between trade in services and investment regulation exists. The third mode of supply of services—the supply of a service by commercial presence in the host country—equals an 'investment' in services. This close link means that there is often a two-fold approach to a certain situation of a possible human rights conflict in a country involving a foreign third party. This third party may be seen as an investor, and the 'investment' may be covered by the regime for international investment regulation, or it may be seen as a measure covered by the GATS under mode three of its four modes of supply. For many areas of discussion on human rights and trade in services, such as trade in health services or infrastructure-related services (such as water delivery), a parallel view from both a trade and an investment law perspective is thus necessary.[59]

4.1 Normative conflict v regime interaction

Human rights lawyers observe the liberalization of services with a certain unease. They are usually worried about the complicated character of the GATS and its ‘locking in’ system, which effectively hinders flexibility for those states that have realized that the liberalization to which they have committed has negative effects for their societies.[60] As a main point of concern, the liberalization of services domestically usually means the opening of these service sectors to international competition and increasing the activity of the private sector in the delivery of such services. Because the nature of the private sector's interest in service delivery is necessarily economic, there is a risk that the needs of certain groups of people with regard to these services may be disregarded if the delivery of that service to those groups is not profitable or viable from the perspective of the private service deliverer. Especially for services of basic need—such as the delivery of clean water, food, basic infrastructure, or the provision of education—domestic, public service delivery can therefore, in certain instances, provide a better service for a wider public than private actors, who are focused on and conditioned by their economic success. To the extent that the services at issue have a human rights dimension, for example by touching on the right to water, the right to education, or the right to information, services liberalization under trade regimes and international human rights law may be in normative conflict.

Water delivery today is not ensured for a large proportion of the world's population, with a tremendous effect on health and life. The delivery of water services by private actors has been suggested as an improvement to the situation.[61] Arguably, private companies may be able to undertake the investments needed to make clean water more available to a wider public, particularly in developing countries. A liberalization of the industry is necessary to engage international investors in water distribution services, meaning the opening of the sector to international trade and **(p. 288)** investment via the removal of trade and investment barriers and restrictions. Some states around the globe have decided to follow this path.

This has created a potentially delicate situation for security in water delivery in some places, which has led to a certain debate amongst human rights lawyers.[62] The right to access to water exists in human rights law, but its status is far from clear.[63] It is expressed mainly in an indirect manner in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC).[64]

The right to water is also recognized in soft law, such as the UN Millennium Development Goals which aim to halve the amount of people without access to safe drinking water,[65] the work undertaken by the World Health Organization (WHO) to set out normative guidelines on various aspects of water provision,[66] and the work of the UN Committee on Economic, Social and Cultural Rights. This Committee adopted in 2002 ‘General Comment 15’ on Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). These articles relate to the rights to an adequate standard of living and to an adequate standard of health, respectively. The right to water is inferred from both of these articulated rights.[67]

The basic potential normative conflict between trade law and human rights law concerns the conditions under which water services are provided, and the possible negative effects on individuals. According to General Comment 15, water constitutes a ‘public good’ and should, as such, be generally available. The Comment recognizes overall the involvement of the private sector in the provision of water services.[68] However, it imposes strict requirements on states, amongst others, on how to regulate the activity of private parties, requiring them ‘to prevent third parties from interfering in any way with the enjoyment of the right to water’.[69] **(p. 289)** The Comment further stipulates that states should provide for ‘the necessary and effective legislative and other measures’ necessary to guarantee that third parties provide equal access to water. Water should be affordable, and payment for water services should be based on the principle of equity.[70]

According to human rights lawyers, the privatization of water services carries the risk that these requirements may be disregarded, as business enterprises regard water as a good and water distribution as a service that both have a price, and they will only be willing to invest and engage in the activity if it guarantees them a certain revenue. Although complete divestiture of water companies is rare, liberalization increases the involvement of private companies and thus shifts the principles under which the sector is governed towards an economic regulation driven by market forces. Market forces may, however, leave behind individuals claiming a right of access to water. This potential normative conflict may lead to cases before courts, particularly when people claim to be treated in an inhuman manner by water providers that are possibly not serving them or are doing so in an unacceptable manner. Typically, such conflicts will involve the most vulnerable groups of a society.

In the area of health services, the general situation is similar to water services. While many people worldwide lack access to appropriate health services, private actors have been suggested to fill the gap left by deficient public authorities and to undertake the investments necessary to provide health services to a wider public.[71] Human rights activists oppose such a proposal, because they perceive a fundamental conflict between the regulation of services following economic motivation, and the international human rights law requiring every human to be able to enjoy 'the highest attainable standard of health conducive to living a life in dignity'.[72] The right to health has been expressed in several international human rights instruments.[73] Opening the health sector to (international) competition could possibly lead to a differentiation between humans according to their income, origin, or character of the sickness, all of which are problematic from a human rights law perspective. In particular, even though it is often recognized that private investment in health care can improve the level of the service overall, concerns have been **(p. 290)** expressed that health services in a country would be shifted from general provision to some particular profitable areas, leaving other areas behind.[74]

While the classical discussion of trade in services and human rights thus focuses on a perceived opposition of trade law and human rights, because trade liberalization limits the policy space of a government and may subject certain sectors to economic principles seemingly not in line with human rights patterns, there may be more interaction between human rights law and services liberalization. The limitation of the national policy space to regulate need not only have negative effects, as can possibly occur in the case of water distribution, but may arguably also have positive effects for human rights; this is an aspect of the discussion that is noted far less often.[75] Indeed, trade rules may get in the way of national government policies that must be seen critically from a human rights perspective, particularly when these policies hinder freedom of expression, or access to information. In such cases, the opening of the relevant services sectors can be beneficial for human rights.

Overall, clashes between trade rules and human rights rules, as noted in the context of trade in services, call for conflict avoidance or conflict resolution strategies. The classical forms, as deduced from the Vienna Convention on the Law of Treaties (VCLT), seem, however, to be difficult to apply in the context of trade rules versus human rights norms. As demonstrated by Michaels and Pauwelyn, both *lex posterior* and *lex specialis* are concepts that raise difficulties for the question of trade-related societal interests versus

other societal values.[76] The main reason is that these concepts were mostly meant to address intra-regime conflicts. However, inter-regime matters, such as those between the functionally separate legal regimes on trade and on human rights, give rise to difficulties. After all, how would one decide on the more 'special' rule concerning a trade in service regulation, possibly affecting a human rights issue? Even though the human rights issue may be the more special one to be affected, the trade regime may be the more specific regime to handle trade questions. The situation is similar for a conflict resolution focusing on *lex posterior* criteria: given the differently focused regimes on trade, investment, human rights, various environmental agreements, or even EC law, how would any hierarchy between these regimes be established following a temporal sequence?[77] It seems clear that domestic courts, which could attempt to apply conflict avoidance techniques, would face difficult conceptual challenges in dealing with the multitude of functionally separate international legal regimes. **(p. 291)**

4.2 Trade liberalization rules v human rights law in cases before courts

Conflicts in the areas mentioned above have emerged and have led to disputes before the courts. An important such case has been considered by the High Court of South Africa, in 2008.[78] The City of Johannesburg had delegated its authority to act as the water service provider to a private company. This company restricted the water supply to a poor township by limiting the amount of water offered for free and introducing a prepaid system for further water supply to customers. This action was found to be unlawful by the court, which recognized, with explicit reference to both the South African Constitution and to international human rights law, the existence of a right to access to water. This case thus demonstrates that there can indeed be a normative conflict between the regulation of public services by private parties pursuing economic motives, and individual rights as guaranteed by international human rights law.[79] Without disputing this normative conflict, to find a clear conflict between human rights law and international trade rules in this case would require the establishment of a clear causal link between the human rights violation and the international trade rules. This causal link is doubtful, or at least weak. There is no clear evidence in this case that the liberalization of the services market, induced by increasing commitments under the GATS, was the reason for the normative conflict that arose. In fact, the water service provider was owned by the city itself. So it seems that trade rules would not have hindered the public authorities from shaping their water supply arrangements in a manner consistent with human rights law.

In the area of health services, the debate concerning possible conflicts between trade and human rights has largely been conducted on an academic level, with free trade supporters and human rights lobbyists exchanging predominantly theoretical arguments. Actual cases demonstrating that a real conflict has taken place are scarce. In particular, a discussion of such a conflict, with reference to international trade law, is lacking.

