THE INTERNATIONAL CONSTITUTIONAL ORDER

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Constitutionalism is a deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulation of the complexily overlapping political communities of a post-Westphalian world.[1]

I. INTRODUCTION

This article argues the case for an emerging international constitutional order consisting of an international community, an international value system and rudimentary structures for its enforcement. It departs from a perception of international constitutionalism that refers to the fundamental structural and substantive norms—unwritten as well as codified—of the international legal order as a whole. The reference to the constitutionalization of the international legal order indicates the process of (re-)organization and (re-)allocation of competence among the subjects of the international legal order, which shapes the international community, its value system and enforcement.[2]

Traditionally, the term 'constitution' was reserved for domestic constitutions. The domestic constitution as we know it today is a concept invented by the 18th- and 19th-century legal philosophy, in order to facilitate the transition from feudalism to liberalism. Written constitutions were favoured as a means of limiting state intrusion on private rights and liberties and of ensuring political participation of citizens.[3] Most municipal constitutions today provide a legal framework for the political life of a community for an

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[1] Neil Walker 'Post-national Constitutionalism and the Problem of Translation' in Joseph HH Weiler and Marlene Wind (eds) *European Constitutionalism beyond the State* (CUP Cambridge 2003) 53.

[2] See also Alfred Verdross and Bruno Simma *Universelles Voelkerrecht: Theorie und Praxis* (3rd edn Duncker and Humblot Berlin 1984) 70 ff.

[3] Bardo Fassbender 'The United Nations Charter as Constitution of the International Community' (1998) 36 Columbia Journal of Transnational Law 573. See also Christian Tomuschat 'Obligations Arising for States without or against their Will' (1993 IV) 235 Recueil des Cours de l'académie de droit international de la Haye 235; Thomas Franck 'The Emerging Right to Democratic Governance' (1992) 85 American Journal of International Law 46 ff.

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indefinite time.[4] They present a complex of fundamental norms governing the organization and performance of governmental functions in a given State and the relationship between State authorities and citizens.[5]

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 recognize sub-national constitutions on the federated State level.[6] More importantly, however, the constitutionalization process within the European Union (EU) that resulted in the Treaty Establishing a Constitution for Europe, has challenged the notion that a constitutional order necessarily presupposes the existence of such a traditional constitutional *demos*.[7] Europe's constitutional architecture has never been validated by a process of constitutional *demos* and challenges one of the classic conditions of a constitution, namely the inherent association of a constitution and constitutional law with State- and peoplehood.[8] Instead, the European constitutional order envisages competing (national) polities within a larger polity order in the form of shared values and political organization.[9] It thus envisages the co-existence of national constitutional orders within a supra-national constitutional order in the form of the EU.

The debate pertaining to European constitutionalization has illustrated the utility of the transposition to the post-national level of abstract notions of constitutionalism, in order to acquire control over decision-making taking place outside national borders.[10] This debate has concerned the transposition of notions ranging from neo-Kantian humanistic values to democracy, accountability, equality, the separation of powers, the rule of law and fundamental rights. In essence, European constitutionalists have illustrated the significance of constitutionalism as a frame of reference for a viable and legit-

[4] Fassbender (n 3) 536.

[5] ibid 534.

[6] See, eg Beng Beutler *Das Staatsbild in den Länderverfassungen nach 1945* (Duncker and Humblot Berlin 1973); Johannes J Riegler *Konflikte zwischen Grundgesetz und Länderverfassungen* (Würzburg University Würzburg 1996); Robert L Maddex *State Constitutons of the United States* (Congressional Quarterly Washington 1998). See also Joseph HH Weiler 'In Defence of the Statues Quo: Europe's Constitutional *Sonderweg*' in HH Joseph Weiler and Marlene Wind (eds) *European Constitutionalism Beyond The State* (CUP Cambridge 2003) 9.

[7] 'Treaty Establishing a Constitution for Europe', reprinted in (2004) 47 Official Journal of the European Union 2004/C 310/01.

[8] Weiler (n 6) 9.

[9] Miguel P Maduro 'Europe and the Constitution: What if this is as Good as it Gets?' in Joseph HH Weiler and Marlene Wind (eds) *European Constitutionalism Beyond The State* (CUP Cambridge 2003) 82, 85.

[10] The author uses the term post-national to refer to all legal orders on the international level. The term is used in a descriptive fashion to describe those legal orders that lie 'beyond' the State. It is broad enough to include a supra-national (regional) order with a high level of integration such as the European Union, as well as (universal) international orders with a lesser level of integration such as the United Nations. See also Joseph HH Weiler and Marlene Wind 'Introduction' in Joseph HH Weiler and Marlene Wind (eds) *European Constitutionalism Beyond The State* (CUP Cambridge 2003) 3. See also Walker (n 1) 34.

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imate regulatory framework for any political community, including those in a post-national setting, ie those constitutional orders that are formed beyond the state, which can be of a regional, international, or supra-national nature.[11]

Another post-national domain in which the use of constitutional language has become quite common—perhaps as a spill-over effect of the European debate—concerns the foundational treaties of international organizations. The constituent documents of international organizations, such as the World Trade Organization (WTO), the World Health Organization (WHO), or the United Nations (UN), are often described as the constitution of the respective organization in question. When used in this context, the term constitution refers to the fact that the constituent document of an international organization 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 realizing common goals.[12] The constitutionalist approach to the law of international organizations is also an indication of the fact that the powers of international organizations have to be exercised in accordance with certain legal constraints, notably those articulated in its constituent document.[13] The constitution of an international organization thus embodies the legal framework within which an autonomous community of a functional (sectoral) nature realizes its respective functional goal, eg trade liberalization, human rights protection, or the maintenance of international peace and security.

This article extends the use of the term constitution beyond this usage to describe a system in which the different national, regional and functional (sectoral) constitutional 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. This vision of an international constitutional model is inspired by the intensification in the shift of public decision-making away from the nation State towards international actors of a regional and functional (sectoral) nature, and its eroding impact on the concept of a total or exclusive constitutional order where constitutional functions are bundled in the nation State by a single legal document.[14] It assumes an increasingly integrated international legal order in which the exercise of control over the political decision-making process would only be possible in a system where national and post-national (ie regional and functional) constitutional orders complemented each other in what amounts to a *Verfassungskonglomerat*.

[11] See also Walker (n 1) 34; Maduro (n 9) 84.

[12] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* Advisory Opinion ICJ Rep 1996 para 19.

[13] Anne Peters 'Global Constitutionalism Revisited' paper presented at seminar on the Future of International Constitutional Law in Amsterdam on 28 Nov 2003 s 2A.

[14] Christian Walter 'Constitutionalising (Inter)national Governance—Possibilities for and Limits to the Development of an International Constitutional Law' (2001) 44 German Yearbook of International Law 192. For an earlier articulation of this phenomenon, see Henry G Schermers 'Internationaal institutioneel recht' (1963) 17 Internationale Spectator 292 ff.

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States—who constitute the main members of the international community—have never consciously come together to establish a constitution regulating the international public order and setting forth the guiding principles for the main functions of international governance.[15] Instead, the international community developed over time. Within this evolutionary process, the adoption of the United Nations Charter (the UN Charter) constituted a definitive moment in the emergence of an international community.[16] Its universal State membership has the dual role of sectoral constitutional regime for peace and security, and key connecting factor that links the different State communities to the international community.[17] As will be indicated below, the membership of the international community extends beyond the State membership provided for in the UN Charter. As a result, it would not be accurate to describe the UN Charter as 'the constitution' of the international community.[18] Even so, the UN Charter has had a significant impact on the membership of the international community through its linking function.

The notion of an international community was also strengthened by 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 arising towards other (individual) States. In the *Barcelona traction case* of 1970, 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*.[19] Recently, the ICJ has reaffirmed this distinction in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[20]

This concept of community-oriented obligations further finds recognition in the law of State responsibility, which has created a system of responsibility for serious violations of international obligations towards the international community as a whole (*erga omnes*). In the Articles on State Responsibility of 2001, the International Law Commission (ILC) drew a distinction between breaches of bilateral obligations and obligations of a collective interest nature, which include obligations towards the international community as a

[15] Tomuschat (n 3) 219.

[16] ibid 236; Fassbender (n 3) 573.

