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Conflicts between international paradigms: Hierarchy versus systemic integration

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Abstract: This article gives an overview of two competing paradigms in the practice of judicial organs for the resolution of norm conflicts, namely the paradigm of a human rights based hierarchy versus the paradigm of systemic integration or conflict avoidance. Judicial practice indicates that norm conflicts typically manifest themselves between human rights obligations on the one hand and other categories of international obligations on the other. Do judicial organs resolve such norm conflicts in a manner that favours human rights obligations? If so, this would support the view in the literature that the international legal order is increasingly operating within a paradigm of hierarchy, with human rights at its apex. The article addresses this question based on the results of a study conducted by 10 authors who have analysed the practice of domestic, regional, supranational and international courts in dealing with norm conflicts between human rights, on the one hand and the other sub-regimes of public international law mentioned above, on the other (de Wet and Vidmar 2011). The article argues that judicial practice reveals no clear or consistent patterns of a human rights based hierarchy in international law can currently be induced from the manner in which courts resolve norm conflicts in international law. Instead, courts avoid resolving norm conflicts within a paradigm of hierarchy and instead remain within a paradigm of systemic integration that is aimed at maximizing the accommodation of competing sub-regimes of public international law.

Keywords: human rights; norm conflicts; peremptory norms

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Introduction

In domestic legal systems, some norms are of a constitutional nature and thereby hierarchically superior to ordinary ones.[1] The system of norm hierarchy is underpinned by the value system of a certain constitutional polity.[2] Domestic legal systems also feature a comprehensive judiciary system, the task of which is the enforcement and interpretation of legal norms as well as resolution of conflicts between them.[3]

International law has traditionally been regarded as a horizontal system of legal norms.[4] Besides the absence of a clear hierarchy, the international legal order also lacks a centralized system of enforcement.[5] The function of the international judiciary is thus 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.

Resolution of norm conflicts refers to the manner in which judicial bodies in a particular situation reconcile (seemingly) incompatible obligations arising under different norms, all of which are binding upon the particular international actor. When are two international legal obligations deemed to be incompatible? In this article such an incompatibility – and by extension the concept of a norm conflict – is defined in two ways, either in a narrow or broad sense. A narrow definition of a 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 (sometimes also referred to as 'apparent conflict'), on the other hand, refers to situations where compliance with an obligation under international law does not necessarily lead to a breach of another norm, but rather to

[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] See D Shelton, 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291.

[3] Kelsen (n 1) 115.

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

[5] It is arguable that the International Court of Justice (ICJ) is the central court which enforces applicable legal norms internationally, as its scope is not limited to a particular international legal sub-regime. However, the jurisdiction of this court to settle international disputes is severely hampered by the fact that it depends on state consent and that only states can be parties to contentious proceedings.

[6] See W Jenks, 'Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401.

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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, arising under various international legal regimes, are balanced against one another. This type of balancing is also referred to as regime-interaction. Conflicts that can be resolved through interpretation are sometimes seen as being only apparent conflicts as opposed to genuine ones. For some authors genuine conflicts are only those which remain irresolvable despite attempts to apply methods of harmonious interpretation.[8]

Judicial practice indicates that norm conflicts, in a broader and narrow sense, typically manifest themselves between human rights obligations on the one hand and other categories of international obligations on the other, notably immunities; extradition and non-refoulement; international peace and security; trade and investment; and environmental law.[9] Sometimes one is also confronted with a conflict between different human rights obligations, which can be described as an intra-regime conflict.

This contribution considers the competing paradigms of norm hierarchy and systemic integration and analyses case law in order to establish which one dominates judicial practice. The contribution draws on the results of a comprehensive study of the practice of international and domestic judicial bodies in dealing with norm conflicts between human rights on the one hand and the other above-mentioned sub-regimes of public international law on the other.[10]

For the purpose of this study international judicial bodies include internationalized and supranational regional courts and tribunals (including

[7] For a discussion see, *inter alia*, M Milanovic, '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 Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of International and Comparative Law* 69, 71–2; E Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17 *European Journal of International Law* 395; J Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, Cambridge, 2003) 176.

[8] M Milanovic, 'Norm Conflicts, International Humanitarian Law, and Human Rights' in O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press, Oxford, 2011) 102. Using the term 'apparent conflict' as synonym for 'broad conflict' can, however, be confusing. It could create the impression that a broad norm conflict does not qualify as a conflict at all. This would not be a correct assumption, as the limitation of the scope of certain rights or obligations under the circumstances is in fact the result of and resolution to a norm conflict.

[9] See E de Wet and J Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, Oxford, 2012) 5.

[10] Ibid.

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criminal and arbitral) as well as quasi-judicial bodies. These international and domestic judicial bodies provide valuable empirical evidence of those norms that are formally acknowledged in judicial decisions 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.

The broad range of judicial decisions considered in the analysis also assists in acquiring comprehensive empirical data about the practical impact of legal pluralism within the international legal order. In a context of multiple parallel, overlapping and conflicting (international) legal obligations, different judicial bodies may use differing techniques for the purpose of conflict resolution. These techniques may, in turn, give an indication as to whether specialized judicial bodies display a functional (regime-oriented) bias when resolving norm conflicts and, if so, whether such bias leads to the strengthening of certain categories of norms at the expense of others.

