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The Present and Future of *Jus Cogens*

edited by
Enzo Cannizzaro

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In copertina: Andrea Mantegna, *Trionfo della virtù* (1502) [particolare], Museo del Louvre, Parigi.

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Preface

This book gathers the contributions presented to the first edition of the *Gaetano Morelli Lectures,* held in the Spring of 2014.

In presenting this initiative, also on behalf of my colleagues, Paolo Palchetti and Beatrice Bonafè, I wrote:

> "The aim of the *Lectures* is to offer conceptual tools for appraising controversial knots of international law in its continuing development. There is a lot of sense, in our view, for doing this. International law is one of the branches of legal science where the pressing need for change goes hand in hand with the persistence of its basic legal paradigms. It is this unique blend of theory and practice, of tradition and innovation, which makes international law so challenging and ultimately explains its ongoing intellectual fascination".

This sentence condenses our shared view of the *Lectures* and, more generally, our vision of legal research, as an incessant collective reflection capable to shake continuously our most consolidated ideas and preconceptions.

This is the reason which led us to choose *jus cogens* as the topic for the first edition of the Lectures. *Jus cogens* is not only a "classical accomplished" of international law. It is, first and foremost, a litmus test for its future development, situated at the crossroad from where diverse perspectives depart: one which leads back to the traditional bilateralist conception; another, at the other end of the spectrum, which leads to new and still unexplored territories, where the common values of mankind unfold all their potentialities.

Jus cogens appears thus to be a fascinating yet treacherous topic, perpetually in search of a legal paradigm able to capture all its infinite implications. The two general courses have thus been entrusted to leading scholars: Prof. Pierre-Marie Dupuy and Prof. Christian Tomuschat. I am personally indebted to them, not only for accepting this invitation and lending their talent and their passion to this initiative, but also for enthusiastically endorsing the overall cultural mission entrusted to the *Lectures*. The publication of this book, freely accessible to every scholar all over the world, now offers the possibility to read these two major contributions of two *Maestri* of the international legal science.

I am also grateful to Prof. Giorgio Gaja, who was Gaetano Morelli's pupil and succeded to him on the ICJ bench forty-two years on, for his introduction. The book is completed by two short Chapters, by Beatrice Bonafè and by myself, which may give an account, albeit in a cursory and concise way, of the challenging discussion that took place in the final seminar class.

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A final word does not seem to be fully inopportune, with regard to the scholar after whom the *Lectures* have been named. As I wrote one year ago:

> "The idea to convene in Rome on a yearly basis to discuss key issues of contemporary international law is naturally connected with the glorious Institute of International Law of "*La Sapienza*". The story of this institution has accompanied the development of international law in the XX Century, to which the members of the Institute have considerably contributed. Naming the Lectures after Gaetano Morelli is thus more than an individual tribute; it is a collective acknowledgement to a legal tradition, which we intend to renew and to innovate every year, brick after brick".

This resolution appears to be the most opportune, on the eve of the second edition of the *Lectures*.

Rome, May 2015

Enzo Cannizzaro

Introduction

When the University of "Roma Sapienza" was still called the University of Rome and its Law School was the only one in the city, Gaetano Morelli lectured on international law for five academic years, until he became a judge of the International Court of Justice in 1961. Professor Morelli's lectures at the law school were not well attended. As one of the students who followed his lectures I can offer an explanation for this. He spoke very coherently and precisely, always selecting the appropriate words. He had a remarkable memory: although he did not use any notes, he sounded as if he was reading from a book. In fact, what he was saying closely followed his own textbook.[1] He did not enliven his subject by illustrating it with some examples drawn from cases or State practice. To sum up, although he was an admirable speaker, I have come across more fascinating lecturers. I say this in the knowledge that Morelli's lecturing skills are clearly not the reason why the present series is named after him.

As Professor Cannizzaro explains in his preface, the name of Gaetano Morelli was chosen as the most significant representative of a tradition of studies in international law which became known as "the Italian conception" or more modestly as "the Roman school".

One of the main features of this legal tradition was a reaction against the use of natural law concepts in the analysis of issues of International Law. This was the essence of Dionisio Anzilotti's positivism. Another feature was the separation of the analysis of legal problems from political and social elements and moral considerations. This

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[1] Morelli, *Nozioni di diritto internazionale*. The seventh and last edition of this textbook was published in 1967.

is reflected in the scholarly work of the generation which was writing during the Fascist period. It is for instance remarkable that, when giving his inaugural lecture at the University of Naples in 1935 on the development of international law in relation to new circumstances,[2] Professor Morelli did not make a single reference to any of the policies of the Italian Government of the time.

More than any other scholar belonging to the Roman school, Morelli attempted to build a coherent and comprehensive system covering the general part of international law. He strived to reach rigorous, even if sometimes rather abstract, conclusions. When discussing what seemed to be new issues with Professor Morelli, one had the impression that he could always find in his system a category that allowed him to situate the issue and reach a solution.

As a judge, he pursued in his individual opinions the same aim of providing logically stringent solutions. In the joined cases between Ethiopia and South Africa and Liberia and South Africa he defended the idea that the *jus standi* in relation to the obligations under the Mandate could operate only in a bilateral dimension and that a State could invoke a right only if the Mandate protected one of its specific interests. Judge Morelli dissented from the 1962 judgment on jurisdiction because in his view there was no dispute between the parties before the filing of the application.[3] He was then part of the majority in the controversial 1966 judgment. In his separate opinion to the latter judgment he maintained that, in the case of the Mandate, "collective interests are not protected by the provisions in question by means of rights conferred on the different States concerned, so that each of those States could individually require the prescribed conduct".[4] Thus, "no State member derives any right in its individual capacity from the provisions of the mandate concerning the administration of the territory" of South-West Africa (Namibia).[5]

In 1968, Morelli, writing on the provisions on *jus cogens* outlined in the ILC draft articles on the law of treaties, observed that there exist

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2 With the omission of a few introductory words, this lecture was published as an article: Morelli, *L'ordinamento internazionale di fronte alle nuove situazioni di fatto*.

3 *South West Africa Cases (Ethiopia* v. *South Africa; Liberia* v. *South Africa)*, Preliminary Objections, Judgment, 21 December 1962, ICJ Reports (1962) 319, at 564-574.

4 *South West Africa*, Second Phase, Judgment, 18 July 1966, ICJ Reports (1966) 6, at 64.

5 Ibid., at 65.

rules of international law which protect interests that are general or collective because they simultaneously belong to all States or to all States members of a group and not to each State individually considered (these words are a translation from an article that he published in the *Rivista di diritto internazionale* in 1968: "norme… le quali provvedono alla tutela di interessi che possono dirsi generali o collettivi in quanto sono simultaneamente propri di tutti gli Stati o di tutti gli Stati componenti una data collettività e non già di ciascuno di essi singolarmente considerato").[6] The obligations under these rules were going to be defined as obligations *erga omnes* by the International Court of Justice in the famous passage in the Barcelona Traction judgment of 1970.[7] The purpose of Morelli's reference to rules protecting collective or general interests was to point out that those rules do not necessarily imply that a treaty conflicting with them is invalid, but only that the treaty is unlawful.

Rules protecting collective interests can be established either through a customary rule or through a treaty. In his article on *jus cogens* Morelli did not refer to his separate opinion in the South-West Africa cases, nor did he say whether a State party to a treaty protecting a general or collective interest could demand the respect of the relevant obligations under the treaty. However, there are some indications that he accepted the idea that any State party to a treaty protecting a general or collective interest could make a claim when the obligation is infringed. He wrote that, when a rule protects a general or a collective interest, the obligation to observe a certain conduct binds each State towards all the others, who have a corresponding right ("Così l'obbligo al previsto comportamento è un obbligo imposto a ciascuno Stato verso tutti gli altri, a ciascuno dei quali è attribuito il diritto soggettivo corrispondente").[8] The issue of *jus standi* is important, because if no State was individually entitled to invoke the respect of an obligation protecting a collective interest, the issue of compliance would often become merely theoretical.

Morelli also accepted the idea that certain rules of international law could entail the invalidity of a conflicting treaty and that, when

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6 Morelli, *A proposito di norme internazionali cogenti*, 115.

7 *Barcelona Traction, Light and Power Company, Limited*, Judgment, 5 February 1970, ICJ Reports (1970) 3, at 32, para. 33.

8 Morelli, *A proposito di norme internazionali cogenti*, 115.

this occurs, general interests covered by those rules would be more intensively protected. However, he did not find any of the examples of rules of *jus cogens* given by the ILC persuasive: neither the rule prohibiting the use of force nor the rules imposing the obligation to cooperate for the repression of certain international crimes.[9] Whether these are rules of *jus cogens* is a question that could not be resolved with reference to State practice in 1968, and in any case Morelli did not attempt to do so. Whether it could be done today relying on State practice is an open question.

Giorgio Gaja

Bibliography

MORELLI, G. "A proposito di norme internazionali cogenti". In *Rivista di diritto internazionale* 51 (1968): 108-117. ISSN: 0035-6158.

MORELLI, G. *Nozioni di diritto internazionale.* 5th ed. Padova: Cedam, 1958.

MORELLI, G. "L'ordinamento internazionale di fronte alle nuove situazioni di fatto". In *Archivio di diritto pubblico* 1 (1936): 185-204.

[9] Ibid., 117.

PART I

GENERAL COURSES

1. The Security Council and *Jus Cogens*

Christian Tomuschat

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

Italy before the International Court of Justice (hereinafter, ICJ),[2] 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 20th 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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[2] *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.[3] 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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[3] 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*).[4] 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.[5] 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.[6]

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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4 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.

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

6 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 18th 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".[7]

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 19th 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,[8] 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 20th 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.[9] 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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7 de Vattel, *Le droit des gens*, vol. I, livre II, chapitre 12, § 161.

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

9 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."[10]

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 19th 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."[11]

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.[12]

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

11 Bluntschli, *Das moderne Völkerrecht*, 234.

12 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 19th 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.[13] Research with German authors at the turning point from the 19th to the 20th 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.[14] Likewise, Albert Zorn emphasizes that there is no restriction on States regarding the conclusion of international treaties.[15] 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.[16]

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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13 Wheaton, *Elements of International Law*, 42-48.

14 von Liszt, *Das Völkerrecht*, 7-8, 112.

15 Zorn, *Grundzüge des Völkerrechts*, 141.

16 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").[17] 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,[18] 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".[19] 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".[20] 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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17 Hegel, *Grundlinien der Philosophie*, § 257.

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

19 Von der Heydte, *Die Erscheinungsformen des zwischenstaatlichen Rechts*, 461.

20 Verdross, *Forbidden Treaties*, 571-577.

Church. In fact, in his article Verdross uses Latin terminology, speaking of treaties "*contra bonos mores*".[21] 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.[22]

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,[23] 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 Hersh 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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21 Ibid., 572.

22 Verdross, *Völkerrecht*, 89.

23 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*)".[24] 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."[25]

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".[26] 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*,[27] 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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[24] UN doc. A/CN.4/63, *Yearbook of the International Law Commission* (1953-II) 90, at 154.

[25] Ibid., at 155.

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

[27] 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.[28]

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.[29] 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.[30] 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.[31]

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,[32] there is no need

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

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

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

31 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, 22nd plenary meeting, 13 May 1969, p. 122-125.

32 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.[33]

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.[34]

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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).

33 Cridden, *The Vienna Convention*, 431-520.

34 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,[35] 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.[36]

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

36 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.[37] 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*.[38] 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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[37] 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.

[38] 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.[39]

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.[40] 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.[41] 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."[42]

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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39 We disagree with Gomez Robledo, *Le* Ius Cogens *international*, 134, who speaks of "la sanction la plus radicale".

40 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.

41 Suy, *The Concept of* Jus Cogens, 75.

42 Mosler, *The International Society*, 19.

scope of application.[43] Today, this extension *ratione materiae* of *jus cogens* is generally accepted.[44] 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.[45]

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.[46] 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.[47] The focus is directed on the consequences entailed by a conflict with a *jus cogens* rule, which

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43 Mosler, *Jus Cogens im Völkerecht*, 22-26.

44 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."

45 *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.

46 Rightly pointed out by Orakhelashvili, *Peremptory Norms*, 28-31.

47 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 rule. 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.[48]

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 j*us 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.[49]

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[48] Thus, Schwarzenberger, *International* Jus Cogens, 463, argued that "International law is not sufficiently specialized for any distinction between tortious and criminal responsibility".

[49] 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.[50] 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.[51]

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

[51] 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",[52] 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),[53] 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.[54]

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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52 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.

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

54 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.[55]

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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[55] 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 Hersh Lauterpacht that *jus cogens* protects overriding interests of the international community, the international *ordre public*.[56] 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,[57] the dividing line has become obsolete.[58]

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.[59]

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[56] 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.

[57] 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.

[58] See convincing arguments put forward by Orakhelashvili, *Peremptory norms*, 33.

[59] 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,[60] 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.[61] 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 cause be confirmed by congruent practice.[62]

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[60] *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.

[61] See also Gaja, *Jus Cogens Beyond the Vienna Convention*, 283; Mosler, *The International Society*, 38.

[62] 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.[63] 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.[64] 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.[65]

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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[63] See Tomuschat, *Obligations Arising for States*, 307, supported by Orakhelashvili, *Peremptory Norms*, 105.

[64] 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.

[65] 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.[66]

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 reconfirmed 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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[66] 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[67] 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,[68] 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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67 *Yearbook of the International Law Commission* (1996-II/2) 17.

68 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.[69] 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*.[70] 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*.[71] We

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69 Kolb, *La détermination du concept*, 10-14.

70 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.

71 Kolb, *Nullité, inapplicabilité ou inexistence*, 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.[72] 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.[73]

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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[72] 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.

[73] 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[74]

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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[74] 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.[75] 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.[76] All of the

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[75] See Tomuschat, *Human Rights,* 1-2.

[76] 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.[77] There is no denying the fact that food and shelter, in particular, belong to the basic commodities a human being needs for its survival.[78] 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?[79] 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 Existenzminimus … ist dem Grunde nach unverfügbar …" ("The right to a guarantee of a dignified minimum level of existence is essentially untouchable …"). However, the Court deals exclusively with the fundamental rights under the German Basic Law.

77 Orakhelashvili, *Peremptory Norms,* 60, contends that economic and social rights "operate in a peremptory way as rights requiring progressive realization".

78 See Shue, *Basic Rights,* 19.

79 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 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."[80]

Reference can also be made to the case of *Abdelrazik v. Canada*[81] 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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[80] *United States Diplomatic and Consular Staff in Tehran*, *supra* note 47, at 42, para. 91.

[81] Canadian Federal Court, *Abdelrazik v. Canada,* Judgment, 4 June 2009, http://www.law.yale.edu/documents/pdf/Intellectual_Life/Abdelrazik_v._Canada.pdf.

jus cogens.[82] 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[83] 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).[84] Apparently on that ground, the Iranian Government denounced in 1979 a Treaty of Friendship between Persia and the Russian Socialist Federal Republic of 1921,[85] which provided for such a unilateral right of intervention.[86]

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.[87]

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

83 Of 16 August 1960, 382 UNTS 4.

84 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.

85 9 LNTS 384.

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

87 *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.[88]

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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[88] 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.[89] 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,[90] 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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89 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.

90 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[91] although de facto it is almost impossible to lead an existence outside the UN.[92]

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

92 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.[93] 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.[94] 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[95] was indeed the veto rights

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

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

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

of the permanent five – to which France was admitted at the last minute.[96] 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.[97] 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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[96] Chapter VI, Section C, para. 3.

[97] 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.[98]

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.[99]

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[98] See Wolfrum, *Article 1*, 113, margin note 21.

[99] 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.[100] 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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[100] 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.[101] 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 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.[102] 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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[101] See, e.g., Tzanakopoulos, *Disobeying*, 55.

[102] 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".[103] 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".[104] 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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[103] Kelsen, *The Law of the United Nations*, 294, and 735-737.

[104] 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."[105]

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.[106]

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.[107] The Purposes and Principles, to which it is committed, establish truly legal constraints and cannot be understood as just political rhetoric.[108] 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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105 Arcari, *Limits to Security Council*, 254.

106 See the following considerations.

107 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.

108 *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.[109] 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.[110] 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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[109] Reinisch, *Value Conflicts*, 54; extensive discussion by Peters, *Article 25*, 828-834.

[110] 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 discussion 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,[111] the second one on 29 June 2010.[112] 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,[113] 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[114] 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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111 UN doc. S/PV.5474.

112 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.

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

114 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.[115] 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.[116] 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 …"[117]

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

[116] 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.

[117] *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.[118]

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*.[119] 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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[118] Simma and Alston, *Sources of Human Right Law*, 82-108.

[119] 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[120] since "human rights are a part of the plurality of values and norms on which the UN is constituted".[121] 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.[122]

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120 See Tzanakopoulos, *Disobeying*, 74-76.

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

122 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.[123] 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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[123] 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."[124]

Argentina stressed:

> "the Charter also states that the Council has duties and we must also take *jus cogens* into consideration."[125]

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."[126]

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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124 UN doc. S/PV.5474, p. 17.

125 Ibid., p. 20.

126 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."[127]

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.[128] 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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[127] UN doc. S/PV.6347 (Resumption 1), 29 June 2010, p. 3.

[128] 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."[129]

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.[130]

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

[130] 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.[131]

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[131] 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 basis 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.[132] 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

[132] 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.[133]
  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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133 "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.[134] 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.[135]

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

135 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.[136]

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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[136] 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."[137]

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,[138] 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.[139] 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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137 UN doc. S/2014/73, p. 3, para. 10.

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

139 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,[140] 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.[141] It does not

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

[141] 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.[142] 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.[143] 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.[144]

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)."

142 Zappalà, *Reviewing Security Council Measures*, 183-186.

143 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".

144 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,[145] where the GA called upon the SC to improve its system without however raising any principled objections against the current regime.[146]

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

146 "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.[147] 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

[147] 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?[148] 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

[148] 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.[149] Only in the recent literature have there been voices suggesting that such a duty should be taken into consideration.[150]

128. Indeed, the proclamation of the responsibility to Protect (R2P) by the General Assembly in 2005[151] 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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149 See Degni-Segui, *Article 24*, 899; Krisch, *Article 39*, 1275, margin note 5.

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

151 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.[152]

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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[152] See also Shraga, *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 know 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.[153]

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.[154] However, no peace treaty with

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[153] 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.

[154] 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.[155] 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.[156] This was certainly the most comprehensive operation of ethnic cleansing which the world ever saw in the 20th 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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155 Reprinted in von Münch, *Dokumente des geteilten*, 32.

156 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,[157] 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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[157] 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.[158]

144. Another illustrative example, where eventually an agreement was reached, is the Dayton Agreement of 1995[159] 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.[160] Lastly, the Agreement between Eritrea and Ethiopia, signed in Algiers on 12 December 2000,[161] 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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158 See Tomuschat, *Article 75*, 1686-1700.

159 Reproduced in 35 ILM (1996) 89.

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

161 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.[162] 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[163] and the establishment of the International Criminal Court for Rwanda one year later.[164] 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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162 Arangio-Ruiz, *Security Council's Law-Making*, 627-630.

163 UN doc. SC Resolution 827 (1993), 25 May 1993.

164 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,[165] 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.[166] 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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165 Graefrath, *Iraqi Reparations*, 15.

166 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.[167]

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[168] 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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167 See, e.g., Orakhelashvili, *Peremptory Norms*, 462.

168 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 UNWRA the status of refugee can be inherited in patrilineal order, their numbers have grown to roughly 5 million people.[169] 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

[169] 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 j*us 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[170] 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

[170] 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*."[171]

This still seems to be the right answer which is also widely shared in the legal literature,[172] with just one dissenting voice,[173] and has also been defended by Sir Gerald Fitzmaurice in his dissenting opinion to the ICJ's advisory opinion in the *Namibia* case.[174] 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.[175]

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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171 Tomuschat, *Peace Enforcement*, 1768.

172 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.

173 Matheson, *United Nations Governance*, 85.

174 *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.

175 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,[176] the Inter-American Court of Human Rights,[177] and the Special Tribunal for Sierra Leone.[178] A differentiated stance has been taken by the European Court of Human Rights.[179] The Human Rights Committee has taken the same stand.[180] 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.[181] 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.[182]

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

177 See from the recent jurisprudence: Inter-American Court of Human Rights, *Moiwana 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.

178 Special Court for Sierra Leone, *Kallon and Kamara*, decision of 13 March 2004, http://www.sc-sl.org/LinkClick.aspx?fileticket=Ft%2FR0iLzl3U%3D&tabid=197, para. 88.

179 ECtHR, *Marguš v. Croatia*, Application No 4455/10, 27 May 2014, para. 139.

180 General Comment No. 20 (1992), para. 15.

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

182 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.[183] 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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[183] 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*.[184] 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.

Bibliography

ALEXIDZE, L. "Legal Nature of *Jus Cogens* in Contemporary International Law". In *Recueil des cours* 172 (1981- III): 219-270. ISBN: 978-90-247-2778-0.

ALMQUIST, J. "A Human Rights Critique of European Judicial Review: Counter Terrorism Sanctions". In *International & Comparative Law Quarterly* 57 (2008): 303-331. ISSN: 1471-6895.

AMERICAN LAW INSTITUTE, *Restatement of the Law Third. The Foreign Relations Law of the United States,* Vol. I. St. Paul: American Law Institute, 1987. ISBN: 9780314301383.

ANGELET, N. "International Law Limits to the Security Council". In GOWLAND-DEBBAS, V. (ed.). *United Nations Sanctions and International Law,* 71-82. The Hague: Kluwer Law International, 2002. ISBN: 90-411-1603-6.

ARANGIO-RUIZ, G. "On the Security Council's 'Law-Making'". In *Rivista di diritto internazionale* 83 (2000): 609-725. ISSN: 0035-6158.

ARCARI, M. "Limits to Security Council Powers under the UN Charter and Issues of Charter Interpretation". In *Polish Yearbook of International Law* 32 (2012): 239-257. ISSN: 0554-498X.

BLUNTSCHLI, J. C. *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt.* Nördlingen: Beck, 1868. ISBN: 1421245825.

BOTHE, M. "Human rights law and international humanitarian law as limits for Security Council action". In KOLB, R. and G. GAGGIOLI (eds.). *Research Handbook on Human Rights and Humanitarian Law*, 371-390. Cheltenham, UK & Northampton MA, USA: Edward Elgar, 2013. ISBN: 978-1-8498-0035-8.

BOWETT, D. "The Impact of Security Council Decisions on Dispute Settlement Procedures". In *European Journal of International Law* 5 (1994): 89-101. ISSN: 0938-5428.

[184] For a summary account of the plot see. http://en.wikipedia.org/wiki/Michael_Kohlhaas.

BULL, H. N. *The Anarchical Society. A Study of Order in World Politics,* 4th ed. Houndmills, Basingstoke: Palgrave Macmillan, 2012. ISBN: 0-230-39339-X.

CIAMPI, A. "Security Council Targeted Sanctions and Human Rights". In FASSBENDER, B. (ed). *Securing Human Rights? Advancements and Challenges of the UN Security Council,* 98-140. Oxford: Oxford University Press, 2011. ISBN: 9780199641499.

CRIDDEN, E. J. "The Vienna Convention on the Law of Treaties in U.S. Interpretation". In *Virginia Journal of International Law* 44 (2004): 431-500. ISSN: 0042-6571.

CZAPLINSKI, W. "Jus cogens and the Law of Treaties". In TOMUSCHAT C. and J.-M. THOUVENIN (eds.). *The Foundamental Rules of the International Legal Order. Jus Cogens and Obligations* Erga Omnes, 83-97. Leiden, Boston: Martinus Nijhoff, 2006. ISBN: 9004149813.