[17] Thomas Franck 'The Political and the Judicial Empires: Must there be a Conflict over Conflict-Resolution?' in Najeeb Al-Naumi and Richard Meese (eds) *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nijhoff The Hague 1995) 627.

[18] As is done by Fassbender (n 3) 529. For criticism of this view see Christian Walter 'International Law in a Process of Constitutionalization' paper delivered in Amsterdam on 10 July 2005 s II.

[19] *Barcelona Traction, Light and Power Company Ltd* (Second Phase) [1970] ICJ Rep 32.

[20] Advisory Opinion 9 July 2004 para 155 ff available at <http://www.icj-cij.org>.

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whole.[21] Breaches of a bilateral nature include situations where the performance of an obligation involves two individual States, even though the treaty framework or customary rule in question establishes obligations applicable to all States (parties).[22] In such an instance the nature of the obligations stemming from the multilateral treaty or customary rule can be described as 'bundles of bilateral obligations'.[23] An example in point would be Article 22 of the Vienna Convention on Diplomatic Relations,[24] where the obligation to protect the premises of a diplomatic mission is owed by the individual receiving State to the individual sending State.[25]

Breaches of a collective nature concern obligations that have been established for the protection of the collective interest of a group of States (*erga omnes partes*) or indeed of the international community as a whole (*erga omnes*).[26] Concrete examples of *erga omnes (partes)* obligations can be found in particular in human rights law and international criminal law. Obligations stemming from regional or universal human rights treaties would have *erga omnes partes* effect towards other States parties, as well as *erga omnes* effect to the extent that they have been recognized as customary international law.[27] The same would apply to the obligations articulated in the Statute of the International Criminal Court (ICC) and which grant the ICC jurisdiction over the most serious crimes of concern to the 'international community as a whole', namely genocide, crimes against humanity and war crimes.

At this stage of its development, the international community is still predominantly composed of States, as they remain central to the process of international law-making, including the establishment of those obligations that constitute the core of the international value system.[28] This pre-eminence is not, however, to be confused with exclusivity. For the international community includes subjects in addition to States, notably international and regional organizations such as the UN, the WTO and the EU. In addition, individuals also constitute members of the international community to the extent that they possess international legal personality, for example in the context of global or regional systems for the protection of human rights.

[21] See Art 42 and Art 48 of the Articles on State Responsibility available in James Crawford *The International Law Commission's Articles on State Responsibility* (CUP Cambridge 2002).

[22] ibid 257. [23] ibid 258.

[24] 18 May 1961 500 United Nations Treaty Series 95.

[25] See *United States Diplomatic and Consular Staff in Tehran* ICJ Rep 1980 3 ff; see also Crawford (n 21) 257–8.

[26] Crawford (n 21) 277.

[27] Pierre-Marie Dupuy 'L'unité de l'ordre juridique international' (2002) 297 Recueil des Cours de l'académie de droit international 382, 384; Crawford (n 21) 277–8; International Law Institute *The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States*, Resolution adopted during the Session of Santiago de Compostela 1989 Art 1 available at <http://www.idi-iil.org/>. See Human Rights Committee 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 of 26 May 2004 para 2.

[28] See Dino Kritsiotis 'Imagining the International Community' (2002) 13 European Journal of International Law 967 ff.

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The international community is therefore in essence made up of different, sometimes overlapping communities each with its own normative (value) system, which can be of a national, regional or a functional (sectoral) nature. Whereas the European Union and the African Union would be examples of regional communities, the WTO would constitute a sectoral community (trade), as would the UN (peace and security). The different regional human rights regimes would also complement each other to constitute, together with the UN human rights regime, a distinct sectoral regime. Together the different communities complement one another in order to constitute a larger whole in the form of the international community.

Such an inclusive view of the international community also finds support in the Articles on State Responsibility of 2001, where the ILC deliberately omitted the linkage of the international community to State actors. Initially, a number of governments had suggested that the phrase 'the international community as a whole' should read 'the international community of *States* as a whole'. These States pointed in particular to the definition of peremptory norms in Article 53 of the two Vienna Conventions of 1969 and 1986, which uses that phrase in terms of the recognition of certain norms as having a peremptory character. The ILC, however, rejected this proposal on the grounds that whilst States belonged ex officio to the international community, such membership was no longer limited to States.

The existence and proliferation in recent years of sectoral regimes have led some authors to question whether one can actually talk of one international community and one international value system. Instead, they see the emergence of a variety of functional (sectoral) constitutional regimes or 'networks'. These functional regimes or networks are characterized by the absence of hierarchy between their respective normative systems, that would determine the outcome of any inter-regime conflicts.[29] The current contribution distinguishes itself from the network approach by arguing that the different sectoral regimes within the international legal order function as complementary elements of a larger whole. This would be the embryonic international constitutional order with the UN Charter system as the main connecting factor.[30] Within this embryonic order an international value system characterized by hierarchical elements is emerging, which can provide some guidance for solving potential conflicts between regimes. In order to understand this submis-

[29] See Walter (n 14) 173, 194–5, 198; ibid Amsterdam paper (n 18) s I; Peters (n 13) s 5. For a discussion on the network structure of a polycentric society see Andreas Fischer-Lescano and Günther Teubner 'Regime-Collission: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 Michigan Journal of International Law 999 ff; Anne-Marie Slaughter *A New World Order* (Princeton University Press Princeton 2004) 131 ff.

[30] See Walter (Amsterdam Paper) (n 18) s II, who correctly points out that by regarding the UN Charter as 'the international Constitution', one glosses over the functional differentiation in the international legal order. At the same time, however, one should not underestimate the importance of the UN Charter as connector within the international constitutional order.

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sion, it is necessary to explain in more detail the nature of the international value system, as well as the mechanisms for its enforcement.

III. THE MANIFESTATION OF THE INTERNATIONAL VALUE SYSTEM THROUGH AN EMERGING HIERARCHY IN INTERNATIONAL LAW

The international value system concerns norms with a strong ethical underpinning, which have been integrated by States into the norms of positive law and have acquired a special hierarchical standing through State practice.[31] Through this combination of superior legal standing and ethical force, these international values constitute a fundamental yardstick for post-national decision-making.[32] As will be illustrated below, this hierarchy manifested itself in particular in relation to human rights norms. It is of a layered nature as it includes the (sometimes overlapping) layers of universal *ius cogens* norms and *erga omnes* obligations.

The international value system is closely linked to the UN Charter, as the latter's connecting role is not only structural but also substantive in nature. In addition to providing a structural linkage of the different communities through universal State membership, the UN Charter also inspires those norms that articulate the fundamental values of the international community. Due to the inspirational role of in particular Article 1(3) of the UN Charter in combination with Articles 55, 56, 62, and 68, human rights norms were promoted in a fashion that elevated them to core elements of the international value system.[33] These articles significantly contributed to a climate in which an elaborate system for human rights protection was created within the UN Charter system, as well as within regional and/or (other) functional regimes. These protection mechanisms and the concretization of the norms in question resulting from them, in turn significantly contributed to the recognition of the *erga omnes* character and, in some instances, even peremptory status of human rights norms.[34]

Within the UN Charter system the concretization of human rights norms has occurred, in part, through the activities of the principal organs of the United Nations itself. The cornerstone of this development was the adoption

[31] See Pierre-Marie Dupuy 'Some Reflections on Contemporary Interantional Law and the Appeal to Universal Values: A Response to Martte Koskenniemi' (2005) 16 European Journal of International Law 133.

[32] The author does not deny that a variety of non-legal ethical norms could also serve as important yardsticks for post-national decision-making. However, the aim of the present contribution is to focus on those ethical norms that simultaneously amount to a legal yardstick for international decision-making.

[33] See Manfred Nowak *Introduction to the International Human Rights Regime* (Martinus Nijhoff Leiden 2004) 73 ff.

[34] See extensively Erika de Wet 'The prohibition of torture as an international norm of Jus Cogens and its implications for national and customary law' (2004) 15 European Journal of International Law 97 ff.

