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**On the Constitutionalization of General International Law**

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# On the Constitutionalization of General International Law

Theodor Schilling\*

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I — Introduction I — Introduction I — Introduction

This article proposes to discuss the question of a constitutionalization of general international law which aims at transposing the achievements of the constitutional State system, in particular in the protection of human rights, to the international level. Under this aspect, international law constitutionalization will be discussed in four steps and two excursus: defining the specific interest of the present research, defining the requirements necessary for a meaningful conception of international law constitutionalization, discussing the dynamism of the international legal order, describing the relevant legal facts as found on the ground, discussing a possible model rôle of intra-treaty constitutionalization, and discussing structural possibilities of a further international law constitutionalization. The discussion will center on the structural requirements of an international law constitutionalization and compare it with international law's structural givens.

The first step needs no further explanation at this point. The second step relies on important aspects of municipal constitutions — that they are the supreme law of the land i.e. apply throughout the respective country, and that they are entrenched — as well as on aspects of the constitutionalization of international organizations which widely is seen in the existence of (quasi-)judicial treaty bodies and their systemizing jurisprudence. Taking into account the specificity of general international law, this step distinguishes three modes of constitutionalization: internationalization, generalization, and entrenchment especially of human rights law. As generalization of international law is dependent on the international community's possibility intentionally to make law i.e. to posit law,<sup>1</sup> the article discusses this question in an excursus.

Moving on to the third step, it then describes the legal facts of international law constitutionalization as found at present. It finds an important inventory of internationalized human rights in treaties which are to some degree protected by treaty bodies. It finds some few generalized rules, and some relevant court protection to which individuals have access. It finds a certain international law entrenchment in the fact that treaties, and consensus law,<sup>2</sup> are not easily amended. It also finds some entrenchment by proxy of human rights treaty rules in this sense that the States parties to those treaties are prohibited to participate in the making of rules conflicting with the treaty rules. But while it finds some *jus cogens*, it does not find the latter's rules entrenched. The constitutionalization aspects of the existence of treaty bodies and of systemization are then dealt with in a second excursus. The fourth step discusses structural possibilities of international law's becoming more generalized and entrenched. The article finds a generalization possibility in the international community's

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<sup>1</sup> On the concept of posited law, cf. *infra* note 58.

<sup>2</sup> On this concept, cf. text at and after *infra* note 72.

power to issue consensus law. But an entrenchment over and beyond the forms already found it finds neither legally possible nor normatively desirable, nor, indeed, factually likely.

Before plunging into the discussion of these issues, some short terminological remarks may be in place. There are two terms used, almost interchangeably, for the phenomenon this article is tackling: international law constitutionalization, and international constitutionalism.<sup>3</sup> Properly speaking, the first describes a process,<sup>4</sup> the second rather a mental attitude, or a thought system,<sup>5</sup> which however — at least as used in municipal contexts — has a normative component, i.e. the limitation of the omnipotence of the legislature by superior legal principles, in particular human rights.<sup>6</sup> Both are complementary. But in first line, it is submitted, what we experience as, or what is required for, the constitutionalization of general international law is a real legal development, not just a reconceptualization of existing international law. This article therefore shall stick with the term constitutionalization. That concept does not imply that international law at present does not have a constitution. Indeed, the notion of constitutionalization as a process presupposes a gradual development so that it is feasible that an entity having already achieved a certain constitutionality becomes further constitutionalized. This appears to be the case of the international community.<sup>7</sup>

## II — Approaches to the Discussion of International Law ConstitutionalizationII — Approaches to the Discussion of International Law ConstitutionalizationII — Approaches to the Discussion of International Law Constitutionalization

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<sup>3</sup> Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EJIL 907 (2004), *passim*, esp. 931, speaks in a similar context of „constitutionalism beyond the state“. — Another term similarly used is legalization; cf. Judith L. Goldstein *et al.*, *Introduction: Legalization and World Politics*, in LEGALIZATION AND WORLD POLITICS 1 (Judith L. Goldstein *et al.*, eds., 2001) at 3: „The definition of legalization adopted in this issue contains three criteria: the degree to which [international] rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring and implementation to a third party.“

<sup>4</sup> Cf. Brun-Otto Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 61 DER STAAT 61 (2003) at 62.

<sup>5</sup> Philip Allot, *The Emerging Universal Legal System*, 3 INTERNATIONAL LAW FORUM DU DROIT INTERNATIONAL 12 (2001) at 16 states that „[t]he first and most important step in meeting the challenge of international constitutionalism is to re-make our international legal worldview, to begin to articulate the eventual structure of a universal legal system“.

<sup>6</sup> Cf. e.g. Bryde, *supra* note 4, at 62, with further references.

<sup>7</sup> Cf. Allot, *supra* note 5, at 16: „We are now beginning to see that old international law was essentially a rudimentary international constitutional law, providing the fundamental structures of a primitive form of international society.“ And cf. Jürgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, in *IDEM*, DER GESPALTENE WESTEN 113 (2004) at 131.

The question of the constitutionalization of general international law can be approached from different angles, in particular under normative, descriptive, conceptual and doctrinal aspects. While these approaches cannot be independent from one another, for the purposes of a well structured discussion they should be kept separate. In this section, they are only presented; they will be discussed more closely later on.

### 1. Normative Approaches. Normative Approaches. Normative Approaches

Normative approaches deal with the questions of the desirability of international law constitutionalization, and of the type of international law constitutionalization which is deemed desirable. They inform the interest an author may have in the subject, and they may thereby also influence the concept of constitutionalization an author may use. They may focus on the interests of the international community —<sup>8</sup> „the society of all societies“<sup>9</sup> —, of individual States,<sup>10</sup> or of the individual. However, the contrast between the interests of the international community and those of the individual is, at least in part, more apparent than real; at least in part, those interests may be seen to coincide. This applies in particular under the aspect of the protection of human rights which of course is an individual interest universally recognized by municipal constitutions<sup>11</sup> but is also at the centre of the preoccupations of the international community.<sup>12</sup>

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<sup>8</sup> Cf. Jochen Abr. Frowein, *Konstitutionalisierung des Völkerrechts*, 39 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 427 (2000); English summary at 447: „Constitutionalization of public international law means recognition of interests of the community of states and the introduction of mechanisms for their implementation“. — On the concept of the international community cf. e.g. Bruno Simma and Andreas L. Paulus, *The ,International Community': Facing the Challenge of Globalization*, 9 EJIL 266 (1998) at 267. And cf. Prosper Weil, *Le droit international en quête de son identité. Cours général de droit international public*, 237 RECUEIL DES COURS (RDC) 9 (1992 VI) at 306: „C'est là ... la notion du droit international actuel la plus fréquemment invoquée, la plus riche aussi en potentialités de tous ordres“. And cf. Jochen Abr. Frowein, *Die Staatengemeinschaft als Rechtsbegriff im Völkerrecht*, 12 LIECHTENSTEINISCHE JURISTEN-ZEITUNG 3 (1991). Doubtful Yasuaki Onuma, Debate contribution, 16 EJIL 264 (2005).

<sup>9</sup> Allot, *supra* note 5, at 16.

<sup>10</sup> This appears to be the approach underlying the work of some Third World scholars; cf. e.g. B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EJIL 1 (2004), but also of many sources close to the U.S. Government, cf. e.g. John R. Bolton, *International Law and American Sovereignty*, available at <http://www.fed-soc.org/pdf/bolton.pdf>, visited May 12, 2005.

<sup>11</sup> Cf. e.g. Jürgen Habermas, *Kants Idee des ewigen Friedens — aus dem historischen Abstand von 200 Jahren*, in *IDEM*, DIE EINBEZIEHUNG DES ANDEREN. STUDIEN ZUR POLITISCHEN THEORIE 192 (Frankfurt a.M. 1996) at 210 *et seq.* And cf. Biaggini, *supra* note 16, at 458.