The second section considers whether and to what extent judicial bodies resolve norm conflicts, either broad or narrow, in a manner that favours human rights obligations. While human rights increasingly shape normative standards in other international legal regimes, it is questionable whether they take an automatic precedence in situations of norm conflicts. The third section analyses the paradigm of a human-rights-based hierarchy as reflected in the concept of *jus cogens*. It argues that although the notion of peremptory norms has been formally acknowledged in jurisprudence, its practical impact has remained limited. The fourth section discusses the paradigm of systemic integration in which judicial bodies tend to resort to various interpretative techniques to reconcile conflicting norms, or even to avoid a norm conflict all together. The fifth section concludes that where human rights clash with other international obligations, judicial bodies tend to favour systemic integration above conflict resolution through the acknowledgment of a human rights hierarchy in international law. Whereas this reduces the relevance of the formal recognition of a hierarchy of norms for human rights protection, it also opens up the possibility of increased accommodation of human rights obligations within other international legal regimes.

The role of international and domestic judicial bodies in determining the place of human rights in international law

In doctrine there has been some support for the argument that the international legal order is increasingly operating within a paradigm of hierarchy, with human rights at its apex. Such an interpretation is particularly rooted in the concept of peremptory norms (*jus cogens*) as concretized in Article 53 of the Vienna Convention on the Law of Treaties of 1969,

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which is mainly formed by a limited number of human rights norms.[11] An additional possible instance of hierarchy follows from Article 103 of the United Nations Charter, which creates a primacy for obligations arising under this treaty over those arising under other international agreements.[12] As such a hierarchy would be applicable across the various sub-regimes of international law, it would ensure some legal certainty, countering the otherwise fragmentary consequences of pluralistic sub-regimes[13].

However, in order to determine the impact of this apparent hierarchy which has its roots in treaty law, one needs to turn to judicial practice. One has to examine how courts interpret the legal obligations arising under the sources of international law and, in particular, how they resolve conflicts when 'ordinary norms' clash with those that ought to be hierarchically superior.

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 fact that the latter constituted *lex posterior* (*lex posterior derogat legi priori*)[14] or *lex specialis* (*lex specialis derogat legi generali*).[15] 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. The paradigm of hierarchy would be upheld if judicial bodies were consistently willing to narrow down other obligations in order to promote human rights obligations essentially on the basis of their special nature.

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 developing international law. Indeed, when enumerating judicial decisions as a subsidiary source of international law, Article 38(1)(d) of

[11] See further below (nn 23–25).

[12] See further below (nn 37–39).

[13] For a discussion, see E de Wet, 'The International Constitutional Order' (2006) 55 *International and Comparative Law Quarterly* 51–76.

[14] See below (nn 54–56).

[15] Under the *lex specialis* principle the more specific legal regulation prevails over the general one. In international law the doctrine may be applied, *inter alia*, with regard to the relationship between treaty law and customary international law, whereas the 'more specific' treaty obligation prevails over a 'more general' customary obligation. Some authors see this as a tool of resolution of norm conflicts, where a treaty obligation conflicts with a customary obligation. See A Orakhelashvili, 'Recent Practice on the Principles of Treaty Interpretation' in A Orakhelashvili and S Williams, *40 Years of the Vienna Convention on the Law of Treaties* (BIICL, London, 2010) 143–4.

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the ICJ Statute[16] does not qualify this provision with '*international* judicial decisions' but invokes 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 relevant for the development of norms of customary international law.[17]

In the absence of a full-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 several aspects of social life has become commonplace.

The acknowledgment of the increasing importance of domestic jurisprudence for the development of international law is not intended to diminish the role of international judicial bodies in this regard. 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.[18]

Especially important for the current analysis 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 (ECtHR) or the United Nations Human Rights Committee (UNHRC) 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.[19]

[16] ICJ Statute, art 38(1)(d).

[17] See E de Wet and J Vidmar, 'Introduction' in De Wet and Vidmar (n 9) 4. See also A Nollkaemper, 'The Role of Domestic Courts in the Case Law of the International Court of Justice' (2006) 5 *Chinese Journal of International Law* 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*'. See also A Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 *International and Comparative Law Quarterly* 57 ff.

[18] De Wet and Vidmar (n 9) 5.

[19] Ibid 5–6.

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Other international judicial bodies have a different functional emphasis than human rights bodies, while national courts for their part function within a much broader paradigm. If these judicial bodies were nonetheless consistently to allow (certain) international human rights obligations to trump other international norms in case of conflict, this would be evidence of an increasing general recognition of the paradigm of human-rights-based hierarchy within international law.[20]

In order to determine the extent to which judicial practice endorses the paradigm of a human-rights-based hierarchy, it is necessary to pay close attention to the techniques which judicial bodies deploy when engaging in norm conflict resolution. Some techniques can be evidence of reluctance on the part of judicial bodies to endorse the paradigm of hierarchy and favour the paradigm of systemic integration instead. 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.[21] In other words, judicial bodies may not acknowledge the existence of a conflict at all and if the conflict is interpreted away, there is no need to establish which norm is 'more important'.

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.

Thus, in the decentralized system of international law, one has to rely on an inductive approach when attempting to determine the existence of a human-rights-based hierarchy within the international legal order. One has to examine the extent to which international (functional) and domestic judicial bodies are willing to accommodate international human rights obligations as a method for conflict resolution between conflicting international norms.

The paradigm of a human rights based hierarchy

At least formally, international law knows of two potential instances of hierarchy, namely norms *jus cogens* and Article 103 of the United Nations Charter.[22] This section will now consider whether judicial practice lends

[20] Ibid 6.

[21] See A Tzanakopoulos, 'Human Rights and United Nations Security Council Measures' in De Wet and Vidmar (n 9) 51–2.

[22] See C Chinkin, '*Jus Cogens*, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution' (2006) 27 *Finnish Yearbook of International Law* 63.

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support for the conclusion that these concepts represent a manifestation of hierarchy in international law.