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of the International Bill of Rights, ie the Universal Declaration of Human Rights of 1948; the Covenant on Civil and Political Rights (ICCPR) of 1966 and the Covenant of Economic, Social and Cultural Rights (ICESCR) of 1966.[35] In addition, the Economic and Social Council (ECOSOC) of the United Nations has developed an elaborate system for the implementation of the rights in the two main Covenants as well as those in other UN human rights treaties. These include the appointment of independent experts to the human rights treaty committees, the increasing use of special rapporteurs by the Commission on Human Rights, the various channels now available for bringing individual petitions to United Nations bodies and the so-called mainstreaming of human rights in the operation of various international organisations including the World Bank.[36]

The Security Council for its part created two ad hoc criminal tribunals for the former Yugoslavia and Rwanda, respectively, which has significantly contributed to the concretization of those human rights violations that qualify as genocide, war crimes and crimes against humanity. The fact that these tribunals were officially created for the prosecution of 'serious violations of international humanitarian law',[37] does not diminish their importance for the concretization of human rights norms. This results from the fact that the respective violations of humanitarian law simultaneously constitute grave human rights violations.[38] Further concretization of human rights norms has occurred outside the UN Charter system in different regional or functional (sectoral) regimes for the protection of human rights. In addition, the ICC is likely to build on the work of the two ad hoc tribunals, by enforcing (and in the process concretizing) the international core crimes of genocide, war crimes and crimes against humanity.[39]

It is significant that the hierarchy of norms that has emerged within the international legal order in the form of peremptory norms or *jus cogens*, predominantly concerns human rights norms. The normatively superior character of these norms were introduced in positive international law through Article 53 of the Vienna Convention on the Law of Treaties of 1969,[40] with

[35] See Ian Johnstone 'The US–UN Relations after Iraq: The End of the World (Order) as We Knot It?' (2004) 15 European Journal of International Law 824.

[36] ibid.

[37] See S/RES/827 of 25 May 199, para 1 ff; and S/RES/955 of 8 Nov 1994 para 1 ff. In S/RES/1315 of 14 Aug 2000 para 1 ff. The Security Council also requested the Secretary-General to negotiate with the Government of Sierra Leone the creation of a tribunal for the prosecution of serious violations of international humanitarian law. The prosecution of war crimes, genocide and crimes against humanity in East-Timor was regulated by the United Nations Transitional Administration in East Timor (UNTEAT) in UNTAET/REG/2000/11 of 6 Mar 2000.

[38] See Human Rights Committee (n 27) para 18.

[39] See Art 5 of ICC Statute available at <http://www.un.org/law/icc/>.

[40] Reprinted in (1969) 8 International Legal Materials 679 ff. Art 53 reads as follows: '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.'

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the primary aim of placing the deviation from peremptory norms beyond the treaty-making competence of States.[41] Although the number of norms having achieved *jus cogens* status remains limited, most of those which are recognized as such, namely the prohibition of genocide, torture, slavery and racial discrimination, are human rights norms.[42] As it is arguable that evolution of these norms into peremptory norms was accelerated by their concretization through the mechanisms developed under the UN Charter system,[43] it would be fair to conclude that the UN Charter's normative framework has been instrumental in bringing about a verticalization in the relations of Member States *inter se*. It has been the catalyst for the development of a legal order based on hierarchically superior values, as opposed to one exclusively based on the 'equilibrium or value of sovereigns'.[44]

Within Europe, an additional layer of human rights hierarchy is identifiable through the practice of the European Court of Human Rights.[45] This is reflected, inter alia, by a decision in which the Court reviewed the compatibility of a rule of customary international law with the right of access to courts guaranteed in Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms of 1950 (the European Convention). The underlying rational for such a review seemed to be that the norms protected by the European Convention would be of a hierarchically superior nature. Member States would be prohibited from recognizing norms of customary international law if and to the extent that they were not compatible with the human rights criteria upheld in the European Convention.[46]

For example, in the case in question, ie *Waite and Kennedy v Germany*,[47] employees of the European Space Agency (ESA) had initiated proceedings against the ESA in the German Labour Courts. The aim of these proceedings was to effect a change in their terms of employment, by means of which their short-term employment contracts would be changed into permanent contracts. The German courts refused to provide the plaintiffs with legal protection on the ground that the ESA enjoyed immunity in the German courts in accordance

[41] For example, a treaty between States allowing for the transfer of detainees from one country to another in order to facilitate torture practices during interrogation would be null and void, as it would violate the prohibition of torture. See Eva Kornicker *Ius Cogens und Umweltvölkerrecht* (Helbing and Lichtenhahn Basel 1997) 105.

[42] See also the *Barcelona Traction* decision (n 19) and its implications.

[43] Pierre-Marie Dupuy 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck Yearbook of International Law 10–11, 31; see also Jochen A Frowein, 'Ius Cogens' (1995) 3 Encyclopedia of Public International Law 67.

[44] Daniel Thürer 'Internationales "Rule of Law"—innerstaatliche Demokratie' (1995) 5 *Schweizerische Zeitschrift für Internationales and Europäisches Recht* 457; See also Barbara Lorinser *Bindende Resolutionen des Sicherheitsrates* (Nomos Berlin 1996) 87. Cf Fassbender (n 3) 548, 554, 574; Tomuschat (n 3) 216. See also Michael Byers 'Conceptualizing the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nordic Journal of International Law 212.

[45] Christian Walter 'Die Europaische Menschenrechtskonvention als Konstitutionalizierungsprozess' (1999) 59 Zeitschrift fuer ausländischs öffentliches Recht und Völkerrecht 979–80.

[46] ibid 980.

[47] *Waite and Kennedy v Germany* Judgment of 18 Feb 1999 RJD 393 (1999-I) 393.

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with customary international law. When confronted with the question whether this decision of the German courts violated the right of individuals to legal protection under the European Convention, the European Court of Human Rights (EctHR) determined that this was not the case. However, in reaching this conclusion the EctHR considered that the legal protection mechanisms within the organization in question (in this case the ESA) must be seen as a material factor in determining whether granting the ESA immunity from German jurisdiction is permissible under the European Convention. It was only because the standard of legal protection provided for by the administrative body of the ESA was comparable to that provided by German courts, that the recognition of the ESA's immunity in German courts did not constitute a violation of the European Convention.[48]

In order to reach this conclusion, the ECtHR effectively reviewed the compatibility of the application of the customary rule of immunity of international organizations in national courts against the European Convention. Any incompatibility with the European Convention would result in a trumping of the customary rule. This type of review could be interpreted as an attempt at establishing an additional layer of hierarchy in international law[49]—a layer that would grant the human rights in the European Convention the status of a so-called regional *ius cogens*. This conclusion is also supported by the fact that the temporal order in which obligations under the European Convention and the ESA were entered into, ie the fact that the obligations under the former predated those under the latter, did not seem to carry much weight in the EctHR's decision.[50] Instead, it focused on the State's responsibility for the protection of fundamental human rights norms that is not affected by any rules of the law of treaties on the relationship between incompatible treaties.[51]

[48] See also Walter (Constitutionalization) (n 14) 198.

[49] Walter (n 45) 981.

[50] According to the normal conflict rule applying between parties later treaties prevail over earlier ones. See Vienna Convention (n 40) Art 30(3) and Art 30(4). It remains to be seen, however, whether the EctHR will develop a consistent line of jurisprudence in this regard. In relation to sovereign immunity the EctHR has thus far been more reluctant to emphasize the availability of alternative and adequate legal protection as a pre-condition for the recognition of immunity. See for example *Al Adsani v The United Kingdom*, Judgment, 21 Nov 2001, para 52 ff, available at <http:/cmiskp.echr.coe.int>. The EctHR regarded the recognition of Kuwait's immunity by the English courts in civil proceedings as a legitimate and proportionate restriction to article 6 ECHR—without considering whether any alternative and adequate standard of legal protection was accessible to the applicant. The EctHR took a similar approach in *Fogarty v The United Kingdom*, Judgment, 21 Nov 2001, para 32 ff, available at <http:/cmiskp.echr.coe.int>. In this instance the EctHR upheld the sovereign immunity of the United States of America in civil proceedings in the English courts. However, the issue of alternative and adequate legal protection did feature in *McElhinney v Ireland*, Judgment, 21 Nov 2001, para 39, available at <http:/cmiskp.echr.coe.int>. When upholding Ireland's recognition of the immunity of the British Secretary of State for Northern Ireland in civil proceedings in the Irish courts, the EctHR noted that the applicant could have brought an action in Northern Ireland against the United Kingdom secretary of State for Defence. The applicant thus had alternative access to the courts of a party to the ECHR.