<sup>12</sup> Cf. in particular Article 1 (3) of the UN Charter and the instruments quoted in *infra* notes 114 to 123. Even fighting terrorism — but arguably not maintaining the security in countries like Afghanistan and Iraq — must step back behind human rights protection; compare Security Council Res. 1456 (2003), Annex para. 6, with Res. 1386 (2001) and 1511 (2003).

Under the type of constitutionalization aspect, normative approaches may deal with the grand questions of the future of the international system, or the more pedestrian questions of „transpos[ing] the achievements of the constitutional State system to the international level, so that mankind is saved from sliding back into the barbarity of the past“.<sup>13</sup> Among the grand questions, it may be discussed whether we should continue to abide by the constitutionalization of international law which is seen as having been under way for a long time, or whether that Kantian project might be replaced by an ethicalization of world politics as implemented by a benevolent hegemon.<sup>14</sup> The discussion of international law constitutionalization under such an approach would have to deal with governmental structures or institutions on a global level.<sup>15</sup> Under the more pedestrian normative approach, the aim of international law constitutionalization can be seen in safeguarding, or reënforcing, municipal constitutional standards by elevating them to the international level. This requires the discussion of structural aspects of the substantive international law constitution which, under this approach, would have to reflect certain traits of municipal constitutions.<sup>16</sup> In this context, possible desired results of international law constitutionalization have been seen in (i) a reënforcement of the legal position of the individual, (ii) a reënforcement of responsible government and of checks and balances in the international system, (iv) a further hierarchization of international law and (v) an increased respect for internationally guaranteed fundamental rights in the drafting and development of treaties.<sup>17</sup> As becomes clear from that list, also this more pedestrian approach considers aspects of an international community.

## 2. Descriptive Approaches. Descriptive Approaches. Descriptive Approaches

Descriptive (legal facts) approaches look at the elements of constitutionalization of international law that can be found on the ground. Some may refer to phenomena of comparative constitutionalism i.e. the fact that one constitutional court may take into account decisions reached by a foreign court.<sup>18</sup> Others consider the actual

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<sup>13</sup> Daniel Thürer, *The „failed State“ and international law*, 81 INTERNATIONAL REVIEW OF THE RED CROSS (IRCR) 731 (1999-No. 836) at 760.

<sup>14</sup> Habermas, *supra* note 7, at 115-6.

<sup>15</sup> Cf. e.g. Habermas, *supra* note 7, at 131-45.

<sup>16</sup> Cf. Giovanni Biaggini, *Die Idee der Verfassung — Neuausrichtung im Zeitalter der Globalisierung?*, ZEITSCHRIFT FÜR SCHWEIZER RECHT 445 (2000) at 469.

<sup>17</sup> Biaggini, *supra* note 16, at 473-4.

<sup>18</sup> Cf. Oliver Gerstenberg, *What International Law Should (Not) Become. A Comment on Koskenniemi*, 16 EJIL 125 (2005) at 129, referring to U.S. Supreme Court, *Lawrence v. Texas*, 123 SCt 2472 (2003). An interesting overview on the U.S. Supreme Court opinions dealing with

constitutionalization of treaty systems i.e. international subsystems as a move in the direction of the constitutionalization of general international law.<sup>19</sup> Such an approach has found its clearest expression in an influential but not exhaustive list of constitutionalization aspects which covers (i) the taking into account of democratic requirements when recognizing a new State, (ii) the protection of human rights in international law, particularly in combination with control and sanctions, (iii) the increase of „constitutional systems of worldwide activities“, (iv) regional systems of integration<sup>20</sup> and (v) international support for the constitutionalization *in* (failed) States.<sup>21</sup>

### 3. Conceptual and Doctrinal Approaches. Conceptual and Doctrinal Approaches. Conceptual and Doctrinal Approaches

Finally, under a conceptual approach it may be enquired into what reasonably may be considered as constituting international law constitutionalization, in other words, what minimum requirements the international legal system must meet to allow a meaningful talk about its constitutionalization. Closely related to conceptual approaches is a doctrinal approach which considers whether the minimum requirements for a meaningful talk of constitutionalization are compatible with international law, or special characteristics of international law.

A conceptual approach may start with the observation that constitutionalization, in accordance with its etymology, must be taken to mean that something (a set of norms)

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international or foreign decisions is given by Ruth Bader Ginsburg, „*A decent Respect to the Opinions of [Human]kind*“: *The Value of a Comparative Perspective in Constitutional Adjudication*, available at: <http://www.asil.org/events/AM05/ginsburg050401.html>, visited Apr 7, 2005. And cf. in general Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L LJ 191 (2003).

<sup>19</sup> Miguel Poiars Maduro, *The Constitutional Challenge of Globalisation — Protecting Common Values*, available at [http://www.coe.int/T/E/Com/Files/Themes/Identity/Col3\\_DiscMaduro.ASP#P14\\_1020](http://www.coe.int/T/E/Com/Files/Themes/Identity/Col3_DiscMaduro.ASP#P14_1020), visited May 12, 2005, states that „developing forms of regional integration ... can even be conceived as intermediary steps on the way to a global polity that may take the constitutional form tested in these regional systems“. And cf. Kathrin Blanck *et al.*, Conference Report — *Europe's Constitutionalization as an Inspiration for Global Governance? Some Viennese Conference Impressions*, 6 GERMAN L J 227 (2005) at 243: „There was obvious agreement among the panelists that the process of European constitutionalization may be an important foundation towards a uniform approach that might, in the long run, shape the development of the global legal order.“

<sup>20</sup> But cf. RICHARD A. FALK, *THE DECLINING WORLD ORDER. AMERICA'S IMPERIAL GEOPOLITICS* 46 (2004), who states that „[a]lmost any generalization about regionalism seems suspect“.

<sup>21</sup> Frowein (2000), *supra* note 8, at 429-44, 447. The further points i.e. (vi) the fact that the monopoly of the Security Council concerning the use of force needs complementary regional mechanisms and (vii) that the same applies for the implementation of constitutional principles by the Security Council appear to reflect rather a normative approach.



develops into a constitution, or that some other thing (an entity) gets a constitution. Generally, and in particular under structural aspects, the concept of constitution is most highly developed in the context of the State; therefore, a municipal constitution must be taken „as the clear, standard example of what [a constitution] is“.<sup>22</sup> As the very notion of constitutionalization is dependent on this concept of constitution, it may be argued, it best takes its meaning therefrom. This approach would imply that meaningfully to talk about international law constitutionalization would require that international law deals with the four groups of regulations that have been identified as building-stones of „the architecture of modern constitutions“: those concerning questions of justice, in particular human rights, questions of the common good, in particular fundamental values, questions of political experience and wisdom i.e. organizational regulations, and questions of constitutional validity i.e. questions of hierarchy.<sup>23</sup>

But there are other, possibly competing, models of international law constitutionalization based not on municipal constitutions but rather on what is perceived as the constitutionalization of international organisations, or intra-treaty constitutionalization. One such model, originally developed in the framework of the European Community, is occasionally also applied to the systems created by the (European) Convention on Human Rights and Fundamental Freedoms<sup>24</sup> (ECHR) and the United Nations Charter. Under that model, certain developments, often in connection with adjudicating bodies,<sup>25</sup> within those international subsystems are seen as constitutionalization.<sup>26</sup> Those developments include, importantly, the access to a court open to individuals to defend their rights, and the systemization, by court decisions, of the law applicable in the respective subsystem.<sup>27</sup> While those aspects are also present, as a matter of course, in municipal legal systems, — the

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<sup>22</sup> Cf., for law in general, H.L.A. HART, *THE CONCEPT OF LAW* (2nd ed. 1994) at 216. Of course, „there is an important difference between saying ‚this is a clear case of X‘ and giving a general definition of X“: William Twining, *The Ratio Decidendi of the Parable of the Prodigal Son* in WILLIAM TWINING, *THE GREAT JURISTIC BAZAAR. JURISTS' TEXTS AND LAWYERS' STORIES* 461 (2002) 474 with further references.