DE MARTENS, G. F. *Précis du droit des gens moderne de l'Europe.* Göttingen, 1801.

DE VATTEL, E. *Le droit des gens ou principes de la loi naturelle.* London, 1758.

DE WET, E. "From Kadi to Nada: Judicial Techniques Favouring Human Rights over United Nations Security Council Sanctions". In *Chinese Journal of International Law* 12 (2013): 787-807. ISSN: 1540-1650.

DE WET, E. "Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection". In FASSBENDER, B. (ed.). *Securing Human Rights? Advancements and Challenges of the UN Security Council,* 141-171. Oxford: Oxford University Press, 2011. ISBN: 9780199641499.

DEGNI-SEGUI, R. "Article 24". In COT, J.-P. and A. PELLET (eds.). *La Charte des Nations Unies: commentaire article par article,* 447- 465. Paris : Economica, 2007. ISBN: 978-2-7178-5057-4.

DOEHRING, K. "Unlawful Resolutions of the Security Council and their Legal Consequences". In *Max Planck Yearbook of United Nations Law* 1 (1997): 91-109. ISSN: 1389-4633.

DOUGLAS, R.M. *Orderly and Humane. The Expulsion of the Germans after the Second World War*. New Haven & London: Yale University Press, 2012. ISBN: 978-0-300-16660-6.

DROUBI, S. *Resisting United Nations Security Council Resolutions.* London & New York: Routledge, Taylor & Francis Group, 2014. ISBN: 041571043X.

DULLES, J. *War or Peace.* New York: Macmillan, 1950.

FASSBENDER, B. "The Role for Human Rights in the Decision-making Process of the Security Council". In FASSBENDER, B. (ed.). *Securing Human Rights? Advancements and Challenges of the UN Security Council,* 74-97. Oxford: Oxford University Press, 2011. ISBN: 9780199641499.

FIORE, P. *Trattato di diritto internazionale pubblico,* Vol. 2. Torino: Unione Tipografico-editrice, 1892.

FOCARELLI, C. *Lezioni di diritto internazionale,* Vol. I. Padova: CEDAM, 2008. ISBN: 8813289626.

GAJA, G. "Jus Cogens Beyond the Vienna Convention". In *Recueil des Cours* 172 (1981-III): 271-316. ISBN: 978-90-247-2778-0.

GAJA, G. "Obligations and Rights *Erga Omnes* in International Law". In *Annuaire de l'Institut de droit international* 71 (2005): 119-212. ISBN: 978-2-233-00573-4.

GAJA, G. "The Protection of General Interests in the International Community". In *Recueil des Cours* 364 (2014): 9-185. ISBN: 9789004255579.

GLENNON, M. J. "Perentory Nonsense". In BREITENMOSER, S., B. EHRENZELLER, M. SASSÒLI, W. STOFFEL and B. WAGNER PFEIFER (eds.). *Human Rights, Democracy and the Rule of Law - Menschenrechte, Demokratie und Rechtsstaat - Droits de l'homme, démocratie et Etat de droit. Liber amicorum Luzius Wildhaber*, 1265-1272. Zürich, Baden-Baden: Dike and Nomos, 2007. ISBN: 978-3-03-751002-5.

GOMEZ ROBLEDO, A. "Le *Ius Cogens* international: sa genèse, sa nature, ses fonctions". In *Recueil des cours* 172 (1981-III): 9-218. ISBN: 90-247-2778-2.

GOODRICH, L. M. AND E. HAMBRO. *Charter of the United Nations. Commentary and Documents*. Boston: World Peace Foundation, 1949.

GORDON, J. "Sword of Damocles: Revisiting the Question of Whether the United Nations Security Council is Bound by International Law". In *Chicago Journal of International Law* 12 (2012): 605-645. ISSN: 1529-0816.

GOWLLAND-DEBBAS, V. "The Security Council as Enforcer of Human Rights, in Securing Human Rights? Achievements and Challenges of the UN Security Council". In FASSBENDER, B. (ed.). *Securing Human Rights? Achievements and Challenges of the UN Security Council,* 36-73. Oxford: Oxford University Press, 2011. ISBN: 978-0-19-964149-9.

GRAEFRATH, B. "Iraqi Reparations and the Security Council". In *Heidelberg Journal of International Law* 55 (1995): 1-68. ISSN: 00442348.

GREWE, W. G. *The Epochs of International Law*. Berlin & New York: de Gruyter, 2000. ISBN: 978-3110153392.

HANNIKAINEN, L. *Perentory Norms (*Jus Cogens*) in International Law: Historical Development, Criteria, Present Status.* Helsinki: Finnish Lawyers' Publishing Company, 1988. ISBN: 951-640-394-8.

HEFFTER, A. W. *Das europäische Völkerrecht der Gegenwart*. Berlin: E.H. Schroeder, 1844.

HEGEL, G. W. F. *Grundlinien der Philosophie des Rechts.* Berlin: Nicolaische Buchhandlung, 1821.

HERDEGEN, M. *Die Befugnisse des UN-Sicherheitsrates: aufgeklärter Absolutismus im Völkerrecht?.* Heidelberg: C.F. Müller, 1998. ISBN: 978-3811410978.

KADELBACH, S. *Zwingendes Völkerrecht.* Berlin: Duncker & Humblot, 1992. ISBN: 3-428-07552-8.

KELSEN, H. *The Law of the United Nations.* New York: Frederick A. Praeger, 1964. ISBN: 9781584770770.

KHAN, D.-E. "Drafting History". In SIMMA, B., D.-E. KHAN, G. NOLTE and A. PAULUS (eds.). *The Charter of the United Nations: A Commentary*, 1-24. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-958015-6.

KIRGIS, F. L. "Security Council Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making". In *American Journal of international Law* 95 (2001): 579-582. ISSN: 0002-9300.

KLABBERS, J. "Setting the Scene". In KLABBERS, J., A. PETERS and G. ULFSTEIN (eds.). *The Constitutionalization of International Law,* 19-31. Oxford: Oxford University Press, 2009. ISBN: 978-0199693542.

KLEIN, E. *Statusverträge im Völkerrecht*. Berlin: Springer, 1980. ISBN: 3-540-10141-1.

KLÜBER, J. *Europäisches Völkerrecht.* Stuttgart, 1821.

KOLB, R. "L'article 103 de la Charte des Nations Unies". In *Recueil des cours* 367 (2014): 9-252. ISSN: 9789004267930.

KOLB, R. "La détermination du concept de *jus cogens*". In *Revue générale de droit international public* 118 (2014): 5-29. ISSN: 0373-6156.

KOLB, R. "Nullité, inapplicabilité ou inexistence d'une norme coutumière contraire au *jus cogens* universel?". In *Revue générale de droit international public* 117 (2013): 281-298. ISSN: 0373-6156.

KOLB, R. *Théorie du Ius Cogens International: essai de relecture du concept.* Paris: Presses Universitaires de France, 2001. ISBN: 2-13-051889-3.

KRISCH, N. "Article 39". In SIMMA, B., D.-E. KHAN, G. NOLTE and A. PAULUS (eds.). *The Charter of the United Nations: A Commentary*, 1272-1296. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-958015-6.

LACHS, M. and V. GOWLLAND-DEBBAS. "Article 1". In COT J.-P. et A.PELLET (eds.). *La Charte des Nations Unies. Commentaire article par article,* 327-336. Paris: Economica, 2005. ISBN: 2-7178-5057-0.

LINDERFALK, U. "All the things You Can Do with *Jus Cogens* – A Pragmatic Approach to Legal Language". *In German Yearbook of International Law* 56 (2013): 351-383. ISSN: 0344-3094.

MAREK, K. "Contribution à l'étude du *jus cogens* en droit international". In GUGGENHEIM P. and M. BATTELLI (eds.). *Recueil d'études de droit International en hommage à Paul Guggenheim,* 426-459. Genève: Tribune, 1968.

MATHESON, M. "United Nations Governance of Post-conflict Societies". In *American Journal of International Law* 95 (2001): 76-85. ISSN: 0002-9300.

MOSLER, H. "Jus Cogens im Völkerecht". In *Annuaire Suisse de droit international* 25 (1968): 9-40. ISSN: 0251-2947.

MOSLER, H. *The International Society as a Legal Community.* Alphen aan den Rijn/Germantown: Sijthoff & Noordhoff, 1980. ISBN: 978-9028600805.

OOSTHUIZEN, G. "Playing the Devil's Advocate: The UN Security Council is Unbound by Law". In *Leiden Journal of International Law* 12 (1999): 549-563. ISSN: 0922-1565.

ORAKHELASHVILI, A. *Peremptory Norms in International Law*. Oxford: Oxford University Press, 2006. ISBN: 978-0-19-929596-8.

PAULUS, A. and J. LEISS. "Article 103". In SIMMA, B., D.-E. KHAN, G. NOLTE and A. PAULUS (eds.). *The Charter of the United Nations: A commentary,* 2110-2137. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-958015-6.

PELLET, A. "Article 38". In ZIMMERMANN, A., K. OELLERS-FRAHM, C. TOMUSCHAT, and C. J. TAMS (eds.). *The Statute of the International Court of Justice,* 731-870. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-969299-6.

PETERS, A. "Article 25". In SIMMA, B., D.-E. KHAN, G. NOLTE and A. PAULUS (eds.). *The Charter of the United Nations: A commentary*, 787-854. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-958015-6.

PETERS, A. "Membership in the Global Constitutional Community". In KLABBERS, J., A. PETERS AND G. ULFSTEIN (eds.). *The Constitutionalization of International Law,* 153-262. Oxford: Oxford University Press, 2009. ISBN: 978-0199693542.

PICONE, P. "The Distinction between *Jus Cogens* and Obligations *Erga Omnes*". In CANNIZZARO, E. (ed.) *The Law of Treaties Beyond the Vienna Convention*, 411-424. Oxford: Oxford University Press, 2011. ISBN: 978-0-19-958891-6.

RANDELZHOFER, A. and O. DÖRR. "Article 2(4)". In SIMMA, B., D.-E. KHAN, G. NOLTE and A. PAULUS (eds.). *The Charter of the United Nations: A commentary*, 200-234. Oxford: Oxford University Press, 2012. ISBN: 9780199639762.

REINISCH, A. "Value Conflicts within the United Nations Security Council". In *Austrian Review of International and European Law* 14 (2009): 41-60. ISSN: 1385-1306.

REISMAN, W. M. "Termination of the USSR's Treaty Rights of Intervention". In *American Journal of International Law* 74 (1980): 144-154. ISSN: 0002-9300.

RICHTER, D. "Judicial Review of Security Council Decisions – A Modern Vision of the Administration of Justice". In *Polish Yearbook of International Law* 32 (2012): 271-297. ISSN: 0554-498X.

ROZAKIS, C. L. *The Concept of* Jus Cogens *in the Law of Treaties.* Amsterdam: North-Holland Publishing Company, 1976. ISBN: 0-7204-0485-1.

RUIZ-FABRI, H. "Article 66". In CORTEN, O. and P. KLEIN (eds.). *The Vienna Conventions on the Law of Treaties,* 1513-1546. Oxford: Oxford University Press, 2011. ISBN: 978-0-19-954664-0.

SALIBA, A. T. "Is the Security Council *Legibus Solutus*? An Analysis of the Legal Restraint of the UNSC". In *Michigan State International Law Review* 20 (2011-2012): 401-419. ISSN: 2328-3068.

SCHEUNER, U. "Conflict of Treaty Provisions with a Peremptory Norm of General International Law". In *Zeitschrift fur auslandisches offentliches Recht und Volkerrecht* 29 (1969): 28-38. ISSN: 0044-2348.

SCHWARZENBERGER, G. "International *Jus Cogens*?". In *Texas Law Review* 43 (1965): 455-478. ISSN: 0040-4411.

SCHWEIGMAN, D. *The Authority of the Security Council under Chapter VII of the UN Charter: Legal Limits and the Role of the International Court of Justice*. The Hague: Kluwer Law International, 2001. ISBN: 90-411-1641-9.

SHEERAN, S. and C. BEVILACQUA. "The UN Security Council and international human rights obligations". In SHEERAN, S. and N. RODLEY (eds.). *Routledge Handbook of International Human Rights Law,* 371-403. London, New York: Routledge, Taylor & Francis Group, 2013. ISBN: 978-0-415-62073-4.

SHRAGA, D. "The Security Council and Human Rights". In FASSBENDER, B. (ed.). *Securing Human Rights? Achievements and Challenges of the UN Security Council*, 8-35. Oxford: Oxford University Press, 2011. ISBN: 978-0-19-964149-9.

SHUE, H. *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy.* Princeton, NJ: Princeton University Press, 1996. ISBN: 9780691029290.

SIMMA, B. and P. ALSTON. "Sources of Human Right Law: Custom, *Jus Cogens* and General Principles". In *Australian Yearbook of International Law* 12 (1988-89): 82-108. ISSN: 0084-7658.

STAHN, C. *The Law and Practice of International Territorial Administration.* Cambridge: Cambridge University Press, 2008. ISBN: 9780521173957.

STURMA, P. "Does the Rule of Law also apply to the Security Council? Limiting its Power by Way of Responsibility and Accountability". In *Polish Yearbook of International Law* 32 (2012): 301-305. ISSN: 0554-498X.

SUY, E. "The Concept of *Jus Cogens* in Public International Law". In *Carnegie Endowment for International Peace, Conference on International Law. 3rd Conference on International Law held in Lagonisi (Greece) between April 3-8, 1966, Papers and Proceedings*, Vol. II, 17-77. Geneva: Carnegie Endowment for International Peace (European Centre), 1967.

TOMUSCHAT, C. "The National Constitution Trumps International Law". In *Italian Journal of Public Law* 6 (2014): 189-196. ISSN: 2239-8279.

TOMUSCHAT, C. "Article 36". In ZIMMERMANN, A., K. OELLERS-FRAHM, C. TOMUSCHAT, and C. J. TAMS (eds.). *The Statute of the International Court of Justice,* 589-657. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-969299-6.

TOMUSCHAT, C. "Article 75". In CORTEN, O. and P. KLEIN (eds.). *The Vienna Conventions on the Law of Treaties,* 1686-1698. Oxford: Oxford University Press, 2011. ISBN: 978-0-19-954664-0.

TOMUSCHAT, C. "Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*; Case T-315/01, *Yassin Abdullah Kadi v. Council and Commission"*. In *Common Market Law Review* 43 (2006): 537-551. ISSN: 0165-0750.

TOMUSCHAT, C. "International Law: Ensuring the Survival of Mankind on the Eve of a New Century". In *Recueil des cours* 281 (1999): 9-438. ISBN: 90-411-1488-2.

TOMUSCHAT, C. "Obligations Arising for States without or against Their Will". In *Recueil des cours* 241 (1993-IV): 195-374. ISBN: 0-7923-2954-6.

TOMUSCHAT, C. "Peace Enforcement and Law Enforcement – Two Separate Chapters of International Law?". In *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz*, 1745-1769. Napoli: Editoriale scientifica, 2004. ISBN: 888832190X.

TOMUSCHAT, C. "Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes* – concluding Observations". In TOMUSCHAT, C. and J. THOUVENIN (eds.). *The Fundamental Rules of the International Legal Order*, 425-436. Leiden, Boston: Martinus Nijhoff, 2006. ISBN: 90-04-14981-3.

TOMUSCHAT, C. and J. THOUVENIN (eds.). *The Fundamental Rules of the International Legal Order.* Jus Cogens *and Obligations* Erga Omnes*.* Leiden, Boston: Martinus Nijhoff, 2006. ISBN: 90-04-14981-3.

TOMUSCHAT, C. *Human Rights – Between Idealism and Realism,* 3rd ed. Oxford: Oxford University Press, 2014. ISBN: 978-0-19-968372-7.

TUERK, H. "Trieste". In *The Max Planck Encyclopedia of Public International Law,* Vol. X, 92-99. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-965791-9.

TZANAKOPOULOS, A. *Disobeying the Security Council: Countermeasures against Wrongful Sanctions.* Oxford: Oxford University Press, 2011. ISBN: 978-0-19-960076-2.

VERDROSS, A. "Forbidden Treaties in International Law". In *American Journal of International Law* 31 (1937): 571-577. ISSN: 0002-9300.

VERDROSS, A. *Völkerrecht.* Berlin: Springer, 1937.

VON DER HEYDTE, F. "Die Erscheinungsformen des zwischenstaatlichen Rechts: *jus cogens* und *jus dispositivum* im Völkerrecht". In *Zeitschrift für Völkerrecht* 16 (1932): 461-463. ISSN: 0931-4415.

VON LISZT, F. *Das Völkerrecht.* Berlin: Haering, 1898.

VON MÜNCH, I. *Dokumente des geteilten Deutschland: Quellentexte zur Rechtslage des Deutschen Reiches, der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik.* Stuttgart: Alfred Kröner, 1968. ISBN: 3-520-39201-1.

WHEATON, H. *Elements of International Law.* Philadlphia, 1836.

WOLFRUM, R. "Article 1". In SIMMA, B., D.-E. KHAN, G. NOLTE and A. PAULUS (eds.). *The Charter of the United Nations: A commentary,* 107-120. Oxford: Oxford University Press, 2012. ISBN: 978-0-19-958015-6.

ZACHARIAS, D. "Holy Alliance (1815)". In *Max Planck Encyclopedia of Public International Law* 4 (2012): 934-938. ISBN: 978-0-19-965791-9.

ZAPPALÀ, S. "Reviewing Security Council Measures in the Light of International Human Rights Principles". In FASSBENDER, B. (ed.). *Securing Human Rights? Advancements and Challenges of the UN Security Council,* 172-194. Oxford: Oxford University Press 2011. ISBN: 978-0-19-964149-9.

ZEMANEK, K. "The Metamorphosis of *Jus Cogens*: From an Institution of Treaty Law to the Bedrock of the International Order". In CANNIZZARO, E. (ed.). *The Law of Treaties Beyond the Vienna Convention*, 381-410. Oxford: Oxford University Press, 2011. ISBN: 978-0-19-958891-6.

ZIMMERMANN, A. "The Security Council and the Obligation to Prevent Genocide and War Crimes". In *Polish Yearbook of International Law* 32 (2012): 307-314. ISSN: 0554-498X.

ZORN, A. *Grundzüge des Völkerrechts.* Leipzig: J.J. Weber, 1903.

ZOTIADES, G. B. *Intervention by Treaty Right. Its Legality in Present Day International Law.* Thessaloniki: University of Thessaloniki, 1965.

2. Le *jus cogens*, les mots et les choses. *Où en est le droit impératif devant la CIJ près d'un demi-siècle après sa proclamation?*

Pierre-Marie Dupuy

Qu'est-il donc impossible de penser et de quelle impossibilité s'agit-il?[1]

Il serait aléatoire de tenter de calculer l'âge du droit international impératif. Encore la démarche ne serait-elle nullement impossible. N'étant pas du droit naturel, le *jus cogens* a une histoire ; il constitue un produit, non un donné normatif[2]. Les rapporteurs spéciaux successifs sur le droit des traités, qu'ils se réfèrent ou non aux écrits bien antérieurs d'Alfred Verdross[3], ont les uns et les autres insisté sur le fait qu'il existait d'ores et déjà en droit positif, au moment du travail qu'ils entreprenaient alors, un ensemble de règles que l'on pouvait dire d'ordre public international[4] Quoiqu'elle ouvrît ainsi un vaste champ au « développement progressif », l'introduction du *jus cogens* à l'article 53 de la Convention de Vienne sur le droit des traités était donc perçue par les rapporteurs spéciaux concernés comme comportant également une dimension codificatrice[5].

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1 Foucault, *Les mots et les choses*, Préface.

2 Voir Virally, *Réflexions*, 5.

3 Verdross, *Heilige und unsittliche*, 164; Verdross, *Forbidden Treaties*, 571. Comparer, toujours du même auteur, *Jus Dispositivum*, 55. Comparer Morelli, *A proposito di norme*, 108.

4 Même si les auteurs précités, tous britanniques, ne se référaient pas forcément de façon explicite à cette dernière notion, voir cependant Schwarzenberger, *The Problem of Public Policy*, 191. Sur les travaux des rapporteurs spéciaux successifs et la place du *jus cogens* dans leurs rapports, voir Gomez Robledo, *Le* jus cogens *international*, 9; voir aussi Rivier, *Droit impératif*, 2001. Sur la notion d'ordre public dans le contexte du droit impératif, outre la référence à Schwarzenberger, voir Rolin, *Vers un ordre public*, 441; voir aussi Jaenicke, *Zur Frage des internationalen*, 77.

5 Voir Frowein, *Jus Cogens*, 327.

Ce constat ne devait évidemment pas pour autant tarir les commentaires critiques à l'égard de la possibilité d'existence d'un droit impératif dans une société internationale constituée d'Etats souverains. Certains semblent d'ailleurs toujours tentés de ne voir autre chose dans l'affirmation du *jus cogens* qu'un simple effet de mode, façon d'apporter une réponse frivole à une question sérieuse, même s'il n'est pas faux que la faveur dont jouit l'affirmation du droit impératif auprès des Etats peut varier en fonction de l'époque et de l'esprit du temps[6]. D'autres encore, tout en en acceptant l'idée, demeurent attachés à l'affirmation selon laquelle on ignorerait toujours quel serait le contenu du droit impératif[7].

Quoi qu'il en soit, la question n'est pas celle de savoir si le *jus cogens* devrait ou non exister mais précisément de constater que ce sont les Etats eux-mêmes, en 1969, au terme des travaux de la Conférence de codification du droit des traités tenue sous l'égide des Nations Unies qui ont voulu procéder à l'affirmation de son existence à l'article 53 de la convention de Vienne, et ce en vue de mentionner explicitement une limite à leur propre liberté de compromettre[8]. On ne peut dès lors que se déclarer d'accord avec Prosper Weil, du moins sur ce point, lorsqu'il déclarait en 1992 dans son cours général à l'Académie de droit international de La Haye que « le fondement de la norme impérative est exactement le même que celui de la norme ordinaire, à savoir l'acceptation et la reconnaissance des Etats, tant et si bien que la théorie du *jus cogens* … n'est pas un désaveu mais une confirmation du fondement du droit international »[9]. Pour reprendre la formule que l'on utilisait ailleurs, on rappellera que l'on se trouve ainsi confronté à une « impérativité convenue », fut-ce de façon implicite, par le comportement des Etats[10].

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6 Voir Sur, *Phénomènes de mode*, 53.

7 Voir en particulier Weil, *Le droit international*, 269. Voir, sur cette question, Waldock, *Deuxième rapport*, 80-81, parr. 8-9.

8 Voir Gaja, *Jus Cogens*, 271.

9 Weil, *Le droit international*, 267.

10 Voir Dupuy, *L'unité de l'ordre juridique*, 277. D'une façon plus générale, pour la présentation d'ensemble de la question par le même auteur, on renverra au chapitre III de la seconde partie, intitulé : Le *jus cogens*, une révolution ?, 269-313.

Toujours est-il que, près de cinquante ans après la proclamation de son existence, on peut légitimement se poser la question de savoir où en est le *jus cogens* ou, plus exactement, quelle a été, depuis 1969, date de son affirmation dans la convention de Vienne sur le droit des traités, l'importance et la portée effective qu'il a reçues dans le droit international positif. Or, il y a plusieurs façons d'aborder cette vaste question ; l'une consiste à observer qu'affirmée à l'occasion de la codification du droit des traités, c'est pourtant dans un autre domaine, celui de la responsabilité internationale, que l'invocation de la notion de droit impératif semble avoir eu les prolongements les plus significatifs[11]. En relation avec un tel constat, on serait alors tenté de faire d'autres remarques, dont l'une dépasse le seul plan du droit pour déborder sur l'analyse des relations internationales dans certains de leurs développements les plus récents. Dans une perspective ainsi élargie, il apparaîtrait que ni les dispositions normatives résultant des travaux de la CDI sur le droit de la responsabilité ni les structures institutionnelles, ni enfin les moyens matériels limités dont dispose la « communauté internationale des Etats dans son ensemble » ne facilitent effectivement l'engagement et la mise en œuvre de la responsabilité internationale des Etats pour manquement à une obligation impérative, alors même que la tentative en a été faite à plusieurs reprises[12].

