ESTABLISHING A HIERARCHY OF HUMAN RIGHTS: IDEAL SOLUTION OR FALLACY?

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The Article discusses the difficulties of establishing a hierarchy of norms in international law, particularly with regard to human rights norms. A number of arguments have been put forward but none of them has proven to be conclusive: be it the distinction between treaty-based norms and norms of customary law, be it the non-restrictability or non-derogability of some treaty rights, be it their erga omnes *character or the inadmissibility to make reservations. The best way to address the issue of hierarchy seems to be the concept of* jus cogens. *However, the consequences of some rights being "superior" to others are by no means clear. The fact that certain rights are addressed in court decisions as being "most fundamental" or representing a "supreme value" does not necessarily mean that these rights prevail over other, seemingly "inferior," rights in a given case. This is so because it is difficult to decide in* abstracto *and in advance possible conflicts of human rights positions of different human beings. The Article therefore recommends a very reluctant use of a terminology pointing at a hierarchy between human rights.*

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When I met David Kretzmer for the first time in March 1995, I could not imagine how important and fruitful our common membership in the U.N. Human Rights Committee would turn out for me. Certainly, the immediate neighborhood based on the alphabetical order according to which the members are seated, helped a lot to establish and keep close contact from the first day onward. But it was more than that. What I learnt to appreciate was David Kretzmer`s deep and radiating conviction that it is only on the basis of the recognition of human rights that there is hope for all of us, without losing out of sight, however, that these rights must be carefully balanced with the needs of society. What perhaps most struck and still strikes me is that unswerving, completely honest search for justice led by a "beautiful mind." The following contribution is just a very small reflection of my gratitude.

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I. *Introduction*

Hierarchy is a term that greatly pleases lawyers around the globe. It is a term that conveys the idea of order, legal security, the chance to overcome anarchy,[1] and to present clear-cut solutions. Hierarchy means superior rank, and elevating a norm in a higher position means to guarantee its supremacy over lower norms. Since the idea of normative hierarchy is of such an "attractive simplicity"[2] there is a danger to become seduced by it.

On the other hand, the sympathy of lawyers with this idea is quite understandable. A hierarchy of norms is necessary for structuring the law and protecting certain norms against amendment or abolition at will.[3] We all accept in our domestic legal orders a pyramid of norms, the constitutional law being on the top. Of course we know that the basis for the ranking of norms is grounded on the categorical difference between the *pouvoir constituant* and the *pouvoir constitué*.

As we cannot easily find such a distinction in international law,[4] the transfer of the concept of a hierarchy of norms to international law was widely debated,[5] and in fact still is.[6] I cannot sketch the various pros and cons that have been forwarded until today;[7] the concept has now been vastly accepted in theory and practice. It is true, however, that its victory can be better explained by sociological than by legal reasons. The pressing need to secure the survival of mankind, to articulate common responses to the global concerns,[8] and to find a way to structuring a steadily growing "complex

[1] Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT'L L.566, 571 (1997).
[2] Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 4 (1986).
[3] Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 297 (2006).
[4] However, Stefan Kirchner, *Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?*, 5 GERMAN L. J. 47, 60-61 (2004), is attributing the *pouvoir constituant* to the international community as a whole.
[5] *See, e.g.*, Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455 (1965); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).
[6] *See, e.g.,* Joseph H. H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law?*, 8 EUR. J. INT'L L. 545 (1997), discussing contemporary scepticism and PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 14 *et seq.* (3rd ed. 1995).
[7] *Cf.* the pertinent discussion by IAN D. SEIDERMAN, HIERARCHY IN INTERNATIONAL LAW. THE HUMAN RIGHTS DIMENSION *passim* (2001); further Shelton, *supra* note 3, at 299 *et seq.*
[8] Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 9, 81 *et seq.* (2001); Shelton, *supra* note 3, at 322-23.