<sup>23</sup> Cf. Günter Frankenberg, *The Return of the Contract: Problems and Pitfalls of European Constitutionalism*, 6 *ELJ* 257 (2000) at 266-73.

<sup>24</sup> of Nov 4, 1950, entry into force Sep 3, 1953, UNTS vol. 213, p. 221.

<sup>25</sup> Cf. e.g. Rainer Wahl, *Konstitutionalisierung — Leitbegriff oder Allerweltsbegriff?* in *WANDEL DES STAATES VOR DEN HERAUSFORDERUNGEN DER GEGENWART. FESTSCHRIFT FÜR WINFRIED BROHM ZUM 70. GEBURTSTAG* 191 (Dieter Lorenz et al., eds; 2002) at 201.

<sup>26</sup> Cf. e.g. the impressive but far from exhaustive list in Deborah Z. Cass, *The ‚Constitutionalization‘ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 *EJIL* 39 (2001) 40-1, note 3.

<sup>27</sup> Bryde, *supra* note 4, at 67 sees that as one task of constitutional courts.

individual right of access to the courts even is a signature achievement of the constitutional State system — they are not there seen as defining the constitution.<sup>28</sup>

The term „constitutionalization“ also is used in the context of the system created by the Agreement Establishing The World Trade Organization (WTO) variously to describe a normative process in which the fundamental ideas of law and order in the WTO develop,<sup>29</sup> or in which constitutional norms and structures are generated by judicial decision-making,<sup>30</sup> or to describe the WTO's growing orientation towards community interests and the respect of global concerns.<sup>31</sup> It is evident that these various concepts of constitutionalization, even if they take up aspects also discussed in the framework of the two concepts adduced above, are overall less demanding, and less encompassing, than the latter. This fact provides the conceptual basis for disputing, in terms of appropriateness, the use of the term constitutionalization as applied to the WTO. In this sense, it has been affirmed that, in the context of the WTO, the concept of constitutionalization is used much too loosely, covering many aspects and only indicating a general direction towards stronger State obligations, and that a constitutionalization *stricto sensu* of the WTO has not yet been achieved.<sup>32</sup>

#### 4. The Interdependence of those Approaches. The Interdependence of those Approaches. The Interdependence of those Approaches

As stated above, the different approaches to international law constitutionalization are not independent from one another. Indeed, the conceptual approach — what requirements must be fulfilled to allow a meaningful discussion of international law constitutionalization — defines the subject also with respect to the other approaches.<sup>33</sup> In particular, the legal facts approach presupposes a knowledge of what kind of facts must be looked for, in other words it requires a subsumption of the facts found on the ground under a predefined concept of constitutionalization. To give an example: assuming that conceptually, international law

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<sup>28</sup> More generally, a constitutionalization of global regimes has been seen in „liberating the universalizing potential of the regime[s]“ and at the same time „ensur[ing] that such regimes are reflexively connected with their social environments“: Andreas Fischer-Lescano & Gunther Teubner, *Reply to Andreas L. Paulus: Consensus as Fiction of Global Law*, 25 MICH. J. INT'L L. 1059 (2004) at 1072.

<sup>29</sup> Cf. Meinhard Hilf, *Die Konstitutionalisierung der Welthandelsordnung. Struktur, Institutionen und Verfahren*, 40 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 257 (2003).

<sup>30</sup> Cass, *supra* note 26 at 72.

<sup>31</sup> Cf. Wolfgang Benedek, *Die Konstitutionalisierung der Welthandelsordnung. Kompetenzen und Rechtsordnung der WTO*, 40 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 283 (2003).

<sup>32</sup> Wahl, *supra* note 25, at 206. — Cf. also DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION, TRADING DEMOCRACY* (2005).

<sup>33</sup> Cf. ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE* (1989) at 86.

constitutionalization presuppose the development, within the international legal system, of a class of norms *jus cogens*, empirically to enquire into the question whether this requirement is fulfilled is to ask whether there is factual evidence showing that international law effectively has developed *jus cogens* norms. Also, the „grand“ normative approach can maintain its premise of an ongoing international law constitutionalization only by reference to such a concept, taking into account, at the same time, the facts found on the ground, while the more pedestrian normative approach is intimately connected to the conceptual one. Inversely, the conceptual approach is of interest only in the context of a normative approach telling us why we should be interested in international law constitutionalization in the first place. Finally, the doctrinal approach is the most contingent of all. As it is not a meaningful question to ask whether international law as it exists is compatible with itself, this approach can only be applied to eventual future developments. It therefore is contingent on the normative and conceptual approaches chosen as well as on the facts found on the ground at present; it is meaningful only if those facts are found wanting under the aspects of the other approaches. To revert to the above example: if no factual evidence for the present existence of *jus cogens* norms should be found, and if that would be considered, under other approaches, a deficiency of international law constitutionalization, the doctrinal approach would ask whether international law is apt to develop such norms as a class.

### III — The Discussion of International Law Constitutionalization — The Different Steps to be Taken

Given the interdependence of the different approaches to the discussion of international law constitutionalization, this article will try to combine them into a multi-faceted research of the topic. This research will involve four steps. Defining the steps to be taken in discussing the constitutionalization of general international law requires first to answer the normative question what purpose should be discussed as being served by international law constitutionalization. This question is at the same time the first step of the enquiry. For reasons shortly exposed below, it is whether international law constitutionalization offers, or can offer, guarantees of individual rights similar to those offered by municipal constitutions. The second step is the conceptual one more closely to define what is required of an international law constitutionalization answering that normative purpose. The third step requires a look at the legal facts found on the ground that are relevant to the normative purpose of the enquiry; it serves to ascertain in how far international law constitutionalization already has been achieved. The fourth step is rather doctrinal; it looks at the question whether a further international law constitutionalization along the lines discussed is structurally possible, given the specificities of international law. As this is at the

same time a question of *lex ferenda*, other such questions — the normative desirability and the factual likelihood of such a development — also will be dealt with within the fourth step.

1. The First Step: The Specific Interest of the Present Research. The First Step: The Specific Interest of the Present Research. The First Step: The Specific Interest of the Present Research

This is the point to state the specific interest of the present research. It is the more pedestrian normative approach described above.<sup>34</sup> Under this approach, international law constitutionalization will be discussed in this article as a possible means of transposing the achievements of the constitutional State system to the international level. This is not a completely arbitrary decision; rather, this approach appears to be sufficiently realistic, and therefore of sufficient practical interest, to justify the research proposed.

2. The Second Step: Requirements of an International Law Constitutionalization. The Second Step: Requirements of an International Law Constitutionalization. The Second Step: Requirements of an International Law Constitutionalization

In this second step, the enquiry is to the traits international law must present to be able to incorporate and protect national constitutional standards, in particular human rights standards. Under one conceptual approach, those traits should correspond to traits constitutional State systems have developed to protect human rights. Of the four groups of constitution building stones identified above,<sup>35</sup> these are the traits concerning questions of justice, political experience and constitutional validity. Under the normative approach here chosen, this conceptual reason for looking to typical State constitutions is confirmed, perhaps more importantly, by a substantive reason: the structural characteristics municipal constitutions have developed over time generally serve the purpose to guarantee the substantive contents of those constitutions — i.e. individual rights — to the whole of the population and to protect those contents from being changed frivolously. While one should not be too dogmatic about this parallelism between municipal constitutions and international law constitutionalization — otherwise, the peculiarities of international law would be left out of account —, in principle, if international law is to protect those rights, it will have to show the same, or similar, characteristics.