Une autre perspective consisterait aussi à examiner quelles ont été, depuis 1969, les instances ayant le plus volontiers invoqué l'existence du droit international impératif. On constaterait alors que les juges internes, souvent très à l'aise avec la notion d'ordre public, s'y réfèrent de plus en plus souvent, au point de provoquer parfois des litiges internationaux comme celui porté en 2008 par l'Allemagne à l'encontre de l'Italie devant la Cour internationale de Justice à la suite d'une série

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11 Voir notamment, Sicilianos, *Classification des obligations* ; Scobbie, *Invocation de la responsabilité* ; et Dupuy, *Quarante ans*, 305.

12 Voir Dupuy, *Deficiencies of the Law*, 210. On peut en particulier penser aux difficultés de la réaction de la communauté internationale face à la commission de crimes de guerre et de crimes contre l'humanité tels que ceux commis en Syrie, sans parler de certaines conséquences, souvent désastreuses sur le plan géostratégique, de certaines opérations à visées à la fois punitive et humanitaire comme l'action autorisée par les Nations Unies en Libye sur la base de la résolution 1973 du Conseil de sécurité.

d'arrêts de la Cour suprême italienne ; ils remettaient en cause l'immunité de juridiction des Etats, du moins dans certains cas limite de non réparation persistante des dommages provoqués par des crimes de guerres et crimes contre l'humanité intervenus sous le régime nazi[13].

Parmi les juridictions internationales, on sait que certaines ont manifesté une conception dynamique des normes d'ordre public international. C'est notamment le cas de la Cour interaméricaine des droits de l'homme[14], du Tribunal international pénal pour l'ex-Yougoslavie (TPIY)[15] ou du Tribunal de première instance de l'Union européenne[16]. D'autres en ont, au contraire, retenu une optique étroite, d'ailleurs vigoureusement critiquée en leur propre sein, comme ce fut en particulier le cas pour la Cour européenne des droits de l'homme dans la célèbre affaire Al-Adsani[17]. Il n'est en tout cas pas douteux que les juridictions, nationales comme internationales, n'hésitent plus aujourd'hui à prendre en compte l'existence en droit international de normes impératives même si elles ne leur assignent pas nécessairement toutes la même portée. Il faudrait enfin évoquer ici non seulement les juridictions internationales mais également d'autres instances de contrôle ou instances d'appréciation du comportement des Etats au regard de la règle de droit (« *adjudicative bodies* ») à l'échelle internationale, tels le Comité des droits de l'homme ; de longue date, on sait que cet organe a pris acte de l'importance du droit international impératif dans son domaine de compétence.

Face à une telle diversité d'organes et de jurisprudences, les yeux se tournent alors naturellement vers l'organe judiciaire principal des Nations Unies[18]. La Cour internationale de Justice a-t-elle aujourd'hui dégagé, face à une question aussi fondamentale que celle touchant à la

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13 *Immunités juridictionnelles des Etats,* (Allemagne c. Italie), arrêt, 3 février 2012, CIJ Recueil (2012) 99.

14 Voir Maia, *Jus cogens,* 272.

15 Voir en particulier TPIY, arrêt, *Furundzija* (IT-95-17/1-T), chambre de première instance, 10 décembre 1998, par. 153.

16 Voir les arrêts *Yusuf* T-306/01 et *Kadi* T-315/01 du Tribunal de première instance du 21 septembre 2005, [2005] ECR II-3649, suivis de l'arrêt de la Cour de justice de l'Union européenne, C-402/05 P, *Kadi*, [2008] ECR I-6351.

17 CEDH, *Al-Adsani c. Royaume-Uni*, requête n. 35763/97, 21 novembre 2001, 21 novembre 2001.

18 Cette préoccupation ne date pas d'hier. Voir, par exemple, Christenson, *World Court*, 93.

structure et aux composantes normatives de l'ordre juridique international, une doctrine suffisamment complète pour éclairer les autres instances d'invocation du *jus cogens* et contribuer ainsi au maintien de l'unité substantielle de l'ordre juridique international dont on pourrait penser que l'organe judiciaire principal des Nations Unies se considère comme le garant, au-delà de son rôle de règlement des différends au cas par cas ? On aurait grand tort de croire que les occasions lui ont fait défaut. Comme on le verra plus loin, une dizaine d'affaires contentieuses et trois avis consultatifs ont, directement ou non, offert au juge international la possibilité de prendre position.

Or, non seulement la Cour n'a toujours pas apporté de contribution évidente à la précision de l'identité des normes impératives comme de leur régime d'application, mais lorsqu'elle s'est enfin résolue à en mentionner explicitement l'existence, elle n'a apporté que des réponses très fragmentaires ayant, *in fine*, pour conséquence d'en restreindre la portée et d'en écarter la mise en œuvre. On doit toutefois se garder de porter un jugement sans nuance sur le bilan à dresser du *jus cogens* dans la jurisprudence de la plus haute juridiction internationale, marquée jusqu'ici par deux phases successives et contrastées.

Dans un premier temps, dès la première affaire dont la CIJ ait connu, elle considérait bien qu'il existait en droit international positif des normes dont l'importance du contenu justifiait que l'on n'y dérogeât jamais, alors même qu'elle n'employait pas pour autant le mot de *jus cogens* ou d'obligation impérative (sauf dans une seule affaire) ; dans une seconde période, beaucoup plus récente puisqu'elle commence en 2006, la Cour a bien nommé le droit impératif mais n'en a pas sollicité pour autant les caractères pour parvenir à ses conclusions. On est ainsi confronté à un mouvement contradictoire, dans le lequel un premier temps nous met en présence de la convergence entre substance et désignation, la plupart du temps implicite, du droit impératif alors que le second semble au contraire consacrer la dissociation de sa qualification explicite et de son application[19].

[19] L'auteur tient à indiquer par loyauté qu'il a lui-même participé à deux des affaires contentieuses analysées ci-après, en qualité de conseil et d'avocat. Il s'agit respectivement de l'affaire du *Timor oriental,* dans laquelle il était avocat du Portugal, et *Allemagne c. Italie*, dans laquelle il était avocat de l'Italie.

2.1. Convergence de la substance et de la désignation

2.1.1. La chose *avant* le mot

A consulter la jurisprudence de la Cour internationale de Justice, si ce n'était en une seule occasion remontant à 1979, il lui aura fallu 37 ans, après l'adoption du texte de la convention de Vienne de 1969 pour se résoudre à utiliser dans l'un de ses arrêts l'expression « normes impératives du droit international général *(jus cogens)* » ; ceci au paragraphe 64 de son arrêt du 3 février 2006 en l'affaire des *activités armées sur le territoire du Congo* (nouvelle requête) dans des termes sur lesquels on reviendra.

Pourtant, dès les origines, en 1949[20], puis dans un certain nombre d'arrêts et d'avis consultatifs, la Cour s'était bel et bien référée à un certain nombre de principes et de règles dont elle insistait pour souligner qu'ils font partie du droit positif *et ne sauraient connaître de dérogation*, quoiqu'elle ne les désignât pour autant comme « normes impératives ». Ainsi, longtemps avant la conclusion des travaux de la Conférence de Vienne sur le droit des traités, la Cour avait-elle pris l'initiative de faire référence à des concepts dont l'analyse, dans le contexte de chacun des arrêts et avis concernés, permet de penser qu'ils entretiennent des liens particulièrement étroits avec la définition que donnera l'article 53 de la Convention de Vienne de 1969.

Ainsi en va-t-il, dès 1949, de « certains principes généraux et bien reconnus, tels que des considérations élémentaires d'humanité, *plus absolues encore en temps de paix qu'en temps de guerre* », comme « l'obligation, pour tout Etat, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits d'autres Etats »[21], formulation dont il résulte que les principes concernés n'admettent pas de dérogation[22]. Loin de faire un usage isolé de ces « considérations» fondamentales, la Cour a bien ainsi inauguré une catégorie normative à laquelle elle se réfèrera par la suite à nouveau. En 1986, dans l'*affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci*, elle en appelle ainsi à nouveau aux « considérations élémentaires d'humanité » en renvoyant explicitement à son arrêt de 1949. Dans les deux cas, et à propos du même

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20 *Détroit de Corfou (Royaume-Uni c. Albanie)*, arrêt, 9 avril 1949, CIJ Recueil (1949) 22.

21 Ibid.

22 Voir P.-M. Dupuy, *Considérations élémentaires*, 117.

type de faits[23], il est confirmé que ces principes font partie de longue date du droit international général et que ce sont eux qui ont inspiré les conventions internationales de droit humanitaire (dont en particulier les conventions IV et VIII de La Haye ainsi que l'article III commun aux conventions de Genève de 1949, même si le caractère coutumier des mêmes principes est dit à d'autres moments avoir trouvé sa source dans les conventions elles-mêmes)[24]. Toujours est-il que, pour souligner l'importance primordiale de ces règles générales, la même référence aux « considérations élémentaires » réapparaîtra en 1996 dans l'*avis relatif à la licéité de la menace ou de l'emploi d'armes nucléaires* à propos des « principes généraux de base du droit humanitaire »[25], faisant ainsi écho, mais en les complétant, aux « principes cardinaux contenus dans les textes formant le tissu du droit humanitaire » visés sous cette même appellation dans l'arrêt intervenu dix ans plus tôt.

On constatera de plus que les règles ainsi désignées sont considérées comme « absolues » dans les arrêts de 1949 et 1986 et comme « fondamentales pour le respect de la personne humaine » en raison du fait qu'elles constituent des « principes *intransgressibles* du droit coutumier» dans l'avis de 1996 ; cette dernière affirmation permettra cependant à la Cour, dont les membres furent, en l'occurrence, particulièrement divisés, d'éviter de s'interroger au paragraphe 83 de son avis sur la nature, impérative ou non, de ces règles ; elle le fit sous le prétexte que la question posée par l'Assemblée générale portait seulement sur leur « applicabilité en cas de recours aux armes nucléaires ». A suivre la formulation de la Cour, nous voilà donc en présence de règles «intransgressibles » mais pas forcément « impératives » ! La chose, oui, mais surtout pas le mot… !

Il est cependant notable qu'en 2004, dans son avis consultatif relatif aux *conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, rendu le 9 juillet 2004, la Cour se réfèrera à nouveau, à propos des obligations les plus fondamentales du droit humanitaire, à

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[23] Le mouillage de mines dans une zone maritime ouverte à la navigation internationale. *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique)*, fond, arrêt, 27 juin 1986, CIJ Recueil (1986) 14, par. 215.

[24] Voir Abi-Saab, *Principes généraux*, 381.

[25] *Licéité de la menace ou de l'emploi d'armes nucléaires*, avis consultatif, 8 juillet 1996, CIJ Recueil (1996) 226, par. 77.

son propre avis de 1996 pour redire, ce qui était important en l'espèce, eu égard à la situation d'Israël à l'égard des conventions de Genève de 1949, qu'en raison du fait que de telles obligations sont à ranger parmi les « considérations élémentaires d'humanité », et que, de ce fait, « elles s'imposent à tous les Etats, qu'ils aient ou non ratifié les instruments conventionnels qui les expriment parce qu'elles constituent des principes intransgressibles du droit humanitaire »[26].

Si l'on remonte à présent en arrière, en dehors de la référence aux « considérations élémentaires » inaugurées en 1949, on se souviendra qu'en 1951, la Cour avait par ailleurs déclaré, à propos de la convention sur le génocide, que « les principes qui sont à la base de la Convention sont des principes reconnus par les nations civilisées comme obligeant les Etats même en dehors de tout lien conventionnel ». Ceci indique l'appartenance de ces règles au droit international général mais ne peut, en soi, suffire à en faire des règles impératives. Cependant, la Cour aura par la suite, à plusieurs reprises[27], y compris lors de son arrêt précité de 2006 dans lequel elle prononce enfin « le mot » ou expression de *jus cogens*, l'occasion de revenir sur les implications de son énoncé de 1951 ; pour dire qu'il désignait bien, admettra t'elle, le caractère proprement impératif de l'interdiction du génocide[28]. Elle renouvellera la même affirmation un an plus tard, dans l'affaire *relative à l'application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*[29].

2.1.2. La chose…et même presque le mot

Dans l'analyse de la position de la Cour à l'égard des obligations impératives, l'affaire relative au *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, restée isolée[30] et occupe une place à part[31]. C'est

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26 Paragraphe 157 de l'avis.

27 Pour l'affirmation du caractère *erga omnes* de l'obligation mais pas encore de sa nature impérative, voir déjà l'affaire de l'*Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*, exceptions préliminaires, arrêt, 11 juillet 1996, CIJ Recueil (1996) 595, par. 31.

28 Aux paragraphes 64 et 125 de l'arrêt du 3 février 2006.

29 Au paragraphe 161 de l'arrêt sur le fond du 26 février 2007.

30 On verra pourquoi dans la conclusion de cet article.

31 *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, fond, arrêt, 24 mai 1980, CIJ Recueil (1980) 3.

en effet la seule, durant la période allant de 1959 à 2006, dans laquelle on constate la rencontre, très délibérée fût-elle éphémère, entre la substance du *jus cogens* et sa désignation explicite par la Cour. C'est en effet la Cour elle-même qui prendra à deux reprises l'initiative de souligner le caractère indérogeable de certaines obligations. L'ordonnance du 15 décembre 1979 est celle dans laquelle la Cour va le plus loin. La haute juridiction y déclare en effet :

> « qu'aucun Etat n'a l'obligation d'entretenir des relations diplomatiques ou consulaires avec un autre Etat, mais qu'il ne saurait manquer de reconnaître les *obligations impératives* qu'elles comportent et qui sont maintenant codifiées dans les conventions de Vienne de 1961 et 1963 »[32].

La Cour soulignera encore cette impérativité d'une manière particulièrement solennelle un an plus tard, dans son arrêt sur le fond en la même affaire et toujours à propos des obligations découlant pour deux Etats de leurs relations diplomatiques, en déclarant que leur méconnaissance ne pouvait que

> «saper à la base un édifice juridique patiemment construit par l'humanité au cours des siècles et dont la sauvegarde est essentielle pour la sécurité et le bien-être d'une communauté internationale aussi complexe que celle d'aujourd'hui qui a plus que jamais besoin du respect constant et scrupuleux des règles présidant au développement ordonné des relations entre ses membres »[33].

Même si le mot lui-même n'est plus prononcé, peut-être parce que la Cour se souvient de l'avoir déjà utilisé au même propos un an plus tôt, il paraît difficile d'imaginer une désignation plus pure des obligations en cause comme appartenant à la catégorie de celles reconnues « par la communauté internationale des Etats dans son ensemble en tant que normes [auxquelles] aucune dérogation n'est permise ». Ainsi peut-on dire que, moins de quatre mois après l'entrée en vigueur de

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32 *Personnel diplomatique et consulaire des Etats-Unis à Téhéran*, mesures conservatoires, ordonnance, 15 décembre 1979, CIJ Recueil (1979) 7, par. 41.

33 Arrêt du 24 mai 1980, *supra* note 31, par. 92.

la convention de Vienne sur le droit des traités[34], on rencontre déjà « la chose » et même déjà le mot, du moins en 1979, puisque dans son ordonnance, la Cour, on l'a vu, emploie elle-même l'expression « obligation impérative ».

Chacun sait que toutes les normes *erga omnes* ne présentent pas nécessairement un caractère impératif mais qu'en revanche, toutes les normes impératives ont un effet *erga omnes*[35]. Il n'est par conséquent pas indifférent de rappeler que c'est la Cour elle-même, là aussi, qui, dès 1970, dans la célèbre affaire de la *Barcelona Traction*, avait introduit cette notion dans des termes bien connus. Il est en tout cas frappant de constater que les exemples donnés par la Cour se rapportent à des obligations toutes aisément identifiables comme étant impératives puisqu'il s'agit de celles interdisant l'agression, le génocide, l'esclavage et la discrimination raciale[36], autant de faits illicites éminents que le premier rapporteur spécial sur le droit de la responsabilité, Roberto Ago, qualifiera plus tard devant la Commission du droit international comme des « crimes » de l'Etat[37]. Il est ainsi particulièrement intéressant de constater que, du moins pendant une première phase qui s'écoule entre 1949 (soit vingt ans *avant* l'adoption de la Convention de Vienne sur le droit des traités) et 1980, la Cour manifeste qu'elle n'a aucune difficulté à constater sinon même à consacrer l'existence d'une hiérarchie normative en droit international général. Or, cette hiérarchie est établie par les juges à partir du contenu (non de la forme) des obligations violées, dont elle déduit l'importance que lui accorde la communauté internationale des Etats dans son ensemble. On a pu constater au rappel qui précède que l'utilisation non dommageable du territoire et l'interdiction du génocide y anticipent la conclusion des travaux de Vienne, alors que l'arrêt intervenu dans l'affaire de la *Barcelona* explicite quant à lui certaines des autres interdictions présentant un caractère impératif et ce, sans que sa liste soit limitative, puisqu'elle

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34 Qui date du 27 janvier 1980.

35 Sur les normes *erga omnes*, voir la résolution de l'Institut de droit international « Les obligations erga omnes en droit international », Session de Cracovie, *Annuaire de l'Institut de droit international* 71 (2005-II) : 286.

36 *Barcelona Traction, Light and Power Company, Limited*, deuxième phase, arrêt, 5 février 1970, CIJ Recueil (1970) 32, par. 34.

37 Voir Dupuy, *Observations sur le crime international*, 449.

mentionne également alors « des principes et des règles concernant des droits fondamentaux de la personne humaine ». On voit ici que la vieille idée selon laquelle le contenu du *jus cogens* serait indéfini, pour être communément répandue, n'en est pas moins inexacte. Encore les obligations précitées ne sont-elles nullement limitatives. C'est donc bien ce qu'on a appelé par ailleurs « l'unité matérielle » de l'ordre juridique international qui est ainsi désignée par la Haute juridiction, à raison des valeurs consacrées dans un certain nombre de règles juridiques de caractère coutumier[38]. Il est frappant de constater qu'à cette époque, la Cour « joue le jeu » en quelque sorte, du droit impératif y compris par anticipation, en ayant une démarche substantielle insistant sur la *ratio legis* de normes d'une importance particulière pour la communauté internationale, ainsi que l'arrêt de 1980 dans l'affaire du *Personnel diplomatique et consulaire* en apporte un témoignage particulièrement éloquent.

Toujours est-il qu'à partir de 2006, la Cour reconnaîtra à nouveau ouvertement, plus encore qu'en 1979 et 1980, que le *jus cogens*, désigné comme tel, existe bien en droit international positif. Elle le dira même quatre fois, en 2006, en 2007, en 2011 et en 2012 en se référant explicitement aux « normes impératives du droit international général *(jus cogens)* ». Pas de doute possible quant à l'affirmation de cette existence, donc. Pourtant, et c'est là tout le paradoxe, l'organe judiciaire principal des Nations Unies ne tirera pas pour autant nécessairement de conséquences de ce constat positif. On avait eu jusques là toute une série de situations, celle de la désignation de la chose avant le mot, puis, le temps d'une seule affaire, la brève rencontre de la chose et presque du mot. Voici qu'en cette phase nouvelle, la plus récente, on sera confronté à une situation encore différente puisqu'on aura, certes, le mot, mais plus la chose, dans la mesure où la Cour procèdera à la dissociation entre qualification et application d'une norme en tant qu'elle appartient au droit indérogeable.

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[38] Voir notre cours général à l'Académie de droit international de La Haye, *supra* note 10, particulièrement pp. 207-396.

2.2. Dissociation entre qualification et application du *jus cogens*

Deux séries de raisons permettent à la Cour d'écarter l'application du droit impératif si l'on entend par là la démarche consistant à tirer les conséquences juridiques du constat d'un manquement (conventionnel ou factuel, le second intéressant alors non le droit des traités mais celui de la responsabilité) d'un ou de plusieurs Etats à une norme de *jus cogens*. L'une est tirée de son absence de compétence pour le faire, l'autre d'une utilisation paradoxale de la distinction classique entre normes primaires et normes secondaires.

2.2.1. Obligations *erga omnes* et compétence de la Cour

A un an d'intervalle, en 2006 et 2007, la Cour, revenant apparemment sur sa réticence à prononcer le mot, ce qu'elle n'avait plus fait depuis son ordonnance de 1979 dans l'affaire du *Personnel diplomatique* dans laquelle elle parlait d' « obligation impérative », va affirmer l'appartenance au *jus cogens* de la norme interdisant le génocide. Elle le fait une première fois, on l'a dit, au paragraphe 64 de son arrêt de 2006 dans l'affaire opposant la RdC au Rwanda, puis en 2007 au paragraphe 161 de son arrêt dans l'affaire opposant la Bosnie Herzégovine à la Serbie-Monténégro. Cependant, dans le premier cas, elle situera cette affirmation par référence au précédent du *Timor oriental* pour se dispenser d'en tirer quelque conséquence normative que ce soit. Dans le second, il est vrai, le rappel du caractère impératif de l'obligation de ne pas commettre un génocide n'est pas subséquemment associé à l'affirmation d'un *non possumus* fondé sur le défaut de compétence. Toutefois, il est frappant de constater que, dans la suite de ses développements nourris relatifs à l'interprétation de la signification et de la portée de la convention de 1948 sur la prévention et la répression du crime de génocide et, particulièrement, de son article premier, la Cour ne prendra jamais appui sur le caractère impératif de l'interdiction qu'elle croit découvrir dans cet article alors pourtant qu'elle n'y figure pas, du moins explicitement.

Pour bien comprendre, en revanche, la démarche de la Cour par référence à la question de sa compétence, présente dans l'affaire de 2006, il faut donc revenir à l'examen de l'arrêt de principe à cet égard.

En 1995, dans l'affaire du *Timor oriental*[39], portée devant elle par le Portugal agissant en tant que puissance administrante au sens de l'article 73 de la Charte des Nations Unies, la question posée par le demandeur revenait à savoir si l'Australie avait enfreint ses obligations *en tant que membre de l'O.N.U* en reconnaissant *de jure* l'annexion par la force de ce territoire effectuée par l'Indonésie. Postérieurement à cette conquête militaire particulièrement sanglante, cet Etat avait en effet conclu avec l'Australie un accord de délimitation du plateau continental dans la zone dite du *Timor Gap* en vue de son exploration et de son exploitation. Même si le Portugal avait veillé à prendre également appui sur d'autres arguments, le *jus cogens* était néanmoins en cause en cette affaire ; ceci, dans la mesure où le Portugal affirmait que l'Australie avait ainsi méconnu le droit du peuple timorais à disposer de lui-même autant qu'à disposer de ses ressources naturelles.