[51] See *Waite and Kennedy* (n 47) para 67. See also *Loizidou v Turkey* Judgment of 23 Mar 1995

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As far as universal *ius cogens* is concerned, the *Barcelona Traction* decision of the ICJ provides authority for the conclusion that *ius cogens* norms would have *erga omnes* effect.[52] Without expressly referring to *ius cogens* the ICJ implied as much by the types of norms it mentioned as examples of *erga omnes* norms. These included the outlawing of the unilateral use of force, genocide and the prohibition of slavery and racial discrimination.[53] Given the fact that these same prohibitions are widely regarded as being of a peremptory nature, it could therefore be concluded 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.[54] 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.[55]

For example, the human rights obligations contained in the ICCPR and ICESCR all have *erga omnes* effect to the extent that they have acquired customary international law status.[56] Their collective interest nature gives the international community as a whole an interest in their performance and reflects that they amount to more than mere 'bundles of bilateral obligations'.[57] 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 their specific recognition as such by a large majority of States.[58] This illustrates that the

Series A No 310 para 75, where the Court described the Convention as 'a constitutional instrument of European public order (ordre public)'. See also Erika De Wet and André Nollkaemper 'Review of Security Council Decisions by National Courts' (2002) 45 Germany Yearbook of International Law 189 ff.

[52] *Barcelona Traction* decision (n 19) 32.

[53] ibid*;* Jochen A Frowein 'Collective Enforcement of International Obligations' (1987) 47 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 71; Karl Zemanek, 'New Trends in the Enforcement of *erga omnes* Obligations' (2000) 4 Max Planck Yearbook of United Nations Law 6–7.

[54] Jochen A Frowein 'Obligations *Erga Omnes*' (1997) Encyclopedia of International Law Volume III 757.

[55] Dupuy (L'unité de l'ordre) (n 27) 385.

[56] Those rights in the ICCPR and ICESCR which have not yet acquired customary status would nonetheless have *erga omnes partes* effect towards other States parties. Given the fact that the ICCPR now counts 154 ratifications and 67 signatories and the ICESCR 151 ratifications and 66 signatories, the *erga omnes partes* effect of the rights in these Covenants effectively covers two-thirds of the State members of the international community. See Dupuy (L'unité de l'ordre) (n 27) 382 n 762; Human Rights Committee (n 27) para 2. See also Ian Seiderman *Hierarchy in International Law* (Intersentia Antwerp 2001) 145.

[57] See above (n 27).

[58] For a recent overview of international jurisprudence concerning the *jus cogens* nature of the prohibition of genocide and torture, see Dupuy (L'unité de l'ordre) (n 27) 295–9. The relationship between *jus cogens* and *erga omnes* obligations has been debated extensively in literature. These inter alia include Byers (n 44) 112 ff; Cherif Bassiouni 'International Crimes: Jus Cogens and Obligations Erga Omnes' (1996) 59 Law and Contemporary Problems 63 ff; André De Hoogh 'The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective' (1991) 42 Österreichische Zeitschrift für öffentliches und Völkerrecht 183 ff; Claudia Annacker 'The Legal Regime of Erga Omnes Obligations in International Law' (1994) 46 Austrian Journal of Public International Law 131 ff.

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international value system has a layered nature. The first layer consists of *ius cogens* norms that by definition have *erga omnes* effect. The second layer consists of *erga omnes* norms that have evolved into customary norms, but not yet into *ius cogens* norms. In addition, there is a third layer of emerging *erga omnes* norms, ie norms whose customary and/or *erga omnes* character are still disputed, but which are gaining increased recognition in international law.

This latter process is accelerated in particular where the concretization of the norm in question can benefit from an international enforcement mechanism such as an international tribunal. An example in point is the concept of sustainable development, which was one of the most important outcomes of the United Nations Conference on Environment and Development (Earth Summit) in Rio de Janeiro in 1992.[59] Sustainable development is a collective interest norm, as it requires States to take account of the interests of future generations when adopting environmental and economic policies.[60] Although it is unlikely that it has already acquired customary status,[61] section 4.2.2. below illustrates that its normative concretization by the International Tribunal on the Law of the Sea (ITLOS)[62] may contribute to its recognition as a customary norm with *erga omnes* effect.

Other grey areas of the international value system would include the principles of trade liberalization and democracy. Even though it remains highly disputed whether WTO obligations are 'bundles of bilateral obligations' rather than *erga omnes partes* in nature,[63] some authors regard free trade as a precondition for the realization of human rights and in that sense inherently connected to the international value system.[64] It cannot be excluded that over

[59] Michael Cottier 'Die Anwendbarkeit von völkerrechtlichen Normen im innerstaatlichen Bereich als Ausprägung der Konstitutionalisierung des Völkerrechts' (1999) 9 Schweizerische Zeitschrift für Internationales und Europaïsches Recht 432 ff.

[60] ibid.

[61] See Catherine Redgwell 'International Environmental Law' in Malcom D Evans *International Law* (OUP Oxford 2003) 664; Ulrich Beyerlin *Umweltvölkerrecht* (Beck Munich 2000) 18. The nature of sustainable development remains a controversial issue. For support of its customary *erga omnes* nature, see separate opinion of Judge Weeramantry *Case concerning Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment 25 Sept 1997 available at <http://www.icj-cij.org>; see also Philippe Sands *Principles of International Environmental Law* (CUP Cambridge 2003) 254. However, several authors not only question the customary status of sustainable development, but whether it possesses the normative clarity to become a customary rule. Due to its normative uncertainty, they do not regard it as formulating a legal obligation for states. It would rather constitute a goal or value which can influence the development or interpretation of legal norms. See Patricia Birnie and Alan Boyle, *International Law and the Environment* (OUP Oxford 2002) 656.

[62] See below (text leading up to) (n 96).

[63] See in particular Joos Pauwelyn 'A Typology of Multilateral Treaty Obligations: are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 European Journal of International Law 907–51.

[64] Ernst-Ullrich 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 636 ff. id 'The WTO Constitution and Human Rights' (2000) 3 *Journal of International Economic Law* 19; Cf. Armin von Bogdandy 'Law and Politics in the WTO—Strategies to Cope with a Deficient Relationship' (2001) 5 Max Planck

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time State practice would support this latter view in a fashion that confirms both the *erga omnes* and customary character of some international trade obligations.

Similarly the principle of democracy, which has gained ground since the end of the Cold War, is increasingly regarded as a prerequisite for the realization of human rights. This can be witnessed in particular in Central and Eastern Europe, where the process of democratization[65] went hand in hand with the ratification of the European Convention on Human Rights by Central and Eastern European States—several of whom are now also members of the EU. The growing importance of democracy is also reflected in the importance the UN itself attaches to this principle,[66] including in instances where it has authorized the civil administration of territories by the UN itself,[67] or by Member States on its behalf.[68] At the same time, however, authoritarian rule remains vividly present in large parts of Africa, Asia and the Middle East. It would therefore be premature to claim the existence of a customary right to democracy (with *erga omnes* effect),[69] even though there is evidence of the growing importance of this principle for the international community as a whole.[70]

In essence, therefore, the layers of the international value systems are in a process of constant evolution. This process is not unlike that of municipal constitutional orders, where the fundamental value system evolves over time.[71] Even though most countries attempt to arrange their most fundamental norms within a single written document, the scope and content of these norms can grow contingently in practice, as it is moulded by the manifold political and historical forces at work within the community.[72]

Yearbook of United Nations Law 653–6; Eric Stein 'International Integration and Democracy: No Love at First Sight' (2001) 95 American Journal of International Law 502. Thomas Cottier and Maya Hertig 'The Prospects of 21st Century Constitutionalism' (2003) 7 Max Planck Yearbook of United Nations Law 273–4.

[65] See, eg *Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE of 3 October 1991* Art II para 17.2 reprinted in (1991) 30 International Legal Materials 1670; *EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* reprinted in (1992) 31 International Legal Materials 1486–7.

[66] Most recently see UN Secretary-General *In Larger Freedom: Towards Development, Security and Human Rights for All* in A/59/2005 of 21 Mar 2005 para 148 ff; ibid *Implementation of the United Nations Millenium Declaration* in A/57/270 of 31 July 2002 para 86; for earlier statements see UN Secretary-General's *Agenda for Peace* in A/47/277–S/24111 of 17 June 1992 paras 81–2.