This needs some detailing. In municipal legal systems, it is customary to distinguish between informal and formal rules of constitutional law i.e. between those rules that are fundamental to a given State, without necessarily being part of its formal constitution, and that

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<sup>34</sup> Cf. text at *supra* note 13.

<sup>35</sup> In the text at *supra* note 23.

constitution, not all of the rules of which are necessarily of fundamental importance.<sup>36</sup> Under this distinction, rules may be considered, as a matter of academic presentation and possibly without legal consequences, as constitutional, in a certain sense and irrespective of any formal criteria, exclusively for their fundamentality. Typically, all of these — formal and informal — municipal constitutional rules have that in common that they are the law of the *land*, i.e. they apply throughout the territory of the entity constituted by them, while only the formal rules are the *supreme* law of the land i.e. take precedence, again typically,<sup>37</sup> over all the other law, in particular later statute law, of the entity; only they are generally considered as entrenched.

„Entrenchment“ is a felicitous term to describe one aspect of what generally is dealt with in civil law systems under the heading of „(derogatory) hierarchy of norms“: it makes palpable that what matters in this context is not the superiority of a rule as such, giving it primacy over certain other rules, but the relative protection of one rule (the entrenched rule) against being abrogated by a certain type of other (inferior) rules (relational entrenchment). But the term entrenchment is also used in a non-relational context. Here, it simply means that it is procedurally difficult, or even impossible, to amend, or to abolish, the rule thus entrenched (procedural entrenchment). In this sense, of course, statute law too is entrenched. Both types of entrenchment are important for the present discussion.

The entrenchment of constitutional provisions implies their judicial protection against encroachments by the legislature. The American system provided for such a protection of the constitution, and with it of the human rights amendments, from early on.<sup>38</sup> Its example was followed by many of the later constitutions which provide judicial protection for human rights also against such encroachments, and, quite recently, also by the French system which had relied, till 1971,<sup>39</sup> on the *volonté générale* as expressed by the National Assembly, and, in an idiosyncratic way, by the English system which had relied, till 1998,<sup>40</sup> mainly on its political culture. This entrenchment of human rights provisions, policed by the courts, has proved rather successful in keeping encroachments by politics-as-usual at bay.<sup>41</sup>

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<sup>36</sup> Cf. e.g. EKKEHARD STEIN, STAATSRECHT (16th ed. 1998) at 11-2.

<sup>37</sup> There used to be exceptions; flexible constitutions like the French *Charte* of 1814 and the Italian constitution of 1848 could be amended in the regular legislative procedure. On the latter cf. e.g. G. Liet-Veaux, *La „fraude à la constitution“*, REVUE DU DROIT PUBLIC 116 (1943) at 118. Also the German constitutions agreed upon between the prince and the people (*Konstitutionalismus*), while not open to such amendment, were not entrenched against later laws; cf. e.g. Rainer Wahl, *Der Vorrang der Verfassung*, 20 DER STAAT 485 (1981) at 491-3.

<sup>38</sup> Cf. U.S. Supreme Court, *Marbury v. Madison*, 1 Cranch 137 (U.S. 1803).

<sup>39</sup> Conseil constitutionnel, *Décision* no 71-44 of Jul 16, 1971.

<sup>40</sup> Human Rights Act 1998.

<sup>41</sup> Cf. most recently House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department*

Other conceptual approaches to constitutionalization,<sup>42</sup> highlighting different aspects which, however, are present as a matter of course also in municipal constitutions, should also be taken into account when considering international law constitutionalization: on the structural level, a certain systemization of the law, and, on the procedural level, individually available judicial protection of those rights.<sup>43</sup> Indeed, in well developed municipal legal systems it is possible to see the courts at the center of the system as it is their function alone to hand down binding decisions i.e. to transform indeterminability of the law into determinability.<sup>44</sup>

These preliminary considerations allow us to distinguish between different modes of general international law constitutionalization. That constitutionalization as understood in the framework of the normative approach here chosen can be perceived in three modes: internationalization, generalization and entrenchment of rules protecting individual rights, especially human rights rules. In addition, but somehow at odds with the structure offered by those three modes, the systemization of general international law, and the individual availability of judicial protection, must be seen as conducive to international law constitutionalization.

The first mode of constitutionalization — internationalization — simply implies that fundamental rules, i.e. rules constitutional because of their fundamental importance for the international legal system, are part of international law, or become part of it, by whatever means.<sup>45</sup> In particular, those rules may well be laid down in treaties. Even if they partake, in that case, of international law's traditional polynormativity<sup>46</sup> i.e. the fact that the contents of the latter are not the same for every State and therefore not uniform, and by that fact appear to fall short of even informal municipal constitutional rules, in view of their very fundamentality they should be considered as constitutional; they enrich the body of

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*(Respondent), X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, judgment of Dec 16, 2004, [2004] UKHL 56.

<sup>42</sup> Cf. text at *supra* note 25.

<sup>43</sup> This aspect should be kept separate from the question of entrenchment which does not require such individual availability.

<sup>44</sup> NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* (1993) at 320. And cf. Andreas Fischer-Lescano, *Die Emergenz der Globalverfassung*, 63 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZAÖRV)* (HEIDELBERG J INT'L LAW [HJIL]) 717 (2003) at 737-8.

<sup>45</sup> Wahl, *supra* note 25, at 201 stresses that the present development from a State-centred international law to an international law recognizing superior obligations is a far-reaching one and requires many intermediate stages not all of which are leading already to a constitutionalization of international law.

<sup>46</sup> Cf. Weil, *supra* note 8, at 219: „Le système international comporte une forte dose de polynormativité“.

international law by rules traditionally found in municipal constitutions. Such fundamental rules, it is submitted, are those dealing with the life of the international community, the relationship of that community to its members, and its (as well as its members') relationship to the individual. In view of the normative approach here chosen, it is the latter group of those rules which is of interest here; they are in the foreground when „sliding back into the barbarity of the past“ must be prevented.<sup>47</sup>

Both the second and the third modes of international law constitutionalization — generalization and entrenchment, respectively — correspond to typical traits of municipal constitutions. The second mode implies that those fundamental rules internationalized under the first mode of constitutionalization apply throughout the international legal system i.e. that they are not subject to the traditional polynormativity of international law; this constitutionalization mode, it appears, is only necessary in the case of an internationalization by treaty. The third mode would imply that some general international law rules — most probably rules of a fundamental character — become entrenched. Both would appear to challenge „structural characteristics“ of present day international law, the first one its „polynormativity“ and the second one exactly its lack of a hierarchy of norms.<sup>48</sup>

General international law will only be able to safeguard the achievements of the constitutional State system, in particular the human rights standards there developed, if it contains such standards itself, if those standards are applicable throughout the international legal system, and, arguably, if they are entrenched procedurally or relationally. To make any talk of international law constitutionalization meaningful under structural aspects, there should therefore be — beyond the fact that international law knows of fundamental rules — some response to one or both of the above challenges. General international law will be better able to safeguard the said achievements if it is systemized and somehow offers individual judicial protection. This completes the second step of the enquiry.

3. First Excursus: The Dynamism of the International Legal Order. First Excursus: The Dynamism of the International Legal Order. First Excursus: The Dynamism of the International Legal Order<sup>49</sup>

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<sup>47</sup> And cf. Frowein (2000), *supra* note 8, at 435-8, 447 *sub* 4.

<sup>48</sup> Cf. Weil, *supra* note 8, at 224: „Dès lors que la source ultime des toutes les normes internationales se trouve dans la volonté des Etats et qu'aucune volonté étatique ne peut prédominer sur les autres, la hiérarchie des normes est tout simplement inconcevable“.

