

# 1. The Security Council and *Jus Cogens*

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I had great hesitations to accept the generous offer that was made to me to be one of the two speakers entrusted with dispensing this year's Morelli lectures. Much has already been said and written about *jus cogens*, that black horse which may lead, as many authors suggest, to a redefinition and entirely new conception of international law. Is it possible to add anything new to the mountains of scholarly literature that fill the shelves of our libraries?<sup>1</sup> Eventually, I felt tempted to take up the challenge of having to analyze the work of the SC in the specific perspective of *jus cogens*. I hope I have found at least a few tiny hints that may enliven the debate. And it is also true: many seemingly old and unshakable truths become less certain when looked at with fresh eyes. To reconsider issues whose contours are not that sharp when tested again is indeed the purpose of my lectures which I shall give alongside my Colleague and Friend Pierre-Marie Dupuy. I would have liked to say that these lectures are presented in cooperation with him. But we had no time to cooperate, thus our ideas have not been concerted. But I trust that nonetheless, at the end of these two days, a kind of synthesis will emerge from our presentations.

Let me thank, at the very outset, the organizers very warmly. To invite a German scholar to speak here in Rome on *jus cogens* is not a self-explanatory undertaking. You will all know that I was agent and counsel for Germany in the recent proceeding between Germany and

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<sup>1</sup> We confine ourselves to mentioning six outstanding books: Hannikainen, *Peremptory Norms* (Jus Cogens); Kadelbach, *Zwingendes Völkerrecht*; Kolb, *Théorie du Jus Cogens*; Orakhelashvili, *Peremptory Norms*; Rozakis, *The Concept of Jus Cogens*; Tomuschat and Thouvenin, *Fundamental Rules*.

Italy before the International Court of Justice (hereinafter, ICJ),<sup>2</sup> where Pierre-Marie Dupuy acted as counsel for Italy. In that proceeding, Italy relied heavily on *jus cogens* – without being able to persuade the Hague judges of the pertinence of its arguments. Germany, on the other hand, did not by any means deny the existence of *jus cogens* but opined that as a creation of the second half of the 20<sup>th</sup> century it had no place in a context dating back to the time of World War II and had more limited effects than contended by the lawyers on the opposite side. I take it that these lectures will not be a renewal of the divergences of the past but will lead us to a common understanding – at least to some extent for the time being.

I feel compelled, at the start of my presentation, to expound my concept of *jus cogens* (or peremptory norms of international law) and to say a few words about the Security Council (hereinafter: SC). This may sound trivial to many of you. But it would be nearly impossible to elaborate on the interaction of these two key elements if their essential features had not been clarified beforehand. It may well be that professor Dupuy will also provide you with an introduction to *jus cogens*. But such parallelism will certainly not be a waste of time inasmuch as, alongside broad consensus, some minor – or major? – discrepancies will appear. Only after those introductory observations will the inter-relationship between the substantive body of law and its agent or foe be focused upon.

## 1.1. Introduction

1. As reflected in the two key words of this presentation, the world seems to be a perfect place, “le meilleur des mondes possibles” (Candide, as imagined by Voltaire), if the two words are understood in a complementary sense. On the one hand, on the side of substantive law, one finds *jus cogens*, the class of norms that protect the fundamental values of the international community, as may be said in anticipation. On the other hand, this treasury of values seems to enjoy the protection

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<sup>2</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99. It is well-known that this judgment was not the last word in the dispute since, by a judgment of 22 October 2014, No 238, the Italian Constitutional Court set aside Law No. 5 of 14 January 2013 enacted by the Italian Parliament to implement the orders of the ICJ. For a comment see Tomuschat, *The National Constitution*, 189.

of the SC, the highest world authority vested by the Charter of the United Nations (hereinafter: Charter) with powers to take binding decisions against any State, disregarding and overriding any objections derived from the principle of sovereignty. Substantive law and its procedural enforcement machinery seem to march hand in hand, in absolute harmony, forming a marriage in heaven.

2. However, it seems that the task to be addressed is a different one, namely not to indulge in happiness, but to inquire into the tensions which may arise from the action of the SC on account of such fundamental rules. Has the SC become the guardian of *jus cogens* which may require it to take protective measures, restricting its discretionary decision-making power? On the other hand, it also needs to be clarified whether the SC and *jus cogens* may occasionally be engaged on a collision course. This latter hypothesis concords to some extent with experiences made elsewhere at domestic levels. Human rights are now recognized world-wide in almost every constitution. For Germany and Italy, it was a particularly urgent concern to reaffirm their attachment to the common European heritage after their peoples had both undergone the misery and humiliation of brutal dictatorship, at the same time as active proponents, as passive observers, or as victims depending on their place in society. But human rights are committed to governments which play a double-edged role. On the one hand, they have been entrusted with maintaining and upholding the rights bestowed upon everyone in the form of constitutional guarantees. By taking care of law and order, they ensure the elementary conditions for the enjoyment of human rights. On the other hand, they may however transgress the limits of their powers, in particular in the exercise of their law-and-order function, becoming a threat to human rights. Inevitably, in the same way as national governments are Janus-faced, the SC may also act either as benefactor or as wrongdoer.<sup>3</sup> Might may be used for the promotion of the public weal, but it is a dangerous device, it can also serve for the pursuit of harmful purposes. In this regard, the international system of governance does not differ from domestic systems of governance. Yet it is much more complex, relying on a multitude of actors coming from all of the regions of the world.

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<sup>3</sup> See also Zappalà, *Reviewing Security Council Measures*, 172-180.

3. It will be the aim of the subsequent reflections to establish an appropriate equilibrium between the two perceptions of the SC. In any event, the SC exists and it will not disappear during our lifetime. The challenge is to understand it as an institution that is fully integrated into the international legal order, not living an outsider's existence apart that is exempt from any legal commitments (*legibus solutus*).<sup>4</sup> The SC, notwithstanding all its defects, in particular its lack of true global representativeness, constitutes the centre piece of the current world order the distinctive features of which are peace and human rights.

## 1.2. The Emergence of *Jus Cogens* in Modern International Law

4. The words "*jus cogens*" may have been known long ago in a remote past as a somewhat abstract concept, familiar in particular to the specialists of private law, mostly under the name of *ordre public*. But it is only recently that they have gained prominence. Debates on the "essence" of present-day international law centre indeed to a great extent on *jus cogens* and the novel concept of "constitutionalization", which is more *à la mode* in Europe than in the United States or any one of the developing countries. It reflects the views of its advocates that the international legal order has proceeded from a juxtaposition of sovereign individual States to a coherent edifice with basic premises that permeate the entire framework of legal rules not unlike the constitution of a State puts its imprint on every single rule of the domestic legal order.<sup>5</sup> Generally, domestic legal orders are conceived of as closed systems displaying internal harmony and consistency, receiving their general orientation from the constitutional norms of the highest hierarchical level. By contrast, until recently the international system was often seen as an "anarchical society", lacking any inherent consistency.<sup>6</sup>

5. It stands to reason that in former centuries, when in Europe law and religion formed mostly an inextricable whole, God's commands

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<sup>4</sup> ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Dusko Tadic* (IT-94-1-AR72), Appeals Chamber, 2 October 1995, ILM 35 (1996) 35, para. 28.

<sup>5</sup> For a comprehensive exposition of this theory see, e.g., Peters, *Membership in the Global Constitutional Community*, 153-262.

<sup>6</sup> Bull, *The Anarchical Society*.

were generally considered as barriers which any secular law-giver had to respect and obey. But even after the advent of enlightenment, when during the 18<sup>th</sup> century the legal systems underwent a process of secularization, some writers at least observed that there must be certain limits to what States may agree upon. Mostly, reference was then made to natural law. Thus, Swiss author Vattel noted in his treatise on international law or principles of natural law: “un Traité fait pour cause injuste ou deshonnête est absolument nul; personne ne pouvant s’engager à faire des choses contraires à la Loi Naturelle”.<sup>7</sup>

This is a particularly interesting statement from a time when the doctrine of natural law was already on its retreat. Generally, the enlightenment did not accept that there could be laws which came from other sources than human reason. But the victory of the new rationalist trends was not complete. Even during the 19<sup>th</sup> century, when the old natural law justifications for law had been definitively abandoned and increasingly the doctrine of positivism had been embraced in the sense that international law emerges from the coordinated will of states,<sup>8</sup> some authors held that there was some hierarchically superior layer of norms which set limits on the treaty-making power of States.

6. Conceptually, there could be no bar to agreements concluded between sovereign States. There was no normative ceiling above them, placing constraints on their actions. God’s authority was a thing of the past, and in fact, until the 20<sup>th</sup> century, there were no international authorities that could be recognized as trustees of the common good. The Holy Alliance and the European Concert were purely political arrangements. They lacked all the characteristics of legitimate institutions of international government.<sup>9</sup> And yet, at least some authors tried to escape from the conceptual straight jacket of positivism, postulating that nonetheless State power had certain limits.

7. One of the first authors to take that view was German writer August Wilhelm Heffter, professor at the University of Berlin, who wrote in 1844 that a valid treaty requires a ‘just cause’:

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<sup>7</sup> de Vattel, *Le droit des gens*, vol. I, livre II, chapitre 12, § 161.

<sup>8</sup> See Klüber, *Europäisches Völkerrecht*, 225-232; de Martens, *Précis du droit des gens*, 79-88.

<sup>9</sup> See Zacharias, *Holy Alliance*, 934.

“Only what is physically and morally possible can be the subject-matter of a treaty. For instance, any obligation running counter to the moral world order or to the commitment of individual States to promote human freedom is impossible. Accordingly, the introduction of the maintenance of slavery can never be validly pledged, neither a stoppage of the intercourse of nations for their mutual moral or physical needs.”<sup>10</sup>

Heffter does not give any reference for supporting his view although he is well familiar with the writers of his time, in particular Vattel and Pufendorf. Another remarkable writer from the 19<sup>th</sup> century is again a Swiss author, Johann Caspar Bluntschli, whose ‘Modern Law of Nations’ appeared in 1868. He also distanced himself from the concept of almighty sovereigns who could engage in any kind of action, notwithstanding its morally objectionable character. Bluntschli went much further than Heffter by postulating that

“the bindingness of international treaties rests on the legal conscience of humankind ... Treaties the content of which violates the generally recognized human rights or the binding rules of international law are therefore invalid.”<sup>11</sup>

He clearly identified the necessity of a general legal order which confers the effect of bindingness on treaties. Giving examples, he spelt out more specifically that, in particular, treaties are invalid which introduce, spread or protect slavery, deprive foreigners of all rights or order persecution on grounds of religion.<sup>12</sup>

8. It would require further investigation to find out which echo these voices had in their time. It is a fact, however, that legal practice was not impressed by such pioneering outsiders. Furthermore, in a time when no overarching institutional structure existed no remedies were available to pursue allegations of invalidity For politicians, such views were apparently nothing else than subjective, individualistic

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<sup>10</sup> Heffter, *Das europäische Völkerrecht*, 147-148 (translation by the author).

<sup>11</sup> Bluntschli, *Das moderne Völkerrecht*, 234.

<sup>12</sup> *Ibid.*, 235.

views which should remain confined to the area of ethics and morals without disturbing the conduct of foreign policy in conformity with classic recipes of rational expediency and self-interest. In fact, not a single arbitral award is known from the 19<sup>th</sup> century where one of the arbitrators would have said that a treaty under review was void on account of substantive defects. To oppose a treaty formally concluded under normal conditions would have amounted to an audacious act of insubordination, not to be expected of arbitrators who had been appointed precisely on the basis of the treaty concerned.

9. Likewise, the prevailing legal doctrine of positivism did not acknowledge any restrictions on the treaty-making power of States. Henry Wheaton, writing in 1836, explicitly rejected the doctrine of natural law and did not mention any restrictions on the treaty-making power of a sovereign nation.<sup>13</sup> Research with German authors at the turning point from the 19<sup>th</sup> to the 20<sup>th</sup> century shows that they categorically denied any such limitations. Franz von Liszt, who wrote his short treatise on “Das Völkerrecht” in 1898, mentions international treaties without any reference to substantive limits to their contents, explicitly rejecting natural law and legal philosophy as sources.<sup>14</sup> Likewise, Albert Zorn emphasizes that there is no restriction on States regarding the conclusion of international treaties.<sup>15</sup> On the other hand, the voice of Pasquale Fiore fought for a minimum level of morality even during that period of dominance of legal positivism.<sup>16</sup>

10. After World War I, the general climate changed dramatically. It had now become a matter of public knowledge that governments may fail dramatically in their political decisions, sacrificing human lives unhesitatingly in cold blood. The ground was therefore prepared for the acceptance of constraints on States’ treaty-making power. No longer was it possible after a fratricidal war which had cost tens of millions of lives to adore the State as the embodiment of the moral good as suggested by Hegel, for whom the Prussian State had served as the factual

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<sup>13</sup> Wheaton, *Elements of International Law*, 42-48.

<sup>14</sup> von Liszt, *Das Völkerrecht*, 7-8, 112.

<sup>15</sup> Zorn, *Grundzüge des Völkerrechts*, 141.

<sup>16</sup> Fiore, *Trattato di diritto internazionale pubblico*, 276: no obligation may be assumed that is “contro i precetti della morale o della giustizia universale”.

foundation and inspirational source for his theories. Hegel, in his “Grundlinien der Philosophie des Rechts” (“Elements of the Philosophy of Right”) (1821), stated without any hesitation, and in categorical brevity, that the State is the “Wirklichkeit der sittlichen Idee” (“the realized ethical idea”).<sup>17</sup> It had to be accepted that like any other human endeavours, the State may fail since it is created and run by human beings who primarily follow their personal instincts and preferences and are not continually guided by lofty philosophical or religious concepts.

11. The League of Nations of 1919 became the concrete articulation of the insight that there should be some overarching authority in the international community, an authority committed, above all, to maintaining international peace and security. We know that the League of Nations failed in its efforts to secure a peaceful future for Europe. At the level of principles, however, its creation amounted to a dramatic change of orientation in international relations. The loosely knit international society took its first timid steps to transform itself into an international community where every member has responsibilities towards every other member. The insight into the mutual dependency of all nations has remained one of the building blocks of the conceptual vision of the international legal order.

12. In the following years,<sup>18</sup> Alfred Verdross, an Austrian publicist, author of a famous treaty on international law, became the main protagonist of the doctrine of *jus cogens*. In 1932, one of his disciples, Friedrich August von der Heydte, published an article in German on “The manifestations of the law between States: *jus cogens* and *jus dispositivum* in international law”.<sup>19</sup> A few years later (1937) Verdross himself followed suit by publishing, in the American Journal of International Law, an article on “Forbidden Treaties in International Law”.<sup>20</sup> At that time, this was still considered as a somewhat exotic view by someone who was largely inspired by the moral teachings of the Catholic

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<sup>17</sup> Hegel, *Grundlinien der Philosophie*, § 257.

<sup>18</sup> See the account given by K. Zemanek, *The Metamorphosis of Jus Cogens*, 381-410.

<sup>19</sup> Von der Heydte, *Die Erscheinungsformen des zwischenstaatlichen Rechts*, 461.

<sup>20</sup> Verdross, *Forbidden Treaties*, 571-577.



Church. In fact, in his article Verdross uses Latin terminology, speaking of treaties “*contra bonos mores*”.<sup>21</sup> In his textbook on “*Völkerrecht*”, published in the same year, he also exposed his doctrine of forbidden treaties, referring explicitly to the writings of Heffter.<sup>22</sup>

13. Obviously, the horrors of World War II furthered once again the notion that treaties should be deprived of absolute supremacy. Injustices had not only been committed by physical acts, but also by concluding treaties that ran roughshod over the interests of other nations. Natural law concepts found new strength. Verdross, who had been elected a member of the International Law Commission in 1957, could work for his cherished idea within the framework of the project aimed at codifying the law of treaties,<sup>23</sup> the work on which had commenced in 1949. He actively engaged himself for the recognition of *jus cogens* as a concept suitable to establish an unassailable core of values in international law.

14. At the International Law Commission, the idea of *jus cogens* made a slow start. The first Special Rapporteur, James Leslie Brierly, produced three reports from 1950 to 1952 which focused only on partial aspects of the law of treaties, in particular technical details. He did not touch upon the issue of *jus cogens*. The approach of Sir Hersch Lauterpacht, the famous British author whose treatise on international law, first published by Ludwig Oppenheim in 1905, later recognized as the standard reference book for many decades, was totally different. Lauterpacht did not shy away from addressing the core issue of the law of treaties. Already in his first report of 1953 he suggested a draft article (15), which was framed as follows:

“A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so by the ICJ.”

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<sup>21</sup> Ibid., 572.

<sup>22</sup> Verdross, *Völkerrecht*, 89.

<sup>23</sup> See his statements: 705th meeting, 21 June 1963, *Yearbook of the International Law Commission* (1963-I) 213, para. 56, and 214, para. 79; 835th meeting, 20 January 1966, *Yearbook of the International Law Commission* (1966-I) 88, para. 35; 840th meeting, 26 January 1966, *Yearbook of the International Law Commission* (1966-I) 121, para. 122.

In the explanatory commentary thereon, he underlined that the provision referred to an “inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*)”.<sup>24</sup> And he continued:

“The voidance of contractual agreements whose object is illegal is a general principle of law. As such it must find a place in a codification of the law of treaties. This is so although there are no instances in international judicial and arbitral practice, of a treaty being declared void on account of the illegality of its object.”<sup>25</sup>

15. All the later Special Rapporteurs followed him, even Sir Gerald Fitzmaurice who otherwise was considered as the incarnation of narrow British positivism. He even advocated the inclusion in the draft of a rule on the “ethics of the object” (Article 20), in which he suggested that judges might refuse the application of a treaty that was not outright illegal but was “clearly contrary to humanity, good morals, or to international good order or the recognized ethics of international behavior”.<sup>26</sup> This transgression of the borderline between law and morals – or this combination of the two – was not appreciated by his colleagues. Accordingly, the idea was not pursued any further.

16. Sir Humphrey Waldock, under whose guidance the codification of the law of treaties was eventually finalized in 1966, also shared the ideas of his two predecessors. After he had taken over as Special Rapporteur, he stated in laconic brevity in his second report of 1963 that “the view that in the last analysis there is no international public order ... has become increasingly difficult to sustain”. He proposed therefore a draft article 13 recognizing the concept of *jus cogens*,<sup>27</sup> acting in perfect harmony with his two predecessors. No major objections were raised. All the members agreed. Eventually Article 53 (then: Article 50)

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<sup>24</sup> UN doc. A/CN.4/63, *Yearbook of the International Law Commission* (1953-II) 90, at 154.

<sup>25</sup> *Ibid.*, at 155.

<sup>26</sup> Third Report, UN doc. A/CN.4/115, *Yearbook of the International Law Commission* (1958-II) 21, at 28.