Peremptory norms of international law (jus cogens)

Doctrinally, the notion of a hierarchy existing within international law finds support in the concept of peremptory norms or *jus cogens*.[23] 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 recognized 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'.[24] This definition reflects the idea that the peremptory norm is no ordinary norm which states are allowed to derogate from or contract out of. The hierarchy implied 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.[25]

An analysis of judicial practice confirms that various judicial bodies have formally recognized the special nature of *jus cogens* norms and that these bodies are not particularly concerned with the fact that the operation of this concept was initially confined to treaty law.[26] In addition, most of the norms on the (still very short) list of peremptory norms are of a human

[23] For references to the concept of 'fundamental norms' see, e.g., 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' 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) 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* 213–19.

[24] The Vienna Convention on the Law of Treaties (1969) art 53.

[25] 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] para 224.

[26] *Armed Activities in the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 6 at 32; Lord Hutton and Lord Millet in *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 3)* [2000] 1 AC 147 1999 All ER 97 (House of Lords); *Public prosecutor's office v Scilingo Manzorro*, Final appeal judgment, No 16/2005 (Spanish High Court); ILDC 136 (ES 2005), *Michael Dominques* (United States), Case 12.285, Inter-Am. C.H.R Report No 62/02, OEA/Ser.L/V/II.117 doc 1 rev.1 (2003) para 49.

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rights nature.[27] Judicial bodies have frequently acknowledged the peremptory status of, in particular, the prohibition of genocide and the prohibition of torture.[28]

However, in practice the relevance of the hierarchically superior nature of *jus cogens* norms for the purpose of norm conflict resolution remains limited. While judicial bodies are on one hand willing to recognize formally the peremptory character of the prohibitions of genocide and torture, they have yet to attach consequences to such peremptory status in the context of norm conflict resolution. For example, an analysis of judgments and arbitral awards in international investment law does not show a single rule of hierarchy which would be applied consistently on a widespread basis. In particular, no rule has emerged in accordance with which an investment that violated a *jus cogens* norm was not entitled to protection of the rules governing investment law – at least not in the context of investor-state cases.[29]

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 that of state immunity. However, even in this instance the relevant case law is coming from one particular jurisdiction. The Italian courts have attached significant weight to the values underpinning *jus cogens* norms and the need for enforcing these obligations (as well as the values that they represent) effectively. In *Ferrini* the Court of Cassation waived the state immunity of Germany in relation to compensation claims for international crimes committed during World War II.[30] In *Lozano* the Court of Cassation did not waive the immunity *ratione materiae* of a United States military official from prosecution in Italy, as the act of killing an Italian intelligence

[27] For a list of the most commonly accepted norms of *jus cogens*, see the Commentary to art 40 paras 4 and 5: 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, pt II. These include prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture, basic rules of international humanitarian law applicable in armed conflict and the right to self-determination.

[28] See (n 21) 51–2.

[29] S Karamanian, 'The Human Rights Dimension of Investment Law' in De Wet and Vidmar, (n 9) 269.

[30] *Ferrini v Germany*, No 5044/04, 87 (2004) Rivista di diritto internazionale 539, ILDC 19 (IT 2004), 128 ILR 659 (11 March 2004); *Criminal Proceedings against Milde*, No 1072/09, 92 (2009) Rivista di diritto internazionale 618, ILDC 1224 (IT 2009). The Italian decisions also find resonance in the dissent of *Al-Adsani v United Kingdom*, App No 35763/97, ECtHR, 21 November 2001, para 55, Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para 3. See also R Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations' in De Wet and Vidmar, (n 9) 87 ff.

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officer in Iraq under the circumstances did not amount to an international crime. However, the Court nonetheless confirmed in an *obiter dictum* that immunity against prosecution would not apply where an international crime was at stake.[31] According to Philippa Webb, these are rare instances where the courts openly confirmed the (potential) trumping effect of a peremptory norm. However, this practice of domestic courts is very limited and cannot yet be generalized as being applicable across jurisdictions.[32] Moreover, the *Ferrini* case has resulted in litigation between Germany and Italy before the ICJ. In this case, the ICJ rather categorically and unambiguously rejected the automatic trumping effect of peremptory norms.[33] From now on this line of argument will be even more difficult to follow in domestic and international litigation.

Moreover, for the purpose of resolving norm conflicts in practice, other formal qualities such as non-derogability can be as or even more relevant than *jus cogens*. This is particularly true in the context of extradition, where the obligation not to extradite persons to countries where they will be exposed to torture (non-refoulement) is an important consideration before extradition may take place.[34] When refusing to give effect to the obligations under an extradition treaty due to a fear that this may result in torture of the extraditee, courts usually do not explicitly refer to the peremptory nature of the prohibition of torture. Instead, the fact that the prohibition of torture is regarded as absolute, allowing no derogation, seems to be the decisive factor.[35]

[31] *Lozano v Italy*, Appeal Judgment Case No 31171/2008, ILDC 1085 (IT 2008); see also L Millet in *Pinochet (No 3)* (n 26) 177; P Webb, 'Human Rights and the Immunities of State Officials' in De Wet and Vidmar, (n 9) 122–3.

[32] As far as the immunity of international organizations is concerned, courts in Europe have relied on art 6(1) ECHR to lift immunity in employment disputes, where the international organization had not provided for an alternative remedy. However, outside the context of employment disputes, courts remain reluctant to lift the immunity of international organizations. In one isolated and older Argentine case, the court ruled that the absence within an international organization of a dispute resolution mechanism pertaining to private claims violated a peremptory norm of international law, namely the right of access to justice. See *Cabrera v Comisión Técnica Mixta de Salto Grande*, 305 Fallos de la Corte Suprema 2150 (5 December 1983). For an extensive discussion of case law see Pavoni (n 30) 99. See also A Reinisch 'The Immunity of International Organizations and the Jurisdiction of Their Administrative Tribunals' 7 (2008) *Chinese Journal of International Law* 285 ff.