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maze of rules"[9] convincingly argues in favour of some leading, one might even say constitutional, rules on the international plane, too.[10] However, the legal reasoning is much more difficult, at least as far as we neglect the well-founded graduation between primary and secondary rules in the law of international organizations.[11]

The current explanations for a higher layer of norms: the concepts of international *ordre public*, *jus cogens*, *erga omnes* norms, international crimes, are bundled together to create the basis for a legal international community which reflect back and, by this, reinforce its founding concepts. It is a kind of *autopoiesis*.[12] Although now even the International Court of Justice has abandoned its reluctance to expressly recognize the existence of peremptory norms,[13] it is still not evident which source of law may carry this result. In fact most treaties, including human rights treaties, can be denounced, and it might be difficult not to overstretch the two elements of customary law (*opinio juris* and state practice) in order to establish additional peremptory norms, and we also have the hitherto rather unsafe basis of general principles.[14] Additionally, we still have a lack of clarity regarding the norms qualifying for *jus cogens*.[15]

In our context it is interesting to note that most rules widely acknowledged as *jus cogens* are human rights norms. But this does not mean that it could be generally maintained that human rights as such enjoy a higher rank than other international obligations. If international bodies insist upon the respect of human rights obligations also in relation to other areas of law, such as trade, economic or humanitarian law,

[9] Kirchner, *supra* note 4, at 53.

[10] For the issue of a constitutionalization of international law see Jochen A. Frowein, *Konstitutionalisierung des Völkerrechts*, 39 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 427 (2000).

[11] *Cf.* Eric Suy, *The Constitutional Character of Constituent Treaties of International Organizations and the Hierarchy of Norms*, *in* RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG, FESTSCHRIFT FÜR RUDOLF BERNHARDT 267 (Ulrich Beyerlin ed., 1995); Ulrich Wölker, *Die Normenhierarchie im Unionsrecht in der Praxis*, 42 EUROPARECHT 32 (2007).

[12] Anthony D'Amato, *International Law as an Autopoietic System*, *in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 335, 349 *et seq.* (Rüdiger Wolfrum & Volker Röben eds., 2005).

[13] Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, 2006, I.C.J. 126 (Feb. 3), at ¶ 64, *reprinted in* 45 I.L.M. 562, 579 (2006).

[14] *Cf.* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 82 (1988-1989).

[15] A famous and rather successful attempt has been made by The American Law Institute, see RESTATEMENT OF THE LAW THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, reporters note 6 and § 702 cl. (a)-(f) (1987).

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it is a mere question of the applicability of the relevant rules.[16] The fact that a state breaches its human rights obligations if it complies with another international binding norm results in its responsibility but does not override the other rule. The same is true the other way round. Since until now the superiority of all human rights has not been established and will certainly not be in the near future, be it only because of the fast and vast proliferation of human rights, we have to look more carefully to those reasons that may lay the legal basis for the recognition of higher norms.

II. *Hierarchy within the Area of Human Rights*

Let us now turn from the question of whether human rights may "trump" other international obligations to the issue of whether some human rights may claim superiority over others, being "more equal" than those and therefore the "winners," as Dinah Shelton has put it,[17] in this legal competition.

The history of the development of human rights does not point at this direction. Each and every right, up to the rights enshrined in the new Convention on the Rights of Persons with Disabilities adopted in December 2006,[18] had to be fought for, and each of them likewise reflects a victory against suppression of freedom and unequal treatment. Can we rank these achievements, making hierarchical distinctions between the rights of different "generations," between individual and collective rights?[19] The danger is great that states would take advantage of a possible ranking, *e.g.*, by caring for the necessary food and at the same time withholding the freedom of expression or to take part in the conduct of public affairs. For some human beings at least life is less worthy than freedom. If human rights are "indivisible," as the Vienna World

[16] Dinah Shelton, *International Law and 'Relative Normativity'*, *in* INTERNATIONAL LAW 145, 170 (Malcolm D. Evans ed., 2003).

[17] Dinah Shelton, *Hierarchy of Norms and Human Rights: Of Trumps and Winners*, 65 UNIV. SASKATCHEWAN L. REV. 301 (2002).

[18] U.N. Convention and Optional Protocol on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/RES/61/106 (Sept. 11, 2006). Adopted by the U.N. General Assembly on Dec., 13, 2006 and opened for signature on Mar. 30, 2007, *reprinted in* 46 I.L.M. 443.

[19] Meron, *supra* note 2, at 2.

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Conference in 1993 has boldly proclaimed,[20] it is not easy to establish a hierarchy between them.

Still we should not fall back behind the line. There are human rights recognized as peremptory norms.[21] Before we get back to this concept let me briefly discuss other arguments which have been raised to create the desired hierarchy.