The reasons for the few cases with respect to both access to water and health care are not clear. It is evident that the as yet limited liberalization of services under the GATS hinders the far-reaching engagement of private players in the sector internationally, and may be a reason why disputes relating to international trade law have not yet arisen. It may, however, also be the case that the matter has more theoretical relevance than practical urgency. Indeed, many countries have found ways to deal with public services that face the difficult characteristic of being at the same time a commercial enterprise and a matter of individual, human rights. The facts that a particular service is taking place in an area that includes human rights obligations and that the service is provided by commercially oriented actors **(p. 292)** do not necessarily have to be in contradiction. Foremost, there is thus far little, if any, indication in domestic case law that the opening of a services sector to international trade and investment via GATS obligations increases the naturally given challenge to integrate human rights obligations and economic principles in certain sectors in a harmonious manner. Whether (subtle) conflict avoidance techniques have contributed to the avoidance of disputes over possibly emerging inconsistencies between trade and human rights norms cannot, therefore, be answered for certain.

Another reason may be, as already noted above,[80] that domestic courts are unwilling to explore trade regulation and weigh it against national or international human rights standards. This can be illustrated in a services-related US case, decided by the Central Division of the District Court of Utah.[81] Here, the claimants had been charged with conspiring to commit fraud by transmitting wagering information in violation of the domestic Wire Act; the purpose of their ‘business model’ was to provide a means of payment for bettors taking part in (illegal) online gambling. They challenged the ruling, asserting that the United States was in violation of its obligations under the GATS. Specifically, they underlined that the WTO's Appellate Body had ruled against the US prohibition of online gambling services, and that this ruling was self-executing and therefore binding upon the court. Further, they argued that the United States was, according to the 1804 *Charming Betsy* doctrine, required to interpret domestic law consistently

with international law. This motion was dismissed. The court found that the WTO Appellate Body decisions were neither self-executing nor binding on the United States or its federal courts. According to the court, WTO Appellate Body rulings were only directed towards the US Congress, and it was up to Congress whether to accept possible sanctions, modify federal law, or renegotiate the WTO commitments. The court underlined that it would only apply domestic federal law, and that any provisions of GATS to the contrary 'shall have [no] effect'.[82] It was thus very clear that individuals should have no right to apply or to make reference to WTO law in US domestic courts.

This decision can, in principle, be considered as a conflict avoidance technique, because it clarified that the respective discussion taken in trade-related forums, such as the WTO Appellate Body, would not gain access into domestic US legal review disciplines. This conflict avoidance thus focuses on a functional separation of regimes; however, it does not clarify the substantive interaction between the normative rules as such. The direct effect that is lacking merely hinders a possible discussion of trade and human rights matters before domestic courts. **(p. 293)**

4.3 Trade in services rules in support of human rights norms?

An area of future relevance for the discussion of trade in services and human rights concerns the restriction of individual freedom rights, such as freedom of speech and the right to free access to information. These rights are at risk in countries applying censorship. Recent cases, such as the restriction of internet services operated by 'Twitter', 'Facebook', or even search engines such as the one offered by 'Google' in countries such as China or Iran,[83] have been discussed in the news recently.[84] Also, a ban on the distribution of news by foreign news agencies in China (except the state-owned agency Xinhua), which would prohibit non-domestic news agencies from selling content to Chinese media, is currently being discussed in the country.

These restrictions may also constitute cases of possible violation of WTO services rules.[85] The internet, with its unrestricted global reach, not only constitutes a place for personal exchange, but is also an important business platform for the international delivery of services. Selling access to content internationally (either by relying on user-fees or advertising incomes) results in a cross-border supply of a service.[86] The GATS regulations, including its non-discrimination rules, apply to such a service. Interestingly, these cases may thus be seen as a reverse example of the negative effects that services liberalization may have on human rights, as discussed in previous examples.

As stated above, the possible normative conflict between international trade in services law and human rights law has emerged from unconfined trade liberalization and its possible opposition to human rights law. Here, the liberalization of trade in services to which a government may have committed under WTO rules could turn against this government and support the realization of human rights in the country, with important benefits for the individuals concerned.

The outcome of any potential case under the WTO rules addressing access to information and internet services is today not clear, as much of the WTO law addressing internet services and online products is not very precise because it was developed during the internet's infancy. However, at least three possible claims could be imagined under WTO disciplines. First, if a country imposed stricter web-filtering conditions on foreign players than on its domestic companies, matters of discrimination would be at issue. Secondly, far-reaching censorship could be seen as disproportionate or unjustified if such censorship disrupted commercial activities by more than what was necessary for the achievement of the goals **(p. 294)** of the censoring government,[87] or could not be convincingly defended by given exceptions for ‘public morals’ or ‘public order’.[88] Lastly, a non-violation complaint is possible under WTO rules[89] where a concession ‘is being upset by (“nullified or impaired…as the result of”) the application of a measure not reasonably anticipated’.[90] This means that where the work of service providers was persistently hindered and the expectations of WTO members as to what they could achieve from trade in this area with that particular member were lowered, those WTO members may have a reason to complain.

There is thus much to be explored regarding domestic measures that manifestly restrict the internet, and at the same time possibly violate the GATS and contradict international human rights norms. The relevance of rulings by domestic courts is currently unclear. As it seems that the violation of these rights occurs in countries with a generally weak respect for international law and a strict separation of international and national law, it is probably rather unlikely that human rights violations will be addressed under the rules of trade law before the domestic courts of these countries. However, due to the fact that the situations mentioned could have negative effects on foreign service providers in a country, WTO dispute settlement could be an option for resolving them. It might be that the very fact that these future potential cases could be addressed at the level of international trade rules may increase their chances of success.

In conclusion, with a particular lack of case law addressing the trade in services and human rights interface today, the question of the future development of this relationship points to increasing activity in the field. With services comprehensively covered under the GATS but with comparably little liberalization having yet taken place, much of the discussion on the impact of trade in services on human rights will emerge in the future. As has been seen, the classical case of a threat to services that guarantee basic human rights by liberalization of trade in services is only one aspect of the complex relationship between trade in services and human rights. Where free trade motivation goes hand in hand with personal freedom rights, such as freedom of expression, a mutually supportive interaction of international trade law and international human rights law is well within reach.

5. Trade-related intellectual property rights v human rights

A third area of concern with respect to possible normative conflicts between trade law and human rights law is the area of intellectual property rights (IPRs), particularly since the coming into force of the TRIPS Agreement in the framework of the WTO. The TRIPS Agreement has a particular characteristic that sets it apart from international trade agreements on goods and services, by defining a specific level of protection for intellectual property rights. Building on earlier **(p. 295)** international conventions covering various fields of intellectual property regulation (the Berne Convention, the Paris Convention) and integrating them into the international trade system governed by the WTO, substantive rights have become an integral part of the body of rules on trade regulation. This is a delicate mix given the WTO's non-discrimination standards, and the back-up of the WTO system, with its dispute settlement mechanism, is a uniquely efficient enforcement system for WTO rules.

The inclusion of intellectual property rights in the trading system during the negotiation of the Marrakesh Agreement in the Uruguay Round was controversial. The United States and several European countries, including Switzerland, manifestly supported the introduction of intellectual property rights into the trade rules. In their experience and legal tradition, innovation was best fostered by rules providing efficient protection for innovators and their inventions. A protection of intellectual property rights was seen as a mandatory requirement for a functioning international trade and investment exchange. Many developing countries at the time had no or only rudimentary intellectual property protection systems in place domestically, and feared

they would be hindered in their development by having to guarantee overly strict protection to such rights.

5.1 Normative conflict v regime interaction

The main discussion on normative conflicts of human rights and intellectual property protection as granted under trade law is reflected in this early stage during the negotiation of the TRIPS Agreement. Potential conflicts arise from the different levels of development achieved by WTO members. The TRIPS Agreement is oriented towards the protection levels appropriate for developed economies: these may not necessarily be the most beneficial for developing countries. Further, in individual cases, protection of these property rights may be in conflict with individual human rights when general principles of protection that are in place to guarantee an economically efficient application of intellectual property rights (and thus, in the long run, necessary innovation) stand in the way of individual human rights, such as the right to health and the right to access to medicine.[91] As an example, a producer of a certain drug against a grave disease such as HIV/AIDS may sell it at a price that is unaffordable to people in a developing country. While the producer may insist on the price, and patent protection granted to the medication may preclude the production of cheaper generic medication, individuals may see their health and life at risk and request access to the drug on the basis of human rights law, which generally attributes a right to health to all humans.[92]

The special relationship between IPRs and human rights law, compared to other areas of trade law such as trade in goods and services, originates from the **(p. 296)** fact that the TRIPS Agreement has in-built protection levels by reference to the above-mentioned international conventions. As such it is far less an agreement providing for non-discrimination rules, but leaving aside the commitments that members may make to bilateral and multilateral negotiations, it has direct implications for individuals in situations of potential conflicts of norms. Given this clear link between intellectual property protection and human rights, it is unsurprising that the relationship has led to important discussions. The clear link also has legal significance: given that the direct effect of intellectual property protection as provided for under the TRIPS Agreement on individuals and their rights is comparably evident, ‘direct effect’ as a legal concept has also been partially accepted by domestic courts.[93] The important connection between rules on intellectual property and human rights norms does not, however, lead to an easy conflict resolution by means of rules provided in the VCLT: the

specialized and functionally separate treaty regimes do not allow a clear distinction regarding *lex posterior* or *lex specialis*.