<sup>49</sup> This is an excursus only in this sense that the following considerations do not fit well into the substantive discussion of international law constitutionalization as an answer to the erosion of municipal constitutions. Of course, the question of the dynamism of the international legal order is very much a question of that order's constitutionalization — indeed, it must be subsumed under the questions of political experience and wisdom identified above, text at *supra* note 23, as one of

Before proceeding to the third step of the enquiry i.e. to describe the relevant legal facts found on the ground it appears expedient to point out an important aspect implied in the requirement that general international law respond to the challenges to its structural characteristics. This requirement implies a certain degree of dynamism in general international law, i.e. some possibility of the international community intentionally to change the law. A relevant distinction operated in municipal constitutional law, necessary exactly because of the latter's dynamism, is the one between substantive and adjective rules. The former, e.g. human rights provisions, are a common, even archetypical,<sup>50</sup> and normatively welcome, but not a theoretically necessary part of a municipal constitution. In contrast, the latter, i.e. rules defining the powers of an entity, in particular the power to legislate, the institutions exercising those powers, in particular the legislature,<sup>51</sup> and their interactions are necessarily constitutional in character. In other words, this distinction is between rules concerning the contents of State actions including, importantly, prohibitions of certain State actions, in particular prohibitions of human rights violations, and rules determining the mode the State institutions operate, and their powers are exercised, prominently among them rules concerning law-making. What we are looking for, therefore, are some — necessarily constitutional — rules about intentional general international law-making.

It is a major structural problem of the discussion of the constitutionalization of international law that there is no agreement on the latter's *Grundnorm*. Of course, Kelsen has formulated that *Grundnorm* in this sense that the States' custom makes law,<sup>52</sup> or that „states ought to behave as they have customarily behaved“.<sup>53</sup> Thereby, he has made customary law — including important principles like *pacta sunt servanda* — the *Grundnorm* of international law. This *Grundnorm*, while it appears to cover the traditional view of the purview of international law — treaty law, customary law, consensus law<sup>54</sup> and case-law —,<sup>55</sup> does not refer to so

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the building-stones of modern constitutional architecture — and it is even highly relevant to the substantive discussion here undertaken, as the fourth step *infra* (II 6) clearly will show.

<sup>50</sup> Cf. e.g. Habermas, *supra* note 11, at 210 *et seq.*

<sup>51</sup> HANS KELSEN, *REINE RECHTSLEHRE* (2nd ed. 1960) at 228; and cf. THEODOR SCHILLING, *RANG UND GELTUNG VON NORMEN IN GESTUFTEN RECHTSORDNUNGEN* (1994) at 164 with further references. — As will become apparent, this article is based loosely on Kelsen's Pure Theory of Law in which Kelsen set out to elucidate the structure of law, to „unveil its object“ (HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961) at xvi). According to Catherine Richmond, *Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law*, 16 *LAW AND PHILOSOPHY* 377 (1997) at 420, „Kelsen hoped always to ‚unveil‘ reality“.

<sup>52</sup> KELSEN, *supra* note 51, at 339. On the *Grundnorm* of customary legal systems in general cf. *ibid.* at 231-2.

<sup>53</sup> HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* (1952) 418.

<sup>54</sup> On this concept, cf. text at and after *infra* note 72.



clear and agreed-upon a point for cutting off the legal discussion on the validity of international law as does, for the validity of municipal law, the *Grundnorm* in a constitution State i.e. that the constitution should be obeyed. Therefore, while the latter *Grundnorm* generally succeeds in cutting off any further discussion on the validity of the constitution or on extra-constitutional methods of law-making,<sup>56</sup> the former does not. Rather, while the outcome of law-generating mechanisms within the Kelsenian *Grundnorm* is generally accepted as law, all kinds of additional mechanisms outside that *Grundnorm* are also discussed in international law.<sup>57</sup>

Among the law-generating mechanisms, of special interest in the present context are rules about law-making that are comparable to rules about municipal legislation in that they allow (i) the making of posited law, as opposed to observed (customary) law,<sup>58</sup> that (ii) is applicable throughout the legal system, as opposed to only in some parts of it.<sup>59</sup> Such law may be made

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<sup>55</sup> In a civil law system, it is not self-evident that case-law is one of the mechanisms of law-making within the *Grundnorm*; rather, it is arguable that a judicial decision which has no basis in the applicable law and finally in the *Grundnorm* automatically constitutes a revolution. But such an argument is simplistic. Every legal system that provides for final judicial decisions by that very fact contains an "error calculus" i.e. a positive provision making it possible in law to consider as law decisions which could otherwise not be so considered because they are incompatible with other substantive or adjective provisions. On this calculus cf. ADOLF MERKL, *DIE LEHRE VON DER RECHTSKRAFT, ENTWICKELT AUS DEM RECHTSBEGRIFF* (1923) at 293 *et seq.*; SCHILLING, *supra* n. 51, at 583-4. And cf., for a common law view, JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1980) at 195: „Primary organs may not only act on previously existing laws, they may sometimes create new laws and apply them.“

<sup>56</sup> But see the discussion on the relationship between the constitutions of Member States and of the European Union, e.g. Theodor Schilling, *The European Court of Justice's Revolution: Its Effects and the Conditions for its Consummation. What Europe can learn from Fiji*, ELREV 445 (2002); Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 ELJ 262 (2005).

<sup>57</sup> That has been expressed in this way that in the case of international law no *a priori* can convince *a priori*: Fischer-Lescano, *supra* note 44 at 724, with reference to ULRICH FASTENRATH, *LÜCKEN IM VÖLKERRECHT. ZU RECHTSCHARAKTER, QUELLEN, SYSTEMZUSAMMENHANG, METHODENLEHRE UND FUNKTIONEN DES VÖLKERRECHTS* (1990) at 32 *et seq.*

<sup>58</sup> By posited law I understand law made in a well-regulated procedure by a competent authority, e.g. a constitution laid down by a constitutional convention, or statute law enacted by the legislature, or statutory instruments or presidential directives issued by an administrative authority. — It is interesting to see that there is in English i.e. the language of the common law no self-evident term generally to describe that kind of law, in contrast to languages of the civil law in which the terms „*gesetztes Recht*“ and „*droit posé*“ need no explanation. A reason might be that the common law is preoccupied with the rôle of judges in the making of the law whereas for the civil law, the rôle of the different legislatures is in the foreground. Stressing the rôle of judges is apt, of course, to blur the differences between the sources of law applied by them. In any case, it appears plausible that a full account of the law must take in view both aspects.

<sup>59</sup> Interestingly, Francisco Orrego-Vicuña, *Law Making in a Global Society: Does Consent still matter?* in INTERNATIONALE GEMEINSCHAFT UND MENSCHENRECHTE. Festschrift für Georg Ress

either within the Kelsenian *Grundnorm* i.e. by the international community of States or, arguably, outside it, by international civil society.

a) State-Made Law a) State-Made Law a) State-Made Law

Of the three sources of law known to Article 38 (1) of the Statute of the International Court of Justice (ICJ), reflecting customary law, treaty law is not applicable throughout the legal system, and traditional customary law is not posited law. General principles of law are best understood as a reference, originally based on customary law, to legal systems more fully developed than international law: also such a reference cannot be assimilated to positing law. But there is, in modern international law, a category of general rules that appear to fulfil the criteria mentioned above. While their classification is controversial, their existence appears to be undisputed in theory and practice. I am speaking, of course, of the so-called *coutume sauvage*,<sup>60</sup> consisting of rules which are universally affirmed, but not reliably applied, by the States. They are classified sometimes as general principles of law<sup>61</sup> and overwhelmingly as customary law. This classification, however, is unsatisfactory.<sup>62</sup>

There are two possible sources of positive law: customary law and posited law. The respective reasons to consider them as law are very different. Posited law is considered as law because it is issued by a legislator accepted as such. Customary international law is considered as law because „[t]he basic norm of international law ... establishes custom — the reciprocal behaviour of states — as a law-creating material fact“.<sup>63</sup> Custom as such fact is „characterized in that people belonging to a community of law under certain equal circumstances behave in a certain equal way, that this behavior takes place for a sufficient period of time, and that for those reasons in those individuals who constitute the custom by

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191 (Jürgen Bröhmer *et al.*, eds, 2005), discusses under the title quoted exclusively treaties and secondary law of international organizations.