The first argument relates to the sources of law. Most human rights are treaty based, but there is agreement that at least some of them have also a parallel foundation as rules of customary law and/or general principles of law. It might well be that these rights better qualify for peremptory norms, but no conclusion to this effect can be drawn from the legal source as such. The sources of international law are equivalent.[22]

It is likewise not conclusive to argue that some human rights are superior to others because they must not be restricted. The lack of limitation clauses indicates the scope of the right but does not say anything with regard to other rights and how to solve a possible conflict between them. The need for balancing them may still arise.

The same is true as far as non-derogability clauses are concerned.[23] As such, non-derogability does not contribute to a hierarchy of human rights norms. If a right is non-derogable it must not be suspended during times of emergency, but may still be restricted as in normal circumstances, according to the principle of proportionality.[24]

[20] Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23, ¶5 (July 12, 1993); *cf.* Annika Tahvanainen, *Hierarchy of Norms in International and Human Rights Law*, 24 NORDISK TIDSKRIFT FOR MENNESKERETTIGHETER 191, 201 (2006); Erika de Wet, *The Prohibition of Torture as an International Norm of* jus cogens *and Its Implications for National and Customary Law*, 15 EUR. J. INT'L L. 97, 119 (2004).

[21] *Supra* note 15.

[22] DUPUY, *supra* note 6, at 15; Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, 8 EUR. J. INT'L L. 583, 585 (1997).

[23] For more on non-derogability clauses see G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, Dec. 16, 1966, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15, Sept. 3, 1953, 213 U.N.T.S. 222; Organization of American States, American Convention on Human Rights, art. 27, Nov. 22, 1969, O.A.S.T.S. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]. Concerning the lack of a corresponding provision in the African [Banjul]Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev. 5 , *reprinted in* 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter ACHPR] *see* Shelton, *supra* note 16, at 164.

[24] Of course, rough times as times of emergency may influence the outcome of the balancing of conflicting values under the auspices of the principle of proportionality quite differently from normal times.

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The lack of power to suspend may have completely different reasons, *e. g.,* because the suspension of the right could by no means help to overcome the emergency, or would always be out of proportion, or is unacceptable because the right represents a value on which the international community is necessarily based. Perhaps it is sound to agree that those rights which are commonly described in the relevant conventions as non-derogable form part of *jus cogens*. In fact, there are four rights common to the relevant catalogues:[25] right to life, right not to be subjected to torture or inhuman or degrading treatment or punishment, right to be free from slavery, and the right not to be subjected to retroactive criminal law, but it is evident that some of them may well be restricted or are limited from the outset.[26]

The human rights guaranteed in a treaty create obligations among all states parties which may claim their respect in relation to each other; they are obligations *erga omnes partes*.[27] Treaty-based rights do not differ amongst each other in this respect. However, there might be some human rights which are truly valid *erga omnes*, obligating all states, and, perhaps, all members of the international community.[28] But this procedural aspect alone does not help to shape superior rights.[29] The *erga omnes* quality may, and probably will, be a consequence of a superior norm but cannot establish it. It is only "together with *jus cogens*" that an obligation *erga omnes* may affirm a normative hierarchy in international law.[30]

No tool to establish a hierarchy between treaty-based human rights is the exclusion of reservations either. Taking the object and purpose test seriously, no reservation could be admitted regarding human rights at all—which is a sound theoretical approach but completely without foundation in practice.[31] Thus the rights not open

[25] *Cf.* Teraya Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12 EUR. J. INT'L L. 917, 927 (2001).

[26] *See also* Tahvanainen, *supra* note 20, at 199 *et seq.*

[27] *See, e. g.*, ICCPR, *supra* note 23, art. 41 which reflects this idea.

[28] *Cf. generally* to this concept MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* (1997).

[29] Meron, *supra* note 2, at 9; Tahvanainen, *supra* note 20, at 196 *et seq.*

[30] In this sense also the Separate Opinion of Judge ad hoc John Dugard, ¶ 4, *DRC v. Rwanda*, *supra* note 13, *reprinted in* 45 I.L.M. 609, 610 (2006).

[31] In fact, it is the abundance of reservations declared by states that has motivated the Human Rights Committee as well as other committees to deal with this issue in a quite progressive way, but not completely denying the admissibility of reservations; see Human Rights Committee, General Comment 24, General Comment on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

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for reservations have to be identified. Here again *jus cogens* norms are, in principle, sound candidates, but because they are peremptory norms on the basis of customary law or as general principles of law, they are untouchable by reservations anyway. The relevant question not always asked is whether the treaty norm paralleling or reflecting the *jus cogens* norm may likewise be featured to have this legal character. I personally doubt this,[32] be it for the reason alone that many human rights treaties, including the genocide and torture conventions, can be denounced. Thus the issue of reservations is barely suitable to add anything to the establishment of a normative hierarchy in the human rights area.