<sup>27</sup> Second report, UN doc. A/CN.4/156, *Yearbook of the International Law Commission* (1963-II) 52.

was adopted unanimously, notwithstanding doubts initially expressed by American member Herbert Briggs.<sup>28</sup>

17. The Vienna Conference on the Law of Treaties of 1969 convened to transpose the draft produced by the ILC into hard law was largely in agreement with the proposals of the ILC. Almost no opposition of principle emerged. Those who had reservations were primarily motivated by the fear that the nullity provided for, without any procedural device to clarify the legal position, might lead to frequent abuse. Moreover, they criticized the imprecise nature of the concept of *jus cogens*, of which only a circular definition empty of real substance had been given. Thus, the “sanctity” of treaties was put in jeopardy.<sup>29</sup> It was in particular the Swiss and the Japanese delegations that pressed for an institutional mechanism for preventative purposes. Eventually, the relevant provision, which became Article 66, was approved after long and fierce debates.<sup>30</sup> Article 66 provides for the jurisdiction of the ICJ in case a dispute arises on the issue of nullity of a treaty. This compromise also paved the way for the adoption of Article 53, which was finally approved by a large majority of 87 votes to eight, with 12 abstentions. The adoption of Article 64 about supervening *jus cogens* was thereafter a matter of routine. A broad majority (84 votes to 8, with 16 abstentions) supported the draft proposal.<sup>31</sup>

18. To date (December 2014), the VCLT with Articles 53 and 64 as one of its main components has received (no more than) 114 ratifications. Many States which still have not deposited their instruments of ratification do not oppose the rules codified in the VCLT on grounds of principle but simply feel that, since the VCLT confines itself mainly to codifying existing customary law,<sup>32</sup> there is no need

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<sup>28</sup> ILC, 683rd meeting, 20 May 1963, *Yearbook of the International Law Commission* (1963-I) 63, para. 35.

<sup>29</sup> See account given by Scheuner, *Conflict of Treaty Provisions*, 33-34.

<sup>30</sup> An excellent summary of those debates is given by Ruiz-Fabri, *Article 66*, 1519-1525.

<sup>31</sup> UN Conference on the Law of Treaties, Second Session, Vienna, 9 April – 22 May 1969, *Official Records*, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 22<sup>nd</sup> plenary meeting, 13 May 1969, p. 122-125.

<sup>32</sup> The U.S. Department of State said in its Letter of Submittal to the President that the VCLT, although not yet in force, “is already generally recognized as the

for them to enter into an additional formal commitment. Yet, Articles 53 and 64 still remain among the few controversial provisions of the VCLT which embody the idea of progressive development of the law.

19. France was among the nations casting a negative vote. Until this very day (30 December 2014), it has refrained from ratifying the VCLT. The main reason for its rejection of the draft was and is the provision on *jus cogens*. Why is France so reluctant to accept a rule on the nullity of treaties conflicting with a peremptory norm of international law? Does France do forbidden things on a massive scale? I once spoke with Paul Reuter on the issue, when we were both members of the ILC. He told me his impression: France is afraid that the use of its nuclear arsenal might be affected by the provision on *jus cogens*. “Au quai d’Orsay ils ne pensent qu’à cela”. The fact that the United Kingdom has ratified the VCLT is not taken as a sign of encouragement by France, not even the fact that both China and Russia as nuclear super-powers have also joined the VCLT. Currently, only the United States remains aloof from the VCLT, possibly on similar grounds. The present author has not been able to find out what the determinative reasons are, although explanations have been suggested in the legal literature.<sup>33</sup>

20. Large numbers of States have appended reservations to their ratification with regard to the compulsory jurisdiction of the ICJ on matters of *jus cogens*. Thus, the historic compromise of the Vienna Conference has been decisively dislodged, at least in theory. In practice, Article 66 has lain dormant now for more than 30 years. No disputes have arisen where a State wished to exonerate itself from the burden of a treaty by arguing that its stipulations were in conflict with a peremptory norm of international law. Apparently, in such instances informal methods of settlement are preferred.<sup>34</sup>

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authoritative guide to current treaty law and practice”, American Law Institute, *Restatement of the Law Third*, 145. See also U.S. Department of State, rubric “Frequently Asked Questions”, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (accessed 15 December 2014).

<sup>33</sup> Cridden, *The Vienna Convention*, 431-520.

<sup>34</sup> For a discussion see Czaplinski, *Jus cogens and the Law of Treaties*, 93-96.

### 1.3. The Gist of *Jus Cogens* – General Considerations

21. It may appear strange at first glance that so much intellectual energy was spent on a provision regulating only treaty relations among States. But this can be easily explained. Every State is bound to observe and respect the whole gamut of rules of international law when it acts unilaterally. It cannot, on its own initiative, shove aside the applicable law in force. In this regard, every rule of international law is a rule of *jus cogens* for a State where it acts individually, if we just take *jus cogens* as a synonym of binding law. No State can dispense itself from compliance with the rules binding on it,<sup>35</sup> except if a relevant rule provides explicitly for an exception in view of specific circumstances. Generally, customary rules or general international law are binding without any such derogation rules. A State can only rely on the specific clauses of the law of State responsibility like force majeure, distress, or necessity in order to avoid accountability. Treaties, on the other hand, often contain special rules for extraordinary situations. In particular, the comprehensive human rights treaties at universal and regional levels allow for departures from the ordinary regime in situations of public emergency threatening the life of the nation.<sup>36</sup>

22. Thus, if one were to take *jus cogens* in the simple sense of bindingness of legal norms one would find a plethora of *jus cogens*, all the rules of international law pertaining to the body of *jus cogens*. However, two States in their specific relationship are generally entitled to shape their reciprocal rights and duties as they see fit. Most of the rules of international law are *jus dispositivum*. States may form their own legal framework in self-responsibility. Thus, for instance, regarding rules on diplomatic or consular relations, two States can lay down higher or lower standards for their mutual relations. The same is true with regard to rules governing maritime issues: States may agree on fishing rights in derogation from the recognized rules of general international law, again in respect of their reciprocal relationship only. States are even free to give up their existence as independent States by

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<sup>35</sup> This simple truth was vehemently emphasized by Marek, *Contribution à l'étude*, 440-441.

<sup>36</sup> ICCPR, Art. 4; ECHR, Art. 15; ACHR, Art. 27. No such clause has been included in the 1981 African Charter on Human and Peoples' Rights.

concluding a treaty of merger with another State.<sup>37</sup> The continuity of statehood is no rule of *jus cogens*. International law does not interfere with freely made decisions by peoples on how they should organize themselves either by forming an independent and sovereign State or by joining, or associating themselves with, another State.

23. It is the novelty of *jus cogens* that States are denied that power to dispose of rules of general international law even if they freely agree on such a derogation. It is at this point that the distinction between *jus dispositivum* and *jus cogens* becomes relevant. Under the doctrine of *jus cogens* the treaty-making power of States suffers a hefty restriction. Rules of *jus cogens* deprive them of their legal capability of producing valid rules of international law by concluding treaties with other States. Not even if all parties concerned consent to objectionable regulations which none of them views as harmful can they escape the grip of general international law inasmuch as the international community considers specific basic principles to be non-derogable. Obviously, the question must be put which rules pertain to the class of *jus dispositivum* and which other rules fall within the scope of *jus cogens*, namely of rules which have an overriding importance in the international legal order.

24. To draw the dividing line between *jus dispositivum* and *jus cogens* is an issue of philosophical dimensions. As already hinted: the general outlook changes dramatically. States are dethroned as the ultimate masters of the world's legal order. Thus, in particular, powerful States have never been friends of *jus cogens*.<sup>38</sup> They realize that the consequences of *jus cogens* may lead to a shift of balance in favour of the international judiciary or other international bodies which cannot as easily be controlled as political organs like the Security Council. Likewise, their actions can be criticized more easily from the viewpoint of *jus cogens*.

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<sup>37</sup> On 3 October 1990, the German Democratic Republic acceded to the Federal Republic of Germany by virtue of a unilateral act which was supported by the preceding Treaty on the Establishment of German Unity (Unification Treaty), 31 August 1990, 30 ILM (1991) 463.

<sup>38</sup> It is significant that both China and Russia have appended a reservation regarding Article 66 – jurisdiction of the ICJ in respect of disputes over the nullity of treaties on account of *jus cogens* – to their instruments of ratification of the VCLT.

25. However, on a practical level, the consequences of a breach of a *jus cogens* rule are modest at best. It stands to reason that a treaty pursuing unlawful aims should be declared null and void. Under Articles 53 and 64 VCLT, *jus cogens* has a purely preventive function. It impedes unlawful treaty stipulations from becoming operative. It is forward-looking, seeking to avert evil. To strike down a treaty conflicting with a *jus cogens* rule is a simple and straightforward solution. No difficult balancing test is necessary. Article 53 does not take into consideration other consequences inasmuch as it operates as a device applicable exclusively within the province of the law of treaties. No other sanctions are imposed. Major complications are avoided.<sup>39</sup>

26. If *jus cogens* had remained confined to its original legal significance as a source of invalidity of international treaties, its impact on the international legal order would have to be called modest at best although it was broadly recognized in the following years.<sup>40</sup> Yet a quantum leap occurred when the concept was also applied to other State acts, not only to treaties. For the first time, a plea to that effect was made by Erik Suy at the famous Lagonissi Conference organized by the Carnegie Endowment shortly before the definitive adoption of the draft on the law of treaties by the ILC.<sup>41</sup> In his General Course at the Academy of International Law in 1974 Herman Mosler observed:

“It would be incomprehensible if rules binding on States [i.e. *jus cogens*] did not apply to acts which concern international law but are not part of an agreement.”<sup>42</sup>

He had already pointed out, in an article published in connection with the termination of the work of the ILC, that in the new perspective *jus cogens* was transformed from a simple rule of treaty law to a general principle of the international legal order with an almost unlimited

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<sup>39</sup> We disagree with Gomez Robledo, *Le Ius Cogens international*, 134, who speaks of “la sanction la plus radicale”.

<sup>40</sup> There was only one prominent voice of dissent during the work of the ILC, that of Schwarzenberger, *International Jus Cogens*, 467-468. In recent years, only Glennon has stood up as an enemy of *jus cogens*: *Peremptory Nonsense*, 1265-1272.

<sup>41</sup> Suy, *The Concept of Jus Cogens*, 75.

<sup>42</sup> Mosler, *The International Society*, 19.

scope of application.<sup>43</sup> Today, this extension *ratione materiae* of *jus cogens* is generally accepted.<sup>44</sup> Forceful annexation of territory provides the best known example of a unilateral act breaching a peremptory rule. A further illustrative case underlies the advisory opinion on Kosovo where the ICJ assessed the country's declaration of independence against that yardstick.<sup>45</sup>

27. Obviously, it could be foreseen from the very outset that the concept of *jus cogens* would not remain confined to international treaties. If *jus cogens* encapsulates the core values of the international legal order, it must be present everywhere in the framework of that legal order. By necessity, its norms assume the quality of an international public order.<sup>46</sup> It should be reiterated that for individual States, acting alone, each and every rule of international law constitutes a binding rule, a logical conclusion which does not elevate the entire framework of rules of international law to the level of *jus cogens* in the specific sense of some kind of hierarchical superiority. However, as a consequence of the broadening of the scope *ratione materiae* of *jus cogens*, the essence of its meaning underwent a dramatic change. Since international law is binding in its entirety on an individual State, to say that a State is confronted with a rule of *jus cogens* makes sense only if one wishes to suggest something else than just the binding nature of the rule in issue. It must then be contended that some obligations under international law have a higher status, a kind of imperial quality warranting special sanctions in case of breach.<sup>47</sup> The focus is directed on the consequences entailed by a conflict with a *jus cogens* rule, which

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<sup>43</sup> Mosler, *Jus Cogens im Völkerecht*, 22-26.

<sup>44</sup> See, e.g., Gaja, *The Protection of General Interests*, 59; Orakhelashvili, *Peremptory Norms*, 206 (with further references). According to the Guiding Principles Applicable to Unilateral Declarations of States, adopted by the ILC in 2006, *Yearbook of the International Law Commission* (2006-II/2) 161, "[a] unilateral declaration which is in conflict with a peremptory norm of general international law is void."

<sup>45</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, at 437, para. 81.

<sup>46</sup> Rightly pointed out by Orakhelashvili, *Peremptory Norms*, 28-31.

<sup>47</sup> Gaja, *Jus Cogens Beyond the Vienna Convention*, 286, has drawn attention to the language used by the ICJ in the Tehran hostages case, *United States Diplomatic and Consular Staff in Tehran*, Judgment, 24 May 1980, ICJ Reports (1980) 3, at 42, para. 91: obligations of "cardinal importance for the maintenance of good relations between States".



originally played only a marginal role. The fact that a treaty is considered void does not give rise to any great emotions. No real harm is caused, in particular since the nullity sets in at the very first moment of the conclusion of the treaty concerned, ahead of its practical implementation so that little, if any room is left for reparation measures in accordance with Article 71(1) VCLT. But if *jus cogens* implies a vast array of possible sanctions on account of just any governmental activities, creative thinking is necessary to find well-balanced remedies.<sup>48</sup>

28. In this respect, Articles 53 and 64 VCLT give only few hints. According to both provisions, the consequence of a breach of *jus cogens* is simply the nullity of the treaty concerned. This is the appropriate response in case of a treaty. Article 71(1) seeks to expand on this fundamental proposition by stating that States shall eliminate as far as possible the consequences of any act performed in reliance on any provision incompatible with a *jus cogens* norm. But in particular with regard to factual unilateral acts like, for instance, an aggression, tying the reparation due to the nullity of a treaty involved makes no sense. Nullity is a legal concept. It cannot make a factual occurrence undone. In this connection, the traditional terminology referring to *jus dispositivum* in contrast to *jus cogens*, being an outflow of the regime of treaty law, is hardly enlightening.

29. In fact, the academic debate has attempted to demonstrate that the violation of a *jus cogens* norm would have other, more far-reaching consequences than the breach of an “ordinary” rule of international law. Since *jus cogens* has strong moral overtones, nothing can be more tempting than to moralize the entire framework of international law in a general revamp, wherever a “backward” legal rule may be discovered.<sup>49</sup>

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<sup>48</sup> Thus, Schwarzenberger, *International Jus Cogens*, 463, argued that “International law is not sufficiently specialized for any distinction between tortious and criminal responsibility”.

<sup>49</sup> In particular, Orakhelashvili, *Peremptory Norms*, 248-254, has purported entirely to restructure international law in the light of *jus cogens*, in particular with regard to remedies.

30. If one thus applies the concept of *jus cogens* to other acts than treaties, one ends up necessarily in the field of State responsibility, pretending that the ordinary regime of State responsibility must be strengthened in respect of *jus cogens* breaches. Or else, one may turn to international criminal law, trying to construe or possibly expand the scope of the relevant offences under the auspices of *jus cogens*. This shift from the law of treaties to the law of State responsibility fundamentally changes the gist of *jus cogens*. In the field of treaty law, *jus cogens* has a purely preventive function. It acts as a blockade against treaties the performance of which will entail evil results, injuring key elements of the international legal order.

31. In fact, in close chronological connection with the agreement of the ILC on the concept of *jus cogens* and the successful conclusion of the Vienna Conference on the Law of Treaties, the International Court of Justice rendered, in 1970, its judgment in the *Barcelona Traction* case where it introduced the distinction between ordinary obligations under international law and obligations *erga omnes* entailed by particularly serious breaches of international law like aggression, genocide and slavery.<sup>50</sup> Obviously, the ethical background of these extraordinary obligations is the same as that of *jus cogens*, but legal consequences were postulated for the law of State responsibility. Both legal concepts are only different reflections of the tools employed to fight deeply immoral acts which at the same time are incompatible with any notion of a civilized international legal order. Therefore, it would appear to be a futile undertaking to elaborate on an alleged substantive distinction between *jus cogens* norms and *erga omnes* obligations. Their focus is different, but their essential groundwork is the same.<sup>51</sup>

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<sup>50</sup> *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, ICJ Reports (1970) 3, at 32, para. 34.

<sup>51</sup> There seems to emerge a broad consensus on this view, see, e.g., Focarelli, *Lezioni*, 216, para. 89.6; Orakhelashvili, *Peremptory Norms*, 268-272. See also earlier writings of the present author: *International Law*, 85-86; *Reconceptualizing the Debate*, 429-430. According to Gaja, *Obligations and Rights Erga Omnes*, 128, "rules imposing obligations erga omnes make up a wider circle, which comprises the smaller circle of norms of jus cogens". For the contrary view see, in particular, Picone, *Distinction*, 411-425.

32. The same line of reasoning led Roberto Ago, Special Rapporteur of the ILC on the law of state responsibility, to introduce in 1976 a distinction between international crimes and simple “delicts”,<sup>52</sup> a distinction which was kept in the first part of the draft articles on State responsibility until their approval on first reading in 1980. In the final version of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter: ARS),<sup>53</sup> the distinction was shifted to the part on the “content” of the international responsibility of States under the heading “Serious breaches of obligations under peremptory norms of general international law” (Articles 40 and 41), which also shows that public order constraints on State conduct have become principles of general applicability.

33. Using *jus cogens* as a general device which operates not only in the field of treaty law, also permits to rely on it for the review of acts of international organizations of which one often does not know exactly to what extent they are bound by customary international law and, in particular, which normally do not count among the circle of parties to international treaties. Still today, with some minor exceptions framed mostly for the purposes of the European Union, most multilateral treaties are not open to international organizations. Thus, even treaties that have seen their birth in the UN cannot normally be adhered to by the UN. In particular, the UN remains outside the two International Covenants on human rights and the other core treaties on human rights protection.<sup>54</sup>

34. In this sense, *jus cogens* has an important function in securing the unity of international law. It does apply everywhere, even in remote corners of the international legal order where on the basis of particular treaties States have built for themselves islands of refuge. Where *pacta sunt servanda* applies, *jus cogens* applies as well. But *jus*

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<sup>52</sup> Fifth report on State responsibility, UN doc. A/CN.4/291 and Add.1 and 2, *Yearbook of the International Law Commission* (1976-II/1) 3, at 54.

<sup>53</sup> Taken note of by UN doc. GA Resolution 56/83, 12 December 2001.

<sup>54</sup> The UN is, however, a party to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT II), 21 March 1986, UN doc. A/CONF.129/15, which contains the same provisions on *jus cogens* as the VCLT.

*cogens* extends additionally to any other articulations of public power on the level of international law, penetrating also into the field of international organizations.

