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Introduction

Erika de Wet and Jure Vidmar

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

[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.

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 balancing is 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

[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.

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:

[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.

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

[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).

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

[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).

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

[23] See Chapter 3.
[24] See Mus (n 6) 216; see also Chapters 2 and 3.
[25] See De Wet (n 10) 71.

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?

[26] See Chapter 6.

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

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

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

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.

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.