If we cannot find another way, one could ask whether it is possible to invoke *jus cogens* "to portray higher norms of international law" in general and in human rights law in particular.[33] As I have already mentioned, many international bodies and courts on the universal and regional level as well as lawyers have accepted the concept without, however, clearly pronouncing on the conceptual derivation. Usually the finding boils down to remarks on human conscience, the link between law and ethics, or the necessarily value-oriented approach of law.[34] I am far from disapproving this. But these high-spirited explanations could not avert attempts to claim the rank of *jus cogens* for the right to life of animals and the duty to assassinate dictators.[35] At least one will recognize that a prudent course has to be steered regarding the proliferation of peremptory norms which might become contradictory among themselves. Even with more or less acknowledged peremptory norms we have problems. What could in fact mean the superior rank of the right to life? Does this right trump all other rights? As far as human rights conventions are concerned the scope of the relevant provision is principally limited, there is never a complete guarantee of the right to life, neither regarding the obligation to respect nor to protect.[36] We have, therefore, very carefully to discuss the possible consequences of a human right being recognized as a peremptory norm.

[32] *See* Eckart Klein, *A Comment on the Issue of Reservations to the Provisions of the Covenant Representing (Peremptory) Rules of General International Law*, *in* RESERVATIONS TO HUMAN RIGHTS TREATIES AND THE VIENNA CONVENTION REGIME 59 (Ineta Ziemele ed., 2004).

[33] Dugard, *supra* note 30, ¶ 5.

[34] *See, e. g.*, Shelton, *supra* note 3, *at* 322-23; Carrillo Salcedo, *supra* note 22, *at* 592; Koji, *supra* note 25, at 921.

[35] *Cf.* the references with Shelton, *supra* note 3, at 303.

[36] *See* ICCPR, art. 2; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 15; ACHR, art. 4 ACHPR (*see supra* note 23).

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This is not an easy task, because these consequences are not very clear. Some points, however, may be stressed.

First, the best recognized consequence of a peremptory norm will be that it is invalidating opposing treaty obligations, according to the Vienna Convention *on* the Law of Treaties.[37] There is likewise broad agreement that a peremptory norm invalidates opposing unilateral acts of a state on the international plane.[38]

Regarding the national level, this overriding effect of peremptory international norms is much less clear, and will depend in a dualist system on the domestic legal order. Completely different answers are possible. The new Swiss Constitution protects international *jus cogens* against violations by people's initiatives aiming at constitutional amendments.[39] The German Basic Law adopts general international law as part of the national legal order, attributing it a rank between the constitution and ordinary federal laws without making a difference between *jus cogens* or other rules of general international law.[40] The Federal Constitutional Court has dealt with peremptory norms and has held that Germany if confronted with an act of another state violative of *jus cogens* is not compelled to disregard the consequences of this act on its territory and for its citizens, but only obliged to cooperate in order to mitigate the consequences of this violation.[41]

Second, it is rather questionable whether this decision meets the requirements of the ILC articles on the responsibility of states.[42] What is more important here is that these articles propose a specific set of rules concerning the way how states have to and, additionally, may react to any serious breach of an obligation arising under a peremptory norm of general international law.[43] Thus there is a follow-up of

[37] Vienna Convention on the Law of Treaties, arts. 53 & 64, May 23, 1969, 1155 U.N.T.S. 331; *reprinted in* 8 I.L.M. 679 (1969).

[38] Meron, *supra* note 2, *at* 20; Tomuschat, *supra* note 8, *at* 82.

[39] Federal Constitution of Switzerland, art. 139, ¶. 3 (1998); *cf.* also de Wet, *supra* note 20, at 101.

[40] Basic Law of the Federal Republic, art. 25, (1949); Helmut Steinberger, *Allgemeine Regeln des Völkerrechts*, *in* HANDBUCH DES STAATSRECHTS VOL. VII, at 525, 551 *et seq.* (Josef Isensee & Paul Kirchhof eds., Heidelberg 1992).

