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**THE EMERGING INTERNATIONAL CONSTITUTIONAL ORDER: THE IMPLICATIONS  
OF HIERARCHY IN INTERNATIONAL LAW FOR THE COHERENCE AND LEGITIMACY  
OF INTERNATIONAL DECISION-MAKING**

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# THE EMERGING INTERNATIONAL CONSTITUTIONAL ORDER: THE IMPLICATIONS OF HIERARCHY IN INTERNATIONAL LAW FOR THE COHERENCE AND LEGITIMACY OF INTERNATIONAL DECISION-MAKING

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## 1 Introduction

In the *Yusuf* and *Kadi* decisions of 2005, the European Court of First Instance (CFI) affirmed the absence of due process for individuals residing in EU Member States and whose assets were frozen, due to their blacklisting by the UN Security Council as 'international terrorists'.<sup>1</sup> This is but one concrete example of the increasing tension between fundamental human rights norms and other international obligations such as international peace and security in the post 9/11 era. In addition, it is a clear illustration of the direct relevance for individuals of the intensification in the shift of public decision-making away from the nation state towards international actors such as international organisations, as it can no longer be said that these decision are only of an inter-state nature.<sup>2</sup>

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1 CFI 21 September 2005, case T-306/01; CFI 21 September 2005, case T-315/01; S/RES/1267 (15.10.1999); S/RES/1333 (19.12.2000); S/RES/1390 (16.01.2002); S/RES/1452 (20.12.2002); S/RES/1455 (17.01.2003); S/RES/1456 (20.01.2003); S/RES/1526 (30.01.2004); S/RES/1617 (29.07.2005); S/RES/1699 (8.08.2006), available at <http://www.un.org/Docs/sc/>.

2 See also *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin) at par 55 ff. On 29 March 2006, the English Court of Appeal relied on the reasoning of the *Yusuf* and *Kadi* cases to justify the detention without trial of a British citizen in Iraq. The court accepted the State's argument that S/RES/1456 (20.01.2003) allowed the British military to suspend, in effect, individual rights such as the right to contest the lawfulness of one's detention under article 5(1) ECHR. At the time of writing, the case was on appeal before the House of Lords.

Moreover, the *Yusuf* and *Kadi* decisions illustrate the inability of any of the respective international legal subjects (UN, EU, Member States) to reconcile by itself its international obligations pertaining to human rights and (inter)national security in a manner that provides any meaningful legal protection to the affected individuals. These (clashing) international obligations also represent obligations that traditionally constituted core elements of the exercise of public power within the nation state, namely the protection of public safety versus the protection of individual liberties. Therefore the *Yusuf* and *Kadi* decisions poignantly illustrate the eroding impact of the continuous (re)-allocation of public power between different international legal subjects on the concept of a 'total' constitutional order, where the fundamental substantive and structural norms that constitute the supreme legal framework for the exercise of public power are concentrated in the nation state.<sup>3</sup> The decisions further underpin the submission that such a supreme legal framework is only possible in a system where national, regional (for example, EU), and functional (for example, WTO, UN) legal orders complement each other in order to form an international constitutional order.<sup>4</sup>

The fundamental substantive elements of the international constitutional order primarily include the value system of the international legal order, meaning norms of positive law with a strong ethical underpinning (notably human rights norms) that have acquired a special hierarchical standing *vis-à-vis* other international norms through state practice.<sup>5</sup> The fundamental structural elements include the subjects of the international legal order that collectively form the international community and they provide mechanisms for the enforcement of the international value system. The international community is composed predominantly of states, which still remain central to international law-making and enforcement. Regional and functional organisations with legal

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3 Walter 2001 *German YIL* 192. Schermers 1963 *Internationale Spectator* 292 ff.

4 De Wet 2006 *ICLQ* 51 ff. See also Kadelbach and Kleinlein 2006 *AVR* 235 ff.

5 See also Dupuy 2005 *EJIL* 133.

personality (for example, EU, UN, WTO), and individuals also participate in the membership of the international community.<sup>6</sup>

The author argues that the term 'constitution' is not exclusively reserved for the supreme legal framework of (sovereign) States, as the fundamental legal framework of any community can be so defined.<sup>7</sup> 'International constitutional law' refers to the fundamental structural and substantive norms – unwritten as well as codified – of the international legal order as a whole, which contain the outer limitations for the exercise of public power. References to the 'constitutionalisation' of the international legal order describe the process of (re-)allocation of competencies among the subjects of the international legal order that shape the international community and its value system.