35. It is clear that States are not entitled to affect the rights and duties of third States through their transactions. Sovereignty and sovereign treaty-making power of a State extend only to what is under its jurisdiction. Thus, to take a hypothetical and even absurd example: Italy and Germany have no legal competence to make determinations on genuinely Swiss matters. They cannot, in a mutual treaty, determine how Swiss banks have to handle bank accounts of German or Italian nationals. Should they ever attempt to do so, the corresponding instrument would simply be *ultra vires*, not on account of a breach of a *jus cogens* rule. Every State is master only within its own territory and with regard to its own matters, defined by the relevant rules on jurisdiction. Therefore, one would not need the concept of *jus cogens* to address situations where a State or a group of States have clearly transgressed their field of competence, but it may be convenient to activate the concept of *jus cogens* in order to underline the seriousness of the alleged violation.<sup>55</sup>

36. Thus, it is precisely the object and purpose of *jus cogens* in the original sense to deny States, although they hold jurisdiction over certain matters, to deny them the right to make use of that power on account of the vicious character of their mutual pledges. In terms of principle, this amounts to a decisive down-grading of national treaty-making power. *Jus cogens* makes clear that all States live under the roof of a common legal order which holds inescapable obligations for every one of them, may they act individually or collectively. In other words, individual sovereign States are not the masters of the world. Constraints are imposed upon all of them. *Jus cogens* in the modern, broader sense establishes a line of defence for the protection of fundamental interests of the international community far beyond the limited field of the law of treaties. Only a new general consensus can retrace the boundaries of the core treasury of international law.

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<sup>55</sup> Linderfalk, *All the things You Can Do*, 351-383, has drawn attention to this publicity effect of the terminology of *jus cogens*.

## 1.4. The Definition of *Jus Cogens*

37. How can this core treasury of the international community be defined in order to make it operational? In fact, a precise definition has never been given, and it must even be assumed that it cannot be given properly, since law must always adapt to the circumstances of its time. One may still regard as most appropriate and fitting the formula coined by Sir Hersch Lauterpacht that *jus cogens* protects overriding interests of the international community, the international *ordre public*.<sup>56</sup> This is the prevailing view in international legal doctrine. It does not need any revision. Admittedly, many authors have tried to draw a distinction between *jus cogens* and rules constituting an international *ordre public*. At closer look, these attempts have generally failed. They were justified as long as *jus cogens* was merely used as a device to measure the lawfulness of treaties. Since *jus cogens* has by now become a general standard for lawful conduct within the international community, as demonstrated by the ILC Articles on State responsibility,<sup>57</sup> the dividing line has become obsolete.<sup>58</sup>

38. Since, however, in 1969 the VCLT ventured to give *jus cogens* a definition, no matter how felicitous this definition may be, it would appear to be convenient to scrutinize first the text of the two relevant provisions, Article 53, which states that a treaty conflicting with a peremptory norm of international law is void, and Article 64, which provides that if a new peremptory norm emerges an treaty conflicting with that norm becomes void and terminates.<sup>59</sup>

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<sup>56</sup> According to Mosler, *The International Society*, 19, the two concepts are not identical. This was true initially. However, with the emergence of *jus cogens* as a weapon *tous azimuts*, the distance has gradually been eroded.

<sup>57</sup> Chapter III of Part Two of the ILC Articles deals with "Serious breaches of obligations under peremptory norms of general international law", clearly outside the province of treaty law.

<sup>58</sup> See convincing arguments put forward by Orakhelashvili, *Peremptory norms*, 33.

<sup>59</sup> We have to leave aside the question of whether Art. 103 Charter may also be characterized as a reflection of *jus cogens*; see on that issue Kolb, *L'article 103*, 86-96.

### 1.4.1. Specific Textual Analysis

39. It must be said in all frankness that the definition provided in Article 53 VCLT is disappointing. The text does not say anything about the hard substance underlying the rule, confining itself to mentioning purely formal criteria. The relevant legal literature agrees on this criticism. The ILC was much too cautious in 1966 when it finalized the formulation of the text.

40. First of all, it must be checked whether a rule has been accepted and recognized by the international community of States as a whole. These are the criteria which are also resorted to when it must be determined whether a given practice has crystallized as customary law. Yet, the criteria seem to be stricter than the criteria to be gleaned from the jurisprudence of the ICJ. According to the leading judgment in the *North Sea Continental Shelf* case, a customary rule presupposes “general recognition” by the international community,<sup>60</sup> which is in any event not tantamount to unanimity. There may be a slight nuance in the required degree of recognition. Also, *jus cogens* could never exist as a purely ‘bilateral’ norm since it derives its authority from the interests of the international community. However, as a matter of principle, a rule of *jus cogens* does not differ as to its consensual element from an ordinary rule of customary international law.<sup>61</sup> Only the criterion of practice does not appear among the constitutive elements of *jus cogens*. Customary law may be called bottom-up law, emerging from the actual conduct of States as empirically observable, whereas *jus cogens* may be associated with a top-down approach where basic values of the international community are the building blocks which need not be buttressed by daily practice but will of course be confirmed by congruent practice.<sup>62</sup>

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<sup>60</sup> *North Sea Continental Shelf*, Judgment, 20 February 1969, ICJ Reports (1969) 3, at 43, para. 74; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, p. 97-8, para. 184.

<sup>61</sup> See also Gaja, *Jus Cogens Beyond the Vienna Convention*, 283; Mosler, *The International Society*, 38.

<sup>62</sup> We are in general agreement with Orakhelashvili, *Peremptory Norms*, 124-125.

41. Accordingly, the specific distinctive criterion is the second one according to which no derogation is permitted, a proviso related to any attempt to change the rule by way of treaty-making. This second criterion underlines the unbreakable nature of a *jus cogens* norm but does not belong to the constitutive elements of *jus cogens*, describing rather its effect, which means at the same time that nothing is said about the underlying reasons. Another deception awaits the reader when analyzing the third criterion, which specifies that any modification can only be brought about by a norm of the same character. This third criterion is essentially hollow because of its circularity. It presupposes that one already knows what a norm of *jus cogens* is.

42. In sum, the textual analysis of Articles 53 and 64 VCLT yields only few concrete elements of clarification. Without a close look at the backdrop of the two articles, they would hardly become suitable as operational normative standards.

#### **1.4.2. *Jus Cogens* as the Center of the International Legal Order - Substantive Considerations**

43. Since the text of Article 53 proves sterile, answers must be sought within the entire framework of the international legal order, in accordance with the rule of interpretation enshrined in Article 31(3)(c) VCLT. Such departure from the text of Article 53 appears all the more necessary since *jus cogens* has left the narrow area of treaty law to conquer the entire field of international law.

44. What are the true legal foundations of *jus cogens*? Articles 53 and 64 cannot be the authoritative legal sources since these two provisions constitute themselves treaty law. Logically, they could not introduce rules of higher hierarchical rank. The concept of *jus cogens* must therefore pertain to the constitution of the international community in the same way as the principle of sovereign equality of States or the principle *pacta sunt servanda*. For purposes of convenience, it might be classified as customary law although it is clear that it was not brought about by an empirical process of progressive growth. A better choice

is to classify it as a core element of the international legal order.<sup>63</sup> In any event, all the countries ratifying the VCLT recognize by their act of ratification that indeed *jus cogens* does exist. Whoever has ratified the VCLT cannot contend afterwards that *jus cogens* is a concept which has no basis in international law.

45. In our search for proper classification, there is no need to stick slavishly to the list of legal sources in Article 38 of the ICJ Statute. One should not forget that Article 38 was taken over from Article 38 of the Statute of the PCIJ, which was drafted at a time (1922) when *jus cogens* had not yet been recognized as a legal concept. Yet Article 38 is good for general orientation purposes. The “general principles of law recognized by civilized nations” are mostly viewed as principles taken from the domestic legal orders of the members of the international community. Here, we are faced with the genuine groundwork of the international legal order which does not need any support from national sources. Furthermore, *jus cogens* rules are not a subsidiary source of international law. If an attempt is made to bring *jus cogens* under one of the categories of Article 38(1), then only para. c) may be taken into consideration on the understanding that “general principles” encompass also principles which are specifically related to the international legal order.<sup>64</sup> In any event, Article 38 should not bar the recognition of new sources with specific characteristics brought into being through the consolidation of the international community.<sup>65</sup>

46. Where and how does one find rules of *jus cogens*? As already pointed out, the decisive criterion is the criterion of non-derogability. Unavoidably, one therefore has to seek guidance from the value system as it is reflected in the rules and principles of today’s international legal order which took its start with the Charter of the United Nations in 1945 and has reached a certain stage of maturity after nearly 70

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<sup>63</sup> See Tomuschat, *Obligations Arising for States*, 307, supported by Orakhelashvili, *Peremptory Norms*, 105.

<sup>64</sup> See, e.g., *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010) 14, at 78, para. 193, 79, para. 197. For a restrictive reading of Art. 38(1)(c) see Focarelli, *Lezioni*, 102-110; Pellet, *Article 38*, 832-841.

<sup>65</sup> See discussion by Orakhelashvili, *Peremptory Norms*, 109-11.



years. Although most subjective judgments concur in defining *jus cogens* it must be admitted that others differ slightly or even oppose one another since no authoritative determination can be made about its essence. But *jus cogens* does not rest on individual arbitrariness and does not get drowned in subjectivisms.<sup>66</sup>

47. As a preliminary observation, one should note that *jus cogens* as a fundamental element of international law could not validly grow in a world which was split up in different regions with an unbalanced power structure. Under the reign of colonialism, many countries lived in the shadow of world history for centuries. They were exhorted to follow the strides of the Western world and could not make their voice heard to an adequate degree. However, since the end of colonialism and the admission of the new States to the United Nations, where they have been able actively to participate in the framing of the contemporary world's legal order, we can speak now of an open discursive stage from which no one is excluded. In this regard, it is highly relevant that the key elements of the current legal order, respect for national sovereignty, human rights, and the rule of law, have been confirmed and re-confirmed time and again. A common consensus on what is good and what is evil, to be avoided at any cost, has slowly emerged around the UN Charter, the Universal Declaration of Human Rights and the two Covenants of 1966 together with the conventions against discrimination. It is this broad international consensus, in which Africa and Asia finally joined, that permits the assertion that the peoples of the world agree on certain key elements whose violation constitutes an assault on the fundamental building blocks of the world legal order. Globalization has opened the world for true universalism also in legal terms.

48. The core substance of the instruments providing for human rights protection constitutes at the same time the inspirational source of the international mechanisms for the international criminal prosecution of offences that jeopardize or destroy those key elements of an

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<sup>66</sup> Therefore, it is wrong to state that those who emphasize the common accord on certain basic values constitute no more than just a school of thought or a "strand" of opinion, see Klabbers, *Setting the Scene*, 25-26.

international legal order in whose centre the human being has its position. While the scope of jurisdiction of the two ad hoc international criminal tribunals established by the SC (ICTY and ICTR) was shaped after the precedents of Nuremberg and Tokyo, the later drafts of the ILC on a Code of crimes against the peace and security of mankind<sup>67</sup> and the Rome Statute of the ICC took additionally into account more recent developments, establishing a list of offences that reflect an international consensus on the most heinous crimes according to the present-day assessment of the essential needs of the international community. The concept of responsibility to protect (R2P), sanctioned by the world summit outcome of 2005,<sup>68</sup> mentions genocide, war crimes, ethnic cleansing and crimes against humanity. Some kind of cross-fertilization has taken place. The idea of *jus cogens* has contributed to shaping the international instruments for the prosecution of international crimes, but on their part these instruments define by ricochet the concept of *jus cogens*.

49. The preceding analysis of the origins of *jus cogens* makes clear that this class of norms does not owe its emergence to a revival of theories about natural law or some kind of divine command. Of course, such moral and even religious convictions support the legal construction and constitute their indispensable underpinnings. But *jus cogens* is the end result of a common effort of humankind which is conscious of its own responsibility. It knows that it cannot leave its fate to any mysterious transcendental authorities but must take its destiny into its own hands. Since the establishment of the UN in 1945, an artful edifice of core norms has taken shape step by step and has by now almost found its completion. This edifice is not a Western invention but has found its recognition by all nations of the world.

50. *Jus cogens* is a precious asset. It should not be dilapidated in addressing petty conflicts of interest which pertain to the daily occurrences in a human community. Academic discourse these days stands permanently in danger of invoking *jus cogens* in an overzealous manner. Some authors even seem to believe that only *jus cogens* constitutes

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<sup>67</sup> *Yearbook of the International Law Commission* (1996-II/2) 17.

<sup>68</sup> UN doc. GA Res. 60/1, 16 September 2005, para. 138.

truly binding law. *Jus cogens* should be reserved as an instrument to address borderline situations where law and morals join to repulse attacks against the foundational bases of the international legal order as the fundamental legal device designed to ensure a dignified life for all human beings. Some examples may show that lack of awareness of the underlying substantive reasons have led to dangerous misconceptions.

51. Recently, Robert Kolb has attempted to demonstrate that the exclusive reliance on the international value system is not correct and that *jus cogens* should be interpreted in a much broader sense.<sup>69</sup> But all of his examples miss the point. On the one hand, Kolb argues that certain axiological premises of the international legal order cannot be changed by States, thus the principle of *pacta sunt servanda*. But these are matters which lie outside the jurisdiction of an individual State. The maxims of *jus cogens* are not needed to deny any validity to attempts to destroy the legal edifice of the international legal order. No single State can by its own individual will tear down its architecture. This is not a matter of *jus cogens*.<sup>70</sup> All States are automatically members of the international community and are unable to build up their own legal universe. Kolb's second example is provided by the intangibility of internal rules of international organizations. Kolb states that, for instance, parties before the ICJ would be unable to determine, by virtue of a mutual agreement, that the ICJ should indicate to them, in violation of the secret of the deliberations, how it intends to decide the case before it. But this is a matter again clearly outside the scope of jurisdiction of the litigant parties. They are not able to impose rules of conduct on the ICJ. Recourse to the concept of *jus cogens* is not necessary in order to come to the conclusion that such attempts can have no legal validity.

### 1.4.3. Customary Law and *Jus Cogens*

52. The question has also been discussed in legal doctrine whether rules of customary law can come into conflict with *jus cogens*.<sup>71</sup> We

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<sup>69</sup> Kolb, *La détermination du concept*, 10-14.

<sup>70</sup> This was already demonstrated persuasively by Mosler, *Jus Cogens im Völkerecht*, 30, who characterizes *pacta sunt servanda* as one of the "Funktionsnormen" of international law. In similar terms Alexidze, *Legal Nature of Jus Cogens*, 260; Orakhelashvili, *Peremptory Norms*, 45.

<sup>71</sup> Kolb, *Nullité, inapplicabilité ou inexistance*, 281-298.

believe that this is a purely intellectual game which has neither theoretical nor practical merit. As is well known, customary law arises from a general practice which is supported by *opinio juris*. It emerges from the jurisprudence of the ICJ that such a general practice does not require that all States have contributed to it, but it must be sufficiently broad in order to give rise to a rule of customary law.<sup>72</sup> The same is true with regard to *jus cogens*. It also requires stable underpinnings. The requirement that a peremptory rule of international law must have been recognized by “the international community of States as a whole” does not mean either that every State must have consented to a specific rule. There may be slight differences in theory as to the quantitative parameters, but essentially no qualitative distinctions can be perceived.

53. Given these constitutive elements of customary law, it is simply inconceivable that any such rule might come into conflict with a *jus cogens* norm which is also based on general recognition. The processes of crystallization are exactly the same as far as the consensual element is concerned. How can a customary rule exist or continue to exist if it does not have the support of the international community? Or else, how can a rule of *jus cogens* emerge if it comes into conflict with a generally recognized customary rule? Accordingly, the issue raised is a non-issue.<sup>73</sup>

#### 1.4.4. The Consequences of a *Jus Cogens* Breach

54. It was already pointed out that pursuant to the original concept of *jus cogens* the consequences of a breach are simple and straightforward: nullity of a treaty conflicting with a norm of *jus cogens*. *Jus cogens* was considered to be an instrument of prevention, not of reparation. Since the current trend is to include *jus cogens* in the law of State responsibility, it becomes much more difficult to draw the right conclusions. The most varied answers may be given in an effort to activate the moral underpinnings of the international legal order. Originally, *jus cogens* was not meant to become a decisive criterion for the settlement of breaches of international obligations.

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<sup>72</sup> Confirmation of the doctrine of customary law by the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, *supra* note 2, at 137-9, paras. 83-91.

<sup>73</sup> But see dissenting opinion of judges Rozakis and Caflisch in ECtHR, *Al-Adsani v. UK*, application 35763/97, 21 November 2001, para. 3.

55. One should be aware of the fact that in 2001, at the end of decades of deliberations, the ILC acted with a great deal of care when defining the consequences of a breach of a *jus cogens* rule. It does not impose any additional obligations on a wrong-doing State, over and above the obligations which generally flow from a breach of an international obligation (Articles 40, 41 ARS). No punitive damages are foreseen, nor any other kind of supplementary sanction. The original intention of establishing harsh sanctions for “international crimes” was thwarted by the waves of criticism which the proposal had aroused.

56. Thus, the only new element is the involvement of third States which shall take “lawful” measures to bring about an end to the injury that has been caused through the unlawful act – without being explicitly authorized to take countermeasures: Article 54 of the ILC Articles avoids taking a stance on the issue. The only “hard” obligation enjoins States not to recognize any situation brought about by the breach of a *jus cogens* rule (Article 41(b) ARS). It is highly noteworthy, furthermore, that the ILC has refrained from suggesting any dramatic changes in the configuration between the States involved. No special procedures have been proposed by it. In particular, the regime of jurisdiction of the ICJ will remain unchanged according to its proposals, and the ICJ has steadfastly taken the position that the subject-matter of a dispute submitted to it does not in any manner whatsoever affect the rules governing its jurisdiction. Allegations that a breach of *jus cogens* rules has occurred do not in and by themselves open the gates to the ICJ<sup>74</sup>

## 1.5. Different Classes of *Jus Cogens*

### 1.5.1. Rules protecting the individual

57. Three different classes of *jus cogens* norms are conceivable. On the one hand, *jus cogens* norms protect the individual human being. Second, States may be protected by *jus cogens*, in particular vis-à-vis the SC. Third, the right of self-determination may shield a people against interference in particular by the SC.

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<sup>74</sup> See references by Tomuschat, *Article 36*, 651, margin note 26.

58. The scope of what we understand today by human rights has expanded enormously in recent years. This has much to do with the general shift of international law from the sovereign State to the individual human being as the centre of the protective endeavours of the international legal order. The primary function of international law is not any longer the protection of sovereign States but the protection of the individual human being.<sup>75</sup> If the dignity of the individual human being stands at the heart of the international legal order, then the quality of *jus cogens* must be recognized to the legal rules which protect the intimate core of the human being, its life, its physical and psychic integrity, and its freedom. Accordingly, offences which debase the affected individual, striking at his/her dignity and existence, must be comprised in the circle of norms coming within the purview of *jus cogens*, in particular the prohibitions on slavery, torture, disappearance and genocide. They require unconditional respect, without any kind of derogation, and restrictions cannot be permissible under any circumstances. No dispute can be perceived in this regard.