<sup>60</sup> René-Jean Dupuy, *Coutume sage et coutume sauvage*, in LA COMMUNAUTÉ INTERNATIONALE. MÉLANGES OFFERTS À CHARLES ROUSSEAU 75 (1974).

<sup>61</sup> Cf. e.g. M. Cherif Bassiouni, *A Functional Approach to General Principles of International Law*, 11 MICHIGAN J INT'L L 768 (1990) at 768-9: „when a custom is not evidenced by sufficient or consistent practice, or when States express *opinio juris* without any supportive practice, these manifestations ... may possibly be considered to be expressions of a given principle“.

<sup>62</sup> Weil, *supra* note 8, at 179: „Entre la coutume coutumière d'hier et la coutume new look d'aujourd'hui il n'est plus guère de commun que le nom“; Robert Y. Jennings, *The Identification of International Law*, in INTERNATIONAL LAW: TEACHING AND PRACTICE Bin Cheng (ed.), 3 (1982) at 5: „most of what we perversely persist in calling customary international law is not only not customary law; it does not even faintly resemble a customary law“. — The following draws heavily on Theodor Schilling, *Völkerkonsensrecht*, in FESTSCHRIFT RESS, *supra* note 59, 235.

<sup>63</sup> HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (Bonnie Litschewski Paulson & Stanley L. Paulson, transl.) 108 (1992).

their actions arises the collective will that one ought to behave in that way<sup>64</sup>. Also in international law, traditionally the perception of a custom as law requires an actual State practice.<sup>65</sup>

There appears to be a deep philosophical reason for such a restricted perception: under the condition of legal equality of States (Article 2 (1) of the UN Charter), the fact that a certain State behavior could develop into a general practice of States is an *ex post facto* proof for the claim that that behavior corresponds to the „Golden Rule“,<sup>66</sup> or reciprocity,<sup>67</sup> in this sense that everyone's maxim should be: „Act so that you can will that your maxim ought to become a universal law (no matter what the end [*Zweck*] may be)“;<sup>68</sup> otherwise, the behavior in question could not have developed into such a general practice.<sup>69</sup> It is for this reason that in the traditional treatment of customary law practice is seen as preponderant, and *opinio juris* as secondary; once there is a practice in an international field which is considered as open to legal regulation — there is a remainder of *opinio juris* in this „considered“ —<sup>70</sup>, it is not to be expected that this practice will not be considered as binding. Therefore, only actual practice i.e. a practice consisting of observable behavior of State organs can give rise to customary

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<sup>64</sup> KELSEN, *supra* note 51, at 231 (my translation).

<sup>65</sup> Cf. e.g. ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ REPORTS 94 (1986), para. 183, with further references. And cf. Eyal Benvenisti, *Customary International Law as a Judicial Tool for promoting Efficiency*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION 85 (Eyal Benvenisti & Moshe Hirsch, Eds, 2004) at note 12: „[G]eneral and consistent state practice — the necessary component for constituting customary international law — will develop if, and only if, such practice is efficient from the perspectives of most of the governments taking part in the process“.

<sup>66</sup> Cf. JOHN RAWLS, A THEORY OF JUSTICE (1971) at 251 *et seq.*

<sup>67</sup> Cf. JOHN RAWLS, THE LAW OF PEOPLES WITH „THE IDEA OF PUBLIC REASON REVISITED“ (1999), in particular the definition at 14.

<sup>68</sup> Immanuel Kant, *To Perpetual Peace. A Philosophical Sketch* (1795), in *IDEM*, PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY AND MORALS (Ted Humphrey, transl.) 107 (1983) at 132 = Ak:VIII:343, 377.

<sup>69</sup> This narrow concept of customary law should be able to withstand the attacks of Martti Koskenniemi, *The Normative Force of Habit*, Fin YB Int'l L 77 (1990) at 91 *et seq.*: not everything one State does becomes customary law but only something the States do for some time.

<sup>70</sup> ICJ, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)*, ICJ REPORTS 3 (1969) at 44, para. 77, states: „There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by a sense of legal duty.“ And cf. Maurice H. Mendelson, *The Formation of Customary International Law*, 272 RdC 155 (1999) at 272-3.

international law in the narrow sense.<sup>71</sup> Such a practice may be confirmed, but must not be replaced, by verbal acts of municipal or international organs. Rules of so-called customary law which cannot be shown without relying on verbal acts i.e. rules of *coutume sauvage* therefore should be attributed to a different source of law.

In view of the dichotomy of legal sources, rules based purely or predominantly on verbal acts of international or municipal organs which, for that reason, cannot be customary international law in the narrow sense of that concept must therefore be posited law.<sup>72</sup> One source of posited international law, it is submitted, and the one fitting best the emergence of rules of *coutume sauvage*, is consensus law.<sup>73</sup> An indication for the existence of such a type of law is Article 53 of the Vienna Convention on the Law of Treaties (VTC) according to which „a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole ...“ which expressly recognizes the international community as law-giver.<sup>74</sup> While Article 53 is not concerned with the recognition of a norm as such but only of its property as *jus cogens*, the clause „accepted and recognized“, which may be understood as expression of the consensus principle, can be applied to the coming into being of consensus law; indeed, it exactly describes the — observable — requirements of the formation of *coutume sauvage* rules by verbal State practice. State consensus plays an important rôle in international law also outside Article 53. For instance, the European Court of Human Rights (ECtHR) has considered an emerging European and international consensus as sufficient reason to change its interpretation of the ECHR, thereby giving that consensus the effect of changing the preëxisting (treaty) law.<sup>75</sup> Similarly, the ICJ, in the context of the question whether treaties may lead to the emergence of customary law, has put „considerable weight to what it termed ‚the general consensus ...“.<sup>76</sup> There is therefore, it is submitted, a convincing case for the claim that international

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<sup>71</sup> Similarly C.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (1983) at 106 *et seq.*; *contra*: the prevailing doctrine; cf. e.g. Report of the ILC to the General Assembly, YILC 1950, Vol. II, p. 368 *et seq.*

<sup>72</sup> Cf. Weil, *supra* note 8, at 178: „la coutume perd son caractère traditionnelle de droit «spontané» pour se rapprocher ... du droit «posé»“.

<sup>73</sup> The term is also used, with a slightly different meaning, by Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AJIL 782 (1966), and by Anthony D'Amato, *On Consensus*, 8 CANADIAN YBIL 104 (1970). Reservations against the term (but not against the subject) by Mendelson, *supra* note 70, at 387.

<sup>74</sup> Cf. Pierre-Marie Dupuy, *L'unité de l'ordre juridique internationale, Cours général de droit international public*, 297 RDC 9 (2002) at 278.

<sup>75</sup> ECtHR, *Christine Goodwin v. United Kingdom*, appl. no. 28957/95, judgment of Jul 11, 2002, paras 84-5. Cf. also HRC, *Judge v. Canada*, comm. no. 829/1998, views of Oct 20, 2003, para. 10.3.

law recognizes State consensus as a means to posit law for the international community as a whole and thus as a source of law in which verbal acts may lead to the formation of law.<sup>77</sup>

This raises the question as to the circumstances under which such a State consensus may be assumed. The answer to this question has been precast by the discussion of the concept „international community of States as a whole“ in Article 53 of the VTC. According to the comments of the Drafting Committee,<sup>78</sup> this concept permits only for the disagreement of a very small number of States, and it requires that all important groups of the international community share the majority view. Within the framework of Article 53, modern law still requires a majority of States which at the same time is representative for all important groups of the international community.<sup>79</sup> The same must apply for international consensus law.<sup>80</sup>

If there is a State consensus on a specific rule of international law, this consensus must find expression;<sup>81</sup> otherwise, it could not be verified. While it does not appear that the details of the making of consensus law have already emerged as customary law, it is submitted that generally it is not necessary that all the States forming the majority of States required for the assumption of a consensus give expression to their relevant persuasion. Rather, it is submitted that at least *prima facie* a sufficient expression of the consensus requires only that one or more States give expression to their persuasion that a given purported legal rule is, or

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<sup>76</sup> Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RDC 1 (1978 I), at 20, referring to ICJ, *Fisheries Jurisdiction Case (Merits) (United Kingdom v. Iceland)*, ICJ REPORTS 3 (1974) at 23. Koskenniemi, *supra* note 69, at 110, notes however that this „did not imply an unequivocal view in favour of the custom-forming effect of ‚pure‘ consensus“.

