The Role of European Courts in Reviewing Conflicting Obligations under International Law

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1. Introduction

In this brief contribution the author will focus on the question whether the Court of First Instance (CFI) and the European Court of Justice (ECJ) addressed satisfactorily the question whether regional and domestic courts are permitted under international law to interpret, apply and even review the legality of international norms generated by another international regime. After all, regional courts such as the CFI and the ECJ, functional judicial bodies such as the World Trade Organisation’s dispute settlement body or the International Centre for Settlement of Investment Disputes panels and domestic courts are principally set up to interpret and enforce the law of their own specific regime. However, in practice these bodies can be confronted with the incidental enforcement or even review of international obligations.

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generated by other international regimes. Practice reveals that regional and domestic courts have over time claimed for themselves some competence to engage in such enforcement and review. As a result, the categorical conclusion of the CFI and ECJ that they would have no power to engage in (any type of) Security Council review seems unconvincing.

2. Past Practice of European Courts

In the European context review of international obligations generated by another international regime has become common where the relationship between states’ human rights obligations under the European Convention of Human Rights (ECHR) and other treaty obligations is concerned. The fact that neither the European Court of Human Rights (ECtHR) nor the respective domestic courts were explicitly established with the purpose of engaging in the incidental review of different sets of international obligations has not prevented them from developing this competence in practice.\(^1\) The range of cases in which the ECtHR has reviewed the application of public international law obligations against the obligations in the ECHR range from absolute rights that may not be restricted or derogated from, even in times of war or public emergency, e.g., the prohibitions on torture and cruel, inhuman or degrading treatment and punishment;\(^2\) to rights that may be restricted for narrow purposes such as in times of emergency, e.g., the right to a fair trial;\(^3\) and rights that may be restricted for broad purposes, such as

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\(^1\) For relevant cases stemming from domestic courts see E. de Wet, “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order”, *Leiden Journal of International Law* 19 (2006), 611, at p. 618 ff.