59. Obviously, not all human rights partake of the quality of *jus cogens*. The rules setting forth the political freedoms of the individual, like freedom of expression, of assembly, of association, do not seem to belong to that inner circle of basic norms. They are protected, and their breach entails legal consequences, but their violation must be noted as an unfortunate everyday experience in many countries. In fact, concerning civil and political rights, one mostly finds claw-back clauses which allow States to impose certain limitations on the right concerned, in keeping with the principle of proportionality and in respecting the exigencies of a democratic society. Such rights that can be accommodated to societal needs do not lend themselves easily to a characterization as *jus cogens*.

60. Most economic and social rights also lack the quality of peremptory norms. Only if human existence and human dignity are directly affected should one speak of a *jus cogens* norm.<sup>76</sup> All of the

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<sup>75</sup> See Tomuschat, *Human Rights*, 1-2.

<sup>76</sup> The judgment of the German Federal Constitutional Court of 18 July 2012,

rights of the second generation need to be organized and concretized by governmental action. Only then can they become a living reality. And it is difficult to see what specific meaning could be attributed to a finding that passivity in organizing the right to social security constitutes a breach of a *jus cogens* norm. Could that amount to something else than declaring that the State concerned is under the obligation to make good its failure? It would be futile to conceive of *jus cogens* as a device suited generally to make the world a better place.<sup>77</sup> There is no denying the fact that food and shelter, in particular, belong to the basic commodities a human being needs for its survival.<sup>78</sup> To be exposed to starvation may be as bad as being intentionally killed by governmental security forces. But the classification of such breakdown of vital governmental services does not seem to lead to any additional legal consequences as they normally derive from *jus cogens* breaches. In this connection, the concept of invalidity does not provide any enlightenment.

61. Generally the question must be put whether there exists only a *numerus clausus* of *jus cogens* norms. Does the judgment not depend on external circumstances, on the time factor, on the intensity of the infringement? Normally, unlawful deprivation of liberty in an individual case does not amount to the level of a violation of *jus cogens*. But take for instance the case of a State which holds asylum-seekers without any foreseeable end on an isolated island where they would have no contact with the outside world?<sup>79</sup> The example tends to suggest that

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*Entscheidungen des Bundesverfassungsgerichts* 132, 134 on the social rights to be granted to asylum seekers is close to making such a statement by holding (p. 159): “Das Grundrecht auf Gewährleistung eines menschenwürdigen Existenzminimums ... ist dem Grunde nach unverfügbar ...” (“The right to a guaranteed minimum level of existence is essentially untouchable ...”). However, the Court deals exclusively with the fundamental rights under the German Basic Law.

<sup>77</sup> Orakhelashvili, *Peremptory Norms*, 60, contends that economic and social rights “operate in a peremptory way as rights requiring progressive realization”.

<sup>78</sup> See Shue, *Basic Rights*, 19.

<sup>79</sup> See Australian Human Rights Commission, *Asylum seekers, refugees and human rights: Snapshot Report 2013*, 15 June 2013, at 1254: asylum seekers were held in detention on Nauru and Manus Island in Papua New Guinea. See also the decisions of the Human Rights Committee, *F K A G et al. v. Australia*, case 2094/2011, 26 July 2013; *M M et al. v. Australia*, case 2136/2012, 25 July 2013.

*jus cogens* has an open texture and does not remain confined to a number of prohibitions clearly defined in anticipation of any subsequent occurrences. In fact, this conclusion may be drawn from the *Tehran hostages* case where the ICJ held:

“Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the United Nation, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.”<sup>80</sup>

Reference can also be made to the case of *Abdelrazik v. Canada*<sup>81</sup> where a Canadian citizen, having found refuge in the Canadian Embassy in Khartoum, was denied a passport by the Canadian authorities, allegedly on account of a travel ban issued by the SC, so that he could not return to his home country. Is such act of expatriation not a breach of a *jus cogens* rule, given that the person concerned is left without any remedy in a foreign country, unable to take care of himself?

62. The cases just mentioned show the complexity of the *jus cogens* debate, which should be differentiated. It is fairly easy to pass judgment on an objectionable treaty, declaring it void. However, if a whole bouquet of undetermined consequences is derived from a *jus cogens* breach the question must be addressed as to what such a breach means, over and above entailing state responsibility according to the traditional rules as set out in the 2001 ILC ARS.

### 1.5.2. Rules protecting States

63. Second, States, too, may need the protection of *jus cogens* norms. The central building block of the international legal order is sovereign equality of all States. The use of military force denies this axiomatic founding element of the international legal order. Therefore, the principle of non-use of force is rightly counted as a norm of

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<sup>80</sup> *United States Diplomatic and Consular Staff in Tehran*, *supra* note 47, at 42, para. 91.

<sup>81</sup> Canadian Federal Court, *Abdelrazik v. Canada*, Judgment, 4 June 2009, [http://www.law.yale.edu/documents/pdf/Intellectual\\_Life/Abdelrazik\\_v.\\_Canada.pdf](http://www.law.yale.edu/documents/pdf/Intellectual_Life/Abdelrazik_v._Canada.pdf).



*jus cogens*.<sup>82</sup> No right of intervention can be established by way of treaty. Therefore, the right of intervention laid down in the London treaty of guarantee regarding Cyprus<sup>83</sup> could have no validity if interpreted as a unilateral right, to be exercised at the discretion of any of the three outside guarantors (Greece, Turkey, United Kingdom).<sup>84</sup> Apparently on that ground, the Iranian Government denounced in 1979 a Treaty of Friendship between Persia and the Russian Socialist Federal Republic of 1921,<sup>85</sup> which provided for such a unilateral right of intervention.<sup>86</sup>

64. Invocation of *jus cogens* has also occurred outside the law of treaties as a defence against the SC. In his separate opinion in the Serbian Genocide case judge Elihu Lauterpacht pointed out that the arms embargo imposed on the whole of the former Yugoslavia by SC Resolution 711 (1991) denied Bosnia-Herzegovina the right to defend its population against genocide and ethnic cleansing. Therefore, he argued that the SC had made itself an accomplice of those crimes, which entailed the inevitable consequences that the Resolution became void and legally invalid. The right of self-defence was based on a peremptory norm of international law that could not be abridged by the SC.<sup>87</sup>

65. It is not easy to draw a precise borderline between “ordinary” rules of international law and rules of *jus cogens*. States are necessarily related to one another through a tight cobweb of treaties and other transactions. In particular, States may give up their independent sovereign existence, joining another State (merger) or associating

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<sup>82</sup> See, e.g., Orakhelashvili, *Peremptory Norms*, 50; Randelzhofer and Dörr, *Article 2(4)*, 231, margin note 67.

<sup>83</sup> Of 16 August 1960, 382 UNTS 4.

<sup>84</sup> Rightly pointed out by Zotiades, *Intervention by Treaty Right*. For a more extensive discussion see also comments by Gaja, *Jus Cogens Beyond the Vienna Convention*, 288; Gaja, *The Protection of General Interests*, 48-49; Orakhelashvili, *Peremptory Norms*, 157-161.

<sup>85</sup> 9 LNTS 384.

<sup>86</sup> See Orakhelashvili, *Peremptory Norms*, 155-157; W. M. Reisman, *Termination*, 151-153.

<sup>87</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, separate opinion of judge Lauterpacht, ICJ Reports (1993) 407, at 441, para. 103. See discussion by Droubi, *Resisting United Nations*, 96-119.

themselves with another State. Thus, the former GDR joined the FRG in 1990 after having negotiated with its western brother/sister the conditions of its accession. Such moves are perfectly lawful although they may signify a deep cut into sovereign rights or even put an end to independent statehood. It is therefore extremely difficult to state when the borderline between a “normal” transaction and unacceptable interference in the domestic matters of one of the contracting parties has been transgressed.

66. It would be highly arrogant if a third party, not involved in a transaction between two States, could validly argue that a treaty under which a State grants extensive privileges to another State is void as conflicting with *jus cogens*. Generally, it can be assumed that States themselves are the best guardians of their sovereign interests. Treaties under which a State permits the stationing troops of another State on its territory generally imply deep restrictions on national sovereignty but must be respected, provided that the conclusion of the instrument has not been procured by unlawful pressure.

67. With regard to the SC, the rule of State sovereignty is applicable only to a limited extent. The SC has been explicitly empowered by the Charter to take all necessary measures for the maintenance of international peace and security. For that purpose, it can even authorize the use of force. Article 2(7) of the Charter provides explicitly that the SC is not bound by the interdiction of intervention in domestic matters. However, the SC is not a new Leviathan. Its powers are embedded in the entire framework of the Charter and have intransgressible limitations.<sup>88</sup>

### 1.5.3. The Right of Self-Determination

68. In inter-State relationships, the right of self-determination will rarely play a decisive role since as a rule the governmental apparatus of a State operates as the mouthpiece of the people concerned. But a government may also violate the right of its people to self-determination by taking decisions which dispose of the territory and its population without any prior consultation or concertation. On the one hand,

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<sup>88</sup> This will be discussed in more detail in the following sections.

principles of *jus cogens* may establish boundaries against the (illegitimate) exercise of the right of self-determination. On the other hand, however, the right of self-determination may also be invoked against measures decided by the SC.

69. A particularly interesting case is the situation of Germany in 1989/90 after the fall of the Berlin wall. Both German governments, duly legitimated through democratic elections, sought reunification. In principle, the Soviet Union had signaled its agreement with that course of action. But there was one big obstacle, the responsibilities of the four occupation powers from the time of Germany's surrender in 1945. Through a formal act of 5 June 1945, they had assumed Supreme Authority over Germany.<sup>89</sup> Some of those responsibilities had already been restored to the two German States in 1955. But a considerable rest of those responsibilities was kept by the Allied Powers, those regarding Berlin, Germany as a whole, the issue of reunification, and a peace settlement. Was it really in the power of the four victorious Allied Powers of 1945 to block the road to re-unification by simply denying their consent? This would have amounted to a grave violation of the principle of self-determination. The Federal Government sought indeed the consent of the Allied Powers. But it could also have argued that, 45 years after Germany's surrender, and 17 years after the two German States had been admitted to the United Nations as peace-loving States,<sup>90</sup> there remained no valid ground to deny the German people the exercise of their right of self-determination. Preference was instead given to seek an agreed solution.

## 1.6. The Security Council

70. In order to ascertain whether *jus cogens* has any relevance for the SC, a short look at its institutional structure is warranted. The SC

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<sup>89</sup> Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, Berlin, 5 June 1945, reprinted in von Münch, *Dokumente des geteilten Deutschland*, 19.

<sup>90</sup> Admission to the United Nations certifies, in accordance with Article 4 of the Charter, the peace-loving character of the State concerned.

is not an institution that emerged from natural forces. It was established under the Charter of the United Nations. In other words, it is based on an international treaty concluded on the basis of equality of all contracting parties. The powers which the SC holds have been conferred upon it by those parties. It enjoys no legitimacy of its own. It is a derivative institution like the world organization as a whole while States have their own legitimacy by virtue of the *pouvoir constituant* of their peoples. The UN, by contrast, is still a child of the States having established it by virtue of an international treaty. Accordingly, the member States are still the masters of the world organization, being able additionally to leave it if they so wish<sup>91</sup> although de facto it is almost impossible to lead an existence outside the UN.<sup>92</sup>

71. Thus, it must always be borne in mind that the SC is a legal construction, not having a societal basis of its own. Whoever was born from the law and within the law, must respect the law. It cannot argue that it has a higher *raison d'être* permitting it to disregard its foundation in accordance with political convenience. Article 24 (2) explicitly directs the SC to act "in accordance with the Purposes and Principles of the United Nations". It is true, on the other hand, that the permanent members of the SC find themselves in a privileged position, especially in two respects. It might therefore be argued that their 'imperial' status reflects on the SC as a whole. Nothing new can be said in this regard but it would nonetheless appear necessary to recall these specific features.

72. On the one hand, all resolutions of the SC of a non-procedural character require a majority of nine affirmative votes, including the votes of the permanent members (Article 27(3)). This provision is the seat of the so-called veto power. If only one of the five permanent members opposes a draft resolution, that draft cannot be adopted.

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<sup>91</sup> See the declaration of interpretation adopted by the founding conference of San Francisco, reprinted in Goodrich and Hambro, *Charter of the United Nations*, 143.

<sup>92</sup> Many years ago, in 1965 (New Year's Day), Indonesia left the UN, erroneously believing that its step would be followed by most members from the developing world. But the hoped for mass exodus from the UN did not take place. Some months later, Indonesia came back ruefully, pretending that what had happened was not a withdrawal but a temporary suspension of its cooperation in the UN. This kind of hideaway strategy was also accepted by the UN itself which reinterpreted its earlier declarations and actions after Indonesia's return.

Notwithstanding continual criticism of this privilege by large numbers of States, in particular developing countries, the five permanent members have hitherto succeeded in defending their structural edge over the other “ordinary” members of the UN.

73. It is well known that the review conference of 2005, whose aim it should have been to revamp the SC, adding to it at least four new permanent members, did not reach the results desired by the four States (Brazil, Germany, India and Japan) that had concluded an alliance of convenience for that purpose. Active resistance blocked their aspirations. Italy was among those vehemently opposing that kind of enlargement of the SC. At the end of the day, the composition of the SC was not changed.<sup>93</sup> Moreover, it was not even possible to establish some kind of monitoring of the SC by the General Assembly.

74. The other great advantage of the permanent members is the requirement of their consent for any amendment of the Charter (Article 108). This means, above all, that they cannot be deprived of their veto power by a modification of the Charter. No prophetic gifts are necessary to predict that the five permanent members will never give up that privilege if not compelled to do so by quasi-revolutionary external circumstances.

75. The privileges conferred on the permanent members of the SC are to be explained by the emergence of the world organization at the end of World War II.<sup>94</sup> The first drafts had been prepared under the decisive influence of the United States, which then worked closely together with the British Government. Obviously, the Soviet Union, which was about to win the war against Nazi Germany, could not be sidelined if the intention was to establish a true world organization. A preparatory conference held in August/September 1944 at Dumbarton Oaks close to Washington prepared the ground. One of the key elements of the Dumbarton Oaks proposals<sup>95</sup> was indeed the veto rights

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<sup>93</sup> See UN doc. GA Resolution 60/1, 16 September 2005: World Summit Outcome, paras. 152-154.

<sup>94</sup> See Grewe, *Epochs of International Law*, 645; Khan, *Drafting History*, 1-12.

<sup>95</sup> <http://www.ibiblio.org/pha/policy/1944/441007a.html>.

of the permanent five – to which France was admitted at the last minute.<sup>96</sup> It was also necessary to take account of China which had emerged as the leading power in Asia after the defeat of Japan.

76. From the very start of the negotiations, smaller States feared that the SC might become a hegemon not constrained by legal rules. Therefore, the utmost care was taken by them to make sure that the SC would not ride roughshod over their rights. Some clues can be gleaned from the text of the Charter, and observers have not failed to elaborate on those words which reflect indeed concerns that were expressed at the founding Conference of San Francisco. In the practice of the SC, however, little attention is given to textual niceties. Generally, the drafting history plays only a modest role in eliciting the scope and meaning of the Charter provisions for the purposes of daily business.

77. Article 1, which enunciates the purposes of the world organization, deals in its first paragraph specifically with the mandate of the UN to uphold, maintain and restore international peace and security. The brevity of that text had been criticized by some delegations as not reflecting the true spirit of the future world organization by failing to mention that peace must be founded on justice. Therefore, it was suggested to add a complement specifying that the maintenance of international peace and security should be guaranteed “in conformity with the principles of justice and international law”. This amendment was defeated.<sup>97</sup> After that, para. 1 was split up into two parts.

78. In its first clause, Article 1(1) sets forth that the United Nations shall take “collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace”. This is a clear reference to action undertaken under Chapter VII of the Charter where the power of the SC to take enforcement action resides. Nothing is said about the yardstick to be used, the line of orientation and the objectives of such measures. The Charter simply enjoins the SC to take action against and remove

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<sup>96</sup> Chapter VI, Section C, para. 3.

<sup>97</sup> See Wolfrum, *Article 1*, 114, margin note 22; Lachs and Gowlland-Debbas, *Article 1*, 331.

such threats. Apparently, the authors of the Charter were of the view that no more could be said about the strategies to be resorted to in such emergency situations.

79. On the other hand, where Article 1(1) in its second clause refers to settlements under Chapter VI, where the SC acts primarily through peaceful means by way of recommendations, it specifies that any settlement should be brought about “in conformity with the principles of justice and international law”. This is exactly the formula which had been rejected for Article 1(1) as a whole. Now it applies only to activities under Chapter VI. The Dumbarton Oaks proposals did not contain such a proviso. It was added at the insistence of Chile, the Netherlands, Ecuador, Greece and Iran.<sup>98</sup>

80. The stock-taking exercise comes to its conclusion with a look at the provisions that deal specifically with the SC. Article 24(2) states explicitly that the SC shall act in accordance with the Purposes of the UN, i.e. the provisions just outlined, but also with its Principles, which are enunciated in Article 2. The following sentence adds that the “specific powers” of the SC are detailed in Chapters VI, VII, VIII and XII of the Charter. This proviso was also meant as a check intended to include the SC in a legal framework preventing it from deriving new and implied powers from its general mandate as the guardian of international peace and security.

81. It might be tempting to draw the conclusion, from a comparison of the first and the second clauses of Article 1(1), that it was the intention of the drafters to exempt the SC from any legal restriction when exercising the powers under Chapter VII. This would be a hazardous exegetical exercise, however, which would run counter to the general tendency of the Charter to emphasize the rule of law. A conclusion *e contrario* would also distort the gist of the amendments introduced by the countries referred to which simply wished to ensure that any peaceful settlement should be in conformity with international law – without wishing to give the SC a free hand in all other situations.<sup>99</sup>

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<sup>98</sup> See Wolfrum, *Article 1*, 113, margin note 21.

<sup>99</sup> See Peters, *Article 25*, 830, margin note 141.

82. Originally, the only question of interest was to what extent the SC would be entitled to intervene in sovereign States. It was not discussed if and to what extent the SC could possibly interfere with individual rights. The SC was conceived as an institution dealing with the States members of the world organization. That the SC might one day pierce the wall of national sovereignty by dealing directly with individuals was outside anyone's imagination. On the other hand, it was clarified from the very outset through Article 2(7) that the SC could intervene in matters under domestic jurisdiction if making use of its enforcement powers under Chapter VII. Indeed, if such authorization had not been given, the enforcement mechanism of Chapter VII would have been devoid of any real effectiveness.

83. It is true, on the other hand, that the SC has not been subjected to any kind of review procedure under the Charter. The ICJ is not a world constitutional court. The SC's resolutions cannot be challenged directly by anyone, neither a State nor a private person.<sup>100</sup> Does that mean that the rule of law does not apply to the SC? Why was no review procedure provided for? Several grounds may be mentioned.

- a) To whom should such a review function have been entrusted? The ICJ is not an ideal control body. When exercising its responsibilities under Chapter VII, the SC is called upon to assess complex factual situations which require a general expertise in political matters which judges normally do not have.
- b) Normally, the SC must act swiftly, under heavy time pressure. On the other hand, proceedings before the ICJ take normally a very long time, mostly several years. The introduction of review procedures would greatly hamper the work of the SC, making it unfit for any urgent decision-making.
- c) The general assumption was that a body in which 15 States are represented, from all of the regions of the world, would necessarily come to well-balanced solutions.