[33] *Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening) (Judgment)* [2012] ICJ Rep, 39, para 97.

[34] See H van der Wilt, 'On the Hierarchy between Extradition and Human Rights' in De Wet and Vidmar, (n 9) 149.

[35] See van der Wilt (n 34) 154. See also *Soering v United Kingdom*, (App No 14038) (1989), Series A No 161, para 88; *Vilvarajah and Others v United Kingdom* (App No 45/1990/236/302-306) (1991), 14 EHRR 248, para 108; *Security v Prabakar* [2004] HKCFA 43, [2005] 1 HKLRD 289 (Hong Kong), ILDC 1121 (HK 2004).

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One may therefore conclude that from a conceptual point of view, the notion of *jus cogens* cannot exist without some sort of norm hierarchy within international law.[36] Judicial practice, however, demonstrates that this hierarchy may be no more than rhetorical or formal, as in practice hardly any use is made of the notion of *jus cogens* as a tool of norm conflict resolution. With the exception of developments pertaining to immunities in recent Italian decisions, judicial bodies have persistently refrained from attaching any significance to the special nature of *jus cogens* obligations (or the values underpinning these obligations), for the purpose of overriding conflicting international obligations binding on the state in question.

Article 103 of the United Nations Charter

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 United Nations Charter (the Charter). It is arguable that Article 103 would present a source-based hierarchy rather than a value (substance) based one. It attributes precedence to obligations arising under the Charter on the basis of their origin, namely that they stem from the United Nations Security Council (itself a treaty creation).[37] A plausible argument can also be made that Article 103 does represent a value based hierarchy, as it is directed at giving effect to the enforcement of the purposes of the United Nations, notably the maintenance of international peace and security.[38] In another view, Article 103 does not establish any hierarchy, but was included in the treaty framework of the 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 Charter and which conflict with specific obligations arising from treaties or customary international law.[39]

Hence, Article 103 is not necessarily a rule of hierarchy. According to Antonios Tzanakopoulos, Article 103 does not establish that obligations under the Charter are non-derogable except by a norm of the same or higher rank. Instead, it merely establishes that on occasion the obligations

[36] A Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2006) 9.

[37] See M Milanovic, 'Norm Conflict in International Law: Whither Human Rights?' (2009) 20 *Duke Journal of Comparative and International Law* 69, 78–9; See also Chinkin (n 22) 63.

[38] D Shelton, 'International Law and "Relative Normativity"' in M Evans, *International Law* (Oxford University Press, Oxford, 2009) 178.

[39] The Fragmentation Report (n 25) 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'.

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under the Charter may lead to the non-application of other obligations under international law.[40]

The opposite interpretation is also possible. In *Al-Jedda*, as decided by the (then still) House of Lords, Lord Bingham of Cornhill stated that in the context of Chapter VII of the 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'.[41] It could be argued that Lord Bingham thus suggested that Article 103, in combination with Article 25[42] and Chapter VII of the Charter, also has an important substantive value. Hence, the hierarchy stemming from Article 103 might not only be source related but also substantive – originating in the concern for international peace and security.[43]

In *Nada* the Swiss Federal Supreme Court had to decide whether binding United Nations Security Council resolutions that obliged member states to freeze the assets of individuals blacklisted by the Security Council's Sanction Committee, due to their suspected involvement with international terrorism, took precedence over, *inter alia*, the right to a fair hearing under Article 6(1) of the European Convention of Human Rights (ECHR). The court, relying on Article 103 of the Charter, answered this question in the affirmative, regarding the operation of Article 103 as an 'effect of normative hierarchy in international law'.[44] This explicit acknowledgement of Article 103 as a manifestation of normative hierarchy remains an isolated example in judicial practice. However, when the case subsequently proceeded to the ECtHR, the latter concluded that the Swiss court did not sufficiently use the room at its disposal for interpreting the Security Council resolution in a human-rights-friendly manner. According to the ECtHR, the choice between giving effect to the Security Council resolution and human rights obligations did not constitute a narrow normative conflict, i.e., it did not imply that compliance with one obligation resulted in the breach of another.[45] Nevertheless, the ECtHR in this case very cautiously resorted

[40] Tzanakopoulos (n 21) 66.

[41] *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.

[42] 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.'

[43] In this respect see also Shelton (n 38) 178.

[44] *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.

[45] *Case of Nada v Switzerland*, ECHR, App No 10593/08, Judgment of 12 September 2012, para 180, where the Court reasoned: 'In view of the foregoing, the Court finds that Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding resolutions of the UN Security Council.'

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to the unusual factual circumstances of the case and did not make a straightforward argument that the Security Council cannot demand a violation of human rights.[46]

In *Kadi*, the European Court of Justice (ECJ) did not address the issue of the hierarchical standing of Article 103 within international law, a point to which will be returned below.[47] As a result, it seems that the jury is still out on the nature of the special standing of Article 103 of the Charter within international law.

All in all, judicial practice demonstrates that norm hierarchy may be no more than a theoretical (formal) concept in international law. While the impact of *jus cogens* in judicial practice has thus far been limited to the formal acknowledgement of its existence, it remains uncertain whether Article 103 of the Charter represents a norm hierarchy at all.