La Cour n'a cependant pas voulu connaître de cette affaire au fond. Elle n'a pas accueilli l'argument portugais selon lequel il s'agissait de juger de la responsabilité individualisée de l'Australie en tant que membre des Nations Unies, indépendamment de celle de l'Indonésie, tiers à l'instance. La puissance administrante, toujours reconnue comme telle par les Nations Unies au moment de la présentation de l'affaire devant la Cour, alléguait notamment que la question de l'illicéité de l'invasion et de l'acquisition par la force du Timor oriental ne se posait plus. Deux autres organes permanents de l'ONU, le Conseil de sécurité et l'Assemblée générale s'étaient en effet prononcés à plusieurs reprises pour condamner l'invasion indonésienne du Timor oriental comme contraire au droit international. Dans cette espèce, le Portugal avait pris grand soin de souligner son titre spécifique ou qualité juridique particulière pour se présenter devant la Cour au nom d'un territoire non indépendant, qualité déjà rappelée plus haut[40] qui lui garantissait de ne pas apparaître comme agissant au nom d'une *actio popularis* comme son seul droit à l'action avait été à trouver dans son appartenance à la communauté internationale des Etats ; par ailleurs, le demandeur affirmait que le droit du peuple timorais à

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39 *Timor oriental (Portugal c. Australie)*, arrêt, 30 juin 1995, CIJ Recueil (1995) 90.

40 Celle de puissance administrante au sens de l'article 73 de l'ONU et reconnue comme telle par cette organisation ; il ne s'agissait donc en rien d'un recours à une quelconque *actio popularis*.

l'expression auquel l'invasion indonésienne n'avait pas permis de s'exercer présentait une portée *erga omnes*.

La Cour lui donna raison au moins sur ce point ; elle le fit, toutefois, sans retenir pour autant le reste de l'argumentation du requérant quant à l'objet du différend (l'engagement de la responsabilité internationale de l'Australie). Elle affirme d'abord :

> « qu'il n'y a rien à redire à l'affirmation du Portugal selon laquelle le droit des peuples à disposer d'eux-mêmes (…) est un droit opposable *erga omnes*. » [41]

Elle ne va cependant pas plus loin ; elle ne va surtout pas jusqu'à dire que le respect d'un tel principe constitue une obligation impérative, même si les juges consentent à observer que ce droit des peuples est « un principe essentiel du droit international »[42]. Toutefois, reprenant l'argument qu'elle avait retenu dans l'affaire de l'*Or monétaire* selon lequel elle n'avait pas compétence pour juger de la légalité des agissements d'un Etat tiers à l'instance et qui entendait le rester[43], la CIJ s'empressera d'ajouter que :

> « l'opposabilité *erga omnes* d'une norme et la règle du consentement à la juridiction sont deux choses différentes. Quelle que soit la nature des obligations invoquées, la Cour ne saurait statuer sur la licéité du comportement d'un Etat lorsque la décision à prendre implique une appréciation de la licéité du comportement d'un autre Etat qui n'est pas partie à l'instance. »[44]

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41 *Timor oriental*, *supra* note 39, par. 29.

42 On notera toutefois que, dans son avis sur relatif aux *conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, 9 juillet 2004, CIJ Recueil (2004) 136, la Cour rappellera la position prise dans l'affaire du Timor à propos du caractère *erga omnes* du droit à l'autodétermination (par. 156). Ceci est d'autant plus remarquable qu'au paragraphe suivant, la Cour poursuit en rappelant de la même manière ce qu'elle avait dit dans son avis de 1996 sur la *Licéité de la menace ou de l'emploi de l'arme nucléaire*

43 Argument qu'elle aurait pu facilement balayer si elle s'en était tenue, comme deux ans auparavant, dans l'affaire de *Nauru*, à une identification précise et clairement individualisée de l'Australie. Voir aussi l'opinion dissidente de M. Weeramantry sous l'arrêt dans l'affaire du *Timor oriental*, *supra* note 39, 139.

44 *Timor oriental*, *supra* note 39, par. 29.

Cet arrêt est critiquable ; il faut toutefois bien comprendre pourquoi. Ce que l'on peut reprocher aux juges, ce n'est nullement l'assertion que l'on vient de citer ; c'est d'avoir voulu éviter la question de fond en se déclarant incompétents alors que, sans nul recours à la jurisprudence de l'*Or monétaire*, la Cour aurait très bien pu clairement individualiser la responsabilité propre à l'Australie. C'est précisément ce qu'elle avait fait seulement à peine plus de deux ans auparavant dans l'affaire relative à *Certaines terres à phosphate à Nauru (Nauru c. Australie)*[45]. Dans l'affaire du *Timor,* la Cour aurait pu également constater que la responsabilité du défendeur était distincte ici de celle de l'Indonésie comme elle l'avait été, dans l'affaire précédente, de celle de la Nouvelle-Zélande et de la Grande Bretagne, pourtant elles aussi parties à l'accord de tutelle sur Nauru. Dans l'affaire du *Timor*, l'Australie était en effet visée par le Portugal au regard de ses obligations en tant que membre des Nations Unies, organisation proclamant le droit des peuples à disposer d'eux-mêmes comme « un principe essentiel » pour reprendre les termes de la Cour elle-même. L'or monétaire aurait ainsi fort bien pu rester au placard si les juges avaient voulu connaître de l'affaire au fond, ce que, très manifestement, ils ne voulaient pas, pour des raisons dont le présent auteur sait de source sûre qu'elles étaient liées au contexte politique de l'époque[46] !

En revanche, y compris dans la perspective du *jus cogens*, on ne peut pas reprocher à la Cour de faire prévaloir la règle du consentement à sa compétence, inscrite dans son propre Statut, sur une règle de fond, fût-elle « d'importance essentielle pour la communauté internationale des Etats dans son ensemble ». D'une certaine façon, en effet, on peut dire, presque en accord sur ce point avec Robert Kolb, que, pour elle, son propre Statut pose des normes impératives[47] ; et l'on peut ajouter

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45 *Certaines terres à phosphate à Nauru (Nauru c. Australie)*, exceptions préliminaires, arrêt, 26 juin 1992, CIJ Recueil (1992) 240, par. 48-55.

46 L'affaire du *Timor oriental* date de 1995, et trouve place en plein cœur du conflit des Balkans. La revendication des droits des peuples aurait très bien pu prospérer devant la Cour, mais quinze ou vingt ans plus tôt, au moment où la vague de la décolonisation n'était pas encore apaisée.

47 Voir Kolb, *Théorie du* jus cogens, notamment 209-317. Une réserve importante demeure toutefois à l'égard de la doctrine – très particulière – de cet auteur. Le droit impératif est du droit international général, non du droit conventionnel. Dire par conséquent que le Statut de la Cour est pour elle impératif ne range cependant pas cette impérativité-là dans le domaine du *jus cogens*. Ce qui est vrai est que la Cour ne peut déroger à son propre Statut parce qu'il est pour elle obligatoire.

que cette impérativité statutaire l'emporte sur toute autre considération, la Cour ne pouvant s'octroyer des pouvoirs que les Etats n'ont pas voulu lui conférer, ni dans son propre Statut ni dans la Convention de Vienne sur le droit des traités. L'affirmation selon laquelle « l'opposabilité *erga omnes* d'une norme et la règle du consentement à la juridiction sont deux choses différentes » est en elle-même inaccessible à la critique, et toute l'habileté de la Cour a précisément été de s'abriter derrière elle pour se déclarer incompétence alors qu'elle aurait pu se déclarer compétente sans l'invoquer[48].

Dans l'affaire des *activités armées sur le territoire du Congo* (République du Congo c. Rwanda), c'est également par référence au fondement de sa compétence que la Cour distingue entre celle-ci et les conséquences de l'appartenance d'une norme au *jus cogens*[49]. Le *non possumus* ainsi prononcé est là encore pour elle impératif parce qu'elle ne saurait agir hors des cadres de son Statut. La Cour commence par se référer au précédent constitué par la distinction que l'on vient de rappeler entre qualité des normes *erga omnes*, d'une part, et fondements de sa compétence, d'autre part. Elle reconnaît ensuite de façon très explicite que la norme interdisant le génocide constitue assurément une norme impérative du droit international, comme elle le redira un an plus tard, dans l'affaire entre Bosnie-Herzégovine et Serbie, et c'est ainsi qu'elle innove en osant enfin prononcer par deux fois « le mot ». Mais elle précise bien, à deux reprises dans le même arrêt de 2006:

> « La Cour estime enfin nécessaire de rappeler que le seul fait que des droits et obligations *erga omnes* ou des règles impératives du droit international général *(jus cogens)* seraient en cause dans un différend ne saurait constituer en soi une exception au principe selon lequel sa compétence repose toujours sur le consentement des parties (voir paragraphe 64 ci-dessus) »[50].

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48 En considérant, pour l'une ou l'autre des raisons avancées par le demandeur, que n'étaient en cause en cette affaire que les agissements de l'Australie et non ceux de l'Indonésie, déjà désignés plusieurs fois comme gravement illicites par le Conseil de sécurité et l'Assemblée générale de l'ONU.

49 *Activités armées sur le territoire du Congo (nouvelle requête: 2002) (République démocratique du Congo c. Rwanda)*, compétence et recevabilité, arrêt, 3 février 2006, CIJ Recueil (2006) 6, par. 64.

50 Ibid., par. 161. Au paragraphe 64, la Cour avait affirmé : « le fait qu'un différend porte sur le respect d'une norme possédant un tel caractère, ce qui est assurément le

On voit donc que la position de la Cour, encore une fois explicable en raison des exigences statutaires auxquelles elle reste soumise, est bien arrêtée. Elle ne se considère pas en situation de pouvoir se saisir elle-même d'un cas d'infraction à une norme impérative si les bases consensuelles de sa compétence ne sont pas établies. On pourrait dire, par comparaison avec les droits internes, qu'*il n'y a pas, en droit international, d'exception d'ordre public* permettant à la Cour d'évoquer une question d'importance fondamentale pour la communauté internationale des Etats dans son ensemble. On retrouve ici le porte-à-faux que l'auteur de ces lignes avait désigné de longue date dans un article portant sur « le juge et la règle générale »[51], entre le fondement consensuel de la compétence judiciaire internationale et l'affirmation d'existence d'un ordre public international constitué par un corps de règles impératives.

Ce que l'on doit rajouter, près de 25 ans plus tard, c'est toutefois qu'est apparue à cet égard une distorsion entre la CIJ et le juge interne, par ailleurs habitué à l'invocation des règles d'ordre public dans son ordre juridique propre, mais, qui plus est, se trouve *doté quant à lui d'une compétence délivrée de l'assentiment préalable des parties*.

On ne doit pas être surpris que non seulement des juges internationaux une fois pour toutes délivrés de l'assentiment des Etats parce qu'il est exprimé dans leur traité constitutif, tels le Tribunal de première instance de l'Union européenne ou la Cour de Luxembourg, prennent la liberté de se référer au droit impératif en tant qu'il reflèterait un ordre public international ; mais on ne doit pas davantage s'étonner que des juges internes, qu'ils soient ou non de dernier recours, fassent de plus en plus souvent référence à l'existence en droit international de règles présentant non seulement un caractère *erga omnes* mais aussi une portée impérative.

C'est précisément ce que fit la Cour suprême italienne dans son arrêt *Ferrini*.

Il déclencha en 2008 le dépôt d'un recours par l'Allemagne à l'encontre de l'Italie devant la Cour internationale de Justice à l'occasion duquel la Cour manifesta d'une façon nouvelle, et cette fois nettement

cas de l'interdiction du génocide, ne saurait en lui-même fonder la compétence de la Cour pour en connaître. En vertu du Statut de la Cour, cette compétence est toujours fondée sur le consentement des parties. »

51 Voir Dupuy, *Le juge et la règle générale*, 569.

plus contestable du point de vue de la technique mais aussi de la logique juridique, son refus de connaître d'un argument fondé sur l'existence du *jus cogens*.

2.2.2. Le recours à la distinction entre règles primaires et règles secondaires comme moyen interdisant à la Cour de tirer les conséquences de l'existence d'une norme impérative

Dans son arrêt *Ferrini,* du 11 mars 2004, la Cour suprême italienne devait examiner la plainte d'une personne victime du travail forcé auquel elle avait été contrainte entre 1943 et 1945 du fait des agissements de l'Allemagne nazie sans jamais pouvoir obtenir par la suite réparation devant les juridictions internes allemandes[52]. Le cas de Monsieur Ferrini n'était nullement isolé mais était partagé par plusieurs dizaines de milliers de personnes. La Cour suprême italienne, prenant en considération ce cas limite conduisant, si elle n'y faisait pas droit, au déni de justice, s'est alors appuyée sur un faisceau d'indices, au premier rang desquels l'émergence du droit impératif international consacrant les valeurs relatives aux droits de l'homme déclarées partagées par la communauté internationale dans son ensemble ; elle parvint ainsi à la conclusion selon laquelle, dans une telle situation, elle pouvait se résoudre à écarter la règle, pourtant reconnue par elle-même fondamentale, de l'immunité de juridiction des Etats étrangers. Elle accueillit ainsi la requête que M. Ferrini avait formulée contre l'Allemagne devant les tribunaux internes italiens afin d'obtenir, enfin, réparation des dommages provoqués par les crimes de guerre et crimes contre l'humanité dont il avait été victime, au même titre que tant d'autres.

Parmi les arguments opposés à l'argumentation sur laquelle s'était fondé le juge italien de dernier recours, l'Allemagne avait entendu restreindre le sens et la portée des normes impératives en droit international positif. Dans sa duplique, elle concluait ainsi un assez long développement par ces termes :

> « En résumé, le *jus cogens* n'est composé que de règles primaires, de règles de conduite interdisant certains comportements spécifiques. Le *jus cogens* a pour objet de prévenir les actes communément considérés

52 Voir De Sena, De Vittor, *State Immunity*, 89.

> comme incompatibles avec les fondements moraux et éthiques les plus essentiels de la communauté internationale. » [53]

Loin de rejeter la vision allemande, la Cour a au contraire entériné cette lecture du *jus cogens* :

> « En l'espèce, la violation des règles interdisant le meurtre, la déportation et le travail forcé a eu lieu entre 1943 et 1945. Tous les intéressés s'accordent à reconnaître le caractère illicite de ces actes. L'application des règles de l'immunité de l'Etat aux fins de déterminer si les juridictions italiennes peuvent connaître de réclamations fondées sur pareilles violations ne saurait créer le moindre conflit avec les règles qui ont été violées. (…) L'obligation de réparation est une règle qui existe indépendamment des règles régissant les moyens par lesquels il doit lui être donné effet. Or, le droit de l'immunité de l'Etat ne concerne que les secondes. »[54]

Ce faisant, la Cour rejetait la thèse que défendait l'Italie selon laquelle existerait un conflit latent entre, d'une part, l'obligation de prévenir et de réprimer les crimes internationaux et, d'autre part, le principe de l'immunité de juridiction de l'Etat. Pour le juge international, en effet :

> « *à supposer, aux fins du présent examen*, que les règles du droit des conflits armés qui interdisent de tuer des civils en territoire occupé ou de déporter des civils ou des prisonniers de guerre pour les astreindre au travail forcé soient des normes de *jus cogens*, ces règles n'entrent pas en conflit avec celles qui régissent l'immunité de l'Etat. Ces deux catégories de règles se rapportent en effet à des questions différentes. Celles qui régissent l'immunité de l'Etat sont de nature procédurale et se bornent à déterminer si les tribunaux d'un Etat sont fondés à exercer leur juridiction à l'égard d'un autre. Elles sont sans incidence

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53 A l'appui d'une telle opinion, l'Allemagne évoquait notamment la distinction entre les règles de procédure gouvernant la compétence de la Cour elle-même et les règles de fond. Consultable sur le site de la Cour à la rubrique de l'affaire, Procédure écrite, Réplique de la République fédérale d'Allemagne, par. 56-68.

54 *Immunités juridictionnelles de l'Etat*, *supra* note 13, par. 94.

> sur la question de savoir si le comportement à l'égard duquel les actions ont été engagées était licite ou illicite. »[55]

Voilà qui est clair et net et tous ceux qui pensent différemment sont des esprits confus ! Pourtant, l'Italie n'était nullement la seule à relever qu'il existe en droit positif un « conflit latent entre les immunités de juridiction des Etats et de leurs agents, d'une part, et les réclamations liées à des crimes internationaux, d'autre part ». Ce sont là, en effet, très précisément les termes de la résolution que l'Institut de droit international avait adoptée seulement deux ans plus tôt, en 2009, à sa session de Naples. Cette résolution portait « sur l'immunité de juridiction de l'Etat et de ses agents en cas de crimes internationaux »[56] ; après le constat de ce conflit normatif, fait dans son préambule, l'IDI a adopté dans le corps de la résolution, à son article II, paragraphe 2, la disposition selon laquelle :

> « Conformément au droit international conventionnel et coutumier, les Etats ont l'obligation de prévenir et de réprimer les crimes internationaux. *Les immunités ne devraient pas faire obstacle à la réparation adéquate à laquelle ont droit les victimes des crimes visées par la présente résolution* ».

Ainsi, cet organe réunissant un aréopage d'experts parmi les plus éminents du droit international reconnaissait-il bel et bien l'existence d'un conflit latent entre deux normes de droit positif, l'une appartenant en effet à la catégorie des règles primaires et l'autre (l'immunité de juridiction de l'Etat devant les tribunaux étrangers) à celle des normes secondaires parce que procédurales.

La netteté avec laquelle la Cour prend la position inverse ne doit ainsi pas faire illusion. Elle n'a que l'apparence de la rigueur. Sa démarche consiste en effet à associer une assertion exacte à une réflexion inaboutie. L'assertion d'évidence, c'est que les règles primaires et les règles secondaires n'appartiennent pas à la même catégorie normative,

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55 Ibid. Les italiques sont de nous.

56 Pour une présentation et un commentaire de la résolution, voir Salmon, *La résolution de Naples*, 316. Le texte de la résolution est disponible à l'adresse suivante : http://www.idiiil.org/idiF/resolutionsF/2009_naples_01_fr.pdf.

ce qu'elle fait du reste de façon peu rigoureuse en se contentant de déclarer qu'elles « se rapportent en effet à des questions différentes », comme si deux normes primaires ou deux normes secondaires ne pouvaient pas, les unes par rapport aux autres, « se rapporter à des questions différentes ». Là n'est donc pas le bon critère. Mais le plus grave est que la Cour s'arrête là dans son raisonnement. Elle dit en effet en substance : « ces normes n'appartiennent pas à la même catégorie, donc, il ne peut y avoir de conflit normatif entre elles ». Elle refuse ainsi délibérément de se poser la question qui vient pourtant logiquement immédiatement après : celle de savoir, au cas où la règle primaire présenterait un caractère impératif (ce qu'elle semble curieusement mettre en doute en l'espèce[57]), si cette impérativité de la règle primaire ne devrait pas, du seul fait de son existence, primer la règle secondaire de l'immunité de juridiction, quant à elle non impérative ?[58] Or, c'est pourtant très exactement ce à quoi la résolution de l'Institut de droit international invite les Etats[59]. En répondant comme elle le fait, c'est-à-dire en inférant l'absence de conflit entre les normes en cause du seul fait que les unes sont des règles de conduite et les autres des règles de procédure, la Cour établit une autonomie intégrale des premières par rapport aux secondes ; comme si la procédure était une fin en soi, et n'était pas destinée à permettre la mise en œuvre des normes substantielles.

Plus précisément, en agissant ainsi, les juges semblent méconnaître l'essence de la distinction établie par Hart entre normes primaires et normes secondaires[60], à laquelle il est vrai qu'ils prennent soin, contrairement aux plaidoiries allemandes, de ne pas se référer explicitement ; toujours est-il que les normes secondaires sont, par excellence, « des normes portant sur les normes » et, par conséquent, même si elles

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57 Comparer avec la prise de position déjà citée de la Cour dans l'affaire des *activités militaires et paramilitaires au Nicaragua et contre celui-ci* ainsi qu'aux développements consacrés aux mêmes principes cardinaux de droit humanitaire, également rappelés plus haut, dans son avis sur la *Légalité de la menace ou de l'emploi des armes nucléaires.*

58 Puisqu'elle fait l'objet en droit positif de toute une série de dérogations, et pas seulement pour les activités menées *jure gestionis.*

59 Outre le fait que la seconde plaidoirie de l'auteur du présent article portait en partie sur cette résolution, rappelons qu'un certain nombre des juges à la Cour sont eux-mêmes membres de l'Institut de droit international et que plusieurs d'entre eux avaient participé à la session de Naples de 2009.

60 Hart, *Concept of Law*; Bobbio, *Nouvelles réflexions*, 159.

ne sont pas toujours dans la dépendance des premières, on ne peut nullement partir du principe de l'absence de lien entre elles et les normes primaires, dont elles sont, selon les cas, chargées d'indiquer comment elles sont produites, mises en œuvre, ou quelles conséquences sont attachées à leur méconnaissance.

Surtout, il convient, ici, de bien percevoir la différence existant entre le raisonnement inabouti de la Cour dans l'*affaire relative à l'immunité de juridiction des Etats* et le constat inattaquable fait dès 1995 selon lequel une chose est le caractère e*rga omnes* d'une norme et une autre la question de savoir si les bases de sa compétence sont réunies en l'espèce. Dans cette dernière assertion, il est exact que l'on trouve une distinction nette entre la règle de fond ou règle primaire et la règle secondaire d'« adjudication », relative à la compétence de la Cour. Cependant, comme on l'a dit plus haut, on est ici en face d'un système conventionnel et *statutaire* établissant clairement la primauté de la seconde sur la première ; rien de semblable, cependant, pour les Etats. Ils n'ont pas, quant à eux, l'obligation statutaire de faire valoir la procédure sur le fond. Ils doivent, tout au contraire, en droit international général, tirer *toutes* les conséquences du caractère impératif d'une norme de conduite déterminée, jusque dans ses prolongements procéduraux. Comme le dit à juste titre l'Institut de droit international en 2009, « *les immunités ne devraient pas faire obstacle à la réparation adéquate à laquelle ont droit les victimes des crimes* » de guerre et des crimes contre l'humanité.

La Cour, quant à elle, derrière la tranquille assurance avec laquelle elle sépare les normes substantielles des normes procédurales, coupe ainsi délibérément les ailes au droit impératif, en indiquant explicitement aux Etats qu'ils n'ont non seulement pas mais qu'ils n'ont *jamais* à remettre en cause la règle classique de l'immunité de juridiction, fût-ce dans des cas limites comme celui auquel était confrontée la Cour suprême de l'Italie. La norme faisant obligation aux Etats de prévenir et de réprimer les crimes de guerre et les crimes contre l'humanité comme de réparer leurs conséquences dommageables risque ainsi de demeurer à l'état de pure virtualité dans un cas comme celui vérifié dans les circonstances de l'affaire Ferrini dans laquelle les tribunaux de l'Etat auteur des faits illicites refusaient depuis des décennies d'en

réparer les conséquences[61]. Du point de vue de la théorie de la norme, la distinction entre normes primaires et secondaires est ainsi privée de toute utilité ; elle est même reniée, puisque les normes secondaires, qui sont pourtant conçues comme étant « des normes sur les normes », ne peuvent plus assurer l'application des normes primaires car séparées radicalement de celles-ci. Pourquoi le passer sous silence, il semble bel et bien qu'il s'agisse tout simplement d'une absurdité théorique !