5.2 Intellectual property protection rules v human rights law

The difficulty in integrating trade law obligations and international human rights in a coherent manner has posed a challenge for national governments in some developing countries, and the different efforts have also led to some discussion in domestic courts. As reported by Frederick Abbott, in the South African pharmaceutical case South African courts were requested by amicus curiae briefs to balance competing rights under international human rights instruments to which South Africa is a party and the TRIPS Agreement. The case was settled before it had to be decided. In a later case concerning the supply of essential medicines, the South African Constitutional Court applied constitutional rules reflecting human rights as a benchmark against which the reasonableness of the government's conduct was measured.[94]

In India, domestic courts have appeared to give important consideration to the human rights effects of an overly strict application of the TRIPs Agreement. In a long dispute known as the *Glivec* case, the Swiss pharmaceuticals producer Novartis had raised claims against the Indian government before the Court of Chennai and the Madras High Court over national patent law, including the 2005 Patents Act, requesting a more extensive granting of patent protection for its products than was offered by the then applicable law.[95] Novartis claimed that India's Patents Act was in violation of WTO rules and the Indian Constitution. **(p. 297)** The courts decided to uphold India's Patents Act, which was perceived as a major victory for patients' access to affordable medicines in developing countries. Novartis decided to appeal to the Supreme Court of India. Concerning the discussion of possible normative conflicts between human rights and trade law before domestic courts, it is important to underline that even in these Indian cases no in-depth analysis of such normative conflicts took place. The Court of Chennai made it clear that it did not intend to discuss the matter of consistency of Indian law with the TRIPS Agreement. It pointed out:

> When such participating nations, having regard to the terms of the agreement and the complex problems that may arise out of the agreement between nation to nation, decide that every participating nation shall have a Common Dispute Settlement Mechanism, we see no reason at all as to why we must disregard it. As we began saying that any International Agreement possesses the basic nature of an ordinary contract

> and when courts respect the choice of jurisdiction fixed under such ordinary contract, we see no compelling reasons to deviate from such judicial approach when we consider the choice of forum arrived at in International Treaties. Since we have held that this court has no jurisdiction to decide the validity of the amended section, being in violation of Article 27 of 'TRIPS,' we are not going into the question whether any individual is conferred with an enforceable right under 'TRIPS' or not.[96]

This ruling gives an important indication of the relationship between international trade law and human rights law before domestic courts in the area of intellectual property rights. Although the issue was omnipresent in the case, the domestic court was unwilling to engage in a discussion of international trade rules and human rights norms. The court came to its conclusion without discussing the merits of the relationship between human rights and trade law. It may be debated whether this could be seen as a conflict avoidance technique. Indeed, a direct confrontation between different norms was avoided, but the discussion was simply left to the international level, limiting the court to a review of domestic law. A substantive discussion about potentially incoherent rules was not undertaken.

The fact that domestic courts have so far been of limited assistance in coordinating potential discrepancies between a state's international obligations and its national law—with conflicts having arisen between human rights and multilateral trade rules in the area of intellectual property—may have triggered political action aimed at clearing away inconsistencies. For intellectual property law, the WTO's Doha Declaration on the TRIPS Agreement and Public Health[97] may be seen as a starting point for accommodating human rights in the trade/intellectual property regime. The Doha Declaration, amongst others, allows compulsory licences to be **(p. 298)** issued by states, under certain conditions, to provide access to medicines in their countries.[98] Given the political nature of the matter, this conflict avoidance has been undertaken more on the political level, rather than left to the courts.

6. Conclusion

This contribution has explored the field of (potential) normative conflicts between WTO law and human rights law by reference to decisions in

courts, despite the scarcity of known case law on the subject, particularly before domestic courts. Consequently, patterns as to how courts (usually) resolve the norm conflicts at issue are difficult to establish. Among those decisions that have been identified, courts have largely avoided clearly acknowledging a hierarchy of norms, or have resolved them by means of classic conflict avoidance techniques. This allows the drawing of conclusions and the identification of two main reasons for the scarcity of cases: a lack of substantive normative conflicts and a lack of available legal means to address conflicts in an appropriate manner before (domestic) courts. This conclusion will briefly reflect on both aspects, as they provide some understanding about the relationship between human rights and trade law.

Clearly, a major reason for the scarcity of case law before domestic courts lies in their reluctance to apply WTO law directly. Trade law is a set of rules applicable for the regulation of trade liberalization between economies. High courts in countries as different as India or the United States have made it plain that these rules have no direct effect for individuals in their countries and thus will not be considered by the courts. The existence of functionally separate treaty regimes for different areas of international law is the fundament for courts to decide about direct applicability of different regulatory areas individually, and—in case they ever assume jurisdiction—to treat these subject matters as mostly separate.

Taking a broader look at the topic ‘trade versus human rights’, including references to regional or international bodies, this contribution has shown that the interaction between trade law and human rights law has more dimensions than a simple assumption of conflicts of law suggests. Two areas of trade regulation in particular have an important dimension in human rights: trade in services and trade-related intellectual property rights. Where trade law reaches deep into domestic affairs, such as in the area of services trade, diverging societal needs can be at stake and require a careful weighing of the different economic and non-economic interests a society may have. Where trade law has a clearly defined scope, by providing itself with certain levels of protection (such as in the area of intellectual property), the important discussion of the role of domestic courts in possibly applying WTO law directly remains relevant, and may be a source of future jurisprudence of domestic courts. **(p. 299)**

Importantly, the conflict between economic regulation and human rights is far from new, since it is a normative conflict between different rules of law that has a long background in national law. Trade rules have projected

this conflict to the international level, and they face the accusation of worsening the conflict by permanently exerting pressure on domestic regulatory regimes and by limiting governments' ability to regulate in favour of development or to defend the weak and exposed groups of a society. While these accusations are not wrong as such, they may only give part of the picture, as the changes that trade rules bring to a country may also have positive implications for it and its society, including positive effects for the country's development. In a public debate on trade law and the right to food between Pascal Lamy, the Secretary General of the WTO, and Olivier De Schutter, UN Special Rapporteur on the Right to Food, Lamy summarized this idea as follows: 'You think that we should not risk opening up, that it is too dangerous; and I say that we should take that risk—it works, in general, even for the most disadvantaged.'[99]

Finally, it needs to be underlined that human rights law and trade law do not diverge or lead to normative conflicts in all cases, despite being different fields of international law with different regulatory goals. Economic interests, as reflected in trade law, work towards a functional system of economic exchange. Such a system requires for its realization a number of individual rights, particularly individual freedom rights including ownerships rights, which are to a large extent in line with assumptions of human rights theory. Particularly when economic interests, covered in one way or another by trade regulation, are congruent with individual aspirations towards a self-determined life of the individual, trade law and human rights law may already play a mutually supportive role. Current discussions about freedom of expression, the internet, and commitments in trade in services give examples of positive connections between human rights law and trade law.

The scattered catalogue of cases dealing with human rights and trade law conflicts, as set out in this contribution, derives from the fragmentation of international law with functionally different treaty regimes, and the lack of clarity as to a hierarchy of norms between national and international levels, as well as an absence of established practice in conflict avoidance techniques. While the functionally different characters of international law and national law, as well as the topical diversity of regulatory intent, necessitate specialized regimes to some extent, the overall perspective gained by reviewing the case law is that the topic is an important one and more coordinated efforts may be needed to better integrate international and national rules, as well as rules addressing different subject matters. The recognition of the overlaps of trade law and human rights law ought therefore to be increased on all levels, and courts should become better

aware of the role they can play in balancing the diverging obligations arising out of trade and human rights regimes. Trade lawyers and human rights experts today stand at the forefront of a task with significant future relevance.

Notes:

(1.) For publications providing a good overview of the whole discussion see in particular: FM Abbott, C Breining-Kaufmann, and T Cottier (eds), *International Trade and Human Rights: Foundations and Conceptual Issues,* Studies in International Economics, The World Trade Forum, vol 5 (The University of Michigan Press, Ann Arbor 2006); T Cottier, J Pauwelyn, and E Bürgi (eds), *Human Rights and International Trade* (OUP, Oxford 2005); J Harrison, *The Human Rights Impact of the World Trade Organisation,* vol 10, Studies in International Trade Law (Hart Publishing, Oxford 2007).

(2.) This scarcity of trade-related case law is a shared characteristic with the other important area of international economic law, namely international investment law. While in the area of investment this is mostly due to the fact that investors prefer to refer disputes to international arbitral tribunals, in the area of trade it is due to a reluctance of courts to directly apply international trade agreements. See below, section 2, ‘Theoretical underpinning’, as well as subsequent chapters.

(3.) For an overview of different forms of conflicts of norms, as well as their possible resolution by international law and applicable legal techniques, please refer to Chapter 1 of this book.