The paradigm of systemic integration through interpretation

The analysed judicial practice reveals that conflicts of the narrow kind, such as the *Kadi* and *Nada* cases involving conflicts between United Nations Security Council obligations and the right to a fair hearing, are rare.[48] Most of the time courts are confronted with broad (apparent) conflicts. This section identifies the tools and patterns of conflict resolution as applied in judicial decisions. It demonstrates that traditional conflict rules play a very limited role in the practice of judicial bodies. Instead, they will either reconcile different rights and/or obligations through harmonious interpretation, or they will avoid any overt recognition of the norm conflict through formalistic techniques of conflict avoidance.

The irrelevance of traditional conflict rules

The traditional conflict rules, originating in the general principles of law as well as in the VCLT, are *lex specialis derogat legi generali* and *lex posterior derogat legi priori*.[49] When it comes to the resolution of norm conflicts (whether narrow or broad) discussed in this contribution, judicial practice reveals these traditional conflict rules are unlikely to be of relevance. This

[46] The applicant with severe health problems was not allowed to enter Switzerland and, thus, leave the small Italian enclave surrounded by Swiss territory. As a consequence, he could not reach other areas of Italy – the state of his citizenship – and seek medical attention there. In such peculiar circumstances different human rights concerns can arise than in a situation where the person can move within a larger territory and has access to the necessary facilities. Ibid paras 195–198.

[47] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351.

[48] *Kadi* decision (n 47); *Nada* decision (n 44).

[49] Compare below (nn 54–56).

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can be explained by the fact that neither of these principles is well suited to resolve the type of norm conflicts in question. Indeed, if a new treaty regulates the same subject matter as a previous treaty, this cannot be described as a norm conflict but rather means that the old legal regulation has been replaced by the new one.[50]

The principle of *lex specialis*, a general principle of international law,[51] 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 that form the object of the analysis all stem from different specialized regimes, one was in fact confronted with one *lex specialis* versus another.[52] This point is aptly articulated by Andreas Ziegler and Bertram Boie in relation to disputes between international trade rules and human rights obligations, which can described as an inter-regime conflict that could not be resolved by principles (such as *lex specialis*) designed for resolving intra-regime conflicts.[53]

The *lex posterior* principle, as articulated in Article 30 of the 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.[54] The applicability of this principle is, however, complicated by the fact that it remains unclear how it should apply to subsequent treaties that do not have identical parties.[55]

In addition, there remains disagreement as to what would constitute treaties 'relating to the same subject-matter'. If the principle is applied strictly, inter-regime conflicts would fall outside the scope of the *lex posterior* principle.[56] However, if the principle implied that treaties deal with the same subject matter when the fulfilment of the obligation under

[50] In accordance with art 30(3) of the VCLT this rule only applies where the parties to the latter treaty are identical to those of the former treaty. See also below (nn 54–56).

[51] See Fragmentation Report (n 25) para 11, which also referred to the principle as a standard technique of legal reasoning.

[52] See Fragmentation Report (n 25) para 129 and para 152, which described fields of functional specialization such as international trade law or international human rights law as *lex specialis*. One area where *lex specialis* may be playing a (limited) role, concerns norm conflicts between the law of immunities and human rights. The United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment played a central role in the outcome of the *Pinochet (No 3)* decision (n 26). Three of the six Lords (Browne-Wilkinson, Hope and Saville) relied upon the argument that parties to the treaty waived immunity *ratione materiae*. This argument amounts to attributing *a lex specialis* effect to the treaty. See also Webb (n 31) 144.

[53] See A Ziegler and B Boie, 'The Relationship between International Trade Law and International Human Rights Law' in De Wet and Vidmar, (n 9) 290.

[54] Art 30, para 1, VCLT. See also Fragmentation Report (n 25) paras 229–30.

[55] See also Fragmentation Report (n 25) para 234.

[56] See also Fragmentation Report (n 25) para 253.

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one treaty affected the fulfilment of the obligation under another, the *lex posterior* principle would be applicable.[57] But even then a straightforward prioritization on the basis of the chronological order of the obligations is unlikely and most likely not satisfactory.[58]

The only principle of the VCLT significant for the resolution of the norm conflicts at stake is the principle of systemic integration contained in Article 31(1)(c), which is also accepted as forming a part of customary international law.[59] 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 law.[60] Although judicial bodies do not necessarily refer to this principle explicitly, they frequently apply it in practice.[61]

Reconciliation through restrictive interpretation

Rather than resolving norm conflicts through the trumping of one right or obligation by another, judicial bodies engage in the reconciliation of the competing rights and/or obligations. This attempt at norm conflict resolution through harmonious interpretation can have a significant impact on the scope of the norms in question.

The second section above suggested that the balancing of competing rights and obligations by judicial bodies may result in the implicit recognition of a human rights based hierarchy in international law. This would be the case 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.[62] However, the case law analysis reveals that the only judicial bodies likely to give implicit recognition 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. Other courts are more inclined to avoid a conflict through interpretation and in the process also eliminate any hierarchy.[63]

[57] See Fragmentation Report (n 25) para 254; Pavoni (n 30) 78, followed 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.

[58] Fragmentation Report (n 25) paras 254 and 272; Pavoni (n 30) 78–9.

[59] Fragmentation Report (n 25) paras 427 and 479.

[60] Fragmentation Report (n 25) para 462.

[61] A well-known example is the *Al-Adsani* decision (n 30) para 55; Fragmentation Report (n 25) para 174.

[62] De Wet and Vidmar (n 9) 3.

[63] D Shelton, 'Resolving Conflicts between Human Rights and Environmental Protection: Is There a Hierarchy?' in De Wet and Vidmar, (n 9) 235.