[67] S/RES/1031 of 15 Dec 1995 para 6 (Bosnia-Herzegovina); S/RES/1244 of 10 June 1994 para 10 (Kosovo); S/1272 of 25 Oct 1999 para 8 (East-Timor).

[68] SC/RES/1483 of 22 May 2003, para 4 and para 8 and S/RES/1511 of 16 Oct 2003 (Iraq).

[69] In addition, significant unclarity also still exists in relation to the core content of democracy, as will be illustrated below in s 5.

[70] See also *Durban Communiqué of the Commonwealth Head of Government Meeting held in Durban, South Africa from 12–15 November 1999* para 18 available at <http://www.thecommonwealth.org/>. See also Franck (n 3).

[71] Tomuschat (n 3) 217–18.

[72] ibid. The rules on government in the United Kingdom constitute the prime example of a constitution whose relevant components cannot be found in a single document.

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IV. THE ENFORCEMENT OF THE INTERNATIONAL VALUE SYSTEM

A. The Role of the United Nations

The existence of an international value system raises the question whether the international community possesses structures capable of enforcing such a system and resolving potential conflicts between its different (hierarchical) components.[73] In the current stage of development of the international constitutional order, the international value system is created and enforced within a variety of institutional structures.

The most important institution within the international constitutional order remains the UN, despite the many limitations faced by its principal organs. For example, it has often been stated that the General Assembly has only limited powers and cannot make the Security Council accountable when it refuses to intervene in situations of widespread and systematic human rights violations, or where it does so in an ineffective manner.[74] One merely has to think of the current situations in Congo and Darfur (Sudan) as cases in point. Additionally, the UN is faced with the absence of a centralized judiciary that could compel Member States to give effect to binding decisions of the Security Council, or review the legality of the latter's decisions in instances where it acts in violation of basic human rights.[75]

However, despite these limitations, practice has also revealed that in those instances in which the Security Council does intervene, it is in the position to take extensive measures in support of the international value system.[76] It is by now undisputed that widespread and systematic human rights violations constitute a threat to international peace and security[77] and that far-reaching measures for addressing such violations may be adopted by the Security Council as a mechanism for the restoration or maintenance of international peace and security.[78] The Security Council has indeed on various occasions adopted measures under Chapter VII in the interest of human rights protection, ranging from economic embargoes, to ad hoc criminal tribunals, to fully fledged civil administrations in Kosovo and East Timor.[79]

[73] See also Andreas Fischer-Lescano 'Die Emergenz der Globalverfassung' (2003) 63 Zeitschrift für ausländisches öffentlichse Recht und *Völkerrecht* 734 ff.

[74] Lorinser (44) 97.

[75] ibid 86.

[76] See also Fassbender (n 3) 574 ff; also conceded by Lorinser (44) 98. Cf Gading *Der Schutz grundlegender Menschenrechte durch militärische Massnahmen des Sicherheitsrates—das Ende staatlicher Souveränität?* (Nomos Baden-Baden 1996) 55, 57.

[77] See extensively Erika de Wet *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing Oxford 2004) 150 ff.

[78] See *Prosecutor v Tadic* Decision of the Defence Motion for interlocutory Appeal and Jurisdiction Case No IT-94-1-AR72 of 2 October 1995 Appeals Chamber para 27 ff available at <http://www.un.org/icty>.

[79] Ever since its first embargo against Southern Rhodesia in S/RES/217 of 20 Nov 1965, one of the underlying aims of the Security Council measures were to address the human rights situation in the territory affected.

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In addition, the admittedly weak structures within the UN for exercising control over Security Council action and inaction, do display some potential for development. For example, the General Assembly could potentially exercise a more comprehensive political control over Security Council inaction, by authorizing the use of force in situations of widespread and systematic human rights violations, where the Security Council itself is unwilling and unable to do so. The rationale behind this argument would be that the embarrassment of a potential 'overruling' by the General Assembly would spur the Security Council into more timely action. The argument is supported by the General Assembly's own practice in the form of the *Uniting for Peace* Resolution of 1950.[80] On the basis of this Resolution, the General Assembly, inter alia, authorized peace-keeping missions to the Middle East (UNEF) and the Congo (UNOC) during a period in which the Security Council was lamed due to the tensions of the Cold War.

By doing so, the General Assembly claimed for itself a residual power in the area of peace and security that was not explicitly foreseen in the UN Charter. Since the end of the Cold War, several authors have argued in favour of a revival and even de facto extension of this power of the General Assembly, despite the fact that this is not foreseen in the UN Charter.[81] This would imply, for example, that the General Assembly itself should also authorize peace-enforcement measures in instances where the Security Council is not willing and able to do so under Chapter VII of the Charter.[82]

Furthermore, there is also the possibility that the ICJ still may develop its role as an 'international constitutional court', either by reviewing the legality of Security Council (*ultra vires*) decisions in contentious proceedings between states, or in advisory opinions requested by the Security Council or General Assembly.[83] This type of judicial control could be desirable in instances of excessive Security Council action, resulting in a violation of norms of the international value system, such as *erga omnes* human rights norms.

In relation to advisory opinions, Article 96(1) of the Charter explicitly provides for the General Assembly and the Security Council to request an advisory opinion from the ICJ on any legal question. This clause is phrased in

[80] GA/RES/377(V) of 3 Nov 1950. Its essential feature was an assertion of a right on the part of the General Assembly to act to maintain international peace and security when the Security Council, because of the veto, was unable to do so. See also Finn Seyersted *United Nations Forces in the Law of Peace and War* (Sijthoff Leiden 1966) 42.

[81] See Walter Kälin 'Humanitäre Intervention: Legitimation durch Verfahren? Zehn Thesen zur Kosovo-Krise' (2000) 10 Schweizerische Zeitshcrift für Internationales und Europäisches Recht 171; Inge Österdahl 'The Continued Relevance of Collective Security Under the UN: The Security Council, Regional Organisations and the General Assembly' (1999) 10 Finnish Yearbook of International Law 133; Nigel White 'The Legality of Bombing in the Name of Humanity' (2000) 5 Journal of Conflict and Security Law (2000) 10–11.

[82] In reality the innovative actions of the General Assembly in this regard has remained very modest. It has, for example, never ventured into the areas of peace-enforcement or even explicit criticism of Security Council inaction.

[83] See extensively De Wet (n 77) chs 1 and 2.

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wide language and would arguably also permit the General Assembly to ask the ICJ for an advisory opinion on the legality of binding Security Council resolutions, where the latter is unwilling to submit such a request itself.[84] Unfortunately, however, the General Assembly has thus far not attempted to request an advisory opinion for this purpose. This relates to the political obstacles that needs to be overcome before a request for an advisory opinion can be submitted. In the case of the General Assembly, such a request pre-supposes a two-thirds majority which is very difficult to obtain.[85] However, the possibility cannot be excluded that the General Assembly may still in future reveal the political will necessary to use the advisory opinion procedure in a fashion that facilitates enhanced ICJ control over Security Council action.

As far as judicial review during contentious proceedings is concerned, it is well known that the UN Charter does not provide the ICJ with any explicit power to this effect. The *Lockerbie* proceedings in particular have ignited the debate on whether such a power would nonetheless exist implicitly. This case has, at the very least, illustrated that simultaneous action by the Security Council and the ICJ are possible even where there is a direct conflict between the two organs. Binding decisions of the Security Council would not have *res judicata* or *lis pendens* effect towards the ICJ and the mere fact that the Security Council has taken a decision on the matter in question would not in and of itself exclude the ICJ's jurisdiction or lead to inadmissibility.[86] As the parties to the *Lockerbie* proceedings requested the withdrawal of the proceedings from the role of the ICJ in September 2003, the question whether the ICJ has the implicit power to review the legality of binding Security Council resolutions at the merits stage will, for the time being, remain unanswered. Even so, it remains possible that the ICJ may still at some point claim such a competence for itself.[87]

Admittedly, advisory opinions are not legally binding and decisions in contentious proceedings are only binding *inter partes*.[88] Neither of these

[84] See in particular *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 20) para 36 ff. This advisory opinion recently affirmed that the General Assembly has competence to request an opinion relating to *any* question within the scope of the Charter. See also Franck (n 3) 631. For a comprehensive analysis of the powers of the General Assembly in terms of Art 96(1) of the Charter, see De Wet (n 77) 42 ff.