(4.) The use of trade law to achieve political, non trade-related aims has two aspects. On the one hand, it consists of the use of unilateral sanctions against WTO member states not guaranteeing the appropriate level of human rights protection. While sanctions taken within the framework of Chapter VII of the UN Charter usually constitute acceptable reasons under the security exceptions in the WTO (Art XXI GATT and Art XIVbis GATS) for non-compliance with the general trade principles under the WTO, unilateral sanctions are highly controversial in view of their allegedly extra-territorial scope and their sometimes production-related nature which conflicts with the notion of comparative advantage. The issue is not different with regard to most FTAs and RTAs, although some regional mechanisms allow for a harmonization of requirements in this field in order to avoid distortions and political tensions.

On the other hand, certain bilateral trade agreements have been construed in a way to foster certain development goals including human rights issues, a typical example being the General System of Preferences (GSP), which allows for GSP and GSP+ benefits for certain developing countries in case of adherence to certain policy objectives including human rights.

These issues are not covered in this contribution since they do not relate directly to the core of a possible conflict between trade and human rights rules, as unilateral sanctions or benefits are meant to indirectly foster human rights. The conflict does not directly stem from normative conflicts between trade law and human rights law as two important areas of international law.

(5.) See below, and see in detail T Cottier, 'Trade and Human Rights: A Relationship to Discover' (2002) 5(1) *Journal of International Economic Law* 11.

(6.) World Trade Organization, *Marrakesh Agreement Establishing the World Trade Organization,* first published by the GATT Secretariat in 1994. Reprinted by Cambridge University Press, 2004. The WTO Agreement including all Annexes and Documents is also available at the homepage of the WTO, at http://www.wto.org/english/docs_e/legal_e/final_e.htm.

(7.) As one example out of a whole debate, reference may be made to P Alston, 'Resisting the Merger and Acquisition of Human Rights Law by Trade Law: A Reply to Petersmann' (New York University School of Law, Public Law and Legal Theory Working Paper Series, August 2002), available at http://ssrn.com/abstract_id=332440.

(8.) P Van den Bossche, *The Law and Policy of the World Trade Organization —Text, Cases and Materials* (2nd edn Cambridge University Press, Cambridge 2008) 61.

(9.) See the Appellate Body's 1996 ruling in *US-Gasoline* (Standards for Reformulated and Conventional Gasoline WT/DS2/AB/R, 17 (AB, WTO 1996)).

(10.) See in particular the following articles and working papers: EU Petersmann, 'Judging Judges: Do Judges Meet their Constitutional Obligation to Settle Disputes in Conformity with "Principles of Justice and International Law"?' EUI Working Paper LAW (Florence: European University Institute, Department of Law); EU Petersmann, 'Justice in International Economic Law? From the "International Law among States" to "International Integration law" and "Constitutional Law"' EUI Working Paper LAW (Florence: European

University Institute, Department of Law); EU Petersmann, ‘Theories of Justice, Human Rights and the Constitution of International Markets’ EUI Working Paper LAW (Florence: European University Institute, Department of Law); EU Petersmann, ‘Time for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration Law for Global Integration Law’ Jean Monnet Working Paper (New York: New York University School of Law, n.d.); EU Petersmann, ‘The WTO Constitution and Human Rights’ (2000) *Journal of International Economic Law* 19–25.

(11.) Petersmann, ‘The WTO Constitution and Human Rights’ ibid.

(12.) For an overview over the discussion see T Cottier and C Nadakavukaren Schefer, ‘The Relationship Between World Trade Organization Law, National and Regional Law’ (1998) 1 *Journal of International Economic Law* 93–5.

(13.) Petersmann argues that ‘the widespread disregard of WTO law by domestic courts reflects power-oriented prejudices and democratic distrust *vis-à-vis* international law’, and requests inter alia strengthened implementation of ‘citizen-oriented WTO guarantees of freedom’ and cooperation between international and domestic courts. See EU Petersmann, ‘*Multi-Level Judicial Trade Governance without Justice? On the Role of Domestic Courts in the WTO Legal and Dispute Settlement System*’, EUI Working Paper LAW, 2006/44 (Florence: European University Institute, Department of Law), 2, 3 and 12 ff.

(14.) Cottier and Nadakavukaren Schefer, ‘The Relationship Between World Trade Organization Law, National and Regional Law’ (1998) 1 *Journal of International Economic Law* 97–8.

(15.) For a discussion on the concept of direct effect, see several contributions in ‘National Constitutions and International Law’, including in particular J Steenberger, ‘Is There a Need for Constitutional Reform of Foreign Trade Law of the EEC’ in M Hilf and EU Petersmann (eds), *National Constitutions and International Economic Law* (Deventer, Boston: Kluwer Law and Taxation Publishers 1993) 563–86. For American comments on the questions, see RA Brand, ‘Direct Effect of International Economic Law in the United States and the European Union’ (1996) 17(2) *Northwestern University School of Law* 556; JH Jackson, ‘The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligation’ (1997) 91 AJIL 60.

(16.) K Knop, ‘Here and There: International Law in Domestic Courts’ (2000) 32 *International Law and Politics* 506.

(17.) P Van den Bossche, *The Law and Policy of the World Trade Organization —Text, Cases and Materials,* 68. A few existing exceptions underline, however, the importance of the discussion. Courts of several member states of the European Union have accepted a direct effect of certain provision of the TRIPS Agreement, particularly for TRIPS Arts 9 and 13. See Van den Bossche fn 277.

(18.) The latter piece, published 1936 in Amsterdam, narrates a story about an actor, and despite being fictional, the resemblance to the German actor Gustaf Gründgens was so obvious that Gründgen's son succeeded to de facto prohibit the publication of the work in Germany, following a ruling of the German Constitutional Court on individual rights in cultural matters in 1971. The novel was, however, continuously published abroad, mostly in the Netherlands.

(19.) Some of the important ones will be discussed in the following sections 3.2. and 3.3.

(20.) See above n 2.

(21.) Most general handbooks on trade regulation discuss the benefits of trade liberalization-induced economic globalization. A practical and interesting synopsis of this discussion may, for example, be found in the study book by Peter Van den Bossche, see P Van den Bossche, *The Law and Policy of the World Trade Organization—Text, Cases and Materials* (1st edn Cambridge University Press, Cambridge 2005) 11 ff.

(22.) And will be treated in this contribution as below, see section 4, ‘The liberalization of trade in services and social and economic rights’.

(23.) GATT 1947, Art XX.

(24.) *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* WT/DS363/AB/R (AB, WTO 2010).

(25.) This interesting finding will be discussed further below in the discussion of ECJ case law (*Familiapress* case*),* and relating to trade in services and the internet.

(26.) *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R (AB, WTO 2001); *United States—Standards for Reformulated and Conventional Gasoline*.

(27.) These cases are *US—Continued Suspension of Obligations in the EC—Hormones Dispute* WT/DS320/AB/R (AB, WTO 2008); *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute* WT/DS321/AB/R (AB, WTO 2008); *United States—Restrictions on Imports of Tuna* DS29/R (GATT Panel 1994); *United States—Standards for Reformulated and Conventional Gasoline*; *Brazil—Measures Affecting Imports of Retreaded Tyres* WT/DS332/R (Panel Report, WTO 2007); *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* WT/DS344/R (Panel Report, WTO 2007); *Panel on Japanese Measures on Imports of Leather* L/5623—31S/94 (GATT Panel 1984); *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* WT/DS291/R, WT/DS292/R, WT/DS293/R (Panel Report, WTO 2006).

(28.) *US—Continued Suspension of Obligations in the EC—Hormones Dispute*; *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*.

(29.) *Panel on Japanese Measures on Imports of Leather*.

(30.) *United States—Restrictions on Imports of Tuna*.

(31.) *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*; *Brazil—Measures Affecting Imports of Retreaded Tyres*; *United States—Standards for Reformulated and Conventional Gasoline*.

(32.) The Treaty on the Functioning of the European Union, Part Three (Union Policies and Internal Action), Title II (Free Movement of Goods), Chapter 3 (Prohibition of Quantitative Restrictions between Member States), see Official Journal of the European Union, *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union,* 2008, http://europa.eu/lisbon_treaty/full_text/index_en.htm.

(33.) *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* C-36/02 (ECJ 2004).

(34.) The German Constitution enshrines certain human rights-related values, notably human dignity.

(35.) *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*.

(36.) *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* C-112/00 (ECJ 2003).

(37.) The Court expressed in para 77 of its ruling: ‘The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.’

(38.) The Court expressed in para 74 of its ruling: ‘…since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods’.

(39.) *Commission of the European Communities v French Republic* C-265/95 (ECJ 1997).

(40.) Ibid para 60.

(41.) The dispute was discussed entirely and decided by the International Court of Justice, see *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (International Court of Justice 2010).