Toujours est-il que la position prise par la Cour dans l'affaire Allemagne c. Italie est d'une toute autre nature que celles qu'elle avait prises jusques là, dans une variété d'affaires et selon une assez grande diversité d'attitudes. Ici, bel et bien, *la Cour prend position, et elle le fait dans un sens restrictif à l'égard de la portée des normes impératives* ; elle va dans le sens de l'affirmation d'une impérativité tronquée, parce que réduite au vase clos des normes primaires, elles-mêmes ainsi dépourvues des moyens d'assurer leur respect ou de faire en sorte que leur violation soit réparée. Pour la toute première fois dans l'histoire de sa jurisprudence à l'égard du *jus cogens*, la Cour cherche de la sorte manifestement à limiter la portée de l'impérativité. Or, il lui aurait, là aussi, été possible d'adopter une attitude beaucoup moins radicale. Elle aurait pu rejeter la position de la Cour suprême italienne et rester attachée au maintien, même dans les circonstances limite de l'espèce, de la règle de l'immunité juridique, issue à laquelle l'Italie elle-même s'attendait, tout en constatant, à l'instar de l'Institut de droit international, qu'il y avait bien un problème, ne fût-ce que potentiel pour le juge interne, du fait du « conflit normatif latent » qui existe bel et bien entre l'obligation impérative de réparer les conséquences des crimes de guerre et crimes contre l'humanité, et la règle de l'immunité de juridiction de l'Etat étranger devant les tribunaux internes. Elle aurait pu admettre que, sinon la conclusion en l'espèce de l'arrêt *Ferrini*, tout au moins la *démarche* de la Cour suprême italienne était admissible, consistant à confronter l'extension de la portée du principe de l'immunité de juridiction de l'Etat aux évolutions substantielles que l'on pouvait discerner pour ce qui a trait aux conséquences attachées à la commission des crimes de guerre et contre l'humanité ; cela ne l'aurait pas pour autant empêchée de conclure qu'en l'état actuel, cette évolution

[61] Voir à cet égard les précisions apportées par les plaidoiries de l'Italie, particulièrement son contre-mémoire, p. 8 à 15 et sa duplique, p.6-7.

n'est pas encore suffisamment consolidée en pratique pour avoir conduit jusqu'aux conséquences que la Cour suprême d'Italie en avait tiré. La Cour aurait pu, autre façon de prendre une position plus pondérée, accepter notamment que le fait que le juge interne se pose au moins la question de la prévalence d'une règle sur l'autre n'est pas en soi une illicéité au regard du droit international quand sont en cause les conséquences d'une atteinte grave aux droits de l'homme et/ou au droit humanitaire. Or, la Cour n'a pas fait cela. Elle a décidé de trancher, au risque de bloquer l'évolution du droit international positif. Qui avait dit que le juge international se contente d'appliquer le droit sans chercher à peser sur son évolution ?

2.2.3. Non un retournement, mais une volonté pondératrice

Quelques mois après avoir rendu son arrêt de février mettant un terme au différend entre l'Allemagne et l'Italie, en juillet, la Cour internationale de Justice rendra un autre arrêt, dans l'affaire sur les *questions relatives à l'obligation de poursuivre ou d'extrader*, entre la Belgique et le Sénégal à propos du sort à réserver à l'ancien dictateur tchadien, Hissène Habré ; ce dernier avait trouvé de longue date un refuge sur le territoire sénégalais sans avoir fait l'objet de poursuites judiciaires de la part des autorités locales en dépit des lourdes accusations de crimes contre l'humanité qui pesaient contre lui.

A la lecture des audaces relatives de cet arrêt sur deux points précis, on ne peut s'empêcher de penser que tout se passe comme si les juges s'étaient rendu compte qu'il leur fallait gommer, du moins pour partie, l'impression pénible de réaction à toute évolution du droit dans ses relations avec la norme impérative mais, plus encore, avec les normes *erga omnes* qu'avait laissé leur précédent arrêt.

Premier point : en ce qui concerne le *jus cogens* lui-même, la Cour n'hésite pas à reconnaître, ce qui, il est vrai, avait déjà été dit longtemps avant elle par le TPIY, que « la prohibition de la torture fait partie du droit international coutumier et qu'elle est devenue une norme impérative (*jus cogens*) »[62]. Encore la Cour indique-t-elle, au paragraphe suivant que « l'obligation de poursuivre les auteurs présumés d'actes de torture, en vertu de la convention, ne s'applique qu'aux faits survenus

[62] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, arrêt, 20 juillet 2012, CIJ Recueil (2012) 422, par. 99.

après son entrée en vigueur pour l'Etat concerné ». Il faut donc en déduire que si l'interdiction de la torture fait partie du *jus cogens*, l'obligation de poursuivre demeure quant à elle soumise au régime conventionnel mis en place par la convention de 1984 sur l'interdiction de la torture. Cette distinction n'est cependant nullement précisée dans l'arrêt.

Pourtant, et c'est le second point à relever, la Cour n'avait pas hésité, plus haut dans la motivation de son arrêt, à renoncer à une lecture sélective des dispositions de cette même convention, tout au moins du point de vue de leurs portées respectives. La question déterminante dans cette affaire, en effet, n'était pas celle de l'appartenance de la prohibition de la torture au *jus cogens* dont, au demeurant, la Cour, une fois encore, ne tire aucune conséquence déterminante. La question déterminante était celle du *locus standi* ou intérêt à l'action de la Belgique à l'encontre du Sénégal. Or, la Cour, sans plus d'égards pour un fondement propre à la Belgique du droit d'agir sur la base invoquée de la compétence passive, d'abord avancée par cette dernière, appuie sa reconnaissance de la légalité propre à l'action belge sur l'affirmation qu'il existe certains traités définissant des obligations *erga omnes partes* et que tel est bien le cas pour la convention sur la torture, y compris pour ce qui concerne l'obligation de saisir les autorités compétentes en vue du déclanchement des poursuites pénales. Le plus étonnant est qu'à l'appui du premier des trois éléments de cette affirmation, la Cour n'a pas de problème à s'appuyer sur le *dictum* cité plus haut de la *Barcelona Traction*. Or, ce dernier n'est pas pertinent en l'espèce, comme le relèvera à juste titre le professeur Sur, juge *ad hoc* du Sénégal, « puisque ce qui est en cause, ce sont des obligations d'origine conventionnelle et non coutumières, et qu'au surplus la Cour s'est déclarée incompétente pour connaître des règles coutumières dans le cadre du présent différend »[63]. On peut faire une remarque tout aussi critique à propos de la référence que la Cour fera également à l'avis sur les *réserves à la convention pour la prévention et la répression du crime de génocide* de 1951. Certes, cette convention était bien un traité, mais un traité dont la Cour avait alors dit qu'il énonçait des obligations ayant valeur coutumière. Or ici, il en va de même en ce qui concerne l'obligation, sans aucun

[63] Ibid., opinion dissidente du juge *ad hoc* M. Serge Sur, par. 28 a).

doute coutumière, de prohibition de la torture, même si en l'occurrence la Cour s'était en amont déclarée incompétente pour connaître de la coutume. Mais on ne pouvait certainement pas faire la même affirmation à l'égard de l'obligation d'entreprendre des poursuites (obligation, du reste, procédurale) dont au demeurant la Cour elle-même reconnaîtra plus loin qu'elle relève quant aux conditions de son invocabilité d'un régime resté quant à lui conventionnel ! Qu'importe ! L'essentiel pour la Cour, dans ce dernier arrêt, n'était manifestement pas de chercher d'abord la rigueur logique mais d'envoyer le signal qu'en dépit du précédent très restrictif sinon réactionnaire, au sens littéral du terme, constitué par son arrêt dans l'affaire Allemagne/Italie, elle n'était pas pour autant hostile au droit relatif aux obligations *erga omnes*, quitte à le cantonner ici dans le cadre conventionnel de celles qui sont restreintes aux membres d'une convention e*rga omnes partes.* Elle le fit, qui plus est, en renforçant cet effet d'annonce par la consécration de l'interdiction de la torture en tant que règle impérative, au sein d'un arrêt où elle se disait pourtant incompétente en matière coutumière.

Quoiqu'il en soit, on ne saurait mettre les deux arrêts de 2012 dans la même catégorie du point de vue de sa jurisprudence à l'égard du *jus cogens*, et l'on verra dans un instant pourquoi.

2.3. Conclusion générale

Confronté à la nécessité de faire le bilan de cette quête jurisprudentielle, on est porté à reprendre l'interrogation faite par Michel Foucault au début des « mots et des choses » : *qu'est-il donc impossible de penser et de quelle impossibilité s'agit-il ?* La réponse semble assez évidente. L'impossibilité, du moins pour les juges de la Cour, est celle qui consisterait à penser un *jus cogens* semblant aller à l'encontre des « droits fondamentaux des Etats » pour parler comme elle le fit dans son avis sur la *licéité des armes nucléaires*[64].

L'évolution de la jurisprudence de la Cour à l'égard du *jus cogens* semble dominée par un paradoxe : celui d'après lequel elle était beaucoup plus proche de la chose lorsqu'elle n'en prononçait pas le mot.

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64 Voir note suivante.

C'est dans les premiers temps, dès 1949, avec l'invocation des « considérations élémentaires d'humanité », que la Cour s'appuyait sur une inspiration nettement articulée aux droits de l'homme et aux principes « élémentaires » ou « cardinaux » du droit humanitaire ; elle le fit encore en 1951 avec l'avis sur les *réserves*, puis en 1986 dans l'arrêt Nicaragua/Etats-Unis ainsi qu'en 1996, à l'occasion de l'avis sur la *légalité de la menace et de l'emploi d'armes nucléaires* au demeurant très difficilement acquis, par la seule voix prépondérante du Président de la Cour, puis en 2003 dans son avis consultatif relatif aux *conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé.*

Certes, il y eut l'espèce bien particulière constituée, en 1979-1990, par l'affaire du *Personnel diplomatique,* dans laquelle on a pratiquement le mot dans l'ordonnance et la chose dans l'arrêt. Pourtant, si l'on y regarde de plus près, en cette affaire, la Cour avance le joker du droit indérogeable non en faveur de la protection de la personne humaine mais de ce qu'elle appellera en 1996, dans l'avis précité, marqué ainsi de l'ambivalence issue du clivage entre les juges, comme constituant « les droits fondamentaux de l'Etat »[65]. En 1980, ce qu'il faut sauver, ce sont les privilèges et immunités des agents et des locaux diplomatiques. Alors, la Cour rattache explicitement les normes qui les établissent au patrimoine immémorial de la communauté internationale dans son ensemble. A partir du moment, en 2006, où elle décide, à cela incitée par les arguments de l'une des parties, à reconnaître par deux fois dans l'interdiction du génocide une règle insusceptible de dérogation, la Cour n'en tire cependant pas spécifiquement de conclusions pour sa décision au fond, soit qu'elle ne se reconnaisse pas la compétence pour le faire, dans la première des deux espèces (*RdC contre Rwanda*), soit qu'elle se contente de s'appuyer sur d'autres considérations dans son arrêt de 2007 sur le *génocide*.

Enfin, en 2012, la jurisprudence de la Cour offre apparemment une image contrastée. La réalité est cependant beaucoup plus nuancée. Le 3 février, dans son arrêt sur *l'immunité juridictionnelle de l'Etat*, lorsqu'elle se trouve confrontée à la situation, nouvelle pour elle, de choisir entre la défense intangible des « droits fondamentaux de

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[65] Au paragraphe 96 de son avis, *supra* note 25, la Cour parle du « droit fondamental qu'a tout Etat à sa survie ».

l'Etat » sous les espèces de l'immunité de juridiction, et de normes élémentaires de droit humanitaire dont elle va jusqu'à sembler mettre en cause qu'elles appartiennent au droit impératif, risquant ainsi la contradiction avec sa jurisprudence de 1986 et celle de 1996[66], la Cour choisit ; et elle le fait sans aucune nuance ; sans même ouvrir la perspective de la moindre évolution future alors même que la pratique des juges internes manifestait dans un nombre croissant de pays, y compris la France une tendance de plus en plus nette à la prise en compte du conflit normatif latent très explicitement relevé par l'Institut de droit international dans sa résolution de 2009. La Cour choisit, et elle le fait en se contentant de renvoyer dans un camp les règles primaires (parmi lesquelles certaines sont impératives mais sans pour autant aucun effet tangible, du moins dans sa jurisprudence) et dans l'autre les règles secondaires ; elle dresse une barrière à portée générale entre la procédure et le fond, en semblant jouer sur l'apparente similitude entre le constat, quant à lui parfaitement consistant avec son Statut, selon lequel elle ne peut connaître d'une affaire sans le consentement de la Partie intéressée, et l'affirmation, en elle-même incompatible avec la logique de l'impérativité normative, selon laquelle cette dernière ne s'imposerait qu'à l'égard des normes primaires mais non de celles de procédure. Qui plus est, la Cour n'hésite pas à faire prévaloir une norme procédurale dont le demandeur reconnaissait lui-même qu'elle n'est pas impérative sur une norme qui l'est manifestement[67].

Pourtant, la même année, quelques temps plus tard, le 20 juillet, le discours semble en apparence totalement différent. La Cour n'hésite pas à faire de toute la convention sur la torture, prise en bloc, un traité énonçant des obligations *erga omnes partes*, ceci afin de trouver un fondement au droit d'agir de la Belgique. Si l'on est partisan d'un ordre public international à l'égard de la défense de certaines normes fondamentales, fussent-elles posées par voie conventionnelle, pourquoi ne pas applaudir ? Ce qui gêne, pour autant, dans cette dernière affaire, c'est la façon assez brouillonne selon laquelle la Cour procède, peu conciliable avec la logique. Toutefois, prenons acte de la volonté d'envoyer un message moins négatif à l'égard de plaideurs désireux, dans l'avenir, de s'appuyer sur le *jus cogens.*

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66 Voir *supra* Par. 2.1.1.

67 Voir à cet égard les développements intéressants de l'opinion dissidente du juge Yusuf sous l'arrêt précité, *supra* note 13, 291.

Il ne faudrait cependant pas voir dans ce dernier arrêt une contradiction avec le précédent. L'enjeu était loin d'être le même dans les deux affaires. Ce qui était en cause dans la seconde, c'était seulement la condamnation du Sénégal pour manquement à des obligations qu'il avait lui-même acceptées en devenant partie à la convention sur la torture. C'est, certes, important mais ça n'est au fond, très classiquement, qu'une application de la règle *pacta sunt servanda*. Pour autant, à l'inverse de ce qui était le cas dans l'affaire relative aux *immunités juridictionnelles de l'Etat*, les juges n'étaient pas là confrontés à une opposition frontale entre, d'une part, certains droits attachés à la souveraineté étatique, et, d'autre part, l'affirmation d'obligations touchant aux droits de la personne humaine. Ce qui semble bel et bien aux juges « *impossible à penser* », c'est que, du fait de l'évolution du droit international général, les Etats dont la Cour reçoit sa compétence soient contraints par l'existence des normes impératives à renoncer à toute l'extension de droits que ces mêmes sujets pléniers de l'ordre juridique international détiennent en qualité de souverains.

La réponse à la question précédente vaut également pour la suite de l'interrogation foucaldienne : *de quelle impossibilité s'agit-il ?* A l'analyse de la jurisprudence de la Cour sur la question de l'impérativité normative, les juges s'avouent actuellement dans l'incapacité de penser autrement leur fonction que dans le cadre de la soumission à la sauvegarde des intérêts, très étroitement entendus, de ceux dont ils tirent leur compétence mais aussi leur légitimité : les Etats[68]. L'idée que la Cour puisse être aussi la porte-parole de « la communauté internationale dans son ensemble » ne paraît pas accessible aux juges[69]; ou, du moins, elle ne peut l'être que dans la mesure où l'affirmation des droits de la personne n'ébranle pas les droits faisant partie de l'apanage de souveraineté, tels le droit de bénéficier en toutes circonstances de l'immunité de juridiction devant les tribunaux étrangers ou, dans un autre contexte, « le droit fondamental qu'a tout Etat à sa survie », tel que la Cour le mentionnait dans son avis de 1996 sur la *licéité de la menace ou de l'emploi d'armes nucléaires*[70].

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[68] Comparer aux vues exprimées en 1996 par Carrillo Salcedo, *Droit international*, 35.

[69] Voir pourtant, s'agissant à l'époque d'un futur juge, Simma, *From Bilateralism*, 229 ; en tant que juge, Simma a voté avec la majorité, en faveur de l'Allemagne, dans l'affaire Allemagne c. Italie.

[70] *Supra* note 25, par. 96.

Toutefois, l'arrêt du 20 juillet 2012 relatif aux *questions concernant l'obligation de poursuivre ou d'extrader* manifeste qu'à l'intérieur des limites précédemment décrites, la Cour peut à l'occasion contribuer à consolider la désignation de certains droits fondamentaux de la personne comme appartenant au *jus cogens* ; elle peut aussi, ce qui est différent, désigner certaines obligations comme possédant un caractère *erga omnes*, fut-il limité aux Etats parties à une convention multilatérale générale.

La Cour n'est décidément pas une cour suprême de l'ordre public international et on aurait tort d'en être surpris étant donnée sa base de compétence. Elle est tout au plus une juridiction dépendante des Etats qu'il lui faut par conséquent préserver d'une confrontation ouverte avec les droits fondamentaux de la personne lorsque ce face-à-face pourrait conduire à repenser la souveraineté. Cela, du moins, dans la conception que la Cour se fait de sa fonction…

Bibliographie

ABI-SAAB, R. « Les principes généraux du droit humanitaire selon la Cour internationale de Justice ». In *Revue internationale de la Croix-Rouge 69* (1987) : 381-389. ISSN : 0035-3361.

BOBBIO, N. « Nouvelles réflexions sur les normes primaires et secondaires ». In *Essais de théorie du droit,* 159-173. Bruxelles, Paris : Bruylant, LGDJ, 1998. ISBN : 2-8027-1184-9.

CARRILLO SALCEDO, J. A. « Droit international et souveraineté des Etats ». In *Recueil des cours* 257 (1996) : 35-221. ISBN : 90-411-0440-2.

CHRISTENSON, G. A. « The World Court and *Jus Cogens* ». In *American Journal of International Law* 81 (1987) : 93-101. ISSN : 0002-9300.

DE SENA, P., AND F. DE VITTOR. « State Immunity and Human Rights; The Italian Supreme Court Decision on the *Ferrini* Case ». In *European Journal of International Law* 16 (2005) : 89-112. ISSN : 0938-5428.

DUPUY, P.-M. « L'unité de l'ordre juridique international ». In *Recueil des cours* 297 (2002) : 9-489. ISBN : 90-411-0440-2.

DUPUY, P.-M. « Le juge et la règle générale ». In *Revue générale de droit international public* 93 (1989) : 569-597. ISSN : 0373-6156.

DUPUY, P.-M. « Les considérations élémentaires d'humanité dans la jurisprudence de la Cour internationale de Justice ». In *Mélanges en*

l'honneur de Nicolas Valticos, Droit et justice, 117-130. Paris : Pedone, 1999. ISBN : 2-233-00339.

DUPUY, P.-M. « Observations sur le crime international de l'Etat ». In *Revue générale de droit international public* 84 (1980) : 449-486. ISSN : 0373-6156.

DUPUY, P.-M. « Quarante ans de codification du droit de la responsabilité internationale des Etats ». In *Revue générale de droit international public* 107 (2003) : 305-348. ISSN : 0373-6156.

DUPUY, P.-M. « The Deficiencies of the Law of State Responsibility Relating to Breaches of 'Obligations Owed to the International Community as a Whole': Suggestions for Avoiding the Obsolescence of Aggravated Responsibility ». In CASSESE, A. (ed.). *Realizing Utopia, the Future of International Law,* 210-226. Oxford : Oxford University Press, 2012. ISBN : 0-19-969166-5.

FOUCAULT, M. *Les mots et les choses.* Paris : Gallimard, 1966. ISBN : 2070224848.

FROWEIN, J. « Jus Cogens ». In *Max Planck Encyclopedia of Public International Law 7* (1984) : 327. ISBN : 978-0-19-929168-7. Online edition : http://opil.ouplaw.com/home/EPIL.

GAJA, G. « *Jus Cogens* Beyond the Vienna Convention ». In *Recueil des cours* 172 (1981- III) : 271-316. ISBN : 90-411-0440-2.

GOMEZ ROBLEDO, A. « Le *jus cogens* international : sa génèse, sa nature, ses fonctions ». In *Recueil des cours* 172 (1981- III) : 9-217. ISBN : 90-411-0440-2.

HART, H. *The Concept of Law,* 5th ed. Oxford : Clarendon Law Series, 1984. ISBN : 0-19-876122-8.

JAENICKE, G. « Zur Frage des internationalen ordre public ». In *Berichte der deutschen Gesellschaft für Völkerrecht* 7 (1967) : 77-277.

KOLB, R. *Théorie du jus cogens international.* Paris : PUF, 2001. ISBN : 2-13-051889-3.

MAIA, C. « Le *jus cogens* dans la jurisprudence de la Cour interaméricaine des droits de l'homme ». In HENNEBEL, L., and H. TRIGOURDJA (eds.). *Le particularisme interaméricain des droits de l'homme,* 271-311. Paris : Pedone, 2009. ISBN : 978-2-233-00575-5.

MORELLI, G. « A proposito di norme internazionali cogenti ». In *Rivista di diritto internazionale* 51 (1968) : 108-117. ISSN : 0035-6158.

RIVIER, R. *Droit impératif et juridiction internationale.* PhD thesis, Paris II Panthéon-Assas, 2001.

ROLIN, H. « Vers un ordre public réellement international ». In *Hommage d'une génération de juristes au Professeur Basdevant,* 441-462. Paris : Pedone, 1960.

SALMON, J. « La résolution de Naples de l'Institut de droit international sur les immunités de juridiction de l'Etat et de ses agents en cas de crimes internationaux, du 10 septembre 2009 ». In *Revue belge de droit international* 42 (2009) : 316-343. ISSN : 0035-0788.

SCHWARZENBERGER, G. « The Problem of International Public Policy ». In *Current Legal Problems* 18 (1965) : 191-214. ISSN : 2044-8422.

SCOBBIE, I. « Invocation de la responsabilité pour violation d'obligations découlant de normes impératives du droit international général ». In DUPUY, P.-M. (ed.). *Obligations multilatérales, droit impératif et responsabilité internationale des Etats*, 121-144. Paris : Pedone, 2003. ISBN : 2-233-00419-1.

SICILIANOS, L. « Classification des obligations et dimension multilatérale de la responsabilité internationale ». In DUPUY, P.-M. (ed.). *Obligations multilatérales, droit impératif et responsabilité internationale des Etats,* 57-77. Paris : Pedone, 2003. ISBN : 2-233-00419-1.

SIMMA, B. « From Bilateralism to Community Interest in International Law ». In *Recueil des cours* 250 (1994-VI) : 217-384. ISBN : 90-411-0419-4.

SUR, S. « Les phénomènes de mode en droit international ». *In* SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, *Le droit international et le temps,* 49-65. Paris : Pedone, 2001. ISBN : 2-233-00382-9.

VERDROSS, A. « Forbidden Treaties in International Law ». In *American Journal of International Law* 31 (1937) : 571-577. ISSN : 0002-9300.

VERDROSS, A. « Heilige und unsittliche Staatsverträge ». In *Völkerbund und Völkerrecht* 2 (1935-1936) : 164-168. ISBN : PUV0128815.

VERDROSS, A. « *Jus Dispositivum* and *Jus Cogens* in International Law ». In *American Journal of International Law* 60 (1966) : 55-63. ISSN : 0002-9300.

VIRALLY, M. « Réflexions sur le jus cogens ». In *Annuaire français de droit international* 12 (1966) : 5-29. ISSN : 0066-3085.

WALDOCK, H. « Deuxième rapport ». In *Yearbook of the International Law Commission* (1963-II) : 36-94. ISSN : 0082-8289.

WEIL, P. « Le droit international en quête de son identité ». In *Recueil des cours* 237 (1992-VI) : 9-370. ISBN : 90-411-0235-3.

PART II

SEMINARS

3. On the Special Consequences of a Serious Breach of Obligations Arising out of Peremptory Rules of International Law

Enzo Cannizzaro

The determination of the substantive consequences of serious breaches of *jus cogens* has been much debated in the works that led, in 2001, to the adoption of the International Law Commission's Articles on State responsibility. To the limited scope of this writing, which gathers some reflections offered to the participants to a seminar included in the 2014 edition of the *Gaetano Morelli Lectures*, there is no need to follow retrospectively all the threads of such debate, which touches upon controversial conceptions of international responsibility. In this brief contribution, I propose to appraise some fundamental issues related of the nature and content of these special consequences. In particular, I will examine, mainly in an evolutionary perspective, issues related to the *erga omnes* character of the obligations flowing from Article 41 and to the derogability of the consequences of a serious breach of *jus cogens*.