That there is no reason to reserve the term 'constitution' for the supreme law of a sovereign State consisting of a single *pouvoir constituant* is already illustrated by the fact that federal States such as Germany and the United States recognise sub-national constitutions on the federated state level.<sup>8</sup> More importantly, however, the constitutionalisation process within the European Union (EU) that resulted in the Treaty Establishing a Constitution for Europe,<sup>9</sup> has challenged the notion that a constitutional order necessarily presupposes the existence of such a traditional constitutional *demos*. Europe's constitutional architecture has never been validated by a constitutional *demos*, which challenges one of the classic conditions of a constitution, namely the inherent association of a constitution and constitutional law with state- and peoplehood.<sup>10</sup> Instead, the European constitutional order envisages competing (national) polities within a larger political order in the form of shared values and political organisation.<sup>11</sup> It thus envisages the co-existence of national

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6 De Wet 2006 *LJIL* 611-612.

7 Fassbender 1998 *CJTL* 532-538; 555-61; Allott *Eunomia* 164.

8 Beutler *Das Staatsbild*; Riegler *Konflikte zwischen Grundgesetz und Länderverfassungen*; Maddex *State Constitutions*. See also Weiler In Defence of the Status Quo 9.

9 For the text of the European Constitution (which did not enter into force), see 47 OJ 2004 (2004/C 310/01), also available at EU *Main stages* 2007 <http://europa.eu/> 19 Nov.

10 Weiler In Defence of the Status Quo 9.

11 Maduro Europe and the Constitution, 82, 85; Walker Post-national Constitutionalism 34. Von Bogdandy and Bast (eds) *Principles of European Constitutional Law*.

constitutional orders within a supra-national constitutional order in the form of the EU.

Another domain in which the use of constitutional language has become quite common, concerns the foundational treaties of international organisations. The constituent documents of international (functional) organisations, such as the WTO, the WHO, or the UN, are often described as the constitution of the organisation in question. When used in this context, the term refers to the fact that the constituent document of an international organisation is an international treaty of a special nature. Its object is to create a new subject of international law with a certain (law-making) autonomy, to which the states parties entrust the task of realising common goals.<sup>12</sup> The constitutionalist approach to the law of international organisations is also an indication of the fact that the powers of international organisations have to be exercised in accordance with certain legal constraints, notably those articulated in its constituent document.<sup>13</sup> The constitution of an international organisation thus embodies the legal framework within which an autonomous community of a functional nature realises its respective functional goal, for example, trade liberalisation, human rights protection, or the maintenance of international peace and security.

However, the use of the term 'constitution' is here extended beyond the above notions to describe a system in which the different national, regional and functional regimes form the building blocks of the international community ('international polity') that is underpinned by a core value system common to all communities and embedded in a variety of legal structures for its enforcement. Through the inter-action of the different regimes, glued together by the international value system, the fundamental legal framework of the international legal order containing (*inter alia*) the outer limits for the exercise of public power emerges.

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12 ICJ, Advisory Opinion, 8.7.1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, par 19, available at <http://www.icj-cij.org>.

13 Peters 2006 *LJIL* 579 ff.

The purpose of such an extension is related to the fact that the proliferation in recent years of functional regimes has led some authors to question whether one can actually speak of one international community and one international value system. Instead, they see the emergence of a variety of functional regimes or 'networks'. These functional regimes or networks are characterised by the absence of hierarchy between their respective normative systems, which would determine the outcome of any inter-regime conflicts.<sup>14</sup>

The logical consequence of this line of argument would be that decisions such as those of the CFI in the *Yusuf* and *Kadi* cases in which human rights protection of individuals can effectively be abolished by functional regimes pertaining to (*inter alia*) peace and security, are likely to increase in an era where decisions of international organisations (functional regimes) are increasingly directed at individuals rather than States. This, in turn, is bound to result in a creeping (re-)establishment of absolute public power over private individuals.

As a result, the author challenges the network approach by arguing that the different functional regimes within the international legal order function as complementary elements of a larger whole. This would be the embryonic international constitutional order within which an international value system characterised by hierarchical elements is emerging, which can provide some guidance for solving potential conflicts between regimes. Moreover, since the international value system is composed primarily of human rights norms (see below), inter-regime conflicts would be resolved in a way that prevents uncontrolled exercise of public power over private individuals.