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The absence of a human rights based hierarchy would not necessarily mean that human rights norms have no role to play as a connecting factor between functionally fragmented legal regimes. There is room for human rights considerations in the interpretative process in which judicial bodies engage and it is possible that the impact of human rights in these processes may grow over time. It would, however, be premature to regard human rights as already constituting a strong and well-developed common thread amongst the various legal regimes within the international legal order.

To illustrate the functional bias referred to above, it is illuminating to compare the treatment of the right to property by human rights bodies and arbitral tribunals respectively. The Inter-American Court of Human Rights has shown a tendency to favour the human right to property as guaranteed in Article 21 of the Inter-American Convention on Human Rights over competing investment claims, in particular in relation to the property rights of indigenous communities.[64] A similar position has since also been adopted by the African Commission on Human and Peoples' Rights.[65] However, arbitral tribunals are less inclined to follow a similar reasoning and even if a particular decision effectively results in the protection of the human rights of an indigenous community, the rationale of the decision is likely to be based on other (e.g. investment) principles.[66]

Moreover, it cannot be assumed that specialized human rights courts will necessarily attach a broad scope to human rights obligations whenever presented with a norm conflict. In fact, one reason for the limited practical relevance of *jus cogens* obligations is the very narrow normative scope that all judicial bodies tend to attribute to the peremptory norms of international law. As a result they succeed in avoiding a norm conflict altogether, as it is unlikely that a conflict between the *jus cogens* norm and other norms would arise under such circumstances.

[64] *Ivcher Bronstein v Peru* (2001) Inter-Am. Ct. H.R. (Ser. C) No 74; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* 2001 Inter-Am. Ct. H. R. (Ser. C) No 79; *Moiwana Village v Suriname* (2005) Inter-Am. Ct. H.R. (Ser. C) No 124; *Yakye Axa Indigenous Community v Paraguay* (2005) Inter-Am. Ct. H.R. (Ser. C) No 125 paras 124–127; *Saramaka People v Suriname* Inter-Am. Ct. H.R. (Ser. C) No 172; *Sawhoyamaxa Indigenous Community v Paraguay* (2006) Inter-Am. Ct.H.R. (Ser. C) N. 146. See also Karamanian (n 29) 252.

[65] Afr. Comm. HPR, Case 276/2003 (2010), *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya*, available at <www.up.ac.za/chr>. See also Shelton (n 63) 218–19.

[66] See *Glamis Gold Ltd v United States* (2009) UNCITRAL Case, Award. The arbitral tribunal avoided any express reference to the human rights impact of the mining investment on the indigenous community. Similarly *Biwater Gauff (Tanzania) Ltd v Tanzania* (2008) ICSID Case No ARB/05/22, Award. The case concerned conflicts between investor rights and the right to health and clean water. See also *Suez v Argentina* (2010) ICSID Case No ARB/03/17, Decision on Liability; *Methanex v United States* (2005) UNCITRAL Case, Award, 44 ILM 1345; Karamanian (n 29) 269.

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A very illustrative example concerns the prohibition of torture, where the scope of the *jus cogens* obligation seems to encompass only the prohibition of torture as such (i.e., the negative obligation not to engage in torture).[67] 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 guaranteeing the right of torture victims to access to a court of law. 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 prohibition to engage in torture does not (yet) encompass an ancillary obligation to waive immunity.[68] Such a wider interpretation of the normative scope of *jus cogens* has been suggested by the dissenting judges in *Al-Adsani*[69] and followed in recent Italian decisions. However, it has not yet received wide recognition in judicial practice and in light of the ICJ's decision in *Germany v Italy*,[70] it is unlikely that the *Al-Adsani* dissent will gain the upper hand in judicial decisions.

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.[71] Courts have allowed extradition to states known for engaging in torture practices in instances where the latter have given assurance that this would not occur in relation to the extraditee in question.[72] The conflict between the obligation to extradite in accordance with an extradition treaty and the human rights obligation to refrain from extradition where this may result in torture is thereby prevented by narrowing down the scope (including the absolute character) of the latter obligation. It is only violated if the extraditing state agrees to extradition *without* having received assurances from the requesting

[67] J Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?' in De Wet and Vidmar, (n 9) 33–4.

[68] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, paras 44–45; *Al-Adsani* decision (n 30) para 61; *Bouzari v Iran*, 243 D.L.R. (4th) 406, ILDC 175 (CA 2004) para 90.; *Schreiber v Germany and Canada* [2002] 3 S.C.R. 269, ILDC 60 (CA 2002); Webb, (n 31) 118; Pavoni (n 30) 74.

[69] *Al-Adsani* decision (n 30) paras 35–41.

[70] (n 33).

[71] van der Wilt (n 34) 165–6.

[72] *Al Moayed v Germany*, ECtHR, App No 35865/03, 20 February 2007, para 67 ff; *Judge v Canada* (829/1998) 5 August 2002, UN doc CCPR/C/78/D/829/1998, para 10.9; *United States v Burns* [2001], 1 SCR 283; *Mohamed and another v President of the Republic of South Africa and others*, 2001 (3) SA 893 (CC) ILDC 284 (ZA 2001) para 3.1.1; *Short v The Netherlands*, 1990 NJ 1991, 249. See also van der Wilt (n 34) 167.

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state that the extraditee will not be subjected to torture. The prohibition, therefore, does not apply broadly in the sense that extradition to a state with a notorious torture record is always prohibited. In the process, the absolute character 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.[73]

Similarly, when faced with extradition or deportation requests courts tend to apply a high threshold when determining what constitutes torture, inhuman or degrading treatment[74], as well as evidentiary proof that the risk to the individual is specific and personal.[75] These requirements can also result in narrowing down the scope of the prohibition.