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<sup>100</sup> An indirect attempt to effect such an attempt failed, see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom and United States of America)*, Provisional Measures, Order, 14 April 1992, ICJ Reports (1992) 3, at 234; Judgment, 27 February 1998, ICJ Reports (1998) 9, at 115.



- d) Furthermore, it was assumed that the veto right of all permanent members would reliably prevent any inconsiderate decision.
- e) It was also taken into account that the debates of the SC are generally held in public and that, even if exceptionally the SC meets in private session, the end result must in any event be justified before the world community.
- f) Finally, the big powers had no inclination whatsoever to justify their actions before a body of judges, elected by themselves.

Although many reasons explain the absence of formalized remedies, it would constitute a fatal error to conclude that this lacuna is tantamount to liberating the SC from all substantive constraints.<sup>101</sup> Just the contrary is true. The incompleteness of the control system makes it all the more necessary to place the SC, in the interest of all members of the world organization, under the discipline of such constraints.

## 1.7. The SC's Legal Obligations

### 1.7.1. The Security Council Bound by the Law of the Charter

84. Views about the SC's legal status under general international law have changed over time. Today, after decades of practice, some of the opinions expressed in the early years after the establishment of the UN are only of historical relevance today. The most radical strain of thought held that the SC is free from any constraints. A few voices should be examined separately.

- a) American Secretary of State John Foster Dulles said in 1950 that the SC was exempted from all legal ties. This was a political statement by someone who was not interested in legal niceties, wishing to emphasize the breadth of the political discretion enjoyed by the SC.<sup>102</sup> In a pragmatic sense, Dulles was absolutely right in stressing that no legal guidance is provided by the Charter.
- b) Reference is often made to a sentence written by Hans Kelsen in his commentary on the Charter: "The purpose of the enforcement action under Article 39 is not to maintain or restore the law, but to

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<sup>101</sup> See, e.g., Tzanakopoulos, *Disobeying*, 55.

<sup>102</sup> Dulles, *War or Peace*, 194-195: "If [the SC] considers any situation as a threat to the peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient".

maintain, or restore peace, which is not necessarily identical with the law".<sup>103</sup> It seems extremely doubtful whether this short statement can be interpreted as meaning that Kelsen denied any relevance of legal rules for the exercise of enforcement powers under Chapter VII. Instead, he may have wished to underline the fact that the restoration of peace has an absolute priority – a proposition which can hardly be contested. But it is one thing to state that urgent measures require swiftness, but quite another to contend that also long-term measures may be taken without any regard for the legal position underlying the dispute concerned. Thus, Kelsen would appear to have been misunderstood. In particular, Kelsen did not envisage any of the situations of targeted sanctions which in his time had no place on the agenda of the SC.

- c) A Dutch lawyer, Gabriël H. Oosthuizen, wrote in 1999 that the UNSC has "unfettered powers when dealing with maintenance of international peace and security issues".<sup>104</sup> This statement should not be taken too seriously. Not because the author was apparently young, but because he wrote his piece a couple of years before the issue of targeted sanctions had come to public knowledge. It was only in 1999 that the SC established, through resolution 1267 of 15 October 1999, the first Sanctions Committee in respect of members of the Afghan Taliban. The legal world had not yet taken cognizance of the problematique of targeted sanctions against individuals.
- d) One should lastly mention a recent statement by Italian author Maurizio Arcari who also argues that in the exercise of its enforcement powers the SC is not bound by any rules of international law. He generally takes the view that the Charter has to be read within the context of general international law, but he feels bound by the propositions in Article 1 of the Charter which differentiate between the different fields of activity of the SC:

"But even admitting that this perspective is intriguing, one cannot underestimate the legal hurdles created by the text of the Charter to such integration, at least insofar as Art. 1, para. 1, liberates the actions carried

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<sup>103</sup> Kelsen, *The Law of the United Nations*, 294, and 735-737.

<sup>104</sup> Oosthuizen, *Playing the Devil's Advocate*, 549.

out by the UN in the field of the maintenance of international peace and security from the observance of international law.”<sup>105</sup>

To our mind, this fidelity to the text of the Charter is misconceived. Developments have long since overtaken this hurdle. Even in the debates within the SC, consensus prevails to the effect that in particular human rights norms must be respected in any kind of situation.<sup>106</sup>

85. A short summary leads to simple conclusions. The SC has its foundations in the Charter of the United Nations. Its powers are limited to those with which it was vested by the Charter. The historical origins have no relevance for the interpretation of the Charter. The SC cannot lawfully arrogate to itself powers not granted to it by the States members of the UN. Although the SC is the most powerful UN institution, it cannot unilaterally escape from the cage of the legal rules laid down in the Charter.<sup>107</sup> The Purposes and Principles, to which it is committed, establish truly legal constraints and cannot be understood as just political rhetoric.<sup>108</sup> Only very few voices have argued, mostly in a distant past, that the SC has no legal restrictions to observe.

### **1.7.2. Is the SC Bound by Other Rules of International Law beyond the Charter?**

86. It is more difficult to answer the question whether the SC is bound additionally by rules of international law outside the Charter. The Charter itself fails to make clear indications in that regard. In the provisions on the SC one finds little that might suggest that the SC is obligated to observe and respect other legal acts. The Preamble of the Charter states that the Peoples of the United Nations’ are determined:

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<sup>105</sup> Arcari, *Limits to Security Council*, 254.

<sup>106</sup> See the following considerations.

<sup>107</sup> See, e.g., Gaja, *The Protection of General Interests*, 93; Herdegen, *Die Befugnisse des UN-Sicherheitsrates*, 9; Paulus and Leiß, *Article 103*, 2127, margin note 47; Peters, *Article 25*, 813, margin note 81, and 828-829, margin notes 134-137.

<sup>108</sup> *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 20 July 1962, ICJ Reports (1962) 151, at 167-168; Sheeran and Bevilacqua, *UN Security Council*, 380. Doubts are expressed by Wolfrum, *Article 1*, 108, margin note 4.

“to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”

It is doubtful whether anything of actual normative significance can be derived from these words. It might be argued, in particular, that the drafters cast a look at the state of world affairs before the establishment of the UN and that according to their views the world should be re-ordered according to the judgment of the new institutions which would be free to act as the trustees of the international community, without being subjected themselves to any norms of general international law that had emerged before 1945 or to any treaties concluded at a later stage. However, the paragraph of the Preamble just quoted demonstrates that the drafters were committed to the general observance of the rule of law. They saw the governance of the rule of law as an ideal whose realization should be consistently pursued.

87. There is no clear statement of the ICJ according to which the SC must comply with general international law. August Reinisch argues that the text of the Charter remains “indeterminate” in that respect.<sup>109</sup> However, in the practice of the UN one finds numerous general pronouncements to the effect that the SC must act in accordance with international law, in particular the rules providing for human rights protection.

88. For many years, the General Assembly dealt with the principle of the rule of law. Eventually, in 2012 it adopted a Declaration at a High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels.<sup>110</sup> In this Declaration, different paragraphs are addressed to the SC. The Declaration was adopted without vote, reflecting therefore a broad consensus of the international community. Paragraph 2 states:

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<sup>109</sup> Reinisch, *Value Conflicts*, 54; extensive discussion by Peters, *Article 25*, 828-834.

<sup>110</sup> UN doc. GA Res. 67/1, 24 September 2012.

“We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs ...”

Para. 28 goes on to say:

“We recognize the positive contribution of the Security Council to the rule of law while discharging its primary responsibility for the maintenance of international peace and security.”

Lastly, para. 29 specifies:

“... we encourage the SC to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are maintained and further developed.”

89. It need not be emphasized specifically that the GA is not a legislative body. Nonetheless, its resolutions may render visible a rule of customary or general international law. The propositions adopted by the GA in respect of the rule of law are couched in specific legal terms. They do not promote remote political aims but address an actual practice. However, admittedly they avoid clear-cut language. The GA confines itself to “encouraging” the SC to heed certain standards derived from the instruments evolved within the framework of the World Organization, in particular the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

90. Accordingly, it is not enough to refer to Resolution 67/1 when wishing to demonstrate that the Security Council is bound by “general” international law outside the Charter. But there exists no divergence between the GA and the SC itself regarding the latter’s subjection to the rule of law. The SC has conducted a number of internal discussions on the topic. Those discussions were not incidental to the treatment of other, more specific topics. Rather, they were explicitly flagged out as discussions on the topic: “Strengthening international law: rule of law and maintenance of international peace and security” and “The promotion and strengthening of the rule of law in the maintenance of international peace and security”. The first one of these

discussions took place on 22 June 2006,<sup>111</sup> the second one on 29 June 2010.<sup>112</sup> The main element of these discussions was the mechanism created by the SC for the fight against terrorism, with its main tools: the freezing of assets and travel bans. Speakers, including the delegates of the permanent members of the Security Council,<sup>113</sup> generally underlined the necessity of observing the rule of law in framing resolutions of the Security Council. This broad consensus is also reflected in the Presidential Statement adopted at the end of the debate<sup>114</sup> which emphasizes the

“need to ensure that sanctions are carefully targeted in support of clear objectives and designed carefully so as to minimize possible adverse consequences.”

Obviously, the text does not contain an explicit reference to any constraining legal prescriptions. But it reflects the awareness of the SC that in the fight against terrorism the utmost care must be taken to avert harmful consequences from the individuals targeted by such “smart” sanctions. It goes without saying that the SC itself is reluctant to over-emphasize the legal ties binding upon its enforcement powers.

91. In order to get a definitive answer as to the subjection of the SC to the rules for the protection of human rights, different methodological avenues may be embarked upon.

a) A first avenue seems to be attractive at first glance but must almost automatically be discarded according to strict legal thinking. It could be argued that the UN and its institutions must be bound by instruments which came about within their own framework. From a political viewpoint, this inference seems logical. It would be contradictory if the UN, having produced such instruments for the protection of human rights, could turn its back on those instruments, reneging them as soon as the ratification process has set in. Yet, this would mean

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<sup>111</sup> UN doc. S/PV.5474.

<sup>112</sup> UN doc. S/PV.6347. Later discussions on the rule of law had a different focus: UN doc. S/PV.6705, 19 January 2012; UN doc. S/PV.7115, 21 February 2014.

<sup>113</sup> UN doc. S/PV.6347: United Kingdom, p. 18; China, p. 21, at 22; Russia, p. 22-3; United States, p. 24, at 25.

<sup>114</sup> UN doc. S/PRST/2010/11, 29 June 2010.

resorting to a hazardous construction of relying on the general idea of *venire contra factum proprium*, recognized in private law, or estoppel, as recognized in public international law. Under the doctrine of sources of international law, this idea has not been accepted. Treaties are considered acts of self-commitment where an obligation arises from the explicit will of the State or other international entity concerned. Equating participation in the drafting process with acceptance seems rather far-fetched, all the more so since the UN does no more than provide the institutional framework within which States are the determinative actors.<sup>115</sup> Therefore, the doctrine of acquiescence also fails as support for the production of a binding effect.

92. b) Turning to general international law, the legal position is different. Rules of customary law govern international inter-relationships in general. They grow primarily out of State conduct. International organizations do not have the same weight as States in such processes. Normally, only State practice and the *opinio juris* of States are taken into account when ascertaining whether a customary rule has come into existence.<sup>116</sup> However, the rules binding on States are also binding on international organizations. International organizations cannot have more rights under general international law than States, provided that no provisions to the contrary have been agreed upon. The 1980 advisory opinion of the ICJ on the Egyptian regional office of the WHO is quite clear in that respect:

“International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law ...”<sup>117</sup>

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<sup>115</sup> See, e.g., Fassbender, *The Role for Human Rights*, 80. But see statement by Sheeran and Bevilacqua, *UN Security Council*, 384, favouring that construction.

<sup>116</sup> However, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, at 22, para. 22, the ICJ accepted the modification of Article 27(3) UN Charter through the concordant practice of the SC and the GA.

<sup>117</sup> *Interpretation of the Agreements of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, ICJ Reports (1980) 73, at 89-90. More cautious language was used by the ICJ in *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174, at 180.

As already pointed out the rules of *jus cogens* all pertain to the class of general international law. It is not necessary, at this juncture, to identify the relevant rules of *jus cogens* by providing a complete balance sheet. One thing is clear, however: what a State is not permitted to do, cannot be done by an international organization.

93. It is interesting to note that in the WHO case the ICJ refers to “general rules of international law”, not specifically to customary law. This specific accent of the opinion proves significant in the present context. Indeed, in respect of human rights, in particular, the traditional doctrine of customary law is at a loss since the practice in that field cannot be observed empirically. Therefore, a famous article by Bruno Simma and Philip Alston suggested, many years ago, that indeed non-written propositions in the field of human rights should be classified as general principles and not as customary rules, in particular because the psychological element plays necessarily a much more important element if the practice cannot be observed.<sup>118</sup>

94. Whatever the most appropriate classification of *jus cogens*: our conclusion is that the SC, as an institution of the United Nations, is bound, like all other subjects of international law, by the general rules of international law, including *jus cogens*.<sup>119</sup> The Charter does not exempt it from the binding effect of the general rules. On the contrary, the Charter directs the SC to act in the discharge of its duties “in accordance with the Purposes and Principles of the UN” (Article 24(2) Charter). The promotion and protection of human rights belongs to these purposes and principles. Article 103 Charter cannot be construed in such a way as to give a free hand to the SC to act according to its

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<sup>118</sup> Simma and Alston, *Sources of Human Right Law*, 82-108.

<sup>119</sup> See, e.g., Angelet, *International Law Limits*, 75-77; Bothe, *Human rights law*, 377; Doehring, *Unlawful Resolutions*, 108; Droubi, *Resisting United Nations*, 38; Fassbender, *The Role for Human Rights*, 82; Gordon, *Sword of Damocles*, 640; Herdegen, *Befugnisse des UN-Sicherheitsrates*, 27; Orakhelashvili, *Peremptory Norms*, 436-437, and 459; Saliba, *Is the Security Council Legibus Solutus?*, 418; Sheeran and Bevilacqua, *UN Security Council*, 388; Sturma, *Does the Rule of Law*, 302; Tzanakopoulos, *Disobeying*, 57, 71, 81.



sole political discretion<sup>120</sup> since “human rights are a part of the plurality of values and norms on which the UN is constituted”.<sup>121</sup> Its teleology of supremacy of the Charter does not cover constitutional elements of the international community. On the other hand, it stands to reason that the mandate of the SC must not be undermined by such respect.

95. Obviously, since most human rights are not absolute, whatever their legal source, they cannot have such an absolute character either for the SC. The SC is, hence, generally empowered to proceed to a balancing test when it encounters human rights as a possible obstacle to its action. It has to weigh the public interest objective it is pursuing against the rights affected by its measures. As a rule, the SC concerns itself only with matters of paramount public interest. Therefore, according to the yardstick of proportionality which is generally considered applicable, far-reaching measures of interference may be warranted. Such interference would be impermissible, however, in the case of *jus cogens* rules which demand unreserved respect and obedience.

### 1.7.3. The Lawfulness of the Sanctions Regime

96. In order to give the following considerations a more concrete touch, one might imagine all kinds of hypothetical examples, for instance the SC authorizing the torture of an agent of the secret service of Ruritania with a view to extorting from him secrets which may save our planet from its destruction. Such imaginative *rêveries* make no sense in the present connection. We shall confine ourselves to discussing the real problems that have recently arisen in connection with smart sanctions. The sanctions regime which the SC has established with a view to combating terrorism has led to heated controversies about the limits of international government. At the centre of these debates stands the principle of fair trial which, in and by itself, cannot even be classified as *jus cogens* but undoubtedly pertains to the body of general international law.<sup>122</sup>

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<sup>120</sup> See Tzanakopoulos, *Disobeying*, 74-76.

<sup>121</sup> Sheeran and Bevilacqua, *UN Security Council*, 401; similar views are expressed by Gowland-Debbas, *Security Council as Enforcer*, 69.

<sup>122</sup> For a comprehensive discussion see Ciampi, *Security Council Targeted Sanctions*, 98-140, and de Wet, *Human Rights Considerations*, 141-171.

97. No lengthy explanations are needed. Starting with Resolution 1267 (1999) regarding the Afghan Talibans, the SC has progressively created a system of sanctions to be imposed on persons alleged to engage in terrorist acts or to assist and abet such acts. The sanctions are of two kinds: States are ordered to freeze the assets of such persons and prevent them from travelling through their territories. It is not the SC itself which imposes such sanctions, but subsidiary bodies, sanctions committees, composed in the same way as the SC itself, to which the SC has delegated its powers under Chapter VII. It is these bodies which process the information received by them and issue the sanction orders.

98. The discussions in the SC about the rule of law, mentioned above, were not held by accident. They were prompted in particular by the resistance that had arisen in the European Community/Union regarding the enforcement of such anti-terrorism resolutions, coming to its first culmination point with the judgment of the European Court of First Instance of 21 September 2005.<sup>123</sup> The judgment held that the SC, although elevated to a position of primacy by Article 103 of the UN Charter, was bound to respect international *jus cogens*. Obviously, in particular the permanent members of the SC took the view that such control by national judges – institutionally the judiciary of the European Community/Union is a national judge – could gravely harm the efficiency of the entire anti-terrorism system.

99. The perusal of the summary records of the proceedings provides impressive results. All delegation represented on the SC unanimously defended the view that the SC, when making use of its powers under Chapter VII of the Charter in the fight against terrorism, had to respect human rights. Not a single voice can be found that would have pleaded for an unrestricted power of the SC to hit as hard as possible, without regard for the interests of the targeted persons. Not even the permanent members held different positions. But it was also pointed out by some of them that compliance with general international law, in particular human rights, should not impair the SC's action. Thus, the Russian Ambassador said on 22 June 2006:

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<sup>123</sup> Case T-315/01, *Kadi*, Judgment, 21 September 2005, [2005] ECR II-3649; see para. 111 below.

“It is important that sanctions regimes adhere to fair and clear procedures, without impinging upon the Council’s powers or detracting from the primary goal of improving the effectiveness of sanctions.”<sup>124</sup>

Argentina stressed:

“the Charter also states that the Council has duties and we must also take *jus cogens* into consideration.”<sup>125</sup>

A particularly strong statement was made by China:

“On sanctions, China has always advocated caution. We believe that it is necessary to set strict standards and time lines for sanctions in order to mitigate their negative humanitarian effects. Currently, the Secretariat, the Security Council and the academic community are all engaged in studying the question of how to improve the fairness, transparency and effectiveness of current procedures of listing, delisting and granting humanitarian exemptions. China supports the improvement of United Nations sanctions regimes and believes that the following principles should be adhered to: sanctions should be based on the relevant Security Council resolutions and applied with caution after extensive consultations; we should base ourselves on facts and evidence and should avoid double standards; full account should be taken of the practical situation of the countries concerned and the nature of the work of the sanctions committees; and it is necessary to improve internal mechanisms and enhance efficiency.”<sup>126</sup>

It is particularly significant that a country like Switzerland, which is generally law-abiding, not interested in defending the attributes of the SC, pronounced itself for the continuation of the strategies of the SC in fighting terrorism:

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<sup>124</sup> UN doc. S/PV.5474, p. 17.