3.1. Special consequences for breaches of jus cogens rules

Article 41(1) and Article 41(2) lay down two special obligations that flow from serious breaches of peremptory international law: the positive obligation to cooperate to bring the breach to an end; the negative obligation not to recognize the situation created by such a breach, nor to render aid or assistance in maintaining that situation.

These provisions do not establish special consequences for the State which has committed a serious violation of *jus cogens*. They rather establish obligations for other States, namely for all the States of the

international community, not injured by the breach.[1] In principle, thus, the State which has violated fundamental interests of the international community is bound only by the ordinary consequences of a wrongful conduct, envisaged in Part II, Chapter I, of the Articles on State responsibility.

The absence of special consequences for the author of the breach is basically due to the limited scope of the Articles on State responsibility. The Articles do not govern institutionalized actions, which may appear the most natural response to a breach of fundamental interests of the international community. Nor they concern the criminalization of the conduct of natural persons, which has proved to be another, and particularly efficient, response to a violation of fundamental values of mankind. The Articles only govern the consequences of a serious breach of *jus cogens* flowing for States. The ILC proved to be unable to shape special substantive consequences for the responsible State. That State is, therefore, to abide by the "ordinary" consequences of a breach: it must cease the violation and offer reparation and assurances of non-repetition. Special consequences, thus, only regard the other States acting, individually or collectively, in response to the breach.

However, in spite of the unitary character of the set of substantive consequences flowing from the breach for the responsible State, one cannot exclude that, in practice, such consequences may be more onerous in case of a *jus cogens* breach than those envisaged for a breach of "ordinary" international law. Some examples of this additional onerousness will be given in the following paragraphs.

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[1] Article 41(3) points out that the consequences expressly enshrined in the two first paragraphs are without prejudice to the other consequences referred to in the Articles and to the further consequences that a breach may entail under international law. This latter provision seems to refer to institutional responses to a *jus cogens* breach that, albeit mentioned by Article 59 of the Articles, fall outside the scope of the Articles. Equally outside the scope of this study is the issue concerning the relationship between special consequences of serious breach of *jus cogens* and instrumental measured envisaged by Art. 54 of the Articles. However, a quick reference to this provision will be made in the last paragraph, with a view to comparing the regime of implementation of *erga omnes* obligations with to the special consequences of a breach of peremptory rules of international law, envisaged by Art. 41.

3.2. The obligation not to recognize or to assist a situation created by the violation and the obligation to bring the breach to an end

Article 41(2) imposes on all the States of the international community, acting individually, the obligation not to recognize the situation created by the *jus cogens* breach, nor to render aid or assistance in maintaining such a breach[2].

The provision was probably inspired by the 1971 Advisory Opinion on *Namibia* of the International Court of Justice (ICJ)[3]. In para. 119 the Court said: "The member States of the United Nations are […] under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia".[4]

In that case the obligation not to recognize was based on resolution 276 (1970) of the Security Council (SC). In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ based an analogous obligation not to recognize the legality of a situation created by a serious breach of an *erga omnes* obligation established in the interest of the international community on general international law.[5]

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[2] Talmon, *Duty 'Not to Recognize as Lawful'*; Christakis, *L'obligation de non-reconnaissance*; Dawidowicz, *The Obligation of Non-Recognition*.

[3] *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, paras. 121 ff.

[4] It is worth noting that the Articles on State responsibility invert the semantic logic of this holding: the obligation to recognize the invalidity of that situation is converted in the obligation not to recognize the legality of the situation created by the breach; the obligation to refrain from lending support or assistance to the wrongdoer is converted into the obligation to cooperate to put an end to the breach.

[5] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136. Although the Court did not mention *jus cogens*, it clearly referred to this notion. In para. 159 the Court said: "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction".

The obligation not to recognize the legality of situations created by a breach of international law is incumbent on every State of the international community, which is individually responsible in case of breach. On a different paradigm rests the obligation flowing from Article 41(1): States have the duty to cooperate to bring to an end the wrongful conduct through lawful means. Whereas the duty to cooperate is incumbent on every individual State, the responsibility to bring the breach to an end pertains to all the States of the international community, acting collectively.

It is worth noting that, under Article 54, individual States have the right, but not the duty, to adopt lawful conduct to ensure the "ordinary" consequences of an *erga omnes* obligation's breach, namely cessation and reparation in the interest of the beneficiaries of the breached obligation. Article 41(1) has transformed this right into a duty to react. The legal regime of implementation of international responsibility is thus hardened when *jus cogens* rules are at stake. However, the content of the duty to react under Art. 41(1) is much more elusive than the content of the rights to react under Art. 54. Under Art. 41(1), individual States do not have the duty to adopt positive measures. They have a simple duty to cooperate. The responsibility to attain, through collective action, the goal set out by Article 41(1), namely to bring the breach to an end, is incumbent upon a different entity: all the States of the international community, acting collectively, or the international community as a whole, conceived of as an autonomous holder of rights and duties.

In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, the ICJ referred to that obligation in the following terms: "It is [...] for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end".[6] It is not entirely clear whether the Court wished to point out that every State was individually responsible for the attainment of this objective, or rather that the responsibility fell on the international community as whole. Eloquently, the Court went further by saying, in paragraph 160, that "the United Nations, and especially

[6] Ibid., para. 159.

the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime".

3.3. *Erga omnes* character of the obligations laid down in Article 41

In this paragraph, I will set forth some argument in favour of the *erga omnes* character of the special obligations laid down Article 41.

To demonstrate the *erga omnes* character of the obligation to cooperate enshrined in Article 41(1) a logical argument could be of some avail.

In the conceptual system of Art. 41(1) the obligation to cooperate is not established by itself but it is rather aimed to achieve an ultimate objective, namely to bring the breach to an end. In other words, the concerted action by individual States constitutes the instrument by which the international community can attain its final goal. If the obligation to cooperate had not *erga omnes* character, it would not establish legal relations among its addressees, but simply a network of bilateral relations between each of them and the injured State, with the consequence that only the latter would be entitled to claim compliance with it. This, however, would considerably affect the capacity of the mechanism set up by Art. 41(1) to attain its objective. If the interest to bring to an end a serious violation of *jus cogens* pertains to a collective entity, one should logically assume that the obligation of individual States to cooperate to each other in order to attain this goal cannot be owed to the injured State only.

A logical argument can also be employed to demonstrate the *erga omnes* character of the obligation not to recognize the situation created by the breach.

Such an obligation is not the hallmark of *jus cogens* rules. Quite the contrary, States have the obligation not to recognize the effect of a breach of international law in a number of situations. The expropriation of goods in breach of the international rules on minimum standards of treatment of aliens, for example, entails the obligation not to recognize the effect of the change of property. Albeit incumbent upon all the States, such an obligation can be hardly deemed to have *erga omnes* character. More plausibly, it creates a bilateral relationship between the injured State and the third State, which, by its conduct, has given effect to the breach.

It would have made little sense, if any, to formulate in Article 41(2) an obligation which, regardless of its legal basis, is already part of international law. Its inclusion in the set of rules governing the special consequences of serious breach of *jus cogens* seems rather to highlight that the individual obligation not to recognize is part of the collective response to the breach. In other words, Art. 41(2) establishes an obligation that the States have the duty to perform not only in the interest of the injured State but, again, in the interest of the international community.

In its 2004 Advisory Opinion on the *Legality of the construction of a wall on the occupied Palestinian territories*, the ICJ abstained from expressly qualifying this obligation as *erga omn*es. However, its "communitarian" character clearly emerges from the reasoning of the ICJ.[7] This character seems also to emerge from General Assembly Resolution 60/147, which lays down Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[8]

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[7] In her separate opinion, Judge Higgins said that: "Unlike the Court, I do not think that the specified consequence of the identified violations of international law have anything to do with the concept of *erga omnes*" (para. 37). Judge Higgins went further by contesting tenaciously the *erga omnes* character of the obligation not to recognize: "That an illegal situation is not to be recognized or assisted by third parties is self-evident, requiring no invocation of the uncertain concept of *'erga omnes'*". According to Judge Higgins, the obligation not to recognize constitutes the logical consequence of the unlawfulness of an act, and there would be no need to advocate a special legal consequence flowing from the breach. In this reasoning, however, the identification of the entity having the right to claim performance of the obligation not to recognize remains in the shadow.

[8] UN doc. GA A/Res/60/147, 21 March 2006. The Resolution points to the duty of all States to investigate reports of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law; to submit to prosecution the persons allegedly responsible for the violations if there is sufficient evidence and, if found guilty, the to punish them. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations. Since gross violations of human rights are frequently committed by the national State of the injured individuals, it would be incoherent to point out to such a duty, if this did not correspond to an *erga omnes* obligation.

An argument common to both, the obligation to cooperate to bring the breach to an end and the obligation not to recognize or assist, comes from the circumstance that most *jus cogens* rules establish obligations in the interest of individuals. If the obligation deriving from Article 41(1) and Article 41(2) were owed to the injured State only, there could be no entity entitled to invoke a breach of that obligation. The existence of additional obligations designed to secure the effectiveness of *jus cogens* would be rendered virtually meaningless.

In its judgment on *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the ICJ found that the alternative obligation to prosecute or to extradite, enshrined in the Torture convention, was an obligation *erga omnes partes*, which gives to all the parties to the convention the right to claim respect with such a rule by another party, without the need to demonstrate a special interest. The Court said that the "common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim".[9] The same rationale applies to the obligations flowing from a previous breach of *jus cogens*, whose respect certainly corresponds to a common interest of the international community.

3.4. The *status* of the secondary consequences of a *jus cogens* breach

The use of the notion of *jus cogens* in the Articles on State responsibility has represented a conceptual development whose final implications are still not entirely clear. Originally conceived as a limit to the contractual capacity of States, *jus cogens* is more and more considered as higher law, expressing the fundamental value of the international community.

The relevance of the notion of *jus cogens* in the regime of State responsibility is not merely theoretical. Quite the contrary, the notion of peremptory law may be more useful at the level of the secondary rules than at that of the primary rules. Whereas the conclusion of treaties

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[9] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422, para. 69.

directly conflicting with peremptory rules appears to be a rare occurrence, more frequently States conclude treaties, or adopt unilateral acts, to deal with situations created by previous unilateral breaches of peremptory law. As pointed out by the ICJ in the 1971 *Namibia* Advisory Opinion, the obligation not to recognize the legality of an illegal act, which now constitutes one of the legal consequences of a violation of *jus cogens*, can be breached not only though unilateral conduct but also through agreements which purport to regulate the consequences of the breach.[10]

In this final paragraph, therefore, a quick reference ought to be made to an issue which is acquiring relevance in diplomatic and judicial practice: whether the notion of *jus cogens* may be useful also at the secondary level of the consequences which flow from serious breach of peremptory primary rules.

This issue can be hardly answered on the plane of pure legal logic. Indeed, there is no logical necessity to assume that the secondary rules, designed to govern the legal consequence of a breach, borrow the same normative value of the primary rules breached.

The issue has been recently discussed by the ICJ with regard to the obligation to offer reparation. In its judgment of 3 February 2012 on the *Jurisdictional immunities of a State*,[11] the ICJ pointed out that "against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted".[12]

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[10] The Court has drawn from SC resolutions the obligation for UN Member States "to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia" (see note 3 above, para. 122). The conclusion of treaties with South Africa is further characterised in terms of invalidity in paragraph 126, where the Court said, with regard to South Africa, that "no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of such relationship".

[11] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening),* Judgment, 3 February 2012, ICJ Reports (2012) 99.

[12] Ibid., para. 94.

Although phrased in quite imperative terms, the precedential value of this dictum is not absolute. Post-war settlements are concluded by States in their own interest and in the interest of their citizens. The action of the national State seems thus to be deeply influenced by the legal regime of diplomatic protection, which, by nature, establishes a bilateral relation between the acting State and the State which has allegedly breached the minimum standard of treatment of aliens. Not infrequently, moreover, the conclusion of these settlements represents the only possible way to obtain some form of redress for injuries suffered by nationals.

Thus, the question remains whether derogation is possible from the obligation to offer reparation even where it is established solely "in the interest of the injured State or of the beneficiaries of the obligation breached", according to the very terms of Article 54 of the ILC Articles on State responsibility.

In spite of the great interest of the issue, one must frankly admit that the practice does not allow shaping a definite solution.

In its *Advisory opinion* on the legality of the construction of a wall on the Palestinian occupied territories, the Court repeatedly said that the illegal construction of the wall, in breach of the principle of self-determination, entails the obligation to cease the breach and return the property seized to the natural or legal persons who legitimately owned it and, in case of material impossibility, to offer reparation.[13] The Court, however, did not address the question of whether the right to reparation can be waived, unilaterally or by means of a treaty. Even the Resolution of the General Assembly 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, while providing for a complex system of reparation to the victims, is silent on the legal nature of such a right.[14]

Jus cogens has been sometimes evoked with regard to treaties aimed to regulate the exploitation of resources of unlawfully occupied territories. The underlying idea is that a State which, instead of abiding by the legal consequences envisaged by Article 41(1) and Article 41(2),

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13 See note 5 above, paras. 152 and 153.

14 See note 8 above, part. IX of the resolution.

concludes a treaty with the wrongdoer, whereby it regulates the consequences of the previous violation, commits a breach of *jus cogens* and that the instrument employed, namely the treaty, is null and void. To conclude that not only the conclusion of such treaties constitutes an unlawful act, but also that the treaties are invalid, however, would entail the demonstration that the obligations laid down by Article 41(1) and Article 41(2) have already acquired the status of peremptory law. Such a demonstration, however, has not been convincingly offered.

In a different perspective, one cannot exclude that treaties which purport to regulate a situation created by a *jus cogens* breach interfere with the proper application of higher law, and, therefore, can be assessed as to their validity against the primary *jus cogens* rule. This perspective tends thus to abandon the idea that the rules which establish secondary consequences of a *jus cogens* breach necessarily have *jus cogens* value. Rather, it remains in the area of primary rules and tends to enlarge the notion of conflict under Articles 53 and 64 of the Vienna Convention on the Law of Treaties, so as to cover situations of indirect conflict or even of occasional collisions between a treaty and a *jus cogens* rule. According to the very notion of hierarchy, higher values are offended not only by rules which purport to violate them directly, but also by rules which aim to produce effects inconsistent with their *effet utile*.[15]

This methodological frame could conveniently accommodate the vexed issue of the derogability of the "substantive" consequences of a breach of *jus cogens*.

In this regard, a distinction seems to emerge between the obligation of cessation and the obligation of reparation. The first is established in the interest of the international community as a whole, and, consequently, it is unconditional. The unconditional character of the obligation to cessation also emerges from the instrumental rules which assist its implementation. As already said, Articles 41(1) and 41(2) impose upon all the States of the international community, acting concertedly or individually, the duty to cooperate to bring the breach to an end. This is perfectly reasonable. Although included among the consequences of the breach, indeed, the primary effect of cessation is to resuming compliance with the primary rule breached. If *jus cogens* rules

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[15] Cannizzaro, *A Higher Law for Treaties*, 425.

are established for the protection of fundamental interests of the international community, it is consequential that the international community has a fundamental interest to secure the cessation of the breach. Since the failure to perform the obligation of cessation necessarily deprives the primary rule of its effectiveness, it is unimaginable that the obligation to cease a serious breach of *jus cogens* could be dispensed with, through a treaty or through unilateral waive.

Not necessarily the same rationale applies also to the obligation of reparation. This obligation, although *erga omnes*, is not unconditional but, under Article 48 (2) and Article 54, it is established in the interest of the injured State or of the beneficiaries of the breached primary obligation. Therefore, the obligation of reparation is not an indissoluble corollary of the primary rule breached, in the sense that its failure does not necessarily amount to a deprivation of the effectiveness of the primary rule breached.

In consequence thereof, it is not unreasonable to conclude that the beneficiaries of the peremptory rule breached can waive their right to reparation, through a treaty or through unilateral acts. The more precise identification of these beneficiaries falls outside the scope of the present contribution.

Bibliography

CANNIZZARO, E. "A Higher Law for Treaties?". In CANNIZZARO, E. (ed.). *The Law of Treaties beyond the Vienna Convention*, 425-442. Oxford: Oxford University Press, 2011. ISBN: 9780199588916.

CHRISTAKIS, T. "L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales". In TOMUSCHAT, C. and J.-M. THOUVENIN (eds.). *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes, 127-166. Leiden: Martinus Nijhoff Publishers, 2006. ISBN: 9004149813.

DAWIDOWICZ, M. "The Obligation of Non-Recognition of an Unlawful Situation". In CRAWFORD, J., A. PELLET and S. OLLESON (eds.). *The Law of International Responsibility*, 677-686. Oxford: Oxford University Press, 2010. ISBN: 9780199296972.

TALMON, S. "The Duty 'Not to Recognize as Lawful' a Situation created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation Without Real Substance?". In TOMUSCHAT, C. and J.-M. THOUVENIN (eds.). *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes, 101-125. Leiden: Martinus Nijhoff Publishers, 2006. ISBN: 9004149813.

4. La violation d'obligations envers la communauté internationale dans son ensemble et la compétence juridictionnelle de la Cour internationale de Justice

Béatrice I. Bonafé

La mise en œuvre du *jus cogens* soulève des questions procédurales délicates en particulier en ce qui concerne l'exercice de la fonction juridictionnelle internationale.[1] De ce point de vue, ce qui relève n'est pas tellement le caractère indérogeable mais plutôt la nature *erga omnes* des normes visant la protection des intérêts fondamentaux de la communauté internationale dans son ensemble.[2] Ce qui explique que l'analyse qui suit prenne en considération plus en général les normes ayant une nature *erga omnes*, sauf à mettre en exergue, le cas échéant, des solutions procédurales particulières concernant la mise en œuvre du *jus cogens*.

D'une part, l'exercice de la juridiction contentieuse de la Cour internationale de Justice dépend de l'établissement de sa compétence ainsi que des conditions de recevabilité de la requête introduite par les parties[3]. Certes, le consentement des parties joue un rôle essentiel. Au sens de l'article 36 du Statut, elles doivent accepter la compétence de

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1 A cet égard, l'on peut rappeler la compétence que l'article 66(a) de la Convention de Vienne sur le droit des traités de 1969 confère à la Cour. Toutefois, la Cour n'a jamais été saisie sur la base de cette disposition. Pour une analyse récente, voy. Verhoeven, *Invalidity of Treaties*, 297.

2 En ce qui concerne la nature *erga omnes* des normes du *jus cogens*, voy. Gaja, *The Protection of General Interests*, 55-56.

3 L'article 79, par. 1, du Règlement de la Cour se lit : « Toute exception à la compétence de la Cour ou à la recevabilité de la requête ou toute autre exception sur laquelle le défendeur demande une décision avant que la procédure sur le fond se poursuive doit être présentée par écrit dès que possible, et au plus tard trois mois après le dépôt du mémoire. Toute exception soulevée par une partie autre que le défendeur doit être déposée dans le délai fixé pour le dépôt de la première pièce de procédure émanant de cette partie ».

la Cour pour pouvoir lui soumettre un différend. Peu importe que cette acceptation prenne la forme d'un engagement écrit (une clause compromissoire, un compromis, un traité d'arbitrage, une déclaration unilatérale, par exemple) ou qu'elle découle du comportement des parties (notamment en application du principe du *forum prorogatum*[4]), l'essentiel est que la volonté des parties d'accepter la compétence de la Cour puisse être clairement établie et que les conditions, souvent nombreuses, auxquelles l'exercice de cette compétence peut être soumis soient remplies. Mais ce n'est pas tout. La requête doit aussi être recevable[5]. La Cour a progressivement précisé les conditions pouvant entraîner le rejet d'une demande telles que l'existence d'un différend, d'un intérêt à agir du demandeur, et ainsi de suite.

D'autre part, le droit international connaît désormais des obligations ayant une structure normative particulière en ce qu'elles sont dues envers la communauté internationale dans son ensemble. Selon la Cour ces obligations « concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés »[6]. Si la violation de ces obligations peut affecter tous les membres de la communauté internationale, elle entraîne également la possibilité pour « tous les Etats » de demander leur respect. C'est ce que la Commission du droit international a codifié à l'article 48 de son projet sur la responsabilité des Etats : « tout Etat autre qu'un Etat lésé est en droit d'invoquer la

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4 L'article 38, par. 5, du Règlement de la Cour envisage la possibilité suivante : « Lorsque le demandeur entend fonder la compétence de la Cour sur un consentement non encore donné ou manifesté par l'Etat contre lequel la requête est formée, la requête est transmise à cet Etat. Toutefois, elle n'est pas inscrite au rôle général de la Cour et aucun acte de procédure n'est effectué tant que l'Etat contre lequel la requête est formée n'a pas accepté la compétence de la Cour aux fins de l'affaire ».

5 *Affaire du Cameroun septentrional (Cameroun c. Royaume-Uni)*, exceptions préliminaires, arrêt, 2 décembre 1963, CIJ Recueil (1963) 15, p. 29 : « même si, une fois saisie, elle estime avoir compétence, la Cour n'est pas toujours contrainte d'exercer cette compétence. Il y a des limitations inhérentes à l'exercice de la fonction judiciaire dont la Cour, en tant que tribunal, doit toujours tenir compte. Il peut ainsi y avoir incompatibilité entre, d'un côté, les désirs du demandeur ou même des deux parties à une instance et, de l'autre, le devoir de la Cour de conserver son caractère judiciaire. C'est à la Cour elle-même et non pas aux parties qu'il appartient de veiller à l'intégralité de la fonction judiciaire de la Cour ».

6 B*arcelona Traction, Light and Power Company, Limited*, arrêt, CIJ Recueil (1970) 3, par. 33.

responsabilité d'un autre Etat, si: […] b) L'obligation violée est due à la communauté internationale dans son ensemble »[7]. Pour défendre un intérêt collectif, le droit international accepte alors que les Etats non directement lésés puissent faire valoir la responsabilité de l'auteur de la violation d'une obligation due à la communauté internationale dans son ensemble[8].

Parmi les nombreuses questions procédurales soulevées par la reconnaissance de ces obligations dans l'ordre juridique international, la question qui retiendra notre attention est celle de savoir si l'existence d'obligations visant la protection d'un intérêt général a des conséquences en ce qui concerne l'étendue de la compétence contentieuse de la Cour. D'une part, la violation de telles obligations « concerne tous les Etats » et pourrait justifier une participation élargie aux instances devant la Cour, notamment des Etats qui ne sont pas directement lésés. La possibilité qui leur est reconnue par le droit de la responsabilité de défendre un intérêt collectif ne correspond pas nécessairement à la qualité d'agir en justice. D'autre part, la nature particulière de ces obligations et les implications que leur violation entraîne pour tous les Etats concernés pourrait aussi impliquer une limitation de l'exercice de la compétence contentieuse de la Cour, dont les décisions peuvent porter atteinte à la position des tiers lorsque sont en cause des obligations due à la communauté internationale dans son ensemble.

Encore faut-il vérifier, dans tous les cas visés, que l'élargissement ou la limitation de la compétence de la Cour advienne dans le respect du principe du consentement des parties. La compétence de la Cour reste ancrée à ce principe fondamental et la possibilité de faire valoir devant le juge international l'intérêt général montre toute la tension entre la nature volontaire de la juridiction de la Cour et l'exigence de protection de situations juridiques allant bien au-delà du cadre typiquement bilatéral et réciproque des obligations internationales.