<sup>77</sup> This becomes particularly clear when Mendelson, *supra* note 70, at 290 and *passim*, considers the acceptance by a State of a rule of international customary law as sufficient for considering that State as being bound by that rule, and when according to Frederic Lee Kirgis, Jr., *Custom on a Sliding Scale*, 81 AJIL 146 (1987) at 149, a clearly demonstrated *opinio juris* suffices for the emergence of customary law even in the absence of any State practice.

<sup>78</sup> Reproduced and discussed by Jerzi Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties. A Critical Appraisal*, Supplementum 3 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT (1974) at 99-100, with further references.

<sup>79</sup> Dupuy, *supra* note 74, at 178. More narrowly, according to the definition in note 1 to Article IX of the WTO Agreement, there is consensus „if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision“.

<sup>80</sup> The requirements for the emergence of traditional customary law are similar: here, an „extensive practice“ is required, which also has to be „representative“; cf. the discussion by Mendelson, *supra* note 70, at 218 *et seq.*, who, however, *ibid.*, at 387, more stringently accepts resolutions of the United Nations General Assembly as customary law only if there is „clear commitment and unanimity – or perhaps something very close to it“.

<sup>81</sup> Cf. Bassiouni, *supra* note 61, at 768-9. Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, in IV 2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153 (1995) at 219, speaks in this context of a „self-contained exercise in rhetoric“.

should be, universal law, and not only politically desirable. By the same token, an objection expressed by one or more States must be enough *prima facie* to refute the assumption of a consensus. In the case of a dispute over the existence of a consensus, therefore, it is submitted, its verification exceptionally requires all the States necessary for the assumption of that consensus to express their corresponding persuasion.

The required persuasion may be expressed by the States directly or indirectly. An example for a direct expression of such a persuasion is the statement of U.S. President G.W. Bush, made in connection with the „Operation Iraqi Freedom” in June 2003: „I call on all governments to join with the United States and the community of law abiding nations in prohibiting, investigating and prosecuting all acts of torture”.<sup>82</sup> A more general example are widespread protests against certain State behavior as expression of the protesting States' persuasion that the protested behavior is forbidden by international law. An indirect expression of such a persuasion may be given e.g. by a Security Council or UN General Assembly resolution<sup>83</sup> or even by a statement of the UN Secretary General. One examples of such an indirect expression is the Security Council resolution 1368 (2001)<sup>84</sup> which, as no State expressly objected against it, may be understood as the expression of a general consensus of the international community, having emerged after the attacks on the World Trade Center of Sept 11, 2001, and permitting self-defense against a State on the territory of which terrorists live even if that State neither exploits nor supports those terrorists. Another example is the Secretary General's report which – „*traduisant le sentiment majoritaire prévalant au sein de l'Organisation*” –<sup>85</sup> referred to the international humanitarian law principally of the Geneva Conventions as a source of rules of customary law.<sup>86</sup> On the other hand, a treaty as such (with the possible exception of a truly universal treaty), or even a succession of similar

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<sup>82</sup> Quoted from David Remnick, *Hearts and Minds*, THE NEW YORKER, May 17<sup>th</sup>, 2004, p. 27. Even if there is an arguable claim that „our [the U.S.] government decided to change this country from a nation that officially does not torture to one, officially, that does“ (thus Mark Danner, *What Are You Going to Do with That?*, LII/11 THE NEW YORK REVIEW OF BOOKS, 52 (Jun 23, 2005) at 55), this does not diminish the value of the presidential statement for the emergence of consensus law. Cf. also the verbal acts cited in *infra* note 149.

<sup>83</sup> An in-depth discussion of the possible legal effects of such resolutions is in Mendelson, *supra* note 70, at 347 *et seq.*; Final Report of the International Law Association's Committee on Formation of Customary (General) International Law (London Conference (2000)), *Statement of Principles Applicable to the Formation of General Customary International Law*, available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf>, visited Jan 14, 2005, at 55-65.

<sup>84</sup> of Sept 12, 2001.

<sup>85</sup> Dupuy, *supra* note 74, at 467-8.

<sup>86</sup> Report on para. 2 of Security Council res. 808 (1993), unanimously approved by Security Council res. 827 (1993). The statement contained in this report in turn was approved by ICJ, *Legality of the Use by A State of Nuclear Weapons in Armed Conflict*, ICJ REP. 1996 (I), at 258, para. 81.

treaty provisions, generally<sup>87</sup> cannot be understood as the expression of such a persuasion. Rather, such a treaty is a legislative act for a „micro-legal system“ so that its signature and ratification does not indicate the persuasion of its States parties as to the contents of general international law.<sup>88</sup>

The facts found on the ground therefore allow the conclusion that the international community has the power intentionally to make law, or to change the law, by positing consensus law. While this power is an essential part of international law constitutionalization as here discussed, important in the present context is less the classification of the rules thus made as consensus law<sup>89</sup> but rather their general agreed<sup>90</sup> nature as posited law which comes into being without any practice being required.

b) Law Made by the Civil Societyb) Law Made by the Civil Societyb) Law Made by the Civil Society

Outside the Kelsenian *Grundnorm*, different claims have been made as to the emergence of international law. One example is the claim that in want of central institutions, global law emerges spontaneously, created by international civil society itself, i.e. the general public of the world, or some parts of it — e.g. international pressure groups (NGOs) or the general public of some region of the world — in distance or even in opposition to political institutions.<sup>91</sup> Thus, human rights including those which have not (yet) been made positive law by mechanisms within the *Grundnorm* are claimed to be able to be created as valid law by the civil society continuously invoking certain legal myths.<sup>92</sup> Another example is the claim that a much larger and more open law-making process, which is transmitted through multiple electronic and print channels and operates directly on the politically relevant strata

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<sup>87</sup> International Law Association Committee, *supra* note 83 at 50-4.

<sup>88</sup> *Ibid.* at 47-8.

<sup>89</sup> Even so, the question of classification is in first line a systemic question. Wrong systematics prevent asking the correct questions and thereby giving correct answers. In particular, the question as to the coming into being of rules of *coutume sauvage* cannot be answered correctly if those rules are not attributed to the correct source.

<sup>90</sup> Cf. the quotations at *supra* note 62.

<sup>91</sup> Gunther Teubner, *Globale Bukowina. Zur Emergenz eines transnationalen Rechtspluralismus*, 15 RECHTSHISTORISCHES JOURNAL 255 (1996).

<sup>92</sup> Gunther Teubner, *Privatregimes: Neo-spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft* in ZUR AUTONOMIE DES INDIVIDUUMS. FESTSCHRIFT FÜR SPIROS SIMITIS 437 (Simon & Weiss, eds., 2000) at 444. Something similar to such a creation of international law by invocation has been accepted by ICJ, Case concerning *The Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, judgment of Feb 14, 2002, diss. op. van den Wyngaert, paras 27-8: „the opinion of civil society ... cannot be completely discounted in the formation of customary international law today“.

of the great democratic states and the governments dependent on them, is also continuously shaping expectations and demands of what is right and wrong and, more urgently, which wrongs require some legal remedy.<sup>93</sup>

Both examples<sup>94</sup> may be seen as the purported creation of living law directly by the civil society.