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14 Walter *Post-national Constitutionalism* 173, 194-95, 198; Fischer-Lescano and Teubner 2004 *Mich JIL* 999 ff; Slaughter *A New World Order* 131.

## 2 The international versus regional value systems

The rudimentary hierarchical characteristics of the international value system become very visible when contrasted to the more well-developed hierarchical dimensions of a regional value system, notably that of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950 (ECHR). Regional value systems can be defined in the same manner as the international value system, except that their reach is limited, for example to a particular geographic region, whereas the international value system is of a more universal nature.

The rudimentary international value system is of a layered nature, that includes the (sometimes overlapping) layers of universal *ius cogens* norms and *erga omnes* obligations. As will be illustrated below, most of the international norms qualifying as *ius cogens* and/or *erga omnes* norms are human rights norms, which support the view that human rights have developed into the core of the international value system.<sup>15</sup> The normatively superior character of *ius cogens* norms was introduced in positive international law through article 53 of the Vienna Convention on the Law of Treaties of 1969,<sup>16</sup> with the primary aim of placing the deviation from peremptory norms beyond the treaty-making competence of States.<sup>17</sup>

The concept of *erga omnes* obligations gained recognition through the jurisprudence of the International Court of Justice (ICJ), when it distinguished between the obligations of a state towards the international community as a whole, and those borne towards other (individual) States. In the *Barcelona*

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15 De Wet 2006 ICLQ.

16 UN 2005 *Vienna Convention on the Law of Treaties* <http://untreaty.un.org/> 19 Nov. A 53 determines that: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm 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."

17 See in particular Kadelbach *Zwingendes Völkerrecht*, Orakhelashvili *Peremptory Norms*.

*Traction* case,<sup>18</sup> the ICJ determined that the former obligations are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection: they are obligations *erga omnes*. The notion of *erga omnes* obligations also finds recognition in the Articles on State Responsibility of 2001, where a distinction is drawn between breaches of bilateral obligations and obligations of a collective interest nature, which include obligations towards the international community as a whole.<sup>19</sup>

The *Barcelona Traction* decision of the ICJ provides authority for the conclusion that *ius cogens* norms would have *erga omnes* effect. Without expressly referring to *ius cogens* the ICJ implied as much by the types of (notably human rights) norms it mentioned as examples of *erga omnes* norms.<sup>20</sup> These included the out-lawing of the unilateral use of force, genocide and the prohibition of slavery and racial discrimination. Given the fact that these same prohibitions are widely regarded as being of a peremptory nature, one can conclude that a norm from which no derogation is permitted, because of its fundamental nature, will normally be applicable to all members of the legal community.<sup>21</sup> One should be careful, however, not to assume that the opposite also applies, namely that all *erga omnes* norms would constitute peremptory norms of international law.<sup>22</sup>

For example, the human rights obligations contained in the *International Covenant on Civil and Political Rights* of 1966 (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* of 1966 (ICESCR) all have *erga omnes* effect to the extent that they have acquired customary international

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18 ICJ, Judgment, 5.2.1970, *Barcelona Traction, Light and Power Company* (2<sup>nd</sup> Phase); ICJ Advisory Opinion, 9.7.2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, available at [www.icj-cij.org](http://www.icj-cij.org). See also Report of the International Law Commission, A/61/10 (2006) 419, available at <http://www.un.org/law/ilc/>.

19 See the commentary to a 42 and a 48 in Crawford (ed) *Articles on State Responsibility*; see also Report of the International Law Commission, A/61/10 (2006) 421. See generally Tams *Enforcing Obligations Erga Omnes*.

20 Frowein 1987 *ZaöRV* 71; Zemanek 2000 *Max Planck Yearbook of United Nations Law* 6-7; Report of the International Law Commission, A/61/10 (2006) 421.

21 Frowein *Obligations Erga Omnes* 757; Report of the International Law Commission, A/61/10 (2006) 421.

22 Report of the International Law Commission, A/61/10 (2006) 421.; Dupuy 2002 *RCADI* 385.



law status.<sup>23</sup> Their collective interest nature gives the international community as a whole an interest in their performance and shows that they amount to more than mere "bundles of bilateral obligations".<sup>24</sup> At the same time, this fact does not in and of itself elevate all *erga omnes* human rights obligations to peremptory norms. The peremptory character of the prohibition of genocide and torture resulted from its specific recognition as such by a large majority of States.<sup>25</sup> Customary *erga omnes* norms without peremptory status would therefore constitute a second layer of the international value system, below that of peremptory norms.