(42.) Decision of the Mercosur ad hoc Arbitral Tribunal (*Uru v Arg*) (6 September 2006).

(43.) *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* C-368/95 (ECJ 1997).

(44.) Ibid para 34.

(45.) The Court stated in para 24: ‘Furthermore, it is to be noted that where a Member State relies on overriding requirements to justify rules which are likely to obstruct the exercise of free movement of goods, such justification must also be interpreted in the light of the general principles of law and in particular of fundamental rights (see Case C-260/89 ERT [1991] ECR I-2925, paragraph 43).’ The Court continued (para 25): ‘Those fundamental rights include freedom of expression, as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ERT, paragraph 44).’

(46.) *Totes-Isotoner Corp v United States,* 594 F.3d 1346, 1350 (Fed Cir 2010).

(47.) For an analysis of the decision see C Kelly in the ASIL Insight 14(12) 2010, at http://www.asil.org/insights100517.cfm.

(48.) M Panizzon, *How close will GATS get to Human Rights?* (World Trade Institute/NCCR Trade Regulation Working Paper, Berne August 2006).

(49.) Except air transportation, covered in a plurilateral agreement, and services supplied by the government, exempted under GATS, Art I.

(50.) Van den Bossche, *The Law and Policy of the World Trade Organization—Text, Cases and Materials,* 48.

(51.) See the Preamble, GATS.

(52.) GATS, Art II.

(53.) GATS, Art XVII.

(54.) GATS, Art XIX, 1.

(55.) Ibid.

(56.) Pierrick Devidal, 'Trading Away Human Rights? The GATS and the Right to Education: a legal perspective' (2004) 2 *Journal for Critical Education Policy Studies* 2.

(57.) GATS, Art I, 2(a)–(d).

(58.) The schedules of commitments for all members are available on the homepage of the WTO, see http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm.

(59.) See Chapter 9 (Susan L Karamanian).

(60.) C Dommen, *The WTO, international trade, and human rights* (3D: Trade—Human Rights—Equitable Economy) 10, available at http://www.3dthree.org/pdf_3D/WTOmainstreamingHR.pdf.

(61.) See B Choudhury, *Liberalization of Public Services—Human Rights and Gendered Implications* (PhD Thesis, forthcoming) 95 ff.

(62.) Amongst many important contributions, the following may give an idea about the debate in human rights law: v Petrova, 'At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water' (2006) 31 Brooklyn JIL 577; A Cahill, 'The Human Right to Water—A Right of Unique Status: The Legal Status and Normative Content of the Right to Water' (2005) 9 IJHR 389–410; P Gleick, *The Human Right to Water* (Pacific Institute for Studies in Development, the Environment and Security, 1999); R Francis, 'Water Justice in South Africa: Natural Resources Policy at the Intersection of Human Rights, Economics, and Political Power' (2005) 18 *Georgetown International Environmental Law Review* 149.

(63.) Neither the Universal Declaration of Human Rights, nor the International Covenant on Civil and Political Rights, nor the International Covenant on Economic, Social and Cultural Right stipulate such a right explicitly.

(64.) See CEDAW, Art 14(2)(h); CRC, Art 24(c). In these conventions, water may be indirectly covered under the right to adequate living conditions (CEDAW), or the right to be disease and malnutrition free (CRC).

(65.) MDG Goal 7. See MDG Goals, Targets and Indicators at http://www.undp.org/mdg/goallist.shtml.

(66.) See several guidelines published by the WHO on various aspects of water provision, http://www.who.int/water_sanitation_health/en/.

(67.) UN Committee on Economic, Social and Cultural Rights ('ESC Committee'), 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' 20 January 2003, available at http://www.unhcr.org/refworld/docid/4538838d11.html.

(68.) See Choudhury (n 61).

(69.) ESC Committee, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)' para 23.

(70.) Ibid para 27.

(71.) According to Choudhury, state governments are turning to the private sector in order to avoid large increases in user fees 'resulting from the capital improvements needed to replace aging water service infrastructure, water services being the most capital-intensive of all utilities'. See Choudhury (n 61) 95 ff.

(72.) ESC Committee, The Right to the Highest Attainable Standard of Health, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No 14 (2000), E/C 12/2000/4, para 1.

(73.) Including Art 25.1 of the Universal Declaration of Human Rights, referring to 'the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services', and the International Covenant on Economic, Social and Cultural Rights, stipulating 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Further relevant international conventions are the International Convention on the Elimination of All Forms of Racial Discrimination, the CEDAW, and the CRC.

(74.) ECOSOC, Commission On Human Rights Sub-Commission on the Promotion and Protection of Human Rights, 'Economic, Social and Cultural Rights: Liberalization of trade in services and human rights. Report of the High Commissioner' (E/CN.4/Sub.2/2002/9, 25 June 2002). The report discusses the matter in detail and concludes: 'The liberalization of trade in services presents both opportunities as well as challenges to the enjoyment of human rights. While liberalization offers opportunities for increased economic growth and development, the liberalization process, in particular where it leads to unregulated private sector activities, can threaten universal access for the poor to essential services.'

(75.) Cf also nn 24 and 43.

(76.) R Michaels and J Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law* (Working Paper, Duke Law Scholarship Repository, 2010).

(77.) Ibid.

(78.) *Mazibuko and ors v City of Johannesburg and ors,* ILDC 973 (ZA 2008) 06/13865 (South Africa, High Court, Witwatersrand Local Division 2008).

(79.) As Dommens reports, water prices in Ghana, which the government and the World Bank considered to be below the market rate, were beyond the means of most families. See Dommen (n 60) 8.

(80.) In section 1, 'Introduction' and section 2, 'Theoretical underpinning'.

(81.) *United States v Lombardo and ors, Ruling on Motion to Dismiss, Case No 2:07-CR-286 TS (D Utah); ILDC 1055 (US 2007)* (United States, District Court of Utah, Central Division 2007).

(82.) Ibid.

(83.) Iran is currently not a member of WTO, but is negotiating its accession to the Organization.

(84.) B Hindley and H Lee-Makiyama, *Protectionism Online: Internet Censorship and International Trade Law* (ECIPE Working Paper, Brussels 2009) 2.

(85.) A case in which human rights-related matters ('public morals') were discussed under WTO services disciplines was a case between the US and Antigua concerning online gambling services. At issue was the GATS' exceptions clause, Art XIV of the GATS, which parallels Art XX of the GATT and sets out the general exceptions in the area of services, mentioning under Art XIV (a) measures 'necessary to protect public morals or to maintain public order'.

(86.) Hindley and Lee-Makiyama (n 84).

(87.) Ibid 8 ff.

(88.) GATS, Art XIV.

(89.) GATT, Art XXIII:1(b).

(90.) *Japan—Measures Affecting Consumer Photographic Film and Paper* WT/DS44/R, para 10.82 (Panel Report, WTO 1998).

(91.) *Joint written statement submitted by the Europe-Third World Centre (CETIM), a non-governmental organization in general consultative status and Association of American Jurists, a non-governmental organization in special consultative status* (New York: United Nations/Economic and Social Council: Commission on Human Rights, 17 March 2003).

(92.) For the legal basis in human rights law, see above n 73.

(93.) In non-human rights-related cases, mostly in Germany and the Netherlands, however. See above n 17.

(94.) FM Abbott, 'TRIPS and Human Rights, Preliminary Reflections' in FM Abbott, C Breining-Kaufmann, and T Cottier (eds), *International Trade and Human Rights: Foundations and Conceptual Issues,* Studies in International Economics The World Trade Forum, vol 5 (The University of Michigan Press, Ann Arbor 2006) 160, 161.

(95.) *Novartis v India* WP Nos 24759 and 24760 of 2006 (The High Court of Judicature at Madras 2007); 'Press Release: Indian Court Gives Boost to Access to Medicines as Latest Appeal by Bayer is Rejected' (Médecins sans Frontières); 'Press Release: Indian Court Ruling in Novartis Case Protects India as the "Pharmacy of the Developing World"' (Médecins sans Frontières), at http://www.doctorswithoutborders.org/press/release.cfm?id=2096&cat=press-release.

(96.) *Glivec/Novartis, THE HON'BLE MR.JUSTICE R.BALASUBRAMANIAN and THE HON'BLE MRS.JUSTICE PRABHA SRIDEVAN W.P. Nos.24759 and 24760 of 2006* (Madras High Court, India 2007).

(97.) The Doha Declaration on the TRIPS Agreement and Public Health WT/MIN(01)/DEC/2, 20 November 2001, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

(98.) Ibid. See also explanatory notes of the WTO on the matter at http://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm.

(99.) A podcast and summary of the debate can be found on the webpage of the WTO at http://www.wto.org/english/forums_e/debates_e/debate14_summary_e.htm.