[41] Order of 26 October 2004—2 BvR 955/00, 1038/01—Entscheidungen des Bundesverfassungsgerichts (BVerfGE, Official Collection of Judgments), vol. 112, p. 1, 33 *et seq.* (English translation *available at* http://www.bundesverfassungsgericht.de/en/decisions/rs20041026_2bvr095500en.html, ¶¶ 115 *et seq.*).

[42] Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/RES/56/83 Annex (Jan. 28, 2002).

[43] *See id.* arts. 40, 41, 48 and 54.

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international law to violations of *jus cogens* justifying the distinction between ordinary and peremptory norms. But that is not really a question of hierarchy.

Third, some recent judicial decisions will have brought down to earth again many human rights advocates who might have thought, by means of *jus cogens*, to achieve far reaching effects for relevant human rights norms.[44] The European Court of Human Rights rejected the view that the United Kingdom violated Article 6, paragraph 1, of the European Convention when it did not—based on the state immunity rule—grant access to its courts for an individual who claimed reparation from a foreign state after having suffered torture in this country.[45] While a strong dissent argued that "the procedural bar of state immunity is automatically lifted, because those rules, as they conflict with the hierarchically higher rule, do not produce any legal effect,"[46] the Court's judgment found followers among many national supreme courts, including the House of Lords and the High Court of New Zealand.[47] In a quite analogous way the International Court of Justice made it quite clear that the consensual rule underlying its jurisdiction cannot be removed or overridden by a claim that the defendant state violated peremptory norms of international law.[48] However, in contrast to this stance, the emergence of a rule of universal criminal jurisdiction regarding international crimes was witnessed.[49]

Fourth, for several reasons it makes sense to single out some human rights as belonging to the circle of peremptory norms, because their violation opens up a specific legal regime. But it is not yet clear what this may mean in relation to those rights which do not share this lofty position. A genuine hierarchy between human rights must mean priority or supremacy, or, the other way round, the inferiority of some rights to others. But can we assume this?

[44] In this sense, *see, e. g.*, ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 490 (2006).

[45] Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79 (GC judgment of Nov. 21, 2001); *see* also Kalogeropoulou v. Greece & Germany, 2002-X Eur. Ct. H.R. (judgment of Dec. 12, 2002).

[46] *Al-Adsani v. United Kingdom, supra* note 45, ¶ 3, dissent by eight (out of 17).

[47] Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya [2006] UKHL 26, (appeal taken from [2004] EWCA Civ 1394; Fang v. Jiang, (2006) High Court of New Zealand, judgment of Dec. 21, 2006) CIV 2004-404-5843. *Cf.* further Eckart Klein, *Al-Adsani Case*, Max-Planck-Encyclopedia of Public International Law, *available at* http://www.mpepil.com/.

[48] East Timor (Portugal v. Australia), 1995 I.C.J. 102, ¶ 29 (June 30); *DRC v. Rwanda*, *supra* note 13, ¶ 64. *See* also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro), 2007 I.C.J. (Feb. 26) ¶ 147.

[49] Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶¶ 155 *et seq.* (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

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One may respond to this question by pointing first to the terminology used by international courts, *e. g.* the European Court of Human Rights. In fact the Court has characterized the right to life mentioned in Article 2 not only as "one of the most fundamental provisions in the Convention,"[50] but has elevated it to the "the supreme value in the hierarchy of human rights."[51] Concerning the prohibition of torture,[52] the Court likewise stressed the importance of the right as "one of the most fundamental values of the democratic societies."[53] While the term "supreme value" remains reserved for the right to life, the prohibition of torture has attained "the status of a peremptory norm or *jus cogens*" meaning that the norm "enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules."[54] Still, as a judge has opined in a concurring opinion, there is "no logical hierarchy" between Articles 2 and 3 of the Convention.[55]

It is interesting to note that the Court has never used this terminology in order to avoid the balancing of human rights, but rather to underline the general importance of a certain right for a democratic society and to shield it from interference as far as possible. Thus the use of notions related to a hierarchy of rights is predominantly rhetorical.[56] The only situation where the issue of a possible predominance actually a rose, did not relate to another human right but to the state immunity rule.[57]

Superiority of one right over the other must not be confused with strategies to determine the applicability of a right in a given case, *e. g.,* by interpreting its scope or by applying the *lex posterior* or *lex specialis* rule.[58] Superiority of an applicable right can only mean that it trumps *a limine* any conflicting right, without having regard to

[50] McCann v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at ¶ 146 (G.C. judgment Sept. 27, 1995).