The practical value of this layered international value system is closely related to the question of its enforcement. In particular, the question arises whether the international community possesses structures capable of enforcing such a system and resolving potential conflicts between its different (hierarchical) components.<sup>26</sup> The author has argued elsewhere that at the current stage of development of the international constitutional order, the international value system has to be enforced within a variety of institutional structures, given the absence of a binding, centralised international judiciary.<sup>27</sup> It is therefore up to regional and functional judicial bodies, as well as national courts within domestic jurisdictions to enforce the emerging international value system in a decentralised fashion.

Such enforcement can benefit particularly from a potential spill-over effect of well developed regional value systems that show substantive resemblance to

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23 The remaining obligations under the ICCPR and ICESCR would have *erga omnes partes* effect towards States parties. See Dupuy 2002 *RCADI* 382 fn 762; United Nations Human Rights Committee (HRC), General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 v. 26.05.2004, par 2. See also Seiderman *Hierarchy in International Law* 145.

24 See Crawford (ed) *Articles on State Responsibility* 258.

25 Report of the ILC, A/61/10 (2006) 421. For an overview of the jurisprudence concerning the peremptory character of the prohibition of genocide and torture, respectively, see Dupuy 2002 *RCADI* 295-299. For a discussion of the relationship between *ius cogens* en *erga omnes* obligations, see *inter alia* Byers 1997 *Nordic Journal of International Law* 112 ff; Bassiouni 1996 *Law and Contemporary Problems* 63 ff; De Hoogh 1991 *Österreichische Zeitschrift für öffentliches und Völkerrecht* 183 ff; Annacker 1994 *AJPIL* 131 ff.

26 See Fischer-Lescano 2003 *ZaöRV* 734 ff.

27 De Wet 2006 *ICLQ* 64 ff.

the international value system and that have strong enforcement mechanisms. The most advanced example in this regard is the ECHR, which has been concretised by the binding jurisprudence of the European Court of Human Rights (ECtHR). Moreover, the jurisprudence of the ECtHR has elevated the ECHR to a 'European constitutional order' with normative superiority *vis-à-vis* other international obligations of member States.<sup>28</sup> This can *inter alia* be deduced from the manner in which the ECtHR reviews the application of rules flowing from treaties or customary law against ECHR obligations. The underlying rationale for such review seems to be that the norms protected by the ECHR would be of a hierarchically superior nature *vis-à-vis* other norms of public international law. Member States would be prohibited from giving effect to public international law obligations if and to the extent that they were not compatible with the human rights criteria laid down in the ECHR.<sup>29</sup>

Admittedly, it is arguable that the ECHR merely resolved conflicts between international obligations by means of an inherent functional bias, i.e. by giving preference to the very obligations for which it was created to enforce. This would not necessarily imply the ECtHR's intention to elevate ECHR obligations to a normatively superior position *vis-à-vis* other international obligations. However, it is submitted that through repeated references to the constitutional character of the ECHR and its role as an instrument of 'European public order', the ECtHR indeed took a stand on the general normative superiority of ECHR obligations.

The range of cases in which the ECtHR has reviewed the application of public international law obligations against the obligations in the ECHR suggest that the latter's normative superiority would, in principle, apply to all rights in the ECHR.<sup>30</sup> Stated differently, it would apply to absolute rights that may not be restricted or derogated from, even in times of war or public emergency (for

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28 Frowein 1992 *Collected Courses of the Academy of European Law* 267 ff; Sudre *Existe-il un ordre public européen?* 39 ff. See also Walter 1999 *ZaöRV* 979-980; Hoffmeister 2002 *Der Staat* 362-363; Orakhelashvili 2004 *Cambridge Yearbook of European Legal Studies* 246.