Hierarchy in International Law: The Place of Human Rights
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Conclusions

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1. Recognition of a norm hierarchy in judicial practice: ‘a mere formality’

The foregoing chapters examined whether human rights enjoy a special standing in the international legal order. In particular, they examined the manner in which domestic, regional, and international judicial bodies have treated human rights obligations in situations in which they conflict with rights and/or obligations pertaining to other areas of public international law. The chapters departed from the premise that if these judicial bodies, particularly those functioning within a paradigm broader than human rights protection, have consistently given precedence to the human rights obligations in instances of norm conflicts, this would serve as evidence of the emergence of a human rights-based hierarchy within international law.[1]

The norm conflicts in question could be of a narrow or a broad nature. A narrow definition of norm conflict describes situations where giving effect to one international obligation unavoidably leads to a breach of another obligation or right.[2] A broad definition of norm conflict refers to situations where compliance with an obligation under international law does not necessarily lead to a breach of another norm obligation (which can be a right or an obligation), but instead to its limitation, or even a limitation of all the rights and/or obligations at stake.[3] This type of conflict is sometimes also described as regime interaction,[4] or apparent conflicts which could be resolved through interpretation.[5]

The hierarchy under discussion would be of a substantive nature, in the sense that it would be based on the nature or character of a particular norm, rather than the formal source from which the norms originate. As is well known, the sources of international law listed in Article 38(1) of the Statute of the International Court of Justice do not establish a hierarchy between them.[6] As illustrated by Vidmar in **(p. 301)** this volume, the norms that are the strongest contenders for hierarchical superiority on the basis of their unique nature are those that qualify as peremptory norms of international law.[7] The judicial practice analysed in the previous chapters confirmed that various courts have formally recognized the special nature of *jus cogens* norms, most of which also constitute human rights norms. In addition, there is some agreement on which norms would qualify as such, notably the prohibition of genocide and the prohibition of torture. At the same time, the practical relevance of the special character of peremptory norms remains very limited. In relation to international investment law, Karamanian noted that the judgments and arbitral awards that were analysed did not reflect a single rule of hierarchy which would be applied consistently on a widespread basis. No rule had emerged in accordance with which an investment that violated a *jus cogens* norm was not entitled to protection, at least not in the context of investor-state cases.[8] Even in the context of extradition law, where the freedomfrom torture is an important consideration before an extradition may take place, Van der Wilt concluded that the role of *jus cogens* was minor and that the overriding power of *jus cogens* norms should not be exaggerated.[9]

The only area of international law in which *jus cogens* may increasingly be playing an important role in the resolution of norm conflicts seems to be immunities. The Italian courts, in particular, have attached weight to the values underpinning *jus cogens* obligations and the need to enforce these obligations (as well as the values that they represent) effectively.[10] Even so, this practice is in its early stages and cannot yet be generalized as being applicable across jurisdictions.[11] As far as the immunity of state officials is concerned, Webb described the Italian case of *Lozano* as a rare example of where the court plainly stated that the *jus cogens* nature of the violation was essential to resolving the norm conflict, but she cautioned that in most cases the role of *jus cogens* is not so clear.[12]

Moreover, for the purpose of resolving norm conflicts in practice, other formal qualities, such as non-derogability, can be as relevant—or even more so—than *jus cogens*. Van der Wilt noted that the hierarchical supremacy of the prohibition on torture over extradition obligations was not explicitly underpinned by a reference to its *jus cogens* character. Instead, its special

status within the realm of human rights as an absolute right, allowing no derogation, seemed to be the decisive factor.[13] Similarly, the fact that a human rights norm has 'merely' achieved **(p. 302)** customary international law status can suffice for ensuring its efficient enforcement, regardless of whether it is also recognized as a peremptory norm. An example on point concerns the prohibition of refoulement. Although it has not generally been accepted as a peremptory norm by courts,[14] it does seem to have acquired the status of customary international law.[15] Gilbert drew attention to the fact that the peremptory status of the customary norm would be of little importance unless the state can show it was a persistent objector at the time the norm was created. After all, customary international law already binds all states except persistent objectors.[16]

Outside the area of *jus cogens,* the main contender for claiming a hierarchically superior status in the international legal order would be Article 103 of the UN Charter. On the one hand, it is arguable that Article 103 would present a source-based hierarchy rather than a value-based one. It attributes precedence to obligations arising under the UN Charter on the basis of their origin, namely that they stem from the UN Security Council (itself a treaty creation).[17] On the other hand, it is possible to argue that Article 103 represents a value-based hierarchy, as it is directed at giving effect to the enforcement of the purposes of the United Nations. According to Shelton, Article 103 may be seen as a supremacy clause that suggests that the purposes of the United Nations—collective security and protection of human rights—constitute an international public order to which other treaty regimes and the international organizations giving effect to them must conform.[18]

However, in another view, Article 103 does not establish any hierarchy but was included in the treaty framework of the UN Charter as a conflict rule. It does not intend to elevate all obligations under the Charter to a hierarchically superior position. Instead, it merely attaches a trumping effect to those obligations arising within the treaty framework of the UN Charter and which conflict with specific obligations arising from treaties or customary international law.[19] Hence, Tzanakopoulos submitted that Article 103 is not a rule of hierarchy. According to him, Article 103 does not establish that obligations under the UN Charter are non-derogable except by a norm of the same or higher rank. Instead, it merely establishes that, on occasion, the obligations under the Charter may lead to the non-application of other obligations under international law.[20] **(p. 303)**

Although several judicial decisions resolved the conflict between Article 103 vis-à-vis another international obligation by giving precedence to the former,[21] only the *Nada* decision[22] of the Swiss Federal Tribunal seemed to have explicitly based this on a norm hierarchy in international law.[23] The European Court of Justice in the *Kadi* decision notoriously did not address the issue of the hierarchical standing of Article 103 within international law, a point to which will be returned below in section 3.[24] As a result, it seems that the jury is still out on the nature of the special standing of Article 103 of the UN Charter within international law.

2. The (il)legitimate role of courts in establishing a norm hierarchy in international law

Given the limited impact of hierarchically superior norms in the international legal order in practice, the question of value imperialism through their top-down imposition on a particular domestic setting would not seem to arise.[25] It is also noteworthy that none of the domestic courts under examination disputed the concept of *jus cogens* as such. Indeed, there was no example where a court questioned the *jus cogens* character of a norm which was generally perceived to have acquired this status. Moreover, no court had questioned the underlying values of *jus cogens* norms. For example, courts did not argue that prohibitions of torture, genocide, slavery, or apartheid were incompatible with the domestic values of the jurisdiction in question.

Moreover, even if a court—whether domestic, international (including functional or regional), or even supranational—were to resort to peremptory norms in international law, they would do so for the purpose of resolving a conflict in the framework of their own jurisdictions. In so doing they do not impose the hierarchical interpretation of international law on any other jurisdiction or region. Furthermore, if they, for example, expanded on the short list of generally accepted *jus cogens* norms, they also would do so within the confines of their own jurisdictions. Domestic courts, as organs of state, may provide examples of state practice, **(p. 304)** but this practice will not necessarily become uniform. Other courts are still free to follow or not follow this example.

However, the situation remains ambiguous if domestic or regional courts (ie any judicial body, with the possible exception of the International Court of Justice) were to rely on their interpretation of hierarchically superior norms for the purpose of reviewing binding Security Council decisions. In this instance, the impact of any judicial review resulting in the non-application or

partial non-application of a particular Security Council obligation, because of its conflict with a hierarchically superior human rights obligation, will also formally be binding only within a particular jurisdiction. However, it will nonetheless directly affect the efficacy of the Chapter VII regime under the UN Charter, which was designed to be followed by all UN member states: ie the international community of states as a whole. Other states may perceive this spill-over effect of the non-application of Security Council obligations, in a manner from which they cannot in practice insulate themselves, as a form of value imperialism. This would be the case regardless of whether the trumping of the Security Council obligation resulted from the superior standing of a human rights obligation in the particular domestic (including supranational) legal order, or whether it resulted from an international human rights obligation, as interpreted and applied by the particular court in question. The 'imposing' effect would be the same from the perspective of those states that regard the efficacy of the unified system for the maintenance of peace and security as being under threat.

For example, in the legal order of the European Union (EU), the right to a fair hearing has been proclaimed as 'fundamental', as a result of which individuals must have access to procedural protection of their adversely affected interests.[26] However, if the European Court of Justice (ECJ) reviewed a Security Council decision because it may breach the guarantees of one of the fundamental rights of the EU legal order, would the ECJ be undermining the collective system for the promotion of international peace and security by resorting to the value system of the jurisdiction within which it functions? Or does it engage in the review for a legitimate reason, in the sense that individuals must be able to contest decisions that directly affect their fundamental rights? In this vein, it has been argued that such a response would be legitimate, as it would be necessary to preserve the rule of law—of which fundamental human rights form a part—within the international legal order itself.[27] According to this view, domestic courts are not only a legitimate authority to review Security Council decisions for their compatibility with fundamental human rights, but are indeed bound to do so in order to preserve the rule of law within the international legal system. **(p. 305)**

While the divergent doctrinal debates on these issues continue,[28] the few court decisions available seem to regard themselves as a legitimate authority for engaging in judicial review of Security Council obligations against human rights standards of a domestic (including supranational) nature. However, one should caution against general conclusions at this

stage, given the small number of decisions and jurisdictions in which they were generated. It remains to be seen whether courts in other jurisdictions will over time share this view, or whether they would regard themselves as inappropriate forums for decisions affecting the unity of the Chapter VII regime under the UN Charter.