[85] The only advisory opinion up to date that resulted in review of the legality of a Security Council resolution resulted from the latter's own (and thus far only) request for an advisory opinion, relating to the *Legal Consequences for States of the Continued Presence of South Africa and Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970) ICJ Rep 1971 12 ff.

[86] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Libyan Arab Jamahiriya v United States* (Preliminary Objections) [1998] ICJ Rep 115 ff. See extensively De Wet (n 77) 9 ff.

[87] The ad hoc criminal tribunals for Yugoslavia and Rwanda, respectively, have effectively claimed such a competence. See *Tadic* decision (n 78); *The Prosecutor v Kanyabashi* Decision on the Defence Motion on Jurisdiction Case No ICTR-96-15-T of 18 June 1997 Trial Chamber available at <http://www.ictr.org>.

[88] Karl Doehring 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) 1 Max Planck Yearbook of United Nations Law 91; Derek Bowett 'The Impact of Security Council Decisions on Dispute Settlement Procedures' (1994) 5 European Journal of International Law 98.

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procedures could therefore produce binding obligations for the political organs of the United Nations. However, this does not imply that a determination of illegality of a Security Council resolution, whether resulting from an advisory opinion or incidentally during contentious proceedings, would be devoid of any effect. As instruments for clarifying the law as recognized by the United Nations, ICJ opinions and decisions carry significant weight within the membership of the United Nations and assist in building a climate of compliance. In instances where the ICJ were to determine that a particular Security Council resolution were illegal, it would significantly de-legitimate the resolution. This, in turn, may encourage the Security Council to amend or withdraw the resolution in question, or would even provide Member States with a legal basis for refusing any further implementation of the respective resolution.[89]

B. The Role of Other International Actors

The structures within the United Nations for enforcing the international value system are complemented by mechanisms existing outside the UN Charter. These extra-Charter mechanisms can either exist on the sectoral (functional) level, or in the individual State level.

Examples of sectoral regimes functioning to strengthen the international value system include the ICC and the International Tribunal for the Law of the Sea (ITLOS).[90] Even though these (and other) sectoral regimes first and foremost function to enforce the substantive law particular to that regime, they can also act as protectors of the international value system as such. This would be the case where the substantive obligations of the sectoral regime in question overlap with (potential) *erga omnes* obligations.

In the area of international criminal law, this overlap seems to be self-evident, as the international core crimes defined in the ICC statute coincide with grave human rights violations of an *erga omnes* nature.[91] In the case of ITLOS, such an overlap may at first sight be less self-evident. The main task of this tribunal is to oversee the enforcement of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS),[92] the substantive elements of which would not (yet) constitute a part of the international value system. First, UNCLOS is not a predominantly collective interest treaty. One would have to determine on a case-by-case basis which of the obligations under UNCLOS would amount to collective interest obligations rather than mere 'bundles of bilateral obligations'.[93] Secondly, claims that the collective interest obligations under UNCLOS would be concretizations of customary

[89] See De Wet (n 77) 58 ff.
[90] Walter (n 45) 969; Fischer-Lescano (n 73) 739–40.
[91] Human Rights Committee (n 38).
[92] The text of this Convention is available at <http://www.un.org/Depts/los/index.htm>.
[93] eg, whereas obligations concerning the protection and preservation of living resources and the marine environment would be of a collective interest nature, obligations concerning innocent passage would constitute bundles of bilateral obligations.

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international law would be weak, not in the least due to their vague content. They are formulated in a manner typical of framework obligations whose content has to be concretized in subsequent treaties.[94] The collective interest obligations under UNCLOS would therefore at most amount to *erga omnes partes* obligations.

However, it remains possible that the application and interpretation of these norms by ITLOS may accelerate their concretization and evolution into customary norms with *erga omnes* proper effect. More specifically, ITLOS could contribute to the concretization of the concept of sustainable development through interpretation and application of those articles of UNCLOS that are directed at the conservation of living resources or preservation of the marine environment. One article that could benefit from such concretization is Article 61 of UNCLOS that, inter alia, requires States to conserve and manage the living resources in their exclusive economic zone in a fashion that would produce a 'maximum sustainable yield' of harvested species.[95] Other ways in which ITLOS could contribute to the concept of sustainable development might be through the concretization of the 'assessment duty' in Article 206 of UNCLOS. This article obliges States parties to assess the potential effects of their activities on the marine environment, where they have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment. The purpose of this obligation is to give effect to the duty of care principle that is an important manifestation of the concept of sustainable development.[96]

The role of sectoral regimes such as UNCLOS in enforcing the international value system also follows from the explicit recognition of the primacy of the UN Charter in their constitutive documents. For example, Article 301 of UNCLOS determines that in exercising their rights and duties under the convention, States parties have to refrain from acting in any manner inconsistent with the principles of international law embodied in the UN Charter.[97] This and similar provisions in other functional regimes provide some support for the conclusion that these institutionalized mechanisms for the enforcement of a particular functional regime are also (if only secondarily) aimed at strengthening the core values of the international legal order, in particular those inspired by the UN Charter system.

[94] See Beyerlin (n 61) 113.

[95] The role of ITLOS in this regard could also be strengthened through its enforcement of the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 December 1995*, as foreseen in Art 30 of this Agreement. Text available at <http://www.un.org/Depts/los/index.htm>. The objective of this Agreement (as stated in Art 2) is to ensure the 'long-term conservation and sustainable use' of straddling fish stocks and highly migratory fish stocks.

[96] See Cottier (49) 430.

[97] See also Art I-III (4) of the Treaty Establishing a Constitution for Europe (n 7), which commits the EU to 'strict observance and development of international law, including respect for the principles of the United Nations Charter'.

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The role of individual States in enforcing the international value system is exemplified by Article 48 of the Articles on State Responsibility. In accordance with this Article, States other than injured States are entitled to invoke responsibility where that obligation breached is owed to the international community as a whole. When invoking responsibility in this fashion, the invoking State may claim from the responsible State cessation of the internationally wrongful act, as well as performance of the obligation or reparation in the interest of the beneficiaries. By enabling States to enforce (inter alia) *erga omnes* obligations, the Articles on State Responsibility enables States to complement in a decentralized fashion the existing, institutionalized mechanisms for enforcement of the core values of the international legal order.

At present, the enforcement mechanism provided for in the Articles on State Responsibility is of a limited and modest nature. The ICJ has declined to recognize the existence of an *actio popularis* that would allow any (State) member(s) of the international community to initiate proceedings in vindicating the violation of community interests. In its controversial *South West Africa* decision of 1966, the ICJ, inter alia, motivated its declination with the fact that such a right was not explicitly foreseen in the ICJ Statue.[98] In addition, it gave a very restricted interpretation to the notion of legal interest.[99] Although Article 48 of the Articles on State Responsibility does not provide a solution for the non-provision of an *actio popularis* in the ICJ Statute, it may encourage the ICJ to adopt a broader notion of 'legal interest' in instances where the violation of an *erga omnes* obligation is disputed between two or more States who have, for example, accepted the compulsory jurisdiction of the ICJ in accordance with Article 36(1) of its Statute.[100]

Given the modest nature of the measures provided for in Article 48 of the Articles on State Responsibility, the strengthening of the role of individual States in enforcing the international value system would require one to pay closer attention to the role that national courts could play in this process. While the added value of international enforcement mechanisms such as tribunals is undeniable, the efficacy of most of these values also rests on domestic courts and institutions. This is particularly true in the field of human rights and international criminal law, where all international and regional instruments rely first and foremost on enforcement by domestic institutions in order to make the underlying values a reality.[101]

[98] *South West Africa* Second Phase (Judgment) [1966] ICJ Rep para 88.

[99] *South West Africa* case (n 98) para 44. The Court was unwilling to assume that a State may have a legal interest in vindicating a principle of international law, even though it has not suffered material damages—unless this was explicitly provided for in an international text or instrument.

[100] See also Crawford (n 21) 279; Alain Pellet 'The Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime?' (2001) 32 Netherlands Yearbook of International Law 77.

[101] José Alvarez 'Multilateralism and Its Discontents' (2000) 11 European Journal of International Law 399.