29 Walter 1999 *ZaöRV* 979-980.

30 De Wet 2006 *LJIL* 618 ff.

example, the prohibitions on torture and cruel, inhuman or degrading treatment and punishment);<sup>31</sup> rights that may be restricted for narrower purposes such as in times of emergency (for example, the right to a fair trial);<sup>32</sup> and rights that may be restricted for broader purposes, such as public safety, the protection of public order, the prevention of crime and the protection of the rights and freedoms of others (for example, the right to privacy and family life; the right to vote, and the right to property).<sup>33</sup>

This case law further illustrates that an international obligation appearing to be in conflict with an ECHR obligation would not automatically be trumped by the latter. The ECtHR would first attempt to balance and reconcile the different international obligations at stake. This is particularly the case where decisions of binding obligations of international organisations are at stake.<sup>34</sup> However, the fact remains that all rights and obligations under the ECHR have the potential

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- 31 *Soering v. The United Kingdom*, (Application No. 14038/88), Judgment, 07.07.1989; *Iorgov v. Bulgaria*, (Application No. 40653/98), Judgment, 7.07.2004, unpublished; *Mamatkulov & Askarov v. Turkey*, (Application No. 46827/99; 46951/99), Judgment, 4.02.2005; *Öcalan v. Turkey* (Application No. 46221/99), Judgment, 12.05.2005; all judgments available at <http://cmiskp.echr.coe.int>. See also Dugard and Van den Wyngaert 1998 *AJIL* 210 ff.
- 32 *Waite and Kennedy v. Germany* (Application No. 26083/94), Judgment, 18.02.1999; *Al Adsani v. United Kingdom*, (Application No. 35763/97), Judgment 21.11.2001; *Fogarty v. United Kingdom*, (Application No. 37112/97), Judgment, 21.11.2001; *McElhinney v. Ireland* (Application No. 31253/96), Judgment, 21.11.2001; *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, (Application no. 45036/98), Judgment, 20.06.2005; all judgments available at <http://cmiskp.echr.coe.int>.
- 33 *Matthews v. United Kingdom*, (Application No. 24833/94), Judgment, 18.02.1999; *Slivenko v. Latvia*, (Application No. 48321/99), Judgment, 9.07.2003; *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, (Application No. 45036/98), Judgment, 20.06.2005; all judgments available at <http://cmiskp.echr.coe.int>.
- 34 Eg, in *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, (Application No. 45036/98), Judgment, 20.06.2005, the ECtHR adopted a presumption of conformity of the actions of EU organs with the obligations contained in the ECHR. See also the decisions of *Agim Behrami and Bekir Behrami v. France* (Application No. 71412/01), Judgment, 31.05.2007; and *Ruzhdi Saramati v. France, Norway and Germany* (Application No. 78166/01), Judgment, 31.05.2007. Judgments are available at <http://cmiskp.echr.coe.int>. The ECtHR did not accept effective (extra-territorial) control by the member states in question in Kosovo at the time when the alleged violation of the right to life (Art 2) and the right to deny the legality of one's detention (Art 5(1)) of the ECHR occurred in 2000 and therefore declared the case inadmissible. At the time the states in question formed part of the NATO forces in Kosovo, whose presence was authorised under S/RES/1244 (10.06.1999). The ECtHR's rather convoluted arguments in finding an absence of effective control on the part of the states reflects a reluctance to deal with cases in which it is directly confronted with reviewing United Nations Security Council Resolutions such as S/RES/1244 (10.06.1999).

to trump conflicting obligations under international custom or treaty law in instances of irreconcilable conflict.

### 3 The spill-over effect

The question that now arises is whether this well developed regional constitutional order can strengthen the normative superiority of the international value system (and therefore the international constitutional order) through a spill-over effect. Given its role as the most advanced international system for the protection of human rights, the ECHR is bound to have a significant impact on the interpretation and application of human rights obligations contained in other human rights instruments. Therefore, to the extent that the substance of the European public order overlaps with the international value system as a whole, the former is bound to contribute to the strengthening of the normative superiority of the latter.

At this point one has to underline that other regional human rights regimes would in principle be capable of a similar spill-over effect. However, in light of the ECHR's well-developed jurisprudence and that it is already having a significant influence on the interpretation of the UN and other regional human rights instruments, it is empirically justified to commence an analysis of the "spill-over effect phenomena" with the ECHR. A next step would then be to examine the extent of a similar spill-over effect of the remaining regional human rights regimes on the international value system as a whole.