3. Alternatives to hierarchy: systemic integration through conflict avoidance

The analysis in the preceding chapters has revealed that conflicts of the narrow kind, such as the *Kadi* and *Nada* cases involving conflicts between UN Security Council obligations and the right to a fair hearing, are rare.[29] Most of the time courts are confronted with broad conflicts. When it came to the resolution of norm conflicts (whether narrow or broad), the analysis further revealed that traditional conflict rules in the form of *lex specialis derogat legi generali* and *lex posterior derogat legi priori* were unlikely to be of relevance. This can be explained by the fact that neither of these principles is well suited to resolving the type of norm conflicts discussed in the previous chapters.

The principle of *lex specialis,* a general principle of international law,[30] implies that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific. However, this principle would only become relevant where the conflicting norm indeed represented a *lex generalis*. Since the conflicts analysed in the previous chapters all stemmed from different specialized regimes, one was in fact confronted with one *lex specialis* versus another.[31] This point was aptly articulated by Ziegler and Boie in relation to disputes between international trade rules and human rights obligations, which they described as an inter-regime conflict which could not be resolved by principles (such as *lex specialis*) which were designed for resolving intra-regime conflicts.[32] This fact seems to have been overlooked by Tzanakopoulos when arguing that Article 103 would **(p. 306)** constitute *lex specialis* if one accepted the Kelsian proposition that the Security Council was empowered to create law for a specific purpose.[33] The problem with this submission is that it assumed that those obligations that conflict with Security Council decisions would necessarily represent *lex generalis*. This would arguably not be the case as far as international human rights obligations are concerned.

The *lex posterior* principle, as articulated in Article 30 of the Vienna Convention on the Law of Treaties of 1969 (VCLT), implies that when all

the parties to a treaty are also parties to an earlier treaty on the same subject, the earlier one would only apply to the extent that its provisions are compatible with those of the later treaty.[34] The applicability of this principle is, however, complicated by the fact that it remains unclear how it should apply to subsequent treaties which do not have identical parties.[35] In addition, there remains disagreement as to what would constitute treaties 'relating to the same subject matter'. If the principle is applied strictly, the inter-regime conflicts discussed in previous chapters would fall outside the scope of the *lex posterior* principle.[36] However, if the principle implied that treaties deal with the same subject matter when the fulfilment of the obligation under one treaty affected the fulfilment of the obligation under another, the *lex posterior* principle would be applicable.[37] But even then a straightforward prioritization on the basis of the chronological order of the obligations is unlikely, and most likely not satisfactory.[38] This was underscored by the virtual irrelevance of the *lex posterior* principle in the judicial practice examined in previous chapters, which predominantly concerned inter-regime norm conflicts.[39]

The only principle of the VCLT which was of significance for the resolution of the norm conflicts at stake was the principle of systemic integration contained in Article 31(1)(c), which is also recognized as customary international law.[40] This principle determines that when interpreting a treaty, any relevant rules of international law applicable in the relations between the parties will be taken into account, such as other treaties, customary international law, and general principles of international law.[41] Although the judicial bodies under consideration in the previous chapters rarely referred to this principle explicitly, they nonetheless frequently applied it in practice.[42]

These judicial bodies engaged in the balancing of the substance of the competing rights and/or obligations in a manner that had a significant impact on their scope. The introductory chapter suggested that such balancing may result in the implicit **(p. 307)** recognition of a human rights-based hierarchy in international law, where courts tended to interpret the scope of the human rights obligation broadly, at the expense of the scope of the conflicting right or obligation.[43] However, the analysis in the subsequent chapters revealed that the only judicial bodies likely to give implicit recognition in such a manner to the supremacy of international human rights obligations are those with a functional bias, in the sense that they were created for the very purpose of protecting human rights. Shelton articulated this phenomenon in the context of environmental law by stating that if a conflict was found to exist, the legal system might establish a hierarchy allowing either human

rights law or environmental law to have a trumping effect. This is most likely to occur when a specialized court was established to enforce a particular body of law.[44] Other courts are more inclined to avoid a conflict through interpretation, and in the process also eliminate any hierarchy.[45]

Moreover, it cannot be assumed that specialized human rights courts, when presented with a norm conflict, will necessarily attach a broad scope to human rights obligations. In fact, one reason why the practical relevance of *jus cogens* obligations is very limited in the context of norm conflict resolution is the very narrow scope that all judicial bodies tend to attribute to peremptory norms of international law. As a result, it is unlikely that a conflict between the *jus cogens* norm and other norms would arise, even if one were to accept that *jus cogens* no longer seemed to operate exclusively within treaty law.[46]

A very illustrative example concerns the prohibition of torture, where the scope of the *jus cogens* obligation seems to be limited only to the negative obligation not to engage in the act of torture.[47] The norm conflict which often arises in the torture context, with customary obligations pertaining to immunity, does not, however, relate to this particular negative obligation. Instead, the conflict exists between customary obligations pertaining to immunity and treaty obligations pertaining to the judicial protection (including the obligation on states to guarantee access to a court of law) of torture victims. The right (and corresponding obligations to provide) access to a court under these circumstances does not constitute a matter of *jus cogens,* as the normative scope of the peremptory obligation not to engage in torture does not (yet) encompass an ancillary obligation not to recognize immunity.[48] Such a wider interpretation of the normative scope of *jus cogens* has been suggested by the dissenting judges in *Al-Adsani*[49] and has been followed in recent Italian decisions. However, it has not yet received wide recognition by courts.

Another illuminating example of conflict avoidance through a narrow interpretation of the human rights obligation at stake concerns the issue of diplomatic assurances in extradition law.[50] Courts have allowed extradition to states known for engaging in torture practices in instances where the latter have given assurances that this would not occur in relation to the extraditee in question. The conflict **(p. 308)** between the obligation to extradite and the prohibition to refoule is thereby prevented by narrowing down the scope (including the absoluteness) of the prohibition of refoulement.[51] The prohibition is only triggered if the extraditing state agrees to extradite a

person to a requesting state notorious for torture practices if the latter does so *without assurances*. The prohibition, therefore, does not apply broadly in the sense that extradition to such a state is always prohibited. In the process, the absoluteness of the prohibition of torture itself may also be undermined, as the extraditee might still be tortured, if the diplomatic assurances were not honoured subsequent to the extradition.[52]

In addition to techniques of interpretation that affect the substance (scope) of conflicting rights and obligations, courts engage in formalistic techniques of conflict avoidance. One such technique is the distinction between substantive and procedural law, as applied in relation to the law of immunities.[53] In line with this view, obligations pertaining to immunities cannot conflict with the *jus cogens* norm encompassed in the prohibition of torture, as the former is a matter of procedural law, while the latter constitutes substantive law.[54] Closer scrutiny reveals that this argument is only partially accurate: it is accurate in the sense that there is no conflict between a peremptory norm and a 'lesser' norm in international law. However, it is not accurate insofar as it suggests that the conflict is between a substantive and procedural norm, respectively. As has already been illustrated above, the actual conflict in this instance exists between customary obligations pertaining to immunity and treaty obligations pertaining to the right to access to court. Both categories of obligations are of a procedural nature, and neither has *jus cogens* status.

Judicial practice also revealed that the customary obligation to grant immunity to sovereign states still seems to carry more weight than the obligation of states to grant access to torture victims, in instances of a conflict between these norms. So if any hierarchy existed in this instance, it would favour the international law of immunities rather than international human rights protection. More important for the purpose of this analysis, however, is the fact that by repacking the norm conflict (albeit inaccurately) as one existing between procedural and substantive law, the court avoided any overt dealing with a norm conflict and what it might imply for norm hierarchy in international law.