Another example of conflict avoidance through interpretation that affects the nature or scope of the conflicting norms concerns conflicts between human rights obligations and environmental obligations. When dealing with competing human rights and environmental obligations, judicial bodies resolve the conflict by interpreting environmental interests into, for example, the principle of human dignity or the right to life. This is done by relying on a mixture of international and domestic human rights instruments, on the assumption that the goals of environmental protection and human rights are both aimed at ensuring human well-being.[76] This technique does not remove the norm conflict but shifts it to the level of an intra-regime conflict (within the human rights regime itself). It is usually resolved through a balancing act that narrows down the scope of all the rights and obligations at stake.[77]

[73] 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 G Gilbert, 'Human Rights, Refugees and Other Displaced Persons in International Law' in De Wet and Vidmar, (n 9) 190 ff.

[74] For example, in *R (on the application of Bary) v Secretary of State for the Home Department* [2009] WL 2392232; the House of Lords did not, under the circumstances, accept harsh prison conditions combined with the possibility of life without parole in a Florida prison as a bar to extradition. See also van der Wilt (n 34) 156.

[75] See, for example, United Nations Committee against Torture, *Chipana v Venezuela*, CAT/C/21/D/110/1998, para 3; United Nations Human Rights Committee, 31 July 2008, *Maksudov, Rakhimov, Tashbaev and Pirmatov v Kyrgystan,* CCPR/C/93/D 1461, 1462 and 1447/2006, para 12.4; *Saadi v Italy*, ECtHR, App No 37201/06, 27 February 2008, paras 138, 139. See also van der Wilt (n 34) 170.

[76] Inter-Am. Comm. H.R., *Report on the Situation of Human Rights in Ecuador*, OAS doc. OEA/Ser.L/V/II.96, doc 10 rev.1, 24 April 1997 at 92; *Leon and Agnieszka Kania v Poland*, ECtHR, App No 12605/03, 21 July 2009, para 102; *Borysewicz v Poland*, ECtHR, App No 71146/01, 1 July 2008, para 55; *J.K. Koolwal v State of Rajasthan and Others*, 1988 A.I.R. (Raj.), 2; *K.M. Chinnappa, T.N. Godavaram Thirumalpad v Union of India and Others*, [2002] INSC 453; *Narmada Bachao Aandolan v India and Ors*, AIR 2000 SC 3751, ILDC (IN2000). See also Shelton (n 38) 225–6.

[77] See also Shelton (n 38) 226 ff.

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Conflict avoidance through formalistic interpretation

In addition to techniques of interpretation that affect the substance (scope) of conflicting rights and obligations, courts also 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.[78] 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.[79]

Closer scrutiny reveals that this argument is only accurate in as far as it concedes that there is no conflict between the peremptory prohibition against torture and a lower-ranking norm in international law. However, the argument is not accurate in as far 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 arguably procedural in nature.[80]

Another formalistic conflict avoidance mechanism applied in relation to the law of immunities concerns the distinction between private and official acts, when the immunity *ratione materiae* of a state official is concerned. By arguing that crimes under international law (such as the prohibition of torture) cannot constitute 'official' acts, but must be qualified as 'private acts' of the individual the act in question is excluded from the scope of the immunity *ratione materiae*. As a result, a norm conflict with the right to access to court or the right to a remedy will

[78] Domestic cases that upheld immunity *ratione personae* of state officials and (implicitly) supported the procedural-substantive distinction include *inter alia Affaire Kadhafi*, Judgment No 1414 (Court de Cassation, 13 March 2001) 125 ILR 508–10; Court 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 'Joala'*, Arrêt No 09-84.818; *The Hague City Party and ors v The Netherlands and ors*, Interlocutory Proceedings, KG 05/432, ILDC 849 (NL 2005); *Bow Street Magistrates' Court, Re Mofaz*, First Instance unreported (12 February 2004), ILDC 97 (UK 2004); *Bow Street Magistrates' Court, Re Mugabe*, First Instance unreported (14 January 2004), ILDC 96 (UK 2004); *Res Sharon and Yaron* Final Appeal, No P 02 1139 F/1 (Court de Cassation, 12 February 2003), ILDC 5 (BE 2003). See also Webb (n 31) 1136–7.

[79] *Jurisdictional Immunities of the State* – decision, (n 33) paras 52 ff. See generally Webb (n 31) 118; Pavoni (n 30) 74.

[80] But see Pavoni (n 30) section 75. In the alternative one may argue that what is at stake is the right to a remedy and reparations for victims of serious violations of human rights, which constitutes a substantive right. See also H Fox, The Law of State Immunity (2nd edn, Oxford University Press, Oxford, 2008) 159.

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not arise.[81] However, it is doubtful whether the labelling of torture as a private act is convincing, since torture by state officials almost by definition involves the support of the state apparatus which should also incur state responsibility.[82]

Furthermore, domestic and supranational courts occasionally retreat behind the formal argument of dualism as a method of conflict avoidance. The *Kadi* case before the ECJ was a prime example of withdrawal behind the dualist veil for the purpose of conflict avoidance.[83] The ECJ reshaped the norm conflict as a 'domestic' one that had to be resolved on the basis of European Union law. Although effectively giving precedence to human rights protection over security concerns, this decision was based on the value system of the European Union itself. The ECJ did not address the conflict between the international human rights obligations of its member states and their obligations pertaining to international peace and security under the Charter.[84] This decision forms a stark contrast with the *Nada* case of the Swiss Federal Tribunal, which remains a rare and controversial example of open support for the hierarchical superiority of Security Council decisions vis-à-vis international human rights obligations.[85]

A further illustration of conflict avoidance through the 'dropping of the dualist veil' was the *Samantar* case in which the United States Supreme Court held that the Foreign Sovereign and Immunities Act (FSIA) did not grant a former Prime Minister and Defence Minister of Somalia immunity against a civil claim for acts of torture performed in his official capacity.[86] The court concluded that nothing in the text of the FSIA suggested that the term 'foreign state' should be read to include individual officials acting on the state's behalf. The court thus focussed exclusively on the interpretation of a domestic law and did not address the possibility of *Samantar* enjoying

[81] See *inter alia* Lord Hutton in *Pinochet (No 3)* (n 26); *Bouterse*, Judgment on Appeal, HR 00749/01 CW 2323; ILDC 80 (NL 2001) para 4.2, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Merits)* [2002] ICJ Rep 3, para 85.