<sup>125</sup> *Ibid.*, p. 20.

<sup>126</sup> *Ibid.*, p. 27.

“in regard to the effectiveness and credibility of the sanctions system, Switzerland wishes to underscore the usefulness of the system of targeted sanctions. We believe that it must be preserved and consolidated and that the option of additional improvements should be considered.”<sup>127</sup>

100. One conclusion may be drawn from all these statements: the SC has carefully considered the matter. Its members are willing to remain within the framework of general international law. They do not claim for the SC unbounded powers. Thus, it is highly improbable that any one of the SC's decisions might clash with *jus cogens* rules that protect the core values of the international community. The SC is composed of States that all (most of which?) embrace the rule of law. And if one or the other State wished to relieve the Council from these constraints, there are others which are obligated, under their constitutions and under the human rights treaties they have ratified, to see to it that the SC comply with basic human rights standards. The SC is not a wild beast that must be tamed by the insights of wise men from the legal profession.

101. It remains true that statements made in the SC do not have a binding quality. They provide clues, they constitute evidence from which one may à la rigueur deduce an *opinio juris*. Therefore, our research should be continued in a more systematic manner. How can one *lege artis* come to the conclusion that indeed the voices referred to correspond to the true legal position?

102. “Smart” sanctions were developed by the SC as an alternative to embargoes which hit an entire nation. Iraq was subjected to a comprehensive embargo after its attack on Kuwait.<sup>128</sup> The consequences of those embargo measures must have been catastrophic for the Iraqi population. Hunger became rampant. In particular small children suffered and must have died by the thousands. In a report for the UN Sub-Commission on Human Rights, its Belgian member Marc Bossuyt wrote:

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<sup>127</sup> UN doc. S/PV.6347 (Resumption 1), 29 June 2010, p. 3.

<sup>128</sup> UN doc. SC Resolution 661 (1990), 6 August 1990.

“The sanctions regime against Iraq is unequivocally illegal under existing international law and human rights law ... Some would go as far as making a charge of genocide.”<sup>129</sup>

It is clear that economic sanctions will always and unavoidably entail some harm for the affected population. But sanctions of such gravity, entailing massive human deaths, go to the heart of the concept of human rights. If indeed events on the ground were of the kind described by critical voices, the SC would have violated the human rights norms by which it is bound. Balancing tests are necessary. But an attack against a civilian population is not allowed under the rules of IHL. It cannot be allowed under the law of the Charter.<sup>130</sup>

103. It may be hoped that such excessive measures against an entire nation are today a thing of the past. The main issue today is whether the procedure for the enforcement of smart sanctions can be held to be in conformity with the applicable standards of international law. It is not so much the nature of the sanctions itself that has given rise to criticism. It is the procedure under which a person is placed on a blacklist of the SC or may be removed from those lists that has come into the focus of sharp criticism.

104. Smart sanctions were originally fairly rough. All the assets of the persons identified by a Sanctions Committee were to be frozen. SC Resolution 1267 (1999) directed the States Members of the Organization to

“(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any

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<sup>129</sup> UN doc. E/CN.4/Sub .2/2000/33, 21 June 2000, para. 71. See also Orakhelashvili, *Peremptory Norms*, 455.

<sup>130</sup> On the situation in Iraq following the instauration of the sanctions regime see also “Fourth periodic report of Iraq submitted to the Human Rights Committee”, UN doc. CCPR/C/103/Add.2, 28 November 1996, paras. 1-4.

persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.”

This was extremely harsh. No one was warned beforehand, and the consequences of such a “freezing” were occasionally simply disastrous for the person concerned who, initially, could not even be sure that he/she would have enough money to take care of the daily household needs of the family. It could have been foreseen that such drastic measures would raise anger not only among the potential victims, but also in wide circles of the international community. Critics drew attention to a couple of major and undeniable deficiencies of the procedure:

- Targeting had its factual basis in reports provided to the SC by secret services, in particular by the secret service agencies of the USA, CIA and NSA. The information was not checked, it was rudimentary.
- Thus, the sub-committees of the SC taking the decisions could not know whether the suspicions they were pursuing had any reliable foundation.
- There was a glaring lack of transparency. The proceedings were held in private. The “defendants”, as it were, could not make use of the means of defence which are usually granted to a defendant in a criminal proceeding.
- Freezing all the assets of a person was not compatible with the principle of proportionality.
- The de-listing procedure could only be initiated by the national governments of the persons concerned. They themselves had no right of application.
- All the decisions were taken by the sub-committees of the SC themselves, those that had enacted the targeting measures. Such auto-control did not live up to standards in consonance with the rule of law.
- A freeze was normally not a short-term-measure, it could last for many years.
- Lastly, the main defect was the absence of a judicial remedy. It was an executive agency that held full powers, without any external check.<sup>131</sup>

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<sup>131</sup> See, e.g., Almquist, *Human Rights Critique*, 307.

105. These criticisms did not fail to impress the SC, which had to fear that its decisions would not be heeded. Step by step, the procedure was improved.

- Resolution 1452 (2002), 20 December 2002, (para. 1 (a)), exempted financial resources necessary for basic expenses like, in particular, basic foodstuffs from the freezing order;
- Resolution 1617 (2005), 29 July 2005, specified that a State proposing the listing of a person should provide a “statement of case” describing the factual elements underlying the proposal (para. 4);
- Resolution 1730 (2006), 19 December 2006, determined that any person targeted by a freezing order had the right to request on its own initiative removal from the list, without having to rely on the assistance of his/her state of nationality; for that purpose, a “focal point” was to be established within the UN Secretariat, mandated with pre-reviewing and ordering the requests received (see Annex to the Resolution about de-listing procedure). This Resolution was adopted as an answer to the judgment of the European Court of First Instance in the *Kadi* case of 21 September 2005.<sup>132</sup> Thus, although the targeted persons were not recognized as defendants with procedural rights on a level of parity with those of the designating nations, they were at least admitted as actors being able to fight for their rights and interests.
- Resolution 1735 (2006), 22 December 2006, intensified the requirements of information a designating State had to comply with (para. 5) and demanded additionally that the States concerned “take reasonable steps according to their domestic laws and practices to notify or inform the listed individual or entity of the designation” (para. 11);
- Resolution 1822 (2008), 30 June 2008, refined this requirement by adding that the “statement of fact” should consist of a “narrative summary” of the reasons for the suggested listing (para. 4), to be published on the website of the committee; the Resolution further reiterated that the State concerned

“take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the listed individual

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<sup>132</sup> See para. 111 below.

or entity of the designation and to include with this notification a copy of the publicly releasable portion of the statement of case" (para. 17).

However, with regard to the State holding jurisdiction over the individual or entity concerned the obligation of information was formulated in much stronger terms. The Permanent Mission of that country "shall be notified within one week" (para. 15).

- Resolution 1904 (2009), 17 December 2009, established the Ombudsperson's Office tasked with reviewing all delisting requests regarding the Al-Qaida and Taliban Sanctions List and submitting to the relevant Committee of the SC a comprehensive report on the case with recommendations (Annex II). The Ombudsperson is independent and impartial and shall not receive any instructions from governments. Most important, the Ombudsperson may engage with the petitioner in a dialogue, requesting him to supply additional information.<sup>133</sup>

This Resolution can again be seen as a response to a decision of the European judiciary, namely the judgment of the Court itself of 3 September 2008 which opted for a radical solution of European primacy.

- In Resolutions 1989 (2011), 17 June 2011, and 2083 (2012), 17 December 2012, the existing legal framework was again confirmed and consolidated. Whereas Resolution 1904 (2009) had remained largely silent on the effect of the recommendations contained in the comprehensive report of the Ombudsperson, Resolutions 1989 (2011) and 2083 (2012) went much further in detailing that effect. The Ombudsperson's recommendations continue to lack any bindingness but shall determine the outcome of the proceeding if no objection is raised within 60 days. Rejection of the recommendation

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<sup>133</sup> "6. During this period of engagement, the Ombudsperson:

(a) May ask the petitioner questions or request additional information or clarifications that may help the Committee's consideration of the request, including any questions or information requests received from relevant States, the Committee and the Monitoring Team;

(b) Shall forward replies from the petitioner back to relevant States, the Committee and the Monitoring Team and follow up with the petitioner in connection with incomplete responses by the petitioner; and,

(c) Shall coordinate with States, the Committee and the Monitoring Team regarding any further inquiries of, or response to, the petitioner (= Annex II)".



needs a consensus within the Committee. However, any State can eventually take the case to the SC itself where the usual procedural rules – veto! – apply so that the permanent powers can be sure that no suspect can evade their scrutiny (paras. 21, 26). The Permanent mission of the country concerned is to be informed within three days (Resolution 1989, para 35; Resolution 2083, para. 35).

106. The institution of the Ombudsperson is no fig-leaf.<sup>134</sup> As reported by the current office-holder, her recommendations have been followed in the large majority of cases. According to her latest report (January 2014), from the 51 requests received for de-listing received by it 37 were granted and only three were denied, some of the requests still being under consideration.<sup>135</sup>

107. When attempting to establish a balance sheet with a view to finding out whether possible *jus cogens* norms have been breached, the following elements deserve special attention:

- a) The procedure has gained a high degree of transparency as far as outcomes are concerned. The persons or entities concerned are fully informed as soon as their names appear on the list. The essential data is accessible on the internet. A person caught in the network of the sanctions committees concerned does not find herself in a Kafkaesk situation. He or she knows the allegations filed against him/her.
- b) However, some of the data publicly displayed shows a certain degree of vagueness. In particular, the person concerned has no access to the evidence proper, i.e. the documents from which the suspicion of terrorist activities is deduced.
- c) But it is not correct generally to criticize the black lists for the vagueness of their indications. Thus, two cases might be highlighted: The first name of the Consolidated Al-Qaida/Taliban list is Sayf-Al Adl, listed on 7 September 2010. The narrative indicates:

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<sup>134</sup> See, in particular, De Wet, *From Kadi to Nada*, 787-808.

<sup>135</sup> Seventh Report of the Office of the Ombudsperson to the SC, UN doc. S/2014/73, 31 January 2014, p. 16-30.

“Sayf-al Adl taught militants to use explosives and trained some of the hijackers involved in the attacks in the United States on 11 September 2001. He also trained Somali fighters who killed 18 US servicemen in Mogadishu in 1993.”

Obviously, the narrative lacks supporting evidentiary materials. But the allegations are clearly specified and substantiated.

Another case is that of Malik Muhammad Ishaq, listed recently on 14 March 2014. The account given in the Consolidated List says:

“Malik Ishaq is reported to have admitted in October 1997 in an interview that he was involved in the killings of over 100 people.”

108. It remains that the *listing process* takes place without the persons or entities concerned being given a fair hearing. On the other hand, it stands to reason that any attempts at freezing must come as surprisingly as possible. Otherwise, the targeted assets would immediately be withdrawn from the financial institutions where they are held. Hardly will it be possible to change that part of the procedure. Emphasis must therefore be placed on the modalities of de-listing. In this regard, the Human Rights Committee erred when in the case of *Nabil Sayadi and Patricia Vinck v. Belgium* it found that a hearing should have taken place before the listing took place. On the other hand, the Human Rights Committee is certainly right when it takes the view that nothing would stand in the way of granting a hearing before a travel ban is issued.<sup>136</sup>

109. It is a great advantage that the listed persons or entities have been granted the right to request their de-listing, being able now to submit to the Ombudsperson the requisite supporting evidence. The Ombudsperson has full powers to engage in a dialogue with the petitioner. If the Ombudsperson makes use of those powers, the petitioner is capable of producing all the elements which may discharge him/her from the allegations underlying the designation. In fact, as results from the Ombudsperson’s reports, she constantly seeks to clarify the facts to the greatest possible extent. In her latest report of January 2014 she writes:

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<sup>136</sup> Human Rights Committee, *Nabil Sayadi and Patricia Vinck v. Belgium*, case 1472/2006, 22 October 2008, para. 10.7.

“During the six months under review, the Ombudsperson interacted with all petitioners during the dialogue phase of pending cases, including through e-mail exchanges, telephone discussions and, where possible, face-to-face interviews. During the reporting period, the Ombudsperson travelled to interview five petitioners in person.”<sup>137</sup>

110. What remains is the fact that the persons or entities concerned are not treated as parties with equal rights. The principle of equality of arms is not guaranteed. Above all, the final decision is not taken by a judicial body. The procedure remains in the hands of the governments convening in the SC, and it is certainly no mystery that the permanent members, through their assured continuity in the SC, play a decisive role.

111. It was already hinted that the procedures established by the SC have come under attack above all through the *Kadi* decisions of the European judiciary:

a) Through a judgment of 21 September 2005,<sup>138</sup> the European Court of First instance voiced its dissatisfaction with a European regulation that had transposed the substantive content of a freezing order issued under SC Resolution 1267 (1999), in particular on account of the defective procedure that was challenged as not being in conformity with basic principles of the rule of law. The Court opined that it was not entitled to review the lawfulness of the Regulation since it was more or less a verbatim reproduction of the decision of the Sanctions Committee, given that Article 103 establishes the paramountcy of the UN Charter and the secondary acts issued under the Charter. Yet, it held that the Security Council was bound by international *jus cogens*. Following that basic assumption, it examined the objections raised against the relevant Regulation one by one in a curious reasoning, finding that none of the challenged measures amounted to a breach of any *jus cogens* rule.<sup>139</sup> It assumed, thereby compensating for its extremely broad construction of *jus cogens*, that even such rules could be restricted on account of public purposes, thereby denying the exceptional nature of *jus cogens* rules as protecting overriding interests of the international community.

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<sup>137</sup> UN doc. S/2014/73, p. 3, para. 10.

<sup>138</sup> Case T-315/01, *Kadi*, see note 123 above.

<sup>139</sup> Tomuschat, *Case T-306/01*, 537-551.

112. b) The Court itself did not share the views of the Court of First Instance, holding that any legal act issued by Community institutions must correspond to a full extent to the requirements of the system of protection of human rights as it has developed within the Community and that “in principle full review” must be ensured. In this regard, it challenged in particular the fact that the summary of facts handed over to the applicant could not be rebutted by him inasmuch as the underlying evidence was not made accessible to him. The Court declared that the procedural flaws of the Security Council’s sanctions procedure, reflected in the EC Regulation, had to lead to the invalidation of that Regulation. It did not bother to take into account Article 103 Charter, nor did it ask whether the European standard of human rights protection was the right yardstick for an act reflecting a SC decision, nor did it take up the argument of a *jus cogens* breach. In Germany a saying jokingly often cited is: *Am deutschen Wesen soll die Welt genesen* – German nature will bring healing to the world. It is this recipe which the CJEU applied within a European framework.

113. This is not the place to pursue the subsequent developments in the case. It should just be pointed out that the CJEU, in a more recent judgment of 18 July 2013,<sup>140</sup> fended off all the criticisms directed against its findings, insisting without any reservation on its demand that sanctions regulations must be fully in conformity with the European system, as it now has taken shape in the Charter of Fundamental Rights. Half of the membership of the EU, 14 States, had argued before the CJEU that no valid reasons could be opposed to the challenged Regulation and that accordingly Mr. Kadi’s action was to be dismissed. In sum, the CJEU requires that decisions of a sanctions committee must be susceptible of being submitted to full judicial review.<sup>141</sup> It does not

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<sup>140</sup> Case C-584/10 P, *Kadi*, Judgment, 18 July 2013, ECLI:EU:C:2013:518.

<sup>141</sup> *Ibid.*, para. 133-134: “Such a review is all the more essential since, despite the improvements added, in particular after the adoption of the contested regulation, the procedure for delisting and *ex officio* re-examination at UN level do not provide to the person whose name is listed on the Sanctions Committee Consolidated List and, subsequently, in Annex I to Regulation No 881/2002, the guarantee of effective judicial protection, as the ECtHR, endorsing the assessment of the Federal Supreme Court of Switzerland, recently stated in paragraph 211 of its judgment of 12 September 2012, *Nada v. Switzerland* (No 10593/08, not yet published in the *Reports of Judgments and Decisions*). The essence of effective judicial protection must be that

concede the SC any margin of appreciation in assessing the relevant facts. World-openness stood against eurocentrism. In the long run only will it become visible whether the preferred choice was indeed the better one.

114. We can agree with the thesis propounded by Salvatore Zappalà that the executive agencies established by the SC, the different sanctions committees, are not ideal bodies for the discharge of a balancing test.<sup>142</sup> It is true that judges are usually better qualified for that task. On the other hand, it must be accepted as a fact of life that the decision-making power in respect of world-wide fight against terrorism is vested in the SC, solely and exclusively. The world is not always as the Europeans want it to be. As has already been shown, the SC has made great efforts with a view to ensuring fair and equitable proceedings by improving the applicable procedures.<sup>143</sup> At the end of the day, the debate centers on whether a guarantee of judicial procedure, even a rule of *jus cogens* to that effect, exists under international human rights law.<sup>144</sup>

115. Assessing all the arguments advanced in a sober way, the conclusion seems to be inescapable that all the excitement about smart sanctions and European standards of human rights protection has little or nothing to do with *jus cogens*. One should return to the words of Article 53 VCLT according to which a peremptory norm is a norm “accepted and recognized by the international community of States as a norm from which no derogation is permitted”. Such consensus cannot

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it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may reestablish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered (see, to that effect, *Abdulrahim v Council and Commission*, paragraphs 67 to 84).”

<sup>142</sup> Zappalà, *Reviewing Security Council Measures*, 183-186.

<sup>143</sup> According to Bothe, *Human rights law*, 383, the current situation “is still a far cry from an independent and impartial review of a listing decision”.

<sup>144</sup> Essentially, this is the thesis defended by the Italian Constitutional Court in its judgment of 22 October 2014, see note 2 above, although it seemingly confines itself to making an analysis exclusively under Italian constitutional law.

be found in respect of the right to defence and the right to effective judicial protection, the two legal concepts that stood at the center of the *Kadi* case.