Another formalistic technique that is followed, by definition, by domestic and supranational courts, concerns the retreat behind dualism. The *Kadi* case before the ECJ was a prime example of withdrawal behind the dualist veil for the purpose of conflict avoidance.[55] The ECJ reshaped the norm conflict as a 'domestic' one that had to be resolved on the basis of EU law. Although effectively giving precedence to human right protection above security

concerns, this decision was based on the value system of the EU itself. The ECJ did not address the conflict between **(p. 309)** the international human rights obligations of its member states and their obligations pertaining to international peace and security under the UN Charter.[56] This decision forms a stark contrast with the *Nada* case of the Swiss Federal Tribunal, which remains a rare and controversial example of open acknowledgement of the hierarchical superiority of Security Council decisions vis-à-vis international human rights obligations.[57]

A further illustration of conflict avoidance through the 'dropping of the dualist veil' was the *Lombardo* decision of the District Court of Utah (USA).[58] As illustrated by Ziegler and Boie, the insistence of the court not to apply directly a decision of the WTO Appellate Body pertaining to the General Agreement on Trade in Services (GATS) and to apply only United States federal law avoided the need to resolve whether an international trade-related obligation conflicted with any other (international) right or obligation, including one of a human rights nature.[59]

In essence, the preceding analysis revealed that no clear or consistent patterns of human rights-based hierarchy in international law can currently be adduced from the manner in which courts resolve norm conflicts in international law, regardless of whether one is dealing with a narrow or broad norm conflict. This is due to the fact that courts and other judicial bodies prefer to avoid any overt recognition of a norm conflict in international law and therefore also avoid the need to resolve the conflict by means of a norm hierarchy. In those instances where courts do resolve conflicts on the basis of a human rights-based hierarchy, they rely on a domestic (constitutional) hierarchy of norms that does not attempt to attribute a hierarchical standing to human rights obligations within the international legal order. This reliance on domestic human rights norms can nonetheless have an impact on the efficacy of the international legal order, notably where it leads to the non-application of Security Council obligations adopted under Chapter VII of the UN Charter. The dualist technique of conflict avoidance may therefore be able to shield the domestic legal order from the impact of international obligations, but it will not necessarily prevent the influencing of the international legal order by developments on the domestic level.

Among techniques developed for the purpose of conflict avoidance, the one most frequently resorted to is the principle of harmonious interpretation (systemic integration), which also finds resonance in Article 31(3)(c) of the VCLT. To a certain extent this technique prevents or at least significantly

reduces the fragmentary impact that could result from the development of an increasing number of specialized regimes in international law. However, it can also result in a reduction of the scope of human rights obligations to the point where they merely exist in name. A similar fate seems likely for *jus cogens* norms, even when interpreted by judicial bodies with a 'pro-human rights' functional bias. At this point in time, the scope of these norms seems to be interpreted so narrowly by courts that it is unclear whether they have any value for resolution of norm conflicts. **(p. 310)**

Notes:

(1.) See De Wet and Vidmar, Chapter 1, section 1.

(2.) See CW Jenks, 'Conflict of Law-Making Treaties' (1953) 30 BYIL 401, 401.

(3.) See De Wet and Vidmar, Chapter 1, section 1.

(4.) See Gilbert, Chapter 7, section 1.

(5.) See Webb, Chapter 5, section 1.

(6.) International Law Commission, Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, A/CN.4/L.682, 13 April 2006 ('Fragmentation Report') at 85, para 224.

(7.) Vidmar, Chapter 2, section 2.2.2.

(8.) Karamanian, Chapter 9, section 3.2.4.

(9.) See Van der Wilt, Chapter 6, section 2.

(10.) See Pavoni, Chapter 4, section 3.2. The Italian decisions also find resonance in the dissent of *Al-Adsani v United Kingdom,* (2002) 34 EHRR 11, Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para 3: 'The acceptance…of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions… Due to the interplay of the *jus cogens* rule on the prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.'

(11.) See Webb, Chapter 5, section 2.1.

(12.) Webb, Chapter 5, section 2.2.

(13.) See Van der Wilt, Chapter 6, section 9.

(14.) See Van der Wilt, Chapter 6, section 3.1.

(15.) See Gilbert, Chapter 7, section 3.1.

(16.) See Gilbert, Chapter 7, section 3.1.

(17.) See M Milanović, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative and International Law* (2009) 69, 78–9; see also C Chinkin, '*Jus Cogens,* Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution' (2006) 27 Finnish YBIL 63, 63.

(18.) D Shelton, 'International Law and "Relative Normativity"' in M Evans, *International Law* (OUP, Oxford 2009) 159–85, 178.

(19.) The Fragmenation Report (n 6) para 335 referred to Art 103 as 'a means for securing that Charter obligations can be performed effectively and not [a means for] abolishing other treaty regimes'.

(20.) Tzanakopoulos, Chapter 3, section 4.1.

(21.) See Tzanakopoulos, Chapter 3, section 3.1.1, referring to the decision of *Lockerbie* [1992] ICJ Rep 3.

(22.) *Youssef Nada v State Secretariat for Economic Affairs ad Federal Department of Economic Affairs,* Administrative Appeal Judgement, BGE 133 II 450, 14 November 2007 (Switzerland), para 6.2. See also *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL, 58, para 34, where Lord Bingham noted that Art 103 of the UN Charter should not be given a narrow, contract-based meaning, since '[t]he importance of maintaining international peace and security in the world can scarcely be exaggerated'.

(23.) See Vidmar, Chapter 2, section 2.1.2. However, he suggested that the statement pertaining to the hierarchically superior position of Art 103 of the UN Charter was an *obiter dictum*. The *Nada* decision was based on the subsequently overturned decision of the Court of First Instance of the

European Communities (since renamed as the General Court), Case T-315 *Kadi* [2005] ECR II-3649 [190].

(24.) Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351.

(25.) Cf De Wet and Vidmar, Chapter 1, section 2.

(26.) C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP, Oxford 2009) 308–9.

(27.) A Nollkaemper, 'The European Courts and the Security Council: Three Replies' (2009) 20 EJIL 853, 868.

(28.) The debate, inter alia, concerns the question which human rights would constitute an integral part of the international legal order. See generally E de Wet, 'The International Constitutional Order' (2006) 55 ICLQ 51–76; see also E de Wet, 'Holding the United Nations Security Council Accountable for Human Rights Violations through Domestic and Regional Courts: A Case of "Be Careful What You Wish For?"' in J Farrall and K Rubenstein (eds), *Sanctions Accountability and Governance in a Globalised World* (CUP, Cambridge 2009), 143–68.

(29.) *Kadi* decision (n 24); *Nada* decision (n 22).

(30.) See Fragmentation Report (n 6) para 11, which also referred to the principle as a standard technique of legal reasoning.

(31.) See Fragmentation Report (n 6) paras 129 and 152, which described fields of functional specialization such as international trade law or international human rights law as *lex specialis*.

(32.) See Ziegler and Boie, Chapter 10, section 4.1.

(33.) See Tzanakopoulos, Chapter 3, section 1.

(34.) VCLT, Art 30, para 1. See also Fragmentation Report (n 6) paras 229 and 230.

(35.) See also Fragmentation Report (n 60) para 234.

(36.) See also Fragmentation Report (n 6) para 253; R Wolfrum and N Matz, 'The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity' (2000) 4 Max Planck YBUNL 473.

(37.) See Fragmentation Report (n 6) para 254; Pavoni, Chapter 4, section 2.2, following this interpretation when analysing the approach of the ECtHR regarding the relationship between the ECHR and other treaties (including constitutive instruments of international organizations), which were binding on ECHR parties.

(38.) Fragmentation Report (n 6) paras 254 and 272; Pavoni, Chapter 4, section 2.2.

(39.) See Ziegler and Boie, Chapter 10, section 4.1.

(40.) Fragmentation Report (n 6) paras 427–79.

(41.) Ibid para 462.

(42.) Ibid para 174.

(43.) De Wet and Vidmar, Chapter 1, section 1.

(44.) Shelton, Chapter 8, section 1; see also Fragmentation Report (n 6) para 282.

(45.) Shelton, Chapter 8, section 7.

(46.) See Vidmar, Chapter 2, sections 3.1 and 3.2.

(47.) Vidmar, Chapter 2, section 4.2.

(48.) Webb, Chapter 5, section 3.2.

(49.) *Al-Adsani v United Kingdom,* App No 35763/97 (European Court of Human Rights, 21 November 2001), paras 35–41.

(50.) Van der Wilt, Chapter 6, section 6.

(51.) Ibid.

(52.) Similarly, in the area of refugee law, states have defined refugee status in a very narrow manner. As a result, the duty not to refoule under the 1951 Refugee Convention rarely arises. See Gilbert, Chapter 7, section 3.2.

(53.) See Webb, Chapter 5, section 3.2.

(54.) See generally Webb, Chapter 5, section 1 and Pavoni, Chapter 4, section 2.1.

(55.) *Kadi* decision (n 24).

(56.) See also Tzanakopoulos, Chapter 3, section 3.1.2.1.

(57.) *Nada* decision (n 22).

(58.) *United States v Lombardo and ors,* Ruling on Motion to Dismiss, Case No 2:07-CR-286-TS (D Utah); ILDC 1055 (US 2007) (United States, District Court of Utah, Central Division 2007).

(59.) Ziegler and Boie, Chapter 10, section 4.2.

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