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In addition, national courts could play a role in providing some control over powerful post-national institutions such as the Security Council, in instances where the latter do not act in conformity with the core values of the international community. In these circumstances the role of national courts may be triggered by an action contesting the adoption of national legislation or other measures giving effect to the Security Council decision. The courts may then be required to review, as an incidental question, the legality of the Security Council decision itself or, in the alternative, the legality of an unqualified application of the decision.[102]

Although the recorded practice of national courts reviewing Security Council resolutions is very limited, some examples of national courts being confronted with a challenge to the legality of Security Council resolutions exist. One example is the decision of the *Bundesgerichtshof* of Switzerland in the case of *Rukundo*.[103] 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—for the transfer of Mr Rukundo by the Swiss authorities to the ICTR. Mr Rukundo alleged, inter alia, that the procedure before the ICTR would not satisfy the fair trial standards under Article 14 of the ICCPR. The *Bundesgerichtshof* emphasized that Switzerland would not support international proceedings that did not guarantee those basic human rights in the ICCPR and the European Convention that constituted elements of the international *ordre public*.

In describing the right to a fair trial as belonging to the international *ordre public*, the Swiss Court effectively recognized the *jus cogens* quality of this right. However, at the same time the Court behaved in a deferential fashion by acknowledging the strong presumption of legality of a judicial body created on the authority of the Security Council. It continued by stating that the conformity of the procedures of the ICTR with international human rights standards had to be presumed, and that the defects that had been put forward were not of such a nature that that presumption could be rebutted. The case did thus not result in the rejection of any Security Council decision. But it does indicate the willingness of a domestic court to review whether the decision might have resulted in undermining core values of the international community.

Such review necessarily implies a certain competition in relation to the exercise of competencies and jurisdictions. The *Rukundo* case constitutes a good—if infrequent—example of the potential tension between hierarchically superior obligations flowing from a post-national constitutional order such as the UN Charter, the fundamental character of the right to due process for the Swiss national legal order and arguably also the emerging international constitutional order. It also reflects a tension in relation to who decides how these tensions should be resolved: in this instance the Security Council or a national

[102] See extensively De Wet and Nollkaemper (n 51) 192 ff.
[103] Judgment of 3 Sept 2001 available through <http://www.isdc.ch>.

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court. Admittedly, excessive 'judicial activism' in this regard by national courts could undermine the efficiency of measures taken within the respective post-national sectoral order and lead to fragmentation of the international legal order itself.[104] The decision not to give effect to a binding decision of a post-national decision-making organ such as the Security Council, or to do so only to a limited extent, should be taken prudently and as a 'measure of last resort'.[105]

Such prudent behaviour was evidenced in the *Rukondo* case by the weight that the Swiss court attributed to the presumption of legality attached to Security Council resolutions. In essence, the threat of rejecting binding Security Council measures in this case was more of a symbolic nature, serving as a warning to post-national decision-making bodies to respect core values of the international community.

C. The Legitimacy of the International Value System within the National Legal Order

The reference to the role of national courts in enforcing the international value system touches on the question of the legitimacy of the application of such a top-down value system in the national legal order. In the current context, legitimacy should be understood as the extent to which the international value system is accepted as being representative of the values of the domestic legal order. For many authors such legitimacy is closely connected to the process by means of which the respective value system came into being and, in particular, the democratic quality of that process.[106]

Many critics regard the value system developing under the influence of international institutions and tribunals as an illegitimate, super-imposed normative system that takes place beyond any form of democratic control or accountability.[107] They see international organizations as being governed by an elite group of national officials who are instructed by their respective international secretariats whose staff at times act independently of the Member

[104] See De Wet and Nollkaemper (n 51).

[105] The questions whether States or State organs may refuse to give (full) effect to binding Security Council resolutions, is controversial among authors. For State practice supporting this approach, see De Wet and Nollkeamper (n 51). For a different opinion, see Anthony Aust 'The Role of Human Rights in Limiting the Enforcement Powers of the Security Council: a Practitioner's View' in Erika de Wet and André Nollkaemper (eds) *Review of the Security Council by Member States* (Intersentia Antwerp 2003) 31 ff. See also José Alvarez 'The Security Council´s War on Terrorism' in ibid 119 ff.

[106] Stein (64) 491. See also Nico Krisch 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law' in Michael Byers and Georg Nolte (eds) *United States Hegemony and the Foundations of International Law* (CUP Cambridge 2002) 152. See also Mattias Kumm 'The Legitimacy of Interantional Law: A Constitutionalist Framework Analysis' (2004) 15 European Journal of International Law 915.

[107] Stein (64) 491; Jed Rubenfeld 'The Two World Orders' (2003) 27 Wilson Quarterly 28.

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States of the international organization.[108] In addition, they regard the proliferation of non-governmental organizations (NGOs) that interact with powerful international organizations as self-elected elite advocates of special causes, unrepresentative of the general public and engaged in an unholy alliance with international bureaucrats and sympathetic States, forming a romance of questionable legitimacy.[109] The impact of this illegitimacy becomes even more palpable when the law of the international organization is enforced directly in the domestic legal order without the national parliament's imprimatur—especially where a Member State is outvoted in the international organization that produced the directly applicable decision.[110]

It is submitted that the flaw in these arguments lies in their mythologizing of national democratic governance as a model for international governance.[111] The arguments seem to assume that there is one national model of democratic governance that can set threshold conditions for the legitimacy of international governance. In doing so, they overlook the fact that there is no single actualized form of liberal democracy which could easily be identified as the ideal model of governance. In addition, they overlook the fact that democracy does not necessarily equate legitimacy.[112]

First, whilst there may be agreement that liberal democracy implies periodic multi-party elections,[113] it remains difficult to distil a common essence of what this implies in concrete terms. For democracy can mean many different things, including popular democracy, representative democracy, or pluralist democracy, to name but a few.[114] Secondly, even to the extent that such a

[108] Stein (64) 491.

[109] ibid. For a sceptical approach to multi-lateralism, see in particular Kenneth Anderson 'The Ottowa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society' (2000) 11 European Journal of International Law 91–120; see also BS Chimni 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 European Journal of International Law 19 ff.

[110] Stein (64) 491.

[111] Alvarez (n 101) 410; Philip Allott 'The Emerging International Aristorcracy' (2003) 35 New York University Journal of International Law and Politics 309; See generally Maduro (n 9) 83 ff; Joseph HH Weiler 'Does Europe need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision' (1995) 1 European Law Journal 219 ff; Yves Mény 'The People, the Elites and the Populist Challenge' European University Institute Jean Monnet Chair Paper RSC 98/47; id 'De la démocratie en Europe' (2003) 41 Journal of Common Market Studies 1 ff; Deirdre Curtin 'Civil Society and the European Union: Opening Spaces for Deliberative Democracy' in *Collected Courses of the Academy of European Law* (Kluwer Law International The Hague 1999) 185 ff; Armin von Bogdandy 'Globalization and Europe: How to Square Democracy, Globalization and International Law' 2005 15 European Journal of International Law 885 ff; Carlos Closa 'Constitution and Deomcracy in the Treaty Establishing a Constitution for Europe' (2005) 11 European Public Law 145 ff.

[112] Allott (n 111) 309. See also Armin von Bogdandy 'Demokratie, Globalisierung, Zukunft des Völkerrechts—eine Bestandsaufnahme' (2003) 63 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 858–9.

[113] Christian Pippan (2004) 15 'Book Review', European Journal of International Law 212.