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7 Cet Etat « peut exiger de l'Etat responsable: a) la cessation du fait internationalement illicite et des assurances et garanties de non-répétition, conformément à l'article 30; et b) l'exécution de l'obligation de réparation conformément aux articles précédents, dans l'intérêt de l'Etat lésé ou des bénéficiaires de l'obligation violée » (*Annuaire de la Commission du droit international* (2001-II/2) : 126).

8 Voy., par exemple, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif, 9 juillet 2004, C.I.J. Recueil (2004) 136, par. 159.

4.1. La violation d'obligations *erga omnes* et l'élargissement de la compétence de la Cour

Un certain élargissement de la compétence contentieuse de la Cour peut être envisagé principalement dans deux cas. La violation d'obligations envers la communauté internationale dans son ensemble pourrait être à la base d'une requête introduite par un Etat non directement lésé (4.1.1.) de la même manière qu'un Etat tiers par rapport à l'instance pourrait demander d'intervenir dans une affaire contentieuse sur la seule base du fait d'être destinataire d'une obligation *erga omnes* (4.1.2.). Dans les deux cas, l'élargissement de la compétence de la Cour dépend de l'existence d'un intérêt à agir suffisamment qualifié de l'Etat demandeur ou voulant intervenir.

4.1.1. L'intérêt à agir devant la Cour

La possibilité d'introduire une instance a été limitée par la Cour aux Etats ayant un intérêt à agir suffisamment qualifié. La qualité pour agir devant la Cour existe manifestement lorsque l'Etat demandeur est destinataire d'une obligation internationale réciproque (ou bilatérale) vis-à-vis du défendeur qui permet au premier de prétendre le respect de l'obligation en cause et, partant, d'invoquer la responsabilité du second.

Or, bien plus incertaine a été la position de la Cour sur la question de savoir si un Etat non directement lésé mais destinataire d'une obligation internationale visant la protection d'intérêts collectifs pouvait agir à l'encontre de l'Etat responsable de la violation de cette obligation. La question de l'intérêt à agir d'un Etat destinataire d'une obligation *erga omnes* a longtemps divisé les membres de la Cour.

En 1962, l'affaire du *Sud-Ouest africain* fournit à la Cour l'occasion d'affirmer, dans son arrêt sur les exceptions préliminaires, que le Mandat de la Société des Nations contenait, d'une part, des obligations concernant l'administration du territoire et correspondant à la « mission sacrée de civilisation » mentionnée à l'article 22 du Pacte[9] et, d'autre part, des obligations procédurales dont la clause compromissoire assurait la protection judiciaire de cette mission sacrée[10]. La clause compromissoire de l'article 7 avait un rôle essentiel : elle garantissait

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[9] *Affaire du Sud-Ouest africain (Ethiopie c. Afrique du Sud; Libéria c. Afrique du Sud)*, exceptions préliminaires, arrêt, 21 décembre 1962, CIJ Recueil (1962) 319, p. 333.

[10] Ibid., 336.

le respect des obligations assumées par le Mandataire et conférait à tous les Membres de la Société des Nations le droit de citer le Mandataire devant la Cour permanente[11]. Bien que la Cour ait abordé simultanément les deux questions de recevabilité concernant l'existence du différend et du *locus standi*, elle conclut clairement que l'article 7 donnait « à chacun des autres Membres de la Société des Nations le droit d'invoquer aux mêmes fins la juridiction obligatoire à l'encontre du Mandataire »[12]. Cet intérêt à agir « généralisé » découlait de la nature particulière des obligations du Mandat qui étaient censées protéger un intérêt collectif[13].

Un an plus tard la Cour sembla confirmer la possibilité pour tous les Etats destinataires d'obligations visant la protection d'un « intérêt général » (c'était le cas cette fois d'un accord de tutelle) d'avoir recours à la clause juridictionnelle et d'introduire une instance devant la Cour pour protéger cet intérêt général[14].

La situation qu'envisageaient ces deux affaires concernait ce que l'on appellera plus tard des obligations *erga omnes partes*[15] et la jurisprudence de la Cour pouvait être lue comme favorable à ce que l'on reconnaisse à chaque Etat un intérêt à agir suffisant pour faire valoir la violation de ces obligations.

Le revirement fut soudain, ainsi que très explicite. La décision de 1966 concernant la même affaire du *Sud-Ouest africain*[16] contient une énonciation de principe concernant la condition de l'existence d'un intérêt à agir du demandeur qui reste toujours valable :

> « les Etats ne peuvent se présenter devant la Cour à titre individuel qu'en tant que parties à un différend avec un autre Etat. Au moment où ils se présentent devant la Cour, ils doivent … établir qu'ils ont

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11 Ibid., 337.

12 Ibid., 344.

13 « La portée et l'objet manifeste des dispositions de [l'article 7] indiquent en effet qu'on entendait par là que les Membres de la Société des Nations eussent un droit ou un intérêt juridique à ce que le Mandataire observât ses obligations à la fois à l'égard des habitants du territoire sous Mandat et à l'égard de la Société des Nations et de ses Membres » (ibid., 343).

14 *Affaire du Cameroun septentrional (Cameroun c. Royaume-Uni)*, *supra* note 5, 35-36.

15 Voy. à cet égard Parlett, *The Individual*, 291.

16 *Affaire du Sud-Ouest africain (Ethiopie c. Afrique du Sud; Libéria c. Afrique du Sud)*, deuxième phase, arrêt, 18 juillet 1966, CIJ Recueil (1966) 6.

> vis-à-vis du défendeur en l'espèce un droit ou un intérêt juridique au regard de l'objet de la demande leur permettant d'obtenir les déclarations qu'ils sollicitent, ou en d'autres termes qu'ils sont des parties devant lesquelles l'Etat défendeur est responsable en vertu de l'instrument ou de la règle de droit pertinents »[17].

C'est la conclusion de la Cour sur l'absence d'intérêt à agir suffisamment qualifié de l'Etat destinataire des obligations *erga omnes* découlant du Mandat qui a été critiquée. Par le biais d'une interprétation restrictive de la clause compromissoire, la Cour a affirmé que l'article 7 ne pouvait viser que des requêtes reposant sur un intérêt individuel du demandeur, sans pouvoir assurer la protection de l'intérêt collectif (la mission sacrée du Mandat)[18]. De cette manière, la Cour a non seulement contredit sa décision de 1962, mais elle n'a pas avancé de véritables arguments justifiant le rejet de la demande. Le seul risque qu'elle a mentionné est d' « admettre une sorte d'*actio popularis*, ou un droit pour chaque membre d'une collectivité d'intenter une action pour la défense d'un intérêt public »[19].

Si quelques années plus tard la Cour admit explicitement l'existence d'obligations *erga omnes*[20], ce n'est que très récemment qu'elle a enfin reconnu que tout Etat destinataire d'une obligation *erga omnes partes* a un intérêt à agir suffisamment qualifié pour introduire une instance à l'encontre de l'Etat qui aurait violé cette obligation. La décision rendue dans l'affaire qui opposait la Belgique et le Sénégal affirme :

> « tout Etat partie à la convention contre la torture peut invoquer la responsabilité d'un autre Etat partie dans le but de faire constater le manquement allégué de celui-ci à des obligations *erga omnes partes* […] et de mettre fin à un tel manquement »[21].

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17 Ibid., par. 48.

18 La position du juge Morelli à cet égard est présentée par Gaja, *supra*, dans la Préface de ce volume, p. ii.

19 Ibid., par. 88. La différence entre l'*actio popularis* et l'invocation des obligations *erga omnes* est examinée par Voeffray, *Actio popularis*, 2004, 321; Vermeer-Künzli, *Matter of Interest*, 570-572.

20 B*arcelona Traction, Light and Power Company, Limited*, *supra* note 6.

21 *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, arrêt, 20 juillet 2012, CIJ Recueil (2012) 422, par. 69.

Reste à savoir si le même intérêt à agir peut être reconnu sur la base d'obligations *erga omnes* découlant du droit international général. La question, nous paraît-il, se résout assez facilement. Si le *locus standi* dépend de l'intérêt qu'un Etat peut avoir à ce que l'obligation *erga omnes* soit respectée, donc de la structure normative particulière de ces obligations, peu importe que l'obligation découle d'un traité ou du droit international général, dans les deux cas la même conséquence doit être tirée : l'Etat destinataire d'une telle obligation doit être en mesure d'invoquer la responsabilité de l'auteur de la violation. La jurisprudence de la Cour nous semble alors applicable au cas d'une obligation *erga omnes* de nature coutumière[22].

Un dernier aspect doit être précisé. L'élargissement de la compétence de la Cour qui s'en suit n'implique pas que l'Etat non directement lésé puisse introduire une instance sur la base de la violation d'une obligation *erga omnes* à défaut d'un lien juridictionnel. La Cour a eu l'occasion de mettre en évidence la différence entre l'opposabilité *erga omnes* d'une norme internationale et le principe du consentement à sa juridiction, ce dernier demeurant un principe incontournable que la nature particulière de l'obligation violée ne saurait remettre en cause.

Dans l'affaire *Congo c. Rwanda*, le défendeur contestait la compétence de la Cour, qui aurait dû découler de la clause compromissoire de la convention sur le génocide (article IX), à raison d'une réserve émise par rapport à la clause invoquée par le demandeur. La Cour a pris le plus grand soin de souligner :

> « le seul fait que des droits et obligations *erga omnes* seraient en cause dans un différend ne saurait donner compétence à la Cour pour connaître de ce différend. Il en va de même quant aux rapports entre les normes impératives du droit international général (*jus cogens*) et l'établissement de la compétence de la Cour: le fait qu'un différend porte sur le respect d'une norme possédant un tel caractère, ce qui est assurément le cas de l'interdiction du génocide, ne saurait en lui-même fonder la compétence de la Cour pour en connaître. En vertu du Statut de la Cour, cette compétence est toujours fondée sur le consentement des parties »[23].

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22 Cette solution avait déjà été avancée avant l'adoption de la décision concernant l'affaire *Belgique c. Sénégal*. Voy. en particulier Tams, *Enforcing Obligations*, 310-311.

23 *Activités armées sur le territoire du Congo (nouvelle requête: 2002) (République démocratique du Congo c. Rwanda)*, compétence et recevabilité, arrêt, 3 février 2006,

Cette conclusion est confirmée par les affaires déjà mentionnées. Quand elle s'est déclarée compétente, la Cour a pu exercer sa fonction judiciaire grâce à l'existence d'un fondement spécifique : en 1962 il s'agissait de l'article 7 du Mandat concernant le Sud-Ouest africain et en 2012 de l'article 30, para. 1, de la convention contre la torture.

Or, dans les deux cas, la compétence contentieuse de la Cour reposait sur des clauses compromissoires. L'on pourrait alors s'interroger sur la possibilité que l'intérêt à agir pour le respect d'une obligation *erga omnes* dépende de l'instrument par lequel les parties ont accepté la compétence de la Cour. Une clause juridictionnelle formulée en des termes tout à fait généraux est-elle suffisante pour que les Etats agissent en justice pour la protection d'un intérêt collectif ? Les modalités d'acceptation de la compétence de la Cour autres que les clauses compromissoires peuvent-elles justifier une action pour la protection d'un intérêt général ?

La jurisprudence de la Cour fournit une réponse à la première question. En 1966, l'exclusion d'un intérêt à agir suffisamment qualifié des demandeurs dépendait de l'interprétation de la clause juridictionnelle du Mandat[24]. Pour la Cour, il était « invraisemblable » qu'une clause « de type courant »[25] pût s'étendre à la protection d'un intérêt général et permettre à tout Etat membre d'agir à l'encontre du Mandataire[26]. La présomption était alors en faveur d'une interprétation restrictive, à moins que la clause juridictionnelle ne conférât explicitement aux *omnes* des « pouvoirs de surveillance spéciaux » et donc un droit d'action ayant pour but la protection de l'intérêt général[27]. En 2012, la présomption est renversée : la clause juridictionnelle

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CIJ Recueil (2006) 6, par. 64. Plus loin la Cour rappelle que « le seul fait que des droits et obligations *erga omnes* ou des règles impératives du droit international général (*jus cogens*) seraient en cause dans un différend ne saurait constituer en soi une exception au principe selon lequel sa compétence repose toujours sur le consentement des parties » (par. 125).

24 *Affaire du Sud-Ouest africain (Ethiopie c. Afrique du Sud; Libéria c. Afrique du Sud)*, *supra* note 16, par. 65.

25 Il s'agit dans la plupart des cas de clauses qui visent d'une manière générale tout différend ayant trait à l'interprétation ou à l'application des dispositions conventionnelles.

26 *Affaire du Sud-Ouest africain (Ethiopie c. Afrique du Sud; Libéria c. Afrique du Sud)*, *supra* note 16, par. 63.

27 Ibid., par. 67.

de la convention contre la torture est bien de type courant et pour la Cour elle peut fonder tout type de différend pourvu que l'intérêt à agir du demandeur soit établi[28]. Une clause juridictionnelle rédigée en des termes tout à fait généraux permet donc d'inclure l'intérêt à agir des *omnes*.

Selon une partie de la doctrine cette conclusion se justifie par l'interprétation de plus en plus large de la notion de « différend » que la jurisprudence de la Cour aurait progressivement adoptée[29]. Ce qui nous paraît remarquable est surtout la tendance de la Cour à considérer l'intérêt à agir comme une condition de recevabilité qui doit être établie de façon autonome par rapport aux autres conditions de compétence ainsi que la présomption, qui en découle, selon laquelle une clause juridictionnelle générale peut en principe couvrir les réclamations avancées par les *omnes*.

Il en irait de même alors pour les autres modalités d'acceptation de la compétence de la Cour[30]. La formulation générale d'une clause d'un traité sur le règlement des différends ou d'une déclaration unilatérale d'acceptation de la juridiction obligatoire de la Cour permet aux Etats destinataires d'une obligation *erga omnes* ou *erga omnes partes* d'introduire une instance à l'encontre de l'Etat qui se rendrait responsable de la violation d'une telle obligation[31]. La même conclusion est retenue par l'article 3 de la résolution de l'Institut de droit international sur 'Les obligations et les droits *erga omnes* en droit international'[32].

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28 *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, *supra* note 21, par. 63 et 67-70.

29 Voy. en particulier Gaja, *The Protection of General Interests*, 116.

30 La question ne devrait pas se poser lorsque la compétence de la Cour découle d'un compromis ou plus en général du comportement tenu par les parties après la naissance du différend (c'est le cas par exemple du *forum prorogatum*). Ce qui ne devrait pas faire douter de l'intention des parties de le soumettre à la Cour.

31 Pour une solution analogue parmi les contributions les plus récentes voy. Forlati, *Azioni dinanzi alla Corte*, 104-106; Picone, Papa, *Giurisdizione della Corte*, 703 ; Gaja, *The Protection of General Interests*, 117.

32 L'article 3 se lit : « S'il existe un lien juridictionnel entre l'Etat prétendument responsable de la violation d'une obligation *erga omnes* et un autre Etat auquel cette obligation est due, ce dernier Etat a qualité pour soumettre à la Cour internationale de Justice ou à un autre tribunal international une demande relative à un différend portant sur le respect de cette obligation » (*Annuaire de l'Institut de droit international* 71 (2005-II) : 288).

Ce qui n'exclut tout de même pas que la clause ou la déclaration unilatérale puisse être formulée de manière à limiter la compétence de la Cour. Que l'on prenne par exemple la déclaration unilatérale du Royaume-Uni, telle que récemment modifiée, qui empêche à la Cour de connaître « [t]out différend identique, quant au fond, à un différend dont la Cour a déjà été saisie par la même ou une autre partie »[33]. Vraisemblablement, la clause ne permet pas à la Cour de se prononcer sur la violation d'une obligation *erga omnes* alors que le respect de cette obligation a déjà fait l'objet d'une décision précédente. Ce qui ferait défaut alors ne serait pas l'existence d'un différend (à supposer entre d'autres parties) ou de l'intérêt à agir (pour le respect d'une obligation due à la communauté internationale dans son ensemble), mais le fondement consensuel nécessaire pour que la Cour exerce sa compétence contentieuse.

4.1.2. L'intérêt à agir en tant qu'intervenant

L'existence d'obligations qui s'imposent à tous les sujets du droit international dans le but de préserver les valeurs fondamentales de la communauté internationale peut aussi donner lieu à un élargissement de la participation aux instances devant la Cour en ce qui concerne les Etats pouvant intervenir au sens de son Statut[34].

Dans le cas d'obligations *erga omnes* prévues par un traité, l'application de l'article 63 du Statut ne semble pas soulever de difficultés majeures. Lorsque la Cour, dans l'exercice de sa fonction judiciaire, est appelée à interpréter une disposition d'un traité multilatéral, le Statut reconnaît à tout Etat partie au traité un intérêt pouvant justifier son intervention à l'instance. La même règle s'applique quand le traité inclut des obligations *erga omnes partes*. Tout Etat partie au traité peut

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[33] Déposée à la fin du mois de décembre 2014, elle est publiée sur le site de la Cour : http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=GB.

[34] A cet égard l'article 4 de la résolution sur « Les obligations et les droits *erga omnes* en droit international », ibid., prévoit : « La Cour internationale de Justice ou un autre tribunal international devrait donner à un Etat auquel une obligation *erga omnes* est due la possibilité de participer à une procédure pendante devant la Cour ou devant ce tribunal, qui est relative à cette obligation. Des règles spécifiques devraient régir une telle participation ».

alors intervenir dans le but de soumettre à la Cour une certaine interprétation de la disposition controversée[35].

Toutefois, l'intervention du tiers au sens de l'article 63 du Statut est exclue dans le cas d'obligations *erga omnes* découlant du droit coutumier. La jurisprudence de la Cour a systématiquement limité le champ d'application de la disposition à l'interprétation du droit conventionnel[36], bien que l'intérêt d'un tiers à l'interprétation d'un traité soit tout à fait semblable à son intérêt à l'interprétation du droit international général, vu la tendance de la Cour à ne pas s'écarter de l'interprétation donnée aux normes internationales[37].

En ce qui concerne l'intervention de l'article 62, la participation du tiers à l'instance est limitée au cas où il puisse se prévaloir d'un intérêt d'ordre juridique,

> « dans le sens où cet intérêt doit faire l'objet d'une prétention concrète et réelle de cet Etat, fondée sur le droit, par opposition à une prétention de nature exclusivement politique, économique ou stratégique. Mais il ne s'agit pas de n'importe quel intérêt d'ordre juridique ; encore faut-il qu'il soit susceptible d'être affecté, dans son contenu et sa portée, par la décision future de la Cour dans la procédure principale »[38].

La question est donc de savoir si l'intérêt au respect d'une obligation *erga omnes* tel qu'affirmé par la Cour à l'occasion de l'affaire *Barcelona Traction* peut justifier une intervention au sens de l'article 62. Or, si l'on suit la jurisprudence de la Cour qui reconnaît un intérêt à agir

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35 C'est sur cette base que les Etats fédérés de Micronésie, les Iles Marshall, les Iles Salomon et les Iles Samoa ont demandé à la Cour d'intervenir dans l'affaire concernant la *demande d'examen de la situation au titre du paragraphe 63 de l'arrêt rendu par la Cour le 20 décembre 1974 dans l'affaire des Essais nucléaires (Nouvelle-Zélande c. France)*. Voy. l'ordonnance du 22 septembre 1995, CIJ Recueil (1995) 288.

36 Voy. en particulier *Affaire Haya de la Torre*, arrêt, 13 juin 1951, CIJ Recueil (1951) 71, p. 77 ; *Chasse à la baleine dans l'Antarctique (Australie c. Japon)*, déclaration d'intervention de la Nouvelle-Zélande, ordonnance, 6 février 2013, CIJ Recueil (2013) 3, par. 7.

37 Pour une analyse plus détaillée voy. Bonafé, *La protezione degli interessi*, 188-190.

38 *Différend territorial et maritime (Nicaragua c. Colombie)*, requête du Costa Rica à fin d'intervention, arrêt, 4 mai 2011, CIJ Recueil (2011) 348, par. 26 ; *Différend territorial et maritime (Nicaragua c. Colombie)*, requête du Honduras à fin d'intervention, arrêt, 4 mai 2011, CIJ Recueil (2011) 420, par. 37.

au principal à chaque destinataire d'une obligation *erga omnes*[39], il est difficile de ne pas lui reconnaître un intérêt suffisamment qualifié aux fins de l'intervention[40].

Reste à préciser le rapport entre l'intervention de l'article 62 et le principe du consentement. A cet égard, une distinction doit être faite entre l'intervention du tiers en tant que non partie et l'intervention en tant que partie. Dans le premier cas, le tiers – titulaire d'un intérêt qualifié – peut intervenir sans pour autant demander à la Cour de se prononcer sur ses droits ou obligations ; lors de la procédure il doit se limiter à soumettre ses observations dans le but de protéger son intérêt « en cause » sans être liée par la future décision de la Cour[41]. L'intervention en tant que non partie ne requiert aucun lien juridictionnel, indépendamment du fait que l'intérêt du tiers découle d'une obligation *erga omnes* ou d'une obligation bilatérale. La participation du tiers visant la protection de l'intérê général n'entraîne alors aucune exception au principe du consentement.

En revanche, l'intervention en tant que partie permet au tiers – titulaire d'un intérêt qualifié – de demander à la Cour de se prononcer sur les prétentions qu'il peut avancer vis-à-vis des parties et la future décision de la Cour sera obligatoire pour le tiers en ce qui concerne les aspects pour lesquels l'intervention a été admise. C'est à cause de sa fonction particulière que, « [d]e l'avis de la Cour, le statut d'intervenant en tant que partie nécessite, en tout cas, l'existence d'une base de compétence entre les Etats concernés »[42]. Un lien juridictionnel est alors nécessaire pour toute intervention en tant que partie, sans que la nature *erga omnes* de l'obligation sur laquelle repose l'intérêt juridique du tiers puisse remettre en question le principe du consentement des parties.

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[39] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, *supra* note 21, par. 69-70.

[40] A cet égard Gaja a efficacement observé : « Whatever 'interest of a légal nature' is required in Article 62 of the Statute, it cannot be higher than the one that justifies bringing a claim before the Court » (Gaja, *The Protection of General Interests*, 119).

[41] Voy. en particulier *Différend frontalier terrestre, insulaire et maritime (El Salvador/Honduras)*, requête du Nicaragua à fin d'intervention, arrêt, 13 septembre 1990, CIJ Recueil (1990) 92, par. 97 et 100 ; *Immunités juridictionnelles de l'Etat (Allemagne c. Italie)*, requête de la République hellénique à fin d'intervention, ordonnance, 4 juillet 2011, CIJ Recueil (2011) 494, par. 26 et 31.

[42] *Différend territorial et maritime (Nicaragua c. Colombie)*, requête du Honduras à fin d'intervention, arrêt, 4 mai 2011, CIJ Recueil (2011) 420, par. 28.

4.2. La violation d'obligations *erga omnes* et la limitation de l'exercice de la compétence de la Cour

Au contraire, on pourrait se demander si la nature *erga omnes* de certaines obligations internationales est capable d'entraîner des contraintes et donc de limiter l'exercice de la compétence contentieuse de la Cour. La question s'est posée aussi bien pour la recevabilité des demandes reconventionnelles (4.2.1.) qu'en ce qui concerne la protection du tiers absent (4.2.2.).

4.2.1. Les demandes reconventionnelles

D'aucuns ont soutenu que la nature *erga omnes* d'une norme internationale aurait pour conséquence de rendre irrecevable une demande reconventionnelle concernant la violation d'une telle obligation : le défendeur ne pourrait pas invoquer la violation préalable d'une obligation *erga omnes* pour justifier son comportement vis-à-vis du demandeur[43].