This spill-over effect of the ECHR is partly realised through the jurisprudence of other international or regional human rights bodies. To name but one example, it is well known that the reasoning of the ECtHR in the *Soering* decision was subsequently followed by the UN Human Rights Committee in *Ng v Canada*.<sup>35</sup>

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35 HRC, Decision, 5.11.1993, *Ng v. Canada*, Communication No. 469/1991; HRC, Decision, 30.07.1993 *Kindler v. Canada*, Communication No. 470/1990; HRC, Decision, 20.12.2003 *Judge/ Canada*, Communication No. 829/1998 at <http://www.unhcr.ch/tbs/doc.nsf/>. See also Dugard and Van den Wyngaert 1998 *AJIL* 192.

Similarly, this Committee has followed the ECtHR's approach to reservations in suggesting the severing of reservations to the ICCPR that were in violation of its object and purpose.<sup>36</sup>

However, the spill-over effect can also be realised through the jurisprudence of other international judicial bodies (for example, CFI, ECJ, WTO panels, ICSID arbitration panels) or national courts – if and to the extent that they are confronted with conflicts between international human rights obligations and other international obligations binding on the parties to the dispute. In fact, the existence of a spill-over effect on functional judicial bodies and national courts would reflect the broader normative impact of international human rights norms outside the functional area of human rights. Whereas one may expect that international human rights bodies functioning within similar functional parameters would all accord a higher status to human rights obligations vis-à-vis other international obligations, the same could not necessarily be said of (other) functional judicial bodies or national courts. These bodies operate within a different or, in the case of national courts, much broader functional parameter. If they would nonetheless (consistently) allow international human rights obligations to trump other international obligations in case of irreconcilable conflict, this would be evidence of an increasing general recognition of the hierarchically superior status of the international value system and the strengthening of the international constitutional order as a whole.

Some evidence of national courts attributing a hierarchically superior status to international human rights norms does exist. For example, in the case of *Netherlands v Short*,<sup>37</sup> the Dutch Supreme Court refused the extradition to the United States of an American soldier suspected of having murdered his wife in the Netherlands, despite the fact that such extradition was required under the

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36 See HRC General Comment No. 24, CCPR/C/21/Rev.1/Add.6, 4. 11. 2004. For the ECtHR see *Belilos v. Switzerland* (Application No. 10328/83), Judgment, 29.4.1988; *Loizidou v. Turkey Application* (No. 15318/89), Judgment, 25.03.1995, available at <http://cmiskp.echr.coe.int>. See also Francioni 1999 *Italian YIL* 22-23.

37 HR. 30.3.1990, Par. 7.4, English translation available in *International Legal Materials* 29 (1990), 1375 ff.

NATO Status of Forces Treaty of 1951.<sup>38</sup> Under the influence of the Soering case, the Dutch court feared a violation of Article 3 ECHR, as there was a real risk of the accused being subjected to the "death row phenomena".<sup>39</sup>

More recent examples of the role of national courts in this regard inter alia include two decisions pertaining to article 6(1) ECHR. In the case of *Siedler v Western European Union*,<sup>40</sup> the Belgian Court of Appeal waived the immunity of the Western European Union (WEU) in a case that concerned a labour dispute between the WEU and one of its employees. Under the influence of the ECtHR *Waite and Kennedy* decision,<sup>41</sup> the Belgian court determined that the internal Appeals Commission of the WEU did not provide adequate alternative legal protection in terms of article 6(1) of the ECHR. Similarly, the French Court of Cassation recently declared a case admissible that concerned a dispute between the African Development Bank (BAD) and one of its employees, despite the immunity enjoyed by the former. In *Banque Africaine de Developpement v M.A. Degboe*<sup>42</sup> the Court of Cassation justified the BAD's waiver of immunity on the basis that the impossibility of a party to a civil dispute to bring the case before a court of law that renders binding decisions, constituted a denial of justice that violated the international public order.

Although these decisions primarily strengthen the European public order, they can also result in an indirect strengthening of the international value system as whole, for it is possible that these decisions may influence other national courts or international bodies to apply a similar reasoning to more universal human rights instruments such as the ICCPR. It is significant that in the *Degboe* case, the French Court of Cassation not merely made reference to a violation of article 6(1) ECHR (and therefore the European public order), but to a violation

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38 Treaty of 17.06.1951, Trb (1951) 114, Trb (1953).

39 See also De Wet 2006 *LJIL* 629-630.

40 *Siedler v Western European Union*, Brussels Labour Court of Appeal (4<sup>th</sup> chamber), 17 September 2003, *JT* 2004, 617; ILDC 53 (BE 2003).