[114] Daniel Bodansky 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 American Journal of International Law 599; Allott

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common essence can be distilled on the national level, it has not yet been convincingly explained why the concept of democracy would in and of itself be determinative for the legitimacy of any form of governance. Even in well established democracies, the legitimacy of the decision-making process has been undermined by the fact that national democracies tend to exclude many who are affected by their policies, simply because they are not part of the *demos* as understood in a particular ethno-cultural sense. However, it is questionable whether such ethno-cultural definitions of *demos* are compatible with the founding principles of constitutional democracies which aim at full representation and participation of all affected by the decision-making process.[115] It thus becomes questionable whether the substance of the national democratic legislative decision-making process would necessarily reflect the actual wishes of the majority of those affected by it.[116]

Furthermore, even in instances where groups are officially represented in the governmental decision-making process, the legitimacy of the process suffers from the lack of the de facto access of many of these groups to the public debate leading up to the governmental decision-making process; as well as the lack of transparency of the decision-making process itself; and the (perceived) lack of independence and expertise of the decision-makers in question.[117] One should therefore take care not to assume that the overcoming of the democracy-deficit of the international decision-making process would necessarily result in an overcoming of its legitimacy-deficit.[118] For the acquisition of legitimacy is not merely a matter of expanding the scope of the polity, but also concerns the quality of representation and participation.[119]

At this point it is also necessary to remember that the structural differences between the composition of the international community (the global *demos* or international polity)[120] and national communities make it questionable whether democracy could ever have the same meaning internationally as it does domestically.[121] Consequently, those who regard the national democratic model as an essential pre-requisite for legitimate decision-making would be reluctant to accept that the international legitimacy deficit could ever be overcome. However, if one accepts that democracy does not necessarily result in legitimate decision-making either, it becomes plausible to ask whether the international legitimacy deficit can be overcome through other measures than

(n 111) 319–20; Stein (64) 492. See also Juliane Kokott 'Souveräne Gleichheit und Demokratie im Völkerrecht' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 528.

[115] Maduro (n 9) 83.

[116] Alvarez (n 101) 411.

[117] ibid 410–11; see also Bodansky (n 114) 617 ff.

[118] See also Maduro (n 9) 85.

[119] Maduro (n 9). 85.

[120] But see Bodansky (n 114) 600 who denies the existence of a global 'demos'. Cf Cottier and Hertig (n 64) 287 ff.

[121] Bodansky (n 114) 613. He, inter alia, questions whether the principle of sovereign equality of States could serve as a justification for the translation of the concept of 'one person one vote' into 'one State one vote', as it would grant a disproportionate influence to small States representing only a fraction of the world's population.

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democratic decision-making. These would include but not be limited to measures aimed at a more accessible and transparent decision-making process.[122]

Viewed in this light, it is inappropriate to dismiss the possibility of legitimate post-national decision-making out of hand. Instead, one should acknowledge that the legitimacy deficit is an ongoing challenge intrinsic to any political decision-making process, regardless of whether it is of a domestic or post-national nature.[123] Addressing it, inter alia, necessitates increased public participation and transparency of the process.[124] As a first step, this would imply increased participation of NGOs both nationally and internationally. For whilst it might be wrong to equate those NGOs already present in the (international) political arena with civil society itself, they do constitute a part of civil society that deserves to be heard.[125] Instead of criticizing vocal NGOs for making use of the collective exercise of free speech for mobilizing decision-makers within post-national constitutional regimes, one should concentrate on expanding the accessibility of this form of public participation to as many non-state actors as possible.[126]

In this context it is also noteworthy that there is a significant overlap in content between the international and domestic value systems. This is particularly the case in the area of human rights norms where most modern constitutions in various parts of the world—and notably those drafted by democratically elected constitutional assemblies—contain human rights standards closely resembling those of the international and regional human rights instruments. The fact that this overlap exists despite the lack of democracy on the international level, would defy arguments that a representative value system can only be produced within a democratic process. It also casts doubt on the argument that any appeal to the international value system would merely be a manifestation of European hegemony, in which European traditions and preferences are being presented as universal.[127] It illustrates that one should not confuse the identity of legally entrenched universal values with the manner in which they are sometimes abused by European and non-European States alike.[128] The occurrence of the latter does not necessarily imply the non-existence of the former.

[122] Cottier and Hertig (n 64) 309–10; see also Bodansky (n 114) 617 ff.
[123] Alvarez (n 101) 411.
[124] See Kumm (n 106) 926.
[125] James Hathaway 'America, Defender of Democratic Legitimacy?' (2000) 11 European Journal of International Law 124.
[126] ibid 125
[127] See Martti Koskenniemi 'International Law in Europe: Between Tradition and Renewal' (2005) 16 European Journal of International Law (2005) 115, 117.
[128] See Dupuy (Some Reflections) (n 31) 135, 136. See also Armin von Bogdandy 'Constitutionalism in International Law: A Proposal from Germany' (2005) Harvard International Law Journal (forthcoming) s 6.

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V. CONCLUDING OBSERVATIONS

The foregoing analysis leads one to the conclusion already stated at the outset, namely that the intensification of the shift of power and control over decision-making away from the nation State towards international actors is increasingly eroding the concept of a total or exclusive constitution. In the increasingly integrated international legal order there is a co-existence of national, regional, and sectoral (functional) constitutional orders that complement one another in order to constitute an embryonic international constitutional order. This constitutional co-existence (*Verfassungskonglomerat)* has consequences for the relationship between international and national law. To a certain extent, the development of an international community with an international value system leads to the replacement of the traditional, dualist system with a more integrated system. In this system, individuals and State organs simultaneously function both within the national and post-national communities and legal orders.

The constitutional co-existence further implies a certain competition or even conflict in relation to the exercise of competencies and jurisdictions. The challenges posed by the existence of such conflicts should, however, not be seen as a denial of the co-existence of constitutional orders, but rather as a necessary consequence of the ongoing process of (re)organization of control over political decision-making resulting among these orders. After all, similar potential conflicts have been acknowledged by the German Constitutional Court in the *Solange* decisions,[129] in relation to the enforcement of hierarchically superior norms of European law within national law. This has not, however, prevented the development of a European constitutional order alongside which the national constitutional orders continue to exist. Neither has it prevented the national constitutional orders from playing a fundamental role in enforcing the values of the broader European constitutional order, as well as providing a potential check on excessive action on the part of EU organs.

The analysis has also reflected that the question of the legitimacy of the international constitutional order remains an ongoing challenge. Even though this is a challenge that is by no means unique to the international decision-making process, its impact on the international constitutional order should not be underestimated. Without improved legitimacy, this fragile and embryonic legal order will not be able to endure the anti-international and hegemonic tendencies of our times. These tendencies are reflected, inter alia, by the United States' resistance to the Kyoto Protocol on Climate Change and its active undermining of the ICC.[130] Its obstruction includes bilateral immunity

[129] BVerfGE 89, 155 (12 Oct 1993); and BVerfGE 73, 339 (22 Oct 1996) available at <http://www.bundesverfassungsgericht.de/>.

[130] See also Peters (n 13) s 4.

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agreements[131] and until recently also a UN guarantee of immunity to United States soldiers participating in UN peace-keeping activities.[132] It further includes national legislation explicitly prohibiting any cooperation with the ICC.[133] The anti-international strategy was also dramatically reflected by the Bush doctrine of pre-emptive strike which is not covered by Article 51 of the UN Charter. The United States and British military attack on Iraq in the spring of 2003, was neither justified by a Security Council resolution, nor by the doctrine of self-defence as concretized in Article 51 of the UN Charter.

It is a sad irony that these anti-international developments now emanate so dominantly from the very country that once was the driving force in creating the normative climate and institutional framework that gave birth to and accelerated the development of the international value system.[134] There is a clear danger that the increasing unilateralist behaviour of the United States since 2000 can undermine the international value system and indeed the whole process which the German *Bundesverfassungsgericht* recently so poignantly described as the 'gradually developing international community of democratic States under the rule of law'.[135]

There is therefore a concrete risk that this fragile international community glued together and guided by a core of fundamental values, will be lost. If this were to happen, we are bound to aggravate the loss of control over the post-national political decision-making processes in an era where a return to exclusive and autonomous national decision-making is virtually impossible. For a vibrant international value system that serves as a legal guideline for all post-national decision-making is a pre-requisite for any control over such decision-making. Without it, the re-establishment of absolute public authority over private individuals is only a matter of time.

[131] See 'Status of US Bilateral Immunity Agreements' available at <http://www.iccnow.org/documents/USandICC/BIAs.html>.

[132] SC/RES/1422 of 12 July 2002 and SC/RES/1487 of 12 June 2003 (expired on 30 June 2004).

[133] See 'American Service Members' Protection of 2002', entered into force on 2 Aug 2002 ss 2002 and 2004. Reprinted in (2002) 27 Human Rights Law Journal 275; see also Peters (n 13) s 4.

[134] Johnstone (n 35) 826. He describes, inter alia, the active role the United States has played during the 1990s in creating the post of High Commissioner for Human Rights and in sponsoring the resolution of the Commission of Human Rights on the right to democracy.

[135] BverfG, 2 BvR 1481/04 2004 para 36, available at <http://www.bundesverfassungsgericht.de/>.

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