Certes, la nature *erga omnes* d'une obligation implique l'impossibilité de justifier sa violation en tant que contremesure. Même si la réaction à un fait illicite par la violation d'une obligation *erga omnes* pouvait se justifier, sur le plan bilatéral, vis-à-vis de l'Etat auteur du premier fait illicite, la réaction/violation de l'Etat lésé constituerait de toute façon un fait illicite vis-à-vis de tous les autres Etats destinataires de la norme *erga omnes*. Le même principe s'applique aux normes impératives selon l'article 26 du Projet d'Articles sur la responsabilité des Etats de la Commission du droit international.

La question qui se pose est alors de savoir si la violation d'une obligation *erga omnes* peut faire l'objet d'une demande reconventionnelle et, en particulier, si la demande reconventionnelle concerne nécessairement une allégation ayant pour but de justifier le comportement de l'Etat défendeur[44].

L'article 80, paragraphe 1, du Règlement de la Cour ne pose que deux conditions très générales à la recevabilité d'une demande

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43 Voy. *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*, demandes reconventionnelles, ordonnance, 17 décembre 1997, CIJ Recueil (1997) 243, opinion dissidente du juge Weeramantry, 291 ; Lopes Pegna, *Counter-claims*, 735.

44 Gaja, *First Report*, 145-146.

reconventionnelle : « La Cour ne peut connaître d'une demande reconventionnelle que si celle-ci relève de sa compétence et est en connexité directe avec l'objet de la demande de la partie adverse ». Mais la disposition ne précise pas quelle est la fonction d'une demande reconventionnelle, si son caractère est celui d'un simple moyen de défense ou si elle a une fonction propre qui la distingue d'un tel moyen. Dans le premier cas, l'on pourrait peut-être partager les doutes sur la recevabilité d'une demande reconventionnelle concernant la violation d'obligations *erga omnes*.

Or, la Cour a pris une position très nette à cet égard. Dans l'affaire *Bosnie c. Yougoslavie*, elle a considéré que l'article 80 du Règlement, donc une demande reconventionnelle, « ne saurait viser de simples moyens de défense au fond dont il appartient à la Cour de connaître dans l'exercice normal de sa compétence pour statuer sur les prétentions du demandeur »[45]. Une demande reconventionnelle se caractérise au contraire par le fait d'être indépendante de la demande principale tout en s'y rattachant : « le propre d'une demande reconventionnelle est ainsi d'élargir l'objet initial du litige en poursuivant des avantages autres que le simple rejet de la prétention du demandeur à l'action »[46]. La Cour en a déduit que l'argument tiré du caractère *erga omnes* des obligations découlant de la convention sur le génocide n'était pas déterminant au regard de l'appréciation de la recevabilité de la demande reconventionnelle[47]. On peut alors exclure que la nature *erga omnes* de certaines obligations internationales entraîne une limitation de la compétence de la Cour à admettre des demandes reconventionnelles.

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[45] *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie)*, *supra* note 43, par. 28.

[46] Ibid., par. 27.

[47] Ibid., par. 35. Le raisonnement de la Cour est axé sur le critère de connexité : la nature *erga omnes* des obligations dont la violation était invoquée par le défendeur n'était pas déterminante au regard de l'appréciation de la connexité juridique entre demande principale et demande reconventionnelle. Si l'on peut rejoindre la Cour quand elle conclut que les deux demandes étaient suffisamment connexes car elles poursuivaient le même but juridique (l'établissement de la responsabilité de l'autre partie pour des actes de génocide), la recevabilité d'une demande reconventionnelle concernant la violation d'obligation *erga omnes* semble dépendre de la fonction propre de cette demande plutôt que du critère de connexité juridique. Pour une analyse du critère de connexité dans la jurisprudence de la Cour voy. Bonafé, *Le lien de connexité*, 401.

Enfin, si la reconvention implique un élargissement de l'objet du litige ce n'est pas pour autant qu'elle saurait préjuger le principe du consentement. La jurisprudence a systématiquement confirmé la condition requise par l'article 80 selon laquelle une demande reconventionnelle ne peut excéder les limites dans lesquelles les parties ont reconnu la compétence de la Cour[48].

4.2.2. La protection du tiers absent

La nature *erga omnes* de certaines obligations internationales pourrait encore être invoquée pour restreindre l'exercice de la compétence judiciaire de la Cour à raison des implications que sa future décision risque d'avoir pour des Etats tiers ne participant pas à l'instance. Une décision de la Cour concernant la violation d'une telle obligation a manifestement une « valeur » pour les tiers absents ayant un intérêt juridique à ce que ces obligations soient respectées. Ce qui n'implique pas nécessairement que la Cour ne puisse pas se prononcer.

Le tiers est en principe protégé par article 59 du Statut : la décision de la Cour n'est obligatoire que pour les parties et le tiers est en principe protégé par la valeur relative de la chose jugée. Dans sa décision concernant l'affaire de l'*or monétaire*, la Cour a toutefois reconnu que dans certaines circonstances elle ne peut pas exercer sa compétence contentieuse, notamment lorsque « les intérêts juridiques [du tiers absent] s[o]nt non seulement touchés par une décision, mais constitu[…]ent l'objet même de ladite décision »[49]. Cette limitation se justifierait par l'application du principe du consentement :

> « statuer sur la responsabilité internationale [du tiers] sans son consentement serait agir à l'encontre d'un principe de droit international bien établi et incorporé dans le Statut, à savoir que la Cour ne

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48 Voy. par exemple *Immunités juridictionnelles de l'Etat (Allemagne c. Italie)*, demande reconventionnelle, ordonnance, 6 juillet 2010, CIJ Recueil (2010) 310, par. 14 ; *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica)*, demandes reconventionnelles, ordonnance, 18 avril 2013, CIJ Recueil (2013) 200, par. 20.

49 *Affaire de l'or monétaire pris à Rome en 1943*, question préliminaire, arrêt, 15 juin 1954, CIJ Recueil (1954) 19, p. 32.

> peut exercer sa juridiction à l'égard d'un État si ce n'est avec le consentement de ce dernier »[50].

Cette forme particulière de protection du tiers ne s'avère nécessaire que pour les affaires qui le mettent en cause directement et que la Cour ne pourrait pas trancher sans son consentement.

En revanche, la protection du tiers offerte par l'article 59 du Statut paraît suffisante et le principe de l'*or monétaire* ne s'applique pas lorsque la Cour ne doit pas se prononcer sur la situation juridique du tiers absent, bien que cette dernière corresponde en substance à la situation des parties sur laquelle la Cour doit statuer. C'est ce que la Cour a clairement affirmé dans l'affaire concernant *Certaines terres à phosphates à Nauru*. Saisie d'un différend mettant en cause la responsabilité de l'Australie pour des comportements que cet Etat avait tenus en tant que membre, avec la Nouvelle-Zélande et le Royaume-Uni, de l'autorité administrante de Nauru, la Cour a affirmé pouvoir se prononcer sur la responsabilité de l'Australie sans pour autant déterminer la responsabilité des deux autres Etats :

> « toute décision de la Cour sur l'existence ou le contenu de la responsabilité que Nauru impute à l'Australie pourrait certes avoir des incidences sur la situation juridique des deux autres Etats concernés, mais la Cour n'aura pas à se prononcer sur cette situation juridique pour prendre sa décision sur les griefs formulés par Nauru contre l'Australie »[51].

En d'autres termes, la Cour a le pouvoir de trancher un différend qui aurait des implications pour un tiers absent quand la situation juridique du tiers peut être dissociée de celle des parties parce qu'elle ne constitue pas une question préalable à la détermination de la responsabilité des parties.

La même approche a été suivie par la Cour lorsque le litige avait pour objet des obligations *erga omnes*. D'une part, la Cour confirme son souci de respecter le principe du consentement en estimant

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[50] Ibid.

[51] *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, exceptions préliminaires, arrêt, 26 juin 1992, CIJ Recueil (1992) 240, par. 55.

> « que l'opposabilité *erga omnes* d'une norme et la règle du consentement à la juridiction sont deux choses différentes. Quelle que soit la nature des obligations invoquées, la Cour ne saurait statuer sur la licéité du comportement d'un Etat lorsque la décision à prendre implique une appréciation de la licéité du comportement d'un autre Etat qui n'est pas partie à l'instance. En pareil cas, la Cour ne saurait se prononcer, même si le droit en cause est opposable *erga omnes* »[52].

L'Indonésie a été considérée comme une « partie indispensable » par la Cour parce que son comportement ne pouvait pas être dissocié de celui de l'Australie[53]. Nonobstant l'intérêt de la communauté internationale dans son ensemble au respect des obligations *erga omnes*, la Cour n'a pas considéré cette circonstance comme suffisante pour créer une exception au principe du consentement[54].

D'autre part, la Cour a très récemment confirmé que le critère essentiel pour l'exercice de sa compétence contentieuse reste la possibilité de dissocier la situation juridique des parties (qu'elles ont consenti à lui soumettre) de celle du tiers absent (qui n'a pas accepté la compétence de la Cour), même lorsque le différend concerne des obligations *erga omnes*.

Le différend entre Croatie et Serbie concernait des allégations de génocide, des obligations dont la nature *erga omnes* a été reconnue par la Cour. La compétence de la Cour reposait sur la clause compromissoire de la convention sur le génocide qui liait la Serbie à compter du 27 avril 1992. La Croatie soutenait que la Serbie était responsable aussi des actes de génocide commis par la Yougoslavie avant cette date.

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52 *Timor oriental (Portugal c. Australie)*, arrêt, 30 juin 1995, CIJ Recueil (1995) 90, par. 29.

53 Ibid., par. 28 : « La Cour a examiné attentivement l'argumentation du Portugal tendant à dissocier le comportement de l'Australie de celui de l'Indonésie. Elle est toutefois d'avis qu'il ne lui est pas possible de porter un jugement sur le comportement de l'Australie sans examiner d'abord les raisons pour lesquelles l'Indonésie n'aurait pu licitement conclure le traité de 1989 alors que le Portugal aurait pu le faire ; l'objet même de la décision de la Cour serait nécessairement de déterminer si, compte tenu des circonstances dans lesquelles l'Indonésie est entrée et s'est maintenue au Timor oriental, elle pouvait ou non acquérir le pouvoir de conclure au nom de celui-ci des traités portant sur les ressources de son plateau continental. La Cour ne saurait rendre une telle décision en l'absence du consentement de l'Indonésie ».

54 Voy. à cet égard les remarques de Dupuy, *supra* Chapitre 2.

Entre autres, la Serbie faisait valoir le principe de l'*or monétaire* qui aurait empêché à la Cour d'établir la responsabilité d'un tiers absent (la Yougoslavie). Sur ce point, la Cour a conclu :

> « On ne saurait tenir pareil raisonnement en ce qui concerne un Etat qui a cessé d'exister, comme c'est le cas de la RFSY, puisque pareil Etat n'est plus titulaire d'aucun droit et n'a plus la capacité de donner ou de refuser de donner son consentement à la compétence de la Cour. Quant à la position des autres Etats successeurs de la RFSY, la Cour n'a pas à se prononcer sur leur situation juridique pour statuer sur la présente demande. Le principe évoqué par la Cour dans l'affaire de l'Or monétaire ne s'applique donc pas (cf. *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 1992, p. 261-262, par. 55) »[55].

Manifestement, la Cour n'exclut pas l'existence d'Etat successeurs de la Yougoslavie et, partant, la possibilité que sa future décision puisse avoir des implications pour des tiers absents. Cette circonstance n'est tout de même pas suffisante pour que la Cour refuse d'exercer sa compétence judiciaire du moment qu'elle n'est pas appelée à se prononcer sur leur situation juridique. Ce qui semble confirmer que la situation juridique des tiers intéressés par le respect d'une obligation *erga omnes* peut être dissociée de celle des parties et que la compétence de la Cour n'en est pas pour autant limitée.

Cette jurisprudence devrait permettre de donner une réponse à la question de l'applicabilité du principe de la partie indispensable aux différends concernant des obligations *erga omnes* introduits par un Etat non directement lésé à l'encontre de l'Etat auteur de la violation[56]. L'Etat directement lésé, qui ne voudrait pas participer à la procédure, doit-il être considéré comme une partie indispensable ? La réponse devrait être négative car la Cour ne serait pas appelée à se prononcer sur la situation juridique du tiers absent qui reste séparée de celle du demandeur. Au plus, une coordination entre les réclamations du demandeur et celles de l'Etat directement lésé serait souhaitable si le premier

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55 *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie)*, arrêt, 3 février 2015, par. 116.

56 Thirlway, *Injured and Non-Injured*, 316-319.

agit pour obtenir l'exécution de l'obligation de réparation. La conclusion pourrait être différente si la Cour était obligée de se prononcer sur la position juridique de l'Etat directement lésé[57].

Enfin, l'on pourrait se demander si la nature impérative d'une norme due à la communauté internationale justifierait une solution différente en ce qui concerne la protection offerte à la partie indispensable. D'aucuns ont affirmé que la juridiction contentieuse de la Cour ne devrait pas être limitée par le principe de l'*or monétaire* lorsqu'elle est appelée à établir la violation des conséquences spéciales découlant de la violation du *jus cogens* en particulier en l'absence d'un Etat directement lésé ; dans cette situation particulière, l'application du principe de la partie indispensable rendrait pratiquement impossible le contrôle judiciaire du respect des conséquences visées à l'article 41 du Projet de la Commission du droit international sur la responsabilité des Etats[58]. Face à cet argument qui répond certes à une exigence concrète, reste l'obstacle principal de la conception rigoureuse du principe du consentement des parties qui se dégage de la jurisprudence de la Cour.

4.3. Conclusions

De l'analyse qui précède l'on peut tirer deux conclusions principales. D'une part, la structure normative particulière des obligations dues à la communauté internationale dans son ensemble (et, partant, du droit impératif) peut effectivement entraîner un élargissement de la compétence de la Cour du moment que tout Etat ayant un intérêt au respect de ces obligations possède également un intérêt à agir lui permettant d'introduire une instance au sens de l'article 40 du Statut ou d'intervenir au sens de l'article 62 du Statut. D'autre part, le principe du consentement ne fait pas plus obstacle à l'invocation de ces obligations qu'à l'invocation des autres obligations internationales : à condition qu'un lien juridictionnel soit présent, la Cour peut entretenir une demande reconventionnelle concernant des obligations *erga omnes* et

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[57] Thirlway donne l'exemple suivant : l'Etat non directement lésé accuserait le défendeur d'agression alors que le second justifierait son comportement en tant que légitime défense (ibid., 319). La Cour devrait alors établir si le tiers absent (l'Etat directement lésé) avait commis, le premier, un acte d'agression.

[58] Cannizzaro, *The law of treaties*, 35-36.

se prononcer sur leur violation même si sa décision entraîne des implications pour les tiers absents dont la situation juridique soit dissociable de celle des parties.

Ce qui n'épuise bien sûr pas le sujet. Le régime procédural des obligations *erga omnes* a posé et pose d'autres questions. C'est le cas par exemple des critères d'établissement de la preuve[59], du contenu de la requête d'un Etat non directement lésé[60], de la recevabilité d'une demande en indication de mesures conservatoires introduite par un Etat non directement lésé[61], ou encore du rapport entre la compétence contentieuse et la compétence consultative de la Cour[62].

Plus en général, l'on pourrait se demander si les moyens procéduraux dont dispose actuellement la Cour pour protéger l'intérêt général de la communauté internationale s'avèrent appropriés à cette fin. Aucune instance n'a été introduite pour déclarer l'invalidité d'un traité conclu en violation du *jus cogens*, nous l'avons rappelé. Les instances introduites sur la base d'obligations *erga omnes* restent exceptionnelles[63]. Et le recours, également rare, à l'intervention aussi bien au

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[59] La Cour s'est récemment prononcée à ce sujet : *Application de la convention pour la prévention et la répression du crime de génocide (Croatie c. Serbie)*, *supra* note 55, par. 177 s. Pour une analyse de la position de la Cour voy. Bonafé, *Responsabilité de l'Etat*.

[60] La question est abordée par Picone, Papa, *Giurisdizione della Corte*, 714-716.

[61] La question est abordée par Thirlway, *Injured and Non-Injured*, 325-326.

[62] Il est intéressant de noter que c'est dans le cadre de l'établissement de la violation d'obligations *erga omnes* que la Cour a reconnu que sa compétence consultative n'était pas limitée par l'existence d'un différend entre deux parties qui n'avaient pas manifesté l'intention de le soumettre à sa compétence contentieuse : la demande d'avis concernait « une question qui intéresse tout particulièrement les Nations Unies, et qui s'inscrit dans un cadre bien plus large que celui d'un différend bilatéral. Dans ces conditions, la Cour estime que rendre un avis n'aurait pas pour effet de tourner le principe du consentement au règlement judiciaire et qu'elle ne saurait dès lors, dans l'exercice de son pouvoir discrétionnaire, refuser de donner un avis pour ce motif » (*Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif, 9 juillet 2004, CIJ Recueil (2004) 136, par. 50). Voy. à cet égard Thirlway, *Injured and Non-Injured*, 326-328 ; Ruffert, *Special Jurisdiction*, 304-306 ; Thouvenin, *La saisine de la Cour*, 328-332.

[63] Voy. par exemple les requêtes introduites en 2014 par les Iles Marshall à l'encontre des neuf Etats possédant des armes nucléaires opérationnelles (par ordre alphabétique : la Chine, les Etats-Unis d'Amérique, la Fédération de Russie, la France, l'Inde, Israël, le Pakistan, la République populaire démocratique de Corée et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord) et visant à établir leur responsabilité pour avoir violé l'obligation de négocier un désarmement nucléaire complet.

sens de l'article 62 que de l'article 63 du Statut a le plus souvent pour but la protection d'un intérêt individuel du tiers. Le moins que l'on puisse dire est que ces instruments ne sont pas toujours efficaces[64]. Un procédure moins complexe, qui n'implique pas une phase incidente de recevabilité, ouverte à tous les Etats ayant un intérêt suffisamment qualifié par rapport à l'instance, permettant à ces derniers d'exprimer leurs vues sur la protection des intérêts généraux et laissant en même temps à la Cour le pouvoir d'apprécier la pertinence et l'utilité de ces positions pourrait assurer une meilleure protection des intérêts collectifs grâce à la participation des Etats concernés. Autrement dit, c'est la possibilité de participer en tant qu'*amici curiae* à la procédure contentieuse que la Cour pourrait reconnaître aux *omnes* dans le but de compléter les garanties procédurales existantes[65].

Bibliographie

BONAFÉ, B. I. « Le lien de connexité : dépassement et sauvegarde de la nature 'privée' des différends devant la Cour internationale de Justice ». In D'ARGENT, P., B. I., BONAFÉ, AND J. COMBACAU (eds.). *Les limites du droit international. Essais en l'honneur de Joe Verhoeven - The Limits of International Law. Essays in honour of Joe Verhoeven*, 401-422. Bruxelles: Bruylant-Larcier, 2014. ISBN : 978-2802742913.

BONAFÉ, B. I. « Responsabilité de l'Etat et responsabilité individuelle pour crime de génocide : une séparation purement théorique ? ». In *Ordine internazionale e diritti umani* 1 (2015) : 130-136. ISSN : 2284-3531. Online edition : rivistaoidu.net/sites/default/files/1_paragrafo_1_CIG_15.pdf.

BONAFÉ, B. I. *La protezione degli interessi di Stati terzi davanti alla Corte internazionale di giustizia.* Napoli: Editoriale Scientifica, 2014. ISBN: 978-88-6342-671-7.

CANNIZZARO, E. « The law of treaties through the interplay of its different sources ». In TAMS, C., A. TZANAKOPOULOS, and A. ZIMMERMANN (eds.). *Research Handbook on the Law of Treaties*, 16-38. Cheltenham: Edward Elgar Publishing, 2014. ISBN : 978-0-85793-477-2.

64 Pour une analyse plus générale voy. Bonafé, *La protezione degli interessi*, 187 ss.

65 Ibid., 221-245 ainsi que les références bibliographiques indiquées.

FORLATI, S. « Azioni dinanzi alla Corte internazionale di giustizia rispetto a violazioni di obblighi *erga omnes* ». In *Rivista di diritto internazionale* 84 (2001) : 69-109. ISSN : 0035-6158.

GAJA, G. « First Report on Obligations and Rights *Erga Omnes* in International Law ». In *Annuaire de l'Institut de droit international* 71 (2005-I) : 119-151. ISBN : 2-233-00500-7.

GAJA, G. « The Protection of General Interests in the International Community ». In *Recueil des cours* 364 (2011) : 9-185. ISBN : 978-90-04-25557-9.

LOPES PEGNA, O. « Counter-claims and Obligations *Erga Omnes* before the International Court of Justice ». In *European Journal of International Law* 9 (1998) : 724 -736. ISSN : 0938-5428.

PARLETT, K. *The Individual in the International Legal System*. Cambridge : Cambridge University Press, 2011. ISBN : 978-0-521-19666-6.

PICONE, P. AND M.I., PAPA. « Giurisdizione della Corte internazionale di giustizia e obblighi *erga omnes* ». In PICONE, P. (ed.). *Comunità internazionale e obblighi* « erga omnes », 673-721. Napoli : Jovene, 2013. ISBN : 978-88-243-2237-9.

RUFFERT, M. « Special Jurisdiction of the ICJ in the Case of Infringements of Fundamental Rules of the International Legal Order ». In TOMUSCHAT, C. and J.-M., THOUVENIN (eds.). *The Fundamental Rules of the International Legal Order.* Jus Cogens *and Obligations* Erga Omnes, 295-310. Leiden, Boston : Martinus Nijhoff, 2006. ISBN : 90-04-14981-3.

TAMS, C. *Enforcing Obligations* Erga Omnes in *International Law.* Oxford : Oxford University Press, 2005. ISBN : 978-0-521-85667-6.

THIRLWAY, H. « Injured and Non-Injured States before the International Court of Justice ». In RAGAZZI, M. (ed.). *International Responsibility Today. Essays in Memory of Oscar Schachter,* 311-328. Leiden, Boston : Martinus Nijhoff, 2005. ISBN : 90-04-14434-X.

THOUVENIN, J.-M. « La saisine de la Cour internationale de Justice en cas de violation des règles fondamentales de l'ordre juridique international ». In TOMUSCHAT, C. and J.-M., THOUVENIN (eds.). *The Fundamental Rules of the International Legal Order.* Jus Cogens *and Obligations* Erga Omnes, 311-334. Leiden, Boston : Martinus Nijhoff, 2006. ISBN : 90-04-14981-3.

VERHOEVEN, J. « Invalidity of Treaties : Anything New in/under the Vienna Conventions ? ». In CANNIZZARO, E. (ed.). *The Law of Treaties*

beyond the Vienna Convention, 297-319. Oxford : Oxford University Press, 2011. ISBN : 978-0-19-958891-6.

VERMEER-KÜNZLI, A. « A Matter of Interest: Diplomatic Protection and State Resposibility *Erga Omnes* ». In *International and Comparative Law Quarterly* 56 (2007) : 553-581. ISSN : 1471-6895.

VOEFFRAY, F. *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales.* Paris : PUF, 2004. ISBN : 2-13-054566-1.

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Enzo Cannizzaro is full professor of international law and European Union law at the Sapienza University of Rome. He has been visiting professor at Universities and scientific institutions in Europe and the United States. He is a member of the editorial board of the "Il diritto dell'Unione europea" and member of the scientific board of the "European Journal of International Law" and "Diritti umani e diritto internazionale". Among his most recent books: "The Law of Treaties Beyond the Vienna Convention", Oxford University Press, Oxford, 2012 and the textbook "Diritto internazionale", Giappichelli, Torino, 2014.

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