116. In fact, no regard is had by the CJEU to the fact that the sanctions regime has been established by the 15 members of the SC, among which there are in any event two permanent members who are both parties to the European integration treaties and to the ECHR. As is known from the discussions held in 2006 and 2010 by the SC on the principled aspects of the sanctions regime, all the members manifested their will to ensure a fair and equitable system in enforcing that regime. This was again manifested in the Declaration of the GA regarding the Rule of Law,<sup>145</sup> where the GA called upon the SC to improve its system without however raising any principled objections against the current regime.<sup>146</sup>

117. In particular through the first *Kadi* judgment, the SC became fully aware of the objections raised against the system established by it. As shown above (para. 105), it responded positively to the challenges put forward against the sanctions regime, establishing a relatively high standard of legal protection, albeit with some weaknesses, in particular the absence of a system of judicial review. It is accordingly clear, from an objective viewpoint, that the SC, supported by the GA, has proceeded to a serious balancing of the interests at stake, taking into account on the one hand the need to prevent terrorist attacks, and, on the other, the rights and interests of the affected individuals and entities. In Europe, a large public has certainly very advanced views as to the necessity of full judicial review of every governmental act susceptible of injuring individual rights. This advanced view is not generally shared by the other regions of the world. In particular, the International Covenant on Civil and Political Rights does not require

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<sup>145</sup> UN doc. GA Resolution 67/1, 24 September 2012.

<sup>146</sup> "29. Recognizing the role under the Charter of the United Nations of effective collective measures in maintaining and restoring international peace and security, we encourage the Security Council to continue to ensure that sanctions are carefully targeted, in support of clear objectives and designed carefully so as to minimize possible adverse consequences, and that fair and clear procedures are maintained and further developed".

judicial protection for all kinds of State interference, only in respect of criminal sanctions and in respect of interference with civil rights (“a suit at law”). As far as the guarantee of a judicial remedy for the latter category of disputes is concerned, no obstacle stands in the way of a balancing test that would permit specific restrictions if so warranted by substantial, clearly defined reasons.

118. It amounts therefore to an excessive extension of the concept of *jus cogens* if it is argued that the denial of a judicial procedure constitutes a breach of a *jus cogens* norm. It cannot be denied that, as far as can be seen, all States Members of the UN consider the actual sanctions system as corresponding to all legitimate basic requirements under the rule of law. Contrary to this consensus, conceptually no rule of *jus cogens* can have arisen. This does not mean that the features of the SC’s sanctions regime have reached perfection and are not in any need of improvement. The only lesson which is drawn here is that *jus cogens* is not suited as the yardstick for an experiment under which the attempt is made to ensure adequate legal protection against public-power interference through a sophisticated administrative system instead of a judicial system. Essentially, the conflict between State sovereignty and the rule of law, as encapsulated in the concept of *jus cogens*, is fought out here between an intergovernmental institution and a judicial body operating within a regional framework. Due to their professional formation, judges have only minimal understanding for governmental secrets.

119. The summary account given of the role played by the CJEU in becoming instrumental for the improvement of the UN sanctions regime shows that earlier discussions about the uselessness of *jus cogens* because of the lack of appropriate remedies need to be re-examined. The fact is that many resolutions of the SC must be implemented in the territory of a member State and that, if individual rights are interfered with, domestic remedies will normally be available.<sup>147</sup> National judges cannot be compelled to act as docile servants of the Security Council notwithstanding the obligation under international law incumbent on their State faithfully to implement the orders imparted by the SC. The

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<sup>147</sup> For an extensive discussion of the remedies resorted to by victims of “smart” sanctions see Richter, *Judicial Review*, 271-297.

CJEU has succeeded in subordinating the judiciary of all the EU member States to its doctrine of supremacy of union law. By contrast, the SC still has a long way to go before being able to ensure a similarly positive response to its orders. In any event, the SC cannot permit itself to insist solely on the unassailable legal fences surrounding its decisions. Even the international community's most powerful institution requires the support of the underlying societal forces. If such support is lacking, non-compliance in open or veiled forms must be expected.

120. It may be added that whoever focuses solely on judicial remedies tends to lose sight of the procedural stage preceding the adoption of a resolution. If during deliberations in the SC the argument is brought up that an envisaged measure would be incompatible with basic human rights, such criticism cannot be lightly dismissed. No member of the SC wishes to be exposed to the charge that it participates in abusive exercise of the institution's powers. In this respect, the non-derogable bindingness of *jus cogens* has great weight. Deliberations in the SC constitute also a legal process and would be misinterpreted as machinery where the will of the five permanent members (P5) invariably prevails. The P5 have a boundless potential of blockade but are unable easily to push the non-permanent members to actions rejected by the latter as not promoting the general interest of the international community.

## **1.8. Positive Duties of the Security Council under *Jus Cogens*?**

121. One of the key questions that will in the future be debated with greater intensity concerns the possible duties of the SC. Is the SC obligated to take action when in a given country a situation arises that wreaks havoc on the population, involving massive breaches of *jus cogens* norms?<sup>148</sup> The common assumption is that the SC has a broad political discretion as to the actual use of its powers. In pragmatic terms this may be true, especially in view of the veto right of the permanent members. Nonetheless, the veto right should not be misinterpreted as

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<sup>148</sup> See discussion by Zimmermann, *Security Council and the Obligation to Prevent*, 307-314.



meaning that the permanent members have no legal obligations, as if they had been granted a blank check to act according to their specific whims and fancies.

122. As already noted, the SC, as an institution of the world organization, rests on the Charter as its legal foundation. All of its powers, its rights and duties, are determined by the Charter. It is therefore necessary to take again a look at the Charter in order to find out whether it contains any clues pointing to a duty to act – notwithstanding all the factual arguments that speak against such an ambitious construction of the Charter. In this regard, the rules identified as having a *jus cogens* character would have to provide guidance in interpreting the relevant provisions.

123. Even though the Charter itself does not mention the concept of *jus cogens*, this concept underlies the general rules on the interpretation international treaties as they are codified in the VCLT. It should be reiterated that Article 31(3)(c), which also applies to the interpretation of the Charter, for which no specific legal regime has evolved, directs the interpreter to take into account, together with the context, “any relevant rules of international law applicable in the relations between the parties”. Human rights, in particular, have grown out of the Charter and have by now attained a status in international law which puts them on a par with the traditional objectives of the Charter, namely the maintenance of international peace and security.

124. Obviously, the point of departure must again be Article 24(2) according to which the SC shall act “in accordance with the Purposes and Principles of the United Nations”. There can be no doubt, as just pointed out, that the promotion and protection of human rights pertains today to the key functions of the UN. Thus, the protection of human rights, the most fundamental ones of which may qualify as *jus cogens*, falls today undoubtedly within the scope of jurisdiction of the SC. This institutional responsibility translates also to the members of the SC. They do not sit there of their own right, not in their capacity as holders of sovereign rights. They have all received a mandate from the States members of the international community to discharge their office for the promotion of the global objectives of the Charter and in

conformity with its stipulations. This applies to permanent and non-permanent members alike. The permanent members, too, can derive their mandate only from the members of the world organization. They are not “natural” members. The accountability of the SC and its members becomes visible in the duty to submit an annual report to the General Assembly (Article 24(3)).

125. Chapter VI of the Charter (Articles 33-38) contains detailed provisions on how international disputes should be addressed by peaceful means. The right of initiative, guaranteed in Article 35(1), ensures that any situation of major dimensions, involving a breach of *jus cogens* norms, may be brought to the attention of the SC. Never have there been any complaints that the SC has refused to concern itself with such a request. *Jus cogens* lacks any actual significance in this connection.

126. A duty to take enforcement action under Chapter VII might evoke greater hopes. *Jus cogens* might be relied upon to construe such an obligation. A prominent case in point is the current situation in Syria where more than 100,000 persons have been killed and millions of others have been compelled to flee to the neighbouring countries. The Security Council has not remained passive. It has debated the situation in Syria several times. Through Resolution 2139 (2014) of 22 February 2014, it demanded that the warring parties (para. 2):

“... immediately put an end to all forms of violence, irrespective of where it comes from, cease and desist from all violations of international humanitarian law and violations and abuses of human rights, and reaffirm their obligations under international humanitarian law and international human rights law, and *stresses* that some of these violations may amount to war crimes and crimes against humanity.”

However, the Resolution is not based on Chapter VII of the Charter. It does not enact an arms embargo, nor does it set forth any smart sanctions against the leading figures. Proposals to that effect had been made on an earlier occasion, but no agreement was reached in the SC, in particular because of Russia’s attitude, which belongs to the staunch supporters of the Assad regime.

127. In the *travaux préparatoires*, no hint can be found that the SC may be obligated by law, under specific circumstances, to make use of its powers under Chapter VII. In the leading commentaries, this issue has not been discussed; on the contrary, they emphasize the breadth of the discretion enjoyed by the SC.<sup>149</sup> Only in the recent literature have there been voices suggesting that such a duty should be taken into consideration.<sup>150</sup>

128. Indeed, the proclamation of the responsibility to Protect (R2P) by the General Assembly in 2005<sup>151</sup> has given the debate new life. In the Resolution “World Summit Outcome”, it is specified in para. 139 that

“The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”

The Resolution adds that, if such peaceful means prove ineffective, collective action may be envisaged:

“... we are prepared to take collective action, in a timely and decisive manner, through the SC, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organization as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”

129. A sort of contradiction might be discovered in these propositions. On the one hand, a “responsibility” is postulated. “Responsibility” was deliberately preferred to “duty” in that it does not have the

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<sup>149</sup> See Degni-Segui, *Article 24*, 899; Krisch, *Article 39*, 1275, margin note 5.

<sup>150</sup> See Gowlland-Debbas, *Security Council as Enforcer*, 38; Shraga, *Security Council and Human Rights*, 8.

<sup>151</sup> UN doc. GA Resolution 60/1, 16 September 2005.

clear connotation of a legal obligation. On the other hand, “responsibility” under the Charter is not a mere moral obligation but has a legal dimension, at a somewhat lower level than a genuine legal obligation. In particular with regard to Chapter VII, the tone becomes softer and more hesitant. The States members of the World Organization, assembled in the General Assembly, confine themselves to declaring that they “are prepared” to take collective action “on a case-by-case basis”, thereby manifesting an attitude of cautious reservation that rejects any kind of automaticity with regard to the four classes of crimes identified as the worst international offences. At the same time, the relevant paragraph also stresses that such action should be operated “in accordance with the Charter”. Thus, there is no attempt to evade the framework of the Charter, placing the need to combat such terrible crimes above the Charter.

130. Thus, we have arrived at a crucial crossroads. Those who have the primary responsibility to interpret the Charter in their daily dealings, refuse to provide a clear-cut answer. They prefer a pragmatic approach. While affirming the objective to combat genocide, war crimes, ethnic cleansing and crimes against humanity, they wish to commit any actual decision to the wisdom of the SC, which is indeed a commendable strategy. Where the Charter deals with foreign policy issues, it cannot prescribe simple and straightforward strategies. It is easy for a legal instrument like the Charter to ban certain actions like recourse to the use of force. However, to devise suitable strategies to deal with an unlawful situation is infinitely more complex. Being fully aware of this dilemma, the Charter has opted for flexibility. On the whole, it is an instrument permeated by pragmatism and cannot be understood as a Constitution whose provisions are supervised and implemented by a constitutional court.<sup>152</sup>

131. To burden the SC with positive duties is all the more problematic since the SC is not an almighty institution. Under Chapter VII of

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<sup>152</sup> See also Shrager, *Security Council and Human Rights*, 33: “The power to authorize the use of force is not a duty to do so, but a discretion exercised within the political constraints of the Council”.

the Charter, it is empowered to issue binding determinations. However, institutionally the SC lacks the requisite means for the actual enforcement of its decisions. Since Article 43 has remained largely unfulfilled, no special agreements having been concluded for the provision, on a permanent basis, of armed forces to the World Organization, the SC has to rely, whenever Chapter VII decisions require to be enforced, on the good will of the member States. Member States, on their part, are not obligated under the general provisions of the Charter to provide military contingents to the UN. Accordingly, assuming a legal duty of the SC in the four situations highlighted by the World Summit Outcome would not lead very far. The SC could invoke the Latin adage: *Impossibilium nulla obligatio*. At the most, a duty to act can be conceived of as an obligation of conduct, i.e. an obligation to undertake all feasible efforts to bring together a military operation.

132. The legal position as just expounded appears highly unsatisfactory. Whenever genocide, in particular, is perpetrated somewhere in the world, remedial measures should be taken as swiftly as possible in an effort to save the potential victims. Normally, the SC will also do so out of its political responsibility. But the case of Syria has shown that indeed the SC may remain inactive on the most diverse grounds, not only because of the complicity of a permanent member with the criminal regime, but also on account of a high degree of helplessness. Precisely in Syria, neither side deserves any great sympathies. An international intervention force could not easily take sides with one of the parties. Therefore, the outcome could be that such an intervention force would have to place the whole country under its control, in the same way as in 1945 the victorious Allied Powers established a military government for the whole of Germany. But the assumption of such a burden, which inevitably converts itself into a long-term undertaking, constitutes an enormous challenge for the international community and may turn out to become an unbearable burden.

133. Although strong moral arguments militate in favour of postulating a legal duty of the SC at least in the case of the four core crimes, legal construction should be aware of the borderline between law and policy. Decisions of the SC under Chapter VII, providing for military

enforcement action, are dependent on such an enormous amount of factors to be taken into consideration that they should rather be characterized as the outcome of a political process than of a process under the auspices of law as far as the assessment of the advisability of positive action is concerned. Of course, the framework provided by the UN Charter gives any decision of the SC a firm legal backing. It is from the Charter that the resolutions of the SC receive their authority. But their content cannot be predetermined. In that regard, political considerations will always dominate. This is not a weakness, but rather a strength. The law as laid down in international treaties has its natural limits and must grant enough room to politics which are impacted by the spur of the moment and less so by general precepts although the ideas of justice and equity are generally also the leitmotiv for the practice of the SC.

## **1.9. The Security Council and Peace Settlements**

### **1.9.1. General Considerations**

134. The most difficult chapter of a lecture on the Security Council and *jus cogens* is opened up when approaching the question whether, and to what extent, the SC may affect the identity of a State by making determinations on its territory, its population, or its governmental structure. No conflict has occurred in that respect in recent times but it may well be that a peace arrangement ordered by the SC may be needed one day, perhaps very soon, where the parties involved themselves are not able to bring about a settlement after a conflict. Essentially, the SC is tasked with providing its assistance in unforeseen crisis situations. To engage in peace building or nation building lies outside its field of competence. But in order to stabilize a conflict zone it may be necessary and therefore justifiable to make long-term determinations like the establishment of the ICTY or the ICTR. Today, the lawfulness of these two institutions stands unchallenged.

135. Inevitably, therefore, many of the subsequent considerations must have a speculative character. This should not be seen as a deterrent. Too often, lawyers concern themselves with an urgent issue only after harm has already occurred. But it is precisely the purpose of the

Charter to build up a framework which, prospectively, is able to ensure peace and security. To look into the future also with regard to upcoming challenges for the SC should therefore not be anathema.

136. SC Resolution 687 (1991) of 3 April 1991, making determinations about the situation between Iraq and Kuwait, contained three territorial clauses (paras. 2.-4.) concerning the boundary between the two States. These clauses did not purport to allocate territory belonging to one State to the other one, but confined themselves to confirming an agreement which the two States had concluded beforehand on the matter. Accordingly, the SC demanded that the two States respect the inviolability of the international boundary established by common agreement. At the same time, the UN Secretary-General was called upon to provide his assistance for the demarcation of the boundary. It is well known that the process of demarcation is designed to make a boundary line physically visible on the ground. Demarcation must not change the line fixed according to legal criteria.<sup>153</sup>

137. Traditionally, if after a conflict new boundary lines were drawn, mostly to the benefit of the victorious power, this was done by a peace treaty. A number of important peace treaties were concluded in the suburbs of Paris in 1919 after World War I. For Germany, the Treaty of Versailles was the determinative instrument. Austria's peace treaty was concluded at St. Germain, the peace treaty with Hungary at Trianon. All of these treaties provided for massive territorial and population changes.

138. After World War II, peace treaties with the former axis powers and allies of Germany were brought about fairly soon. Italy's peace treaty of 1947 also provided for territorial losses, in particular regarding Istria. Trieste was incorporated into a new independent entity called the Free Territory of Trieste.<sup>154</sup> However, no peace treaty with

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<sup>153</sup> The Commission appointed by the UN Secretary-General to perform the required demarcation between Iraq and Kuwait was fully aware of the inherent limitations of its mandate, see the Final Report, UN doc. S/25811, 21 May 1993, ILM 32 (1993) 1427, at 1451, paras. 111-2.

<sup>154</sup> This entity was short-lived. It ceased to exist *de facto* in 1954, *de jure* in 1977 by virtue of the Treaty of Osimo, see Stahn, *The Law and Practice*, 188-194; Tuerk, *Trieste*, 95-97.

Germany came about. The victorious Allied Powers met in Potsdam near Berlin in July/August 1945 to decide on Germany's future. The Potsdam Agreement, the outcome of that conference, was signed on 2 August 1945.<sup>155</sup> No German presence was ensured at the conference table. The Allied Powers dictated the conditions which were originally conceived of as preliminaries for a later peace treaty. For Germany, the arrangements which the Allied Powers agreed upon among themselves were dramatic. Germany was to lose one quarter of its national territory.

139. Additionally, the Allied Powers agreed that the German population east of the new Oder-Neisse-line should be "transferred" to the West. This "transfer" was to be effected "in an orderly and humane manner". The realities on the ground were different. Millions of German nationals were killed in the course of the actions of mass expulsion.<sup>156</sup> This was certainly the most comprehensive operation of ethnic cleansing which the world ever saw in the 20<sup>th</sup> century.

140. Obviously, Germany could never have accepted such conditions in a treaty. It should be recalled again that today operations of ethnic cleansing are listed as international core crimes under the provisions on R2P. Fearing such opposition, the Allied Powers did not admit any German voice at the conference table. Another ground explaining the absence of any German element in Potsdam was the lack of legitimate German interlocutors. Understandably, the Allied Powers did not wish to negotiate with the Nazi leaders who were to be indicted before the Nuremberg Military Tribunal. On the other hand, no organized resistance groups had been able to maintain themselves in Germany during the Nazi dictatorship. No respectable political figures that could be considered as legitimate leaders of the German people were in sight. The refugees who had fled Nazi Germany and had secured their personal freedom and physical integrity outside the German zone of influence in Europe had not succeeded in forming a government in exile.

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<sup>155</sup> Reprinted in von Münch, *Dokumente des geteilten*, 32.

<sup>156</sup> See Douglas, *Orderly and Humane*.



141. All this is not relevant *per se*, but may serve as a reminder of what response may be given to an unlawful aggression by an international body. The Allied Group meeting in Potsdam resembles greatly the SC of today, all the more so since the World Organization emerged from the Anti-Hitler coalition of those days. Unhesitatingly, the leaders of the United Kingdom, the United States and the Soviet Union agreed to the proposal to expel the entire German population of the eastern territories from their ancestral homes. They have never distanced themselves from that act of revenge in violation of basic norms of humanity,<sup>157</sup> today to be classified as *jus cogens*.