[51] Streletz, Kessler & Krenz v. Germany, 2001-II; Eur. Ct. H.R. at ¶¶ 72 & 94 (GC judgment Mar. 22, 2001). Tysiąc v. Poland, Appl. No. 5410/03, Eur. Ct. H.R. (Fourth Section) (judgment of Mar. 20, 2007) at ¶ 102, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Tysi%u0105c%20%7C%20v.&sessionid=15442881&skin=hudoc-en.

[52] European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 23, art. 3

[53] Soering v. United Kingdom, 11 Eur. Ct. H.R. (ser. A) at ¶ 88 (1989). Chahal v. United Kingdom, 1996-V Eur. Ct. H.R. (GC judgment of Nov. 15, 1996) at para. ¶ 79; *Al-Adsani v. United Kingdom*, *supra* note 45, at para. 59.

[54] *Al-Adsani v. United Kingdom*, *supra* note 45, at para. ¶ 60.

[55] Concurring opinion of Judge Costa, Keenan v. United Kingdom, 2001-III, 242 (judgment of Apr. 3, 2001).

[56] *See* also Shelton, *supra* note 3, at 314.

[57] *Cf.* the *Al-Adsani v. United Kingdom*, *supra* note 45.

[58] Tahvanainen, *supra* note 20, at 193.

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the special circumstances of the case and the principle of proportionality.[59] Elevating a human right in a higher rank compared with another right means that a general and abstract decision has been made much prior to the emergence of a concrete case in which rights are in conflict. This knowledge calls for caution. Only in very rare cases a just solution can be found *a priori*. Under the German Basic Law all basic rights including the right to life have in case to be balanced with other basic rights with the sole exception of the right to human dignity.[60] Thus, in a conflict between the right not to be tortured and the right to life (of another person) the legal decision was already made in favor of the prohibition of torture.[61] As we know, even here difficult questions arise.[62] But it becomes dangerous if one expands this concept to a point where, as the German Federal Constitutional Court has held some time ago, it renders the state unable to protect its citizens against air-strikes by terrorists, because the shooting down of the plane would violate the dignity of the innocent passengers.[63] At any rate, in all cases not directly involving human dignity, the rights may and must be balanced according to the existing circumstances.

The promotion of more human rights to a higher rank runs the risk that it might become nearly impossible to solve a conflict between competing rights in a convincing manner. Protection of life versus self-determination, protection of life versus protection of the lives of others—if we cannot take into account the circumstances of the case we probably shall fail to come to appropriate decisions.[64]

III. *Conclusion*

Let us, therefore, only very reluctantly use a terminology pointing at a hierarchy between human rights. *Jus cogens* does not necessarily imply this effect. Various

[59] This seems to be misunderstood by D'Amato, *supra* note 12, at 395.

[60] *See* Eckart Klein, *Human Dignity in German Law*, *in* THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 145 (David Kretzmer & Eckart Klein eds., 2002).

[61] *Cf.* Gäfgen v. Germany, Appl. No. 22978/05 (GC judgment of June 30, 2008), *available at* http://cmiskp.echr.coe.int./tkp197/search.asp?skin=hudoc-en.

[62] *Cf.* Winfried Brugger, *Darf der Staat ausnahmsweise foltern?*, 35 DER STAAT 67 (1996).

[63] Judgment of Feb. 15, 2006, 1 BvR 357/05, ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVerfGE, Official Collection of Judgments), VOL. 115, at 118.

[64] We should also not overlook the issue of power that is always involved in the establishment of hierarchies of whatever sort; *cf.* Koskenniemi, *supra* note 1, at 571; Weiler & Paulus, *supra* note 6, at 563.

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consequences may be drawn from this feature, but it is wrong to connect it automatically with the idea of a hierarchy of human rights.

Both of us, *David Kretzmer* to whom this paper is dedicated in friendship and I, do not agree with important statements that the Human Rights Committee had made in its General Comment No. 24 (1994) on the issue of reservations prior to our membership. But at least one sentence in this comment I completely support: "there is no hierarchy of importance of rights under the Covenant."[65] It is reasonable to extend this idea beyond the scope of this specific treaty.

[65] General Comment No. 24, *supra* note 31, at ¶ 10.

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