[82] Webb (n 31) 122. Also, Webb (n 31) 142 elaborates on the emerging practice of treating civil and criminal proceedings differently with respect to immunities, which she also regarded as an (unconvincing) conflict avoidance technique.

[83] *Kadi* decision (n 47).

[84] For a similar dualistic approach in the courts of the United Kingdom, see *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); para 196 ff (Lord Brown). See also Tzanakopoulos (n 21) 53.

[85] *Nada* decision (n 44).

[86] *Samantar v Yousuf*, No 08-1555 slip op (US 1 June 2010), ILDC 1505 (US 2010). See also Webb (n 31) 133.

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immunity under international law, nor whether that would result in a conflict with human rights obligations.[87]

In sum, whether confronted with broad or narrow norm conflicts, judicial bodies rarely resolve them by means of trumping through hierarchically superior norms or any other rules of automatic precedence. Rather, judicial bodies resort to systemic integration through reconciliation and sometimes formalistic approaches of conflict avoidance. A human rights bias in this exercise can be (partly) found in the work of specialized human rights bodies but is not a general pattern. Like other judicial bodies, human rights courts are prone to achieve a balance between the different applicable international obligations in the case at hand.

Concluding remarks

International law has developed as and predominantly remains a horizontal system of norms. Various international and domestic judicial bodies do recognize formally the existence of higher norms in the form of *jus cogens*. This in turn implies the constitutionalization of international law, in the sense that the short list of peremptory norms, most of which are of a human rights nature, rank higher within the international legal order. However, practice reveals that this development has not had any significant impact on norm conflict resolution through judicial reasoning. 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. As a result, they also avoid resolving norm conflicts within a paradigm of hierarchy and instead remain within a paradigm of systemic integration that is aimed at maximizing the accommodation of competing sub-regimes of public international law. These sub-regimes influence and shape one another, but between them there exists no relationship of superiority and subordination.

The technique most frequently applied for sustaining the paradigm of systemic integration is the principle of harmonious interpretation which also finds resonance in Article 31(3)(c) of the VCLT. On one hand, this technique seems to go some way in preventing or at least significantly reducing the fragmentary impact that could result from the development of an increasing number of specialized regimes in international law. On the other hand, it also can result in the reduction of the scope of human rights obligations to a point

[87] For a similar technique in the area of trade law, see *United States v Lombardo and ors*, Ruling on Motion to Dismiss, Case No 2:07-CR-286- TS (D Utah); ILDC 1055 (US 2007). The court refused to apply directly a decision of the WTO Appellate Body pertaining to the General Agreement on Trade in Services (GATS) and applied only United States federal law. Ziegler and Boie (n 53) 292 argued that in doing so, the court 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.

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where they merely exist in name. This, in particular, would also seem to be the fate of *jus cogens* norms, including when interpreted by judicial bodies with a 'pro-human rights' functional bias. More often than not, these norms are interpreted so narrowly by courts that their added value for the purpose of norm conflict resolution is negligible and their formal peremptory character would amount to nothing more than lip-service to the paradigm of a human rights based hierarchy in international law.

On the positive side, the technique of systemic integration implies that functional judicial bodies that operate outside the human rights paradigm such as investment arbitration panels, WTO panels, etc, may increasingly take into consideration human rights considerations when resolving norm conflicts – despite the fact that human rights strictly speaking fall outside their frame of reference.[88] In the long run, and even in the absence of well-developed hierarchy of human rights norms, this may provide increased human rights protection on the international level. In a globalized international community, where the fate of individuals are increasingly determined or affected by decisions of governments and judicial bodies also outside the nation state, this in itself would be a welcome development.

In the final analysis, however, one has to conclude that at the current stage of development of international law, neither the formal recognition of a hierarchy of norms in the form of *jus cogens* nor the technique of systemic integration is a guarantee for effective human rights protection across the various sub-regimes of international law. It is ultimately up to the judicial body in question to determine, on a case-by-case basis, the extent to which the human rights norms at stake will shape the content of the conflicting international obligation and the outcome of the decision. Even within judicial bodies functioning within a distinguished and long-standing functional pedigree, the outcome may not be easily predictable.

[88] There is the risk that the integration of trade and human rights obligations within the same treaty framework could undermine human rights protection as a value in itself and reduce the latter to a mere instrument of free trade protection. For support of such integration see EU Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621. But see also P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law* 843. See generally also R Howse, 'From Politics to Technocracy: and Back Again: The Fate of the Multilateral Trading Regime' (2002) 96 *American Journal of International Law* 94; R Howse and K Nicolaidis, 'Legitimacy through "Higher Law"? Why Constitutionalizing the WTO Is a Step Too Far' in T Cottier and P Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (University of Michigan Press, Ann Arbor, 2003). This debate is, however, concerned with a treaty-based fusion of the two regimes. The present article, on the other hand, considered the conflicting interaction between the two parallel regimes and their systemic integration through judicial decisions, without aiming to redesign the underlying treaty framework.

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