142. For the sake of balance it must be added that the Nazi regime had committed unspeakable atrocities when it held the reins of power, in particular in the course of the war. Furthermore, it had started comprehensive and extremely cruel operations of ethnic resettlement in the whole of central and Eastern Europe. The German people could not count on much sympathy on the part of the victors. It remains, however, that human beings are human beings, irrespective of whether they belong to the victorious or the defeated side. Crimes that have been perpetrated do not justify counter-crimes as reprisals. In fact, the Nazi leaders rightly sat on the bench of the accused at Nuremberg on account of genocide and deportation while criticism of the Allied strategies was not deemed appropriate. What the historical events of 1945 show is that massive breaches almost inevitably entail other injustices in retaliation. A body of 15 States, acting in a spirit of moderation and political wisdom, would certainly not have agreed to the determinations which the victorious Allied Powers adopted while mentally still in the heat of the past battle.

143. The Potsdam Agreement reflects in an exemplary fashion the difficulties encountered today when after armed conflict a peace settlement needs to be arranged. These difficulties are aggravated by the provisions of the VCLT about invalidity of treaties. According to Article 52 VCLT, a treaty is void if its conclusion has been procured by the

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<sup>157</sup> In concordant language, the US State Department and the British Embassy in Prague declared on 14 February 1996 that the conclusions of the 1945 Potsdam Conference were "soundly based in international law" (!), see text of these statement reproduced in "Die Friedens-Warte", *Journal of International Peace and Organization* 72 (1997): 107.

threat or use of force. If an armed conflict has ended by the defeat of one of the parties, a basic situation of inequality is present. The defeated party can easily claim that it signed and ratified the treaty only under the threat that the hostilities would continue – a situation that obtained in 1919 when Germany, threatened by an ultimatum, was granted only an extremely short period of two weeks for its acceptance of the Versailles Treaty. Article 75 VCLT will probably remain a fairly futile attempt to evade the complexities of a treaty imposed on a former aggressor State under pressure.<sup>158</sup>

144. Another illustrative example, where eventually an agreement was reached, is the Dayton Agreement of 1995<sup>159</sup> through which the leaders of three successor States of Yugoslavia reached a settlement about the new boundary lines only under the pressure of the United States. In order to prevent any reproach of ethnic cleansing, the Agreement establishes a right for everyone to return to his/her former place of residence.<sup>160</sup> Lastly, the Agreement between Eritrea and Ethiopia, signed in Algiers on 12 December 2000,<sup>161</sup> should be mentioned. However, there can be no doubt that we encounter more and more “entrenched” conflicts that have stirred up deep emotions rendering any true rapprochement almost impossible.

145. Peace settlements may therefore progressively be brought about by decisions of the SC under Chapter VII of the Charter. Prospectively, one might assume that a peace settlement between Israel and the Palestinians requires the authority of the SC in order to find a just and equitable balance between the rights and interests of the two sides. Other difficult situations may arise in many parts of the world, perhaps even with regard to civil wars like in Syria or in Libya, when the parties themselves are unable to sit down at a negotiating table. Recourse to the SC may then be the only conceivable remedy.

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<sup>158</sup> See Tomuschat, *Article 75*, 1686-1700.

<sup>159</sup> Reproduced in 35 ILM (1996) 89.

<sup>160</sup> Annex 7: [Agreement on] Refugees and Displaced Persons, 35 ILM (1996) 136, Article 1.

<sup>161</sup> Reproduced in 40 ILM (2001) 260.

146. The question arises then what limits to the powers of the SC have to be taken into account. Two questions arise, which cannot be separated from one another easily.

- a) The first question is whether the SC may engage in efforts to bring about a peace settlement, which according to traditional thinking comes within the realm of competence of diplomats. Is the SC only a “policeman”, entrusted with intervening in an actual crisis situation, or may the SC eventually make the final determination? Would it act *ultra vires* when replacing with a resolution under Chapter VII an agreement between the directly interested parties?
- b) The second question then is whether the SC must respect rules of *jus cogens* when dictating a settlement to the parties. If the answer is yes, the next question must be answered as to which rules of *jus cogens* may be opposed to the Security Council.

147. It need not be expounded here in detail that most prominently Gaetano Arangio-Ruiz is a fervent advocate of a restrictive reading of the powers of the SC. To his mind, the SC is in fact no more than an agent of the international community entrusted with combating actual disturbances of international peace and security. Accordingly, he is of the view that any long-term settlement of a dispute should be committed to the hands of politicians and diplomats who would then work out solutions to be consolidated in treaty form.<sup>162</sup> Admittedly, the original concept of the SC was much simpler than what can today be observed empirically. The SC has greatly enlarged its field of action, generally with the support of the GA. The two most decisive steps were the establishment of the International Criminal Court for the former Yugoslavia in 1993<sup>163</sup> and the establishment of the International Criminal Court for Rwanda one year later.<sup>164</sup> Through these resolutions, the SC has manifested its view that its “primary responsibility for the maintenance of international peace and security” (Article 24(1)) is not confined to short-term actions intended to bring to an end armed hostilities or tensions threatening to degenerate into actual fighting. Rightly, the SC asserted its belief that a true situation of peace requires

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<sup>162</sup> Arangio-Ruiz, *Security Council's Law-Making*, 627-630.

<sup>163</sup> UN doc. SC Resolution 827 (1993), 25 May 1993.

<sup>164</sup> UN doc. SC Resolution 955 (1994), 8 November 1994.

broad societal underpinnings, which may require measures to prosecute those responsible for grave offences against the life and physical integrity of other human beings. Initial objections to the broad reading of the powers of the SC, like those advanced by my colleague Bernhard Graefrath,<sup>165</sup> have in fact ceased completely. One may therefore note that time has overtaken Gaetano Arangio-Ruiz's objections. The SC cannot be deemed to be prevented from determining the conditions of peace after an armed conflict.

148. Two years before establishing the two international criminal tribunals, the SC had dictated a peace settlement for the relationship between Iraq and Kuwait, as already pointed out.<sup>166</sup> This settlement was the perfect substitute for a peace treaty. Since the SC had been involved in ordering the Iraqi armed forces to leave Kuwait, it apparently felt that it should say the decisive word in restoring the rightful situation with a view to ensuring fair and equitable conditions for Kuwait.

149. It stands to reason that long-term determinations that cut deep into the physical substance of a State could never be made lightly and hastily. The principles of procedural fairness must be observed. Each side must be given the opportunity to express its views on the matter. Determinations would have to be prepared carefully and should never be made on the spur of the moment where all of a sudden new boundaries owe their emergence to the availability of a drawer and a pencil.

150. Even though the jurisdiction of the SC concerning the imposition of a peace settlement may not be in doubt, the SC may be prevented by *jus cogens* from establishing clauses that encroach upon the core values of the international community.

### **1.9.2. Population Transfers – Ethnic Cleansing**

151. On the one hand, the SC cannot unilaterally order operations of ethnic cleansing. What happened in Germany in 1945 must be remembered as a dark hour of global leadership. Ethnic cleansing is today universally recognized as a war crime and a crime against humanity. It

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<sup>165</sup> Graefrath, *Iraqi Reparations*, 15.

<sup>166</sup> UN doc. SC Resolution 687 (1991), 3 April 1991.

counts among the four most heinous crimes covered by R2P. Human beings cannot be treated like chattel. The SC does not have the authorization under the Charter to uproot people from their homeland.<sup>167</sup>

152. The question remains whether the verdict pronounced would also apply to exchanges of population agreed upon by the States directly involved and submitted to the SC for final approval. The Treaty of Lausanne of 1924<sup>168</sup> was one of the first examples of such a forced exchange. The Greek population in Asia Minor had to leave their homes where their ancestors had lived for 2,000 years while on the other hand the Turks living in Greece had to resettle in Turkey. Such mass transfers carry with them tremendous human suffering, destroying life plans, ruining economic undertakings and being susceptible of ending up in violence. In the case of the Treaty of Lausanne, the exchange was not a strategy freely negotiated and enforced by the two governments. Greece had lost its war against Turkey and had to agree to a settlement that was largely disadvantageous to it. The only argument potentially suited to justify the uprooting of millions of people was the prevention of war by homogenizing the population. This is a rather delicate argument which makes the individual totally subject to the political interests of his/her nation. In particular Western Europe has in the meantime gained such a vast experience with mixed populations through immigration that the test of proportionality would fail in any event. There are many means to ensure the peaceful co-existence of people from different races. The forceful removal of human beings from their traditional environment is the most brutal method that can be imagined. Consequently, such transfers could be deemed to be admissible only if the populations themselves have been consulted beforehand and have agreed to their relocation. Even then, the answer would depend to a great extent on the specific circumstances of the situation. Since it is the individual who is protected, it is difficult to explain that a slim majority should be capable of prejudicing the rights of a minority.

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<sup>167</sup> See, e.g., Orakhelashvili, *Peremptory Norms*, 462.

<sup>168</sup> 28 LNTS 11.

153. In the situation between Israel and Palestine the issue of a population transfer will play a determinative role in any genuine peace negotiations. It is almost unthinkable, at the present time, that Israel might be ready to evacuate the entire Palestinian territory. However, if it agrees to the evacuation, or to a partial evacuation, objections based on the prohibition of a mass transfer of population would have little weight since all the settlers know that they established themselves on Palestinian territory and that Geneva Convention No. 4 (Article 93) contains a prohibition on the insertion of nationals of the occupying power.

154. Another problem to be addressed concerns the refugees who had to leave, or were expelled from, Palestine at the time when the State of Israel was established in 1948. Very few of the original refugees are still alive: However, since according to the doctrine applied by UNRWA the status of refugee can be inherited in patrilineal order, their numbers have grown to roughly 5 million people.<sup>169</sup> Should Israel and the Palestinians come to an agreement, the UN would be freed from a tremendous weight. However, if the burden falls eventually on the SC, the question would arise if the SC could make determinations on the right to return of the refugees, either affirming that right or denying it completely or partially. Assuming that the expulsion of the majority of the refugees was an unlawful act of warfare, to be assessed today as a breach of *jus cogens*, the question needs to be answered whether the corresponding measures of reparation are untouchable as also protected by rules of *jus cogens*.

155. This question leads back to the essential gist of *jus cogens*. As already pointed out, *jus cogens* seeks to avert evil acts from being committed. If, notwithstanding all precautionary measures, a *jus cogens* rule has been breached, the perspective changes dramatically. How the harmful consequences are to be made good is governed by the rules of general international law, as codified in the ILC ARS of 2001. The ILC has refrained from establishing a detailed chapter of secondary rules on breaches of *jus cogens*, limiting itself to stating that

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<sup>169</sup> See UNRWA information, <http://www.unrwa.org/palestine-refugees>.

(a) States shall cooperate to bring to an end through lawful means any serious breach, and (b) that no State shall recognize as lawful a serious breach of a *jus cogens* norm.

156. All these rules do not qualify as rules of *jus cogens*. It is a general lesson taught by the ICJ in the case of *Germany v. Italy* that the consequences of a breach of a *jus cogens* rule do not enjoy the protection of *jus cogens*. Wise statesmanship is required to repair grave breaches. Rigid norms satisfy the requirements of justice only regarding their endeavour to prevent a foreseeable evil from occurring. Once the evil outcome has materialized, dependency on inflexible rules is unsuitable as a recipe for the restoration of satisfactory conditions of peace and justice. In the case of the Palestinian refugees, generous financial support would be needed to create for them satisfactory conditions of life. Insistence on completely reversing the course of history would lead the populations concerned into outright disaster. In this sense, the otherwise thoughtful and imaginative monograph of Alexander Orakhelashvili errs fundamentally. Contending that a breach of *jus cogens* must invariably be repaired by unrestricted restoration of the prior situation<sup>170</sup> is the outflow of a purely mathematical model that ignores the impact of time in historical processes and fails to take into account the fate of the human beings involved.

### 1.9.3. Territorial Changes

157. Could the Security Council order territorial changes, approving factual developments on the ground that have established new borderlines that derogate from the legal position? Serious doubts arise in this connection. In an article written ten years ago I wrote:

“The Council is a creation of the Member States of the World Organization, it is the trustee of the competences conferred upon it, but it thereby has not become a sovereign in its own right that would be entitled to make determination on the identity and integrity of individual States. To enjoin a state to cede parts of its territory or to order

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<sup>170</sup> Orakhelashvili, *Peremptory Norms*, 250-252.

the disintegration of a State, splitting it up into a number of successor States, would constitute a clear *excès de pouvoir*.”<sup>171</sup>

This still seems to be the right answer which is also widely shared in the legal literature,<sup>172</sup> with just one dissenting voice,<sup>173</sup> and has also been defended by Sir Gerald Fitzmaurice in his dissenting opinion to the ICJ’s advisory opinion in the *Namibia* case.<sup>174</sup> Regarding Kosovo, the SC deliberately refrained from separating the Yugoslav province from its mother country when establishing the special regime under resolution 1244 (1999). In the preamble of that resolution, the “sovereignty and territorial integrity” of the Federal Republic of Yugoslavia is explicitly reaffirmed. Should the SC in a given case overstep its mandate, the question would arise if it acts *ultra vires* or whether it infringes a rule of *jus cogens*, namely the principle of State sovereignty.<sup>175</sup>

158. In the relationship between Israel and the Palestinians the situation is different. From the old mandate over Palestine, the UN still holds responsibilities. Israel has no jurisdiction over the Palestine territory. Accordingly, determinations on the boundary line would come within the mandate of the SC.

#### 1.9.4. Amnesties

159. A last problem that should be evoked is amnesties. For long periods in history, amnesties were a natural component of peace treaties. Article 6(5) of Additional Protocol II to the Geneva Conventions of 1949 continues that traditional line by encouraging the “authorities in power” to grant the “broadest possible amnesty” to persons having participated in a non-international armed conflict. Now that international law has become replete with moral values, the issue requires

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<sup>171</sup> Tomuschat, *Peace Enforcement*, 1768.

<sup>172</sup> Bowett, *Impact of Security Council Decisions*, 96; Herdegen, *Befugnisse des UN-Sicherheitsrates*, 29; Kirgis, *Security Council Governance*, 579; Klein, *Statusverträge im Völkerrecht*, 354; Orakhelashvili, *Peremptory Norms*, 420.

<sup>173</sup> Matheson, *United Nations Governance*, 85.

<sup>174</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, see note 116 above, at 294, para. 115.

<sup>175</sup> See also Schweigman, *Authority of the Security Council*, 173.



re-consideration, in particular in respect of grave breaches, i.e. violations of *jus cogens* norms. The Rome Statute does not provide a clear answer. Some international courts have pronounced themselves resolutely against the validity of any amnesty, in particular the International Criminal Tribunal for the Former Yugoslavia,<sup>176</sup> the Inter-American Court of Human Rights,<sup>177</sup> and the Special Tribunal for Sierra Leone.<sup>178</sup> A differentiated stance has been taken by the European Court of Human Rights.<sup>179</sup> The Human Rights Committee has taken the same stand.<sup>180</sup> In particular in the relationship between Israel and Palestine a precise regulation would be an absolute necessity – which would probably need the seal of approval by the SC to be acceptable to both sides.

160. The first question to be answered in this connection is whether a rule prohibiting amnesties for the core crimes listed in the World Summit Outcome on R2P can be deemed to exist.<sup>181</sup> The lack of an explicit provision in the Rome Statute suggests approaching the issue with caution. We proceed from the general assumption, as already pointed out, that the legal rules determining the consequences of a breach of *jus cogens* rules do not, as of themselves, partake of the same quality.<sup>182</sup>

161. However, an amnesty may be so closely connected to the crime itself that it may be deemed to frustrate and subvert the prohibition itself. This is true, in particular, if a departing dictatorial group enacts

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<sup>176</sup> ICTY, Judgment, *Anto Furundzija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, 38 ILM (1999) 317, at 349 para. 155.

<sup>177</sup> See from the recent jurisprudence: Inter-American Court of Human Rights, *Moitwana Community v. Suriname*, 15 June 2005, para. 206; *Gutiérrez Soler v. Colombia*, 12 September 2005, paras. 54, 95-96; *Masacres de El Mozote v. El Salvador*, 25 October 2012, para. 296.

<sup>178</sup> Special Court for Sierra Leone, *Kallon and Kamara*, decision of 13 March 2004, <http://www.sc-sl.org/LinkClick.aspx?fileticket=Ft%2FR0iLz3U%3D&tabid=197>, para. 88.

<sup>179</sup> ECtHR, *Maruš v. Croatia*, Application No 4455/10, 27 May 2014, para. 139.

<sup>180</sup> General Comment No. 20 (1992), para. 15.

<sup>181</sup> For a detailed study of the issue see Orakhelashvili, *Peremptory Norms*, 223-239.

<sup>182</sup> For a view to the contrary see, in particular, Orakhelashvili, *Peremptory Norms*, 248-254. However, it is erroneous to state that the obligation to provide reparation in the form of restoration “is ... a natural continuation of the peremptory status of basic human rights” (ibid., at 248).

rapidly an amnesty before its final handing over of power to representatives of a new democracy. On the other hand, a system like the one introduced in South Africa, according to which full and unrestricted admissions even of the most cruel atrocities lead to a complete amnesty, should not be derailed by the prosecuting authorities of other countries. This was a considerate and deliberate decision of the South African people after the fall of the Apartheid regime, an act of self-determination. The aim was to ensure internal peace and security. There can be no interest on the part of the international community to disregard such a decision that was taken after a thorough consideration of all the pros and cons.<sup>183</sup> Accordingly, the SC would not be prevented from approving an amnesty negotiated and agreed by the two main parties to a peace treaty under the conditions just outlined.

162. There is no need to inquire further into the constraints which the SC would have to observe when making determinations on a peace treaty, in whatever form. In principle, our conclusion is that when enacting a resolution determining a peace settlement or approving a settlement concluding between the parties concerned, the SC cannot be deemed to be exempt from the applicable rules of *jus cogens*, in particular those rules which protect individual human beings.

## 1.10. Concluding Observations

163. It was our task to inquire into the relevance of *jus cogens* for the work of the SC. The conclusion that indeed the SC must be considered as bound by peremptory rules of international law is a finding of highly symbolic character. It underlines that the SC is to be conceived as an institution of the international community operating within a framework of parameters under the rule of law. It would be erroneous, however, to believe, that the moralization of international law through the introduction of *jus cogens* into its architecture constitutes an omnipotent recipe for guaranteeing peace and security within the international community. *Jus cogens* should not become a synonym for the

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<sup>183</sup> Orakhelashvili's statement, *Peremptory Norms*, 239, that "amnesties are devoid of all legal validity and force internationally and cannot give rise to rights and obligations" is characterized by extreme moral rigidity.

proposition “*fiat justitia, pereat mundus*”, which has found its dramatic configuration in Heinrich von Kleist’s novel *Michael Kohlhaas*.<sup>184</sup> Precisely after a nation or an entire region has experienced tremendous injustices and calamities, wise statesmanship is required to re-establish an environment of peace and justice.

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<sup>184</sup> For a summary account of the plot see. [http://en.wikipedia.org/wiki/Michael\\_Kohlhaas](http://en.wikipedia.org/wiki/Michael_Kohlhaas).

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