41 *Waite and Kennedy v. Germany* (Application No. 26083/94), Judgment, 18.02.1999, available at <http://cmiskp.echr.coe.int>.

42 Judgment, 25.01.2005, *Banque Africaine de Developpement v. M.A.Degboe*, Nr. 04-41012, available at <http://www.courdecassation.fr/>.

of the international public order. This is already an indication of a spill-over effect of the ECHR on the international value system as a whole.

Another interesting case is the *Rukundo* decision of the Swiss Federal Supreme Court.<sup>43</sup> This decision involved a request by the International Criminal Tribunal for Rwanda (ICTR) – a tribunal that was created by the Security Council under Chapter VII of the UN Charter<sup>44</sup> – for the transfer of Mr. Rukundo by the Swiss authorities to the ICTR. Mr. Rukundo claimed that the procedure before the ICTR would not satisfy the fair trial standards under articles 6 ECHR and 14 of the ICCPR. The Federal Supreme Court emphasised that Switzerland would not support international proceedings that did not guarantee those basic human rights in the ICCPR and the ECHR that constituted elements of the international public order.

The Swiss court thus incidentally reviewed the legality of a Security Council resolution when scrutinising the domestic measures that implemented the resolution. In doing so, it reviewed the actions of the Security Council against obligations in the ECHR as well as the ICCPR. It affirmed – at least in principle – the normative superiority of both human rights instrument vis-à-vis binding Security Council resolutions in case of conflict. In this fashion the Swiss court strengthened both the regional<sup>45</sup> and international value systems.<sup>45</sup> At the same time the Court was at pains to interpret the different international obligations in a harmonious fashion. It acknowledged the strong presumption of legality of a judicial body created on the authority of the Security Council and concluded that the procedural defects of the ICTR were not of such a nature as to rebut the presumption of their conformity with international human rights obligations.

Even so, the rhetorical willingness of the Swiss Court to acknowledge the normative supremacy of human rights obligations - also in relation to obligations flowing from the United Nations Charter - forms a clear contrast with

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43 Judgment, 3.9.2001, *Emmanuel Rukundo v. l'Office fédéral de la justice*; Nr. 1A.129/2001, available at <http://www.bger.ch/>.

44 S/RES955 (8.11.1994).

45 De Wet and Nollkaemper 2002 *German YIL* 192 ff.

the *Yusuf and Kadi* decisions of the CFI,<sup>46</sup> in which the right to a fair trial was outweighed by obligations under the UN Charter pertaining to international peace and security.

#### 4 Conclusion

One could therefore conclude that there is already some evidence of a hierarchically superior international value system that draws inspiration and strength from a regional value system in the form of the ECHR. At the same time, however, the international value system remains fragile (especially in relation to obligations pertaining to international peace and security).

Moreover, extensive analysis of the practice of regional, sectoral and national (judicial) bodies has yet to be undertaken, in order to determine whether over time, the spill-over effect of the ECHR (and other regional human rights regimes) on the international value system will strengthen the latter to the point where all customary human rights obligations with *erga omnes* effect enjoy a superior standing in the international legal order which is similar to that of the ECHR on a regional level. Whether or not it would be accurate to describe the (core content) of the rights in the ECHR as constituting regional *jus cogens*, it nevertheless cannot be denied that these obligations have a special normative standing in international law.

In essence therefore, it remains to be examined whether the spill-over effect of the ECHR (and other regional human rights regimes) on the international value system would strengthen the latter to the point where all customary human rights obligations with *erga omnes* proper effect enjoy a superior standing – regardless of whether they strictly qualify as peremptory norms of international law. The true test for this development would lie in the extent to which courts and functional regimes outside the system of human rights acknowledge the

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46 See also *R. (on the application of Al-Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin) at par 55 ff as discussed in note 2 above.



normatively superior standing of international human rights obligations *vis-à-vis* other international obligations.

By engaging in such an analysis, one would effectively examine the extent to which a supreme (legal) framework for the (control over) the exercise of public power can be found in the interaction between national, regional and functional regimes and the core value system common to all regimes.

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**List of abbreviations**

a	article(s)
CFI	European Court of First Instance
ch	chapter(s)
cl	clause(s)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
NATO	North Atlantic Treaty Organisation
par	paragraph(s)
s	section(s)
sch	schedule(s)
UN	United Nations
WEU	Western European Union
WHO	World Health Organisation
WTO	World Trade Organisation