International civil society undisputedly plays an increasing rôle in international law-making.<sup>95</sup> Important examples of treaties which in all likelihood would not have seen the light of day without the vigorous support by the civil society are the Ottawa Landmine Treaty<sup>96</sup> and the Rome Statute of the International Criminal Court.<sup>97</sup> In addition, a compelling case can be made that some legal rules ultimately applied by the courts have originated in perceptions held by the civil society. A prime example here is the perception that forced disappearances form a distinct human rights violation.<sup>98</sup> Of course, there are other rules perceived by civil society which have not (yet) been applied by the courts. After the judicial application of such a perception, we clearly are dealing with a legal rule, case-law being one of the mechanisms of law-making within the Kelsenian *Grundnorm*. But the interesting question is to the status of that perception *before* any court decision i.e. the question whether it had been transformed, before its application by the court, by some State actions into (consensus) law,<sup>99</sup> — in that

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<sup>93</sup> W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING (R. Wolfrum & V. Röben (eds.) Max -Planck-Institut für ausländisches öffentliches Recht und Völkerrecht) 15 (2005), at 23-4, who calls this law, „for convenience, ‚media-made law‘“. Cf. also Fischer-Lescano, *supra* note 44, at 750 *et seq.*

<sup>94</sup> An overview over very different types of such law is given by Klaus Günther, *Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory*, available at <http://www.law.nyu.edu/clppt/program2003/readings/gunther.pdf>., visited Mar 2, 2005, pp. 3-8, who speaks of „Juristenrecht“.

<sup>95</sup> Cf. Dupuy, *supra* note 74, at 418 *et seq.*

<sup>96</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti Personnel Mines and on Their Destruction, Sep. 18/ Dec. 3, 1997, 36 ILM 1509 (1997).

<sup>97</sup> A/CONF183/9 of Jul 17, 1998, corrected by procès-verbaux of Nov 10, 1998, Jul 12, 1999, Nov 30, 1999, 8 May 2000, Jan 17, 2001 and Jan 16, 2002.

<sup>98</sup> Cf. e.g. Andreas Fischer-Lescano, *Globalverfassung: Los Desaparecidos und das Paradox der Menschenrechte*, 23 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 217 (2002) 228-35.

<sup>99</sup> In *Forti v. Suarez-Mason*, 694 F.Supp. 707, N.D.Cal., 1988, Jul 06, 1988, at 710, the District Court states: „The legal scholars whose declarations have been submitted in connection with this Motion are in agreement that there is universal consensus as to the two essential elements of a claim for ‚disappearance‘. In Professor Franck's words: The international community has also reached a consensus on the definition of a ‚disappearance‘. It has two essential elements: (a) abduction by a state official or by persons



case, we are still moving within the traditional framework of State-made international law — or whether the perception was applied by the courts, without more, as law, and thus treated, in spite of the absence of any relevant State action, as *lex lata* —<sup>100</sup> in that case, we are looking at a phenomenon which is, in international law, completely new.<sup>101</sup> By the same token, in the absence of any court decision about a rule perceived by the civil society, it must remain doubtful whether that perception may be described as law and, if so, whether such law is part of the same legal system as traditional State-made law, or whether this is a case of pluralism of legal systems. If it is part of the same legal system as State-made law it may yet be applied by a court acting within that system which would be a case of what I just have called a „completely new phenomenon“. If it is not,<sup>102</sup> it remains by necessity outside of any consideration of State-made law.<sup>103</sup>

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acting under state approval or authority; and (b) refusal by the state to acknowledge the abduction and detention.

[quotations omitted] Plaintiffs cite numerous international legal authorities which support the assertion that ‚disappearance‘ is a universally recognized wrong under the law of nations. For example, United Nations General Assembly Resolution 33/173 recognizes ‚disappearance‘ as violative of many of the rights recognized in the Universal Declaration of Human Rights, G.A. Res. 217 A (III), adopted by the United Nations General Assembly, Dec. 10, 1948, U.N. Doc. A/810 (1948)“. This appears to indicate that, in the court’s opinion, a transformation in consensus law had taken place.

<sup>100</sup> Van den Wyngaert, *supra* note 92, para. 27-8, comes close to such a view: „Advocacy organizations ... have taken clear positions on the subject of international accountability. This may be seen as the opinion of the *civil society*, an opinion that cannot be completely discounted in the formation of customary international law today ... The Court fails to acknowledge this development, and does not discuss the relevant sources.“ (the judge’s italics). And cf. Peter Hulst, *Three Sources – No River. A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and ‚General Principles of Law‘*, 54 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT 219 (1999) at 248: „every actor on the international law scene is relevant“. Similarly, according to Dupuy, *supra* note 74, at 422, international law must take into account the *opinio juris* of the international civil society.

<sup>101</sup> It is not new as such. Rather, it resembles the so-called *Juristenrecht* developed in German universities during the nineteenth century. But it is important to note that that law was a law by academic lawyers for academic lawyers and not necessarily applied by any court. In the end, of course, it was ratified by the legislature and became the Civil Code (*Bürgerliches Gesetzbuch*).

<sup>102</sup> As appears to be implied by Reisman, *supra* note 93, at 22: „The political decision maker, whether operating in a democratic system which requires responsiveness to constituencies, or in an authoritarian system which reduces but does not eliminate the need for such responsiveness, can no longer ignore this dynamic form of law-making. This is the imperative version of what is presented as right that appears in editorials of the leading newspapers, is repeated relentlessly in the visual and auidial media and that comes to be reflected in popular expectations. Those expectations, in turn, are recorded in incessant opinion polls which are then checked regularly by nervous decision-makers and their ‚spin-meisters.‘ Since I view the lawyer’s task as seeking to understand in order to influence decision, I cannot exclude this corollary process from a meaningful conception of international law.“

<sup>103</sup> Cf. Theodor Schilling, *On the Value of a Pluralistic Concept of Legal Orders for the Understanding of the Relation between the Legal Orders of the European Union and its Member States*, 83 ARCHIVES FOR PHILOSOPHY OF LAW AND SOCIAL PHILOSOPHY (ARSP) 568 (1997) at 573-

The „completely new phenomenon“ can be integrated in the present discussion by taking the point of view of the adjudicator or other actor under international law. From that point of view, it is possible to deal with the lack of a consented breaking-off point for the discussion of the contents of international law;<sup>104</sup> that point is here replaced by the breaking-off point applied by the respective adjudicator or other actor. Indeed, in deciding cases or giving legal advice, every actor necessarily must rely on some *Grundnorm* or rule of recognition; otherwise, she could not determine which law to apply. Therefore, if an actor decides, or gives advice, on the basis of a rule only perceived by the civil society,<sup>105</sup> she must discuss her reasons to consider that rule as law, and thereby allow an observer to determine the *Grundnorm* she has applied.

However, because of the fragmentation of international law, reliance on adjudicators and other actors poses an additional problem. In contrast to both municipal legal systems and many international law subsystems, general international law is characterized by the absence of a centralized court (system). For many questions, international law does not provide for compulsory jurisdiction of any adjudicator, and only in rare cases, municipal adjudicators are competent to act.<sup>106</sup> International law is applied by a multitude of — municipal and international — actors and adjudicators which are not in a hierarchical relationship but act quite independently from one another. Basically, therefore, if seen from her proper perspective, each of those actors — more exactly: each of the respective systems, if any, to which those actors belong — is applying her own „international law“. Consequently, where one actor is prepared to act in the paradigm of the „completely new phenomenon“, another actor likely will decline to do so and treat the rule only perceived by the civil society as non-law. In practice, there is only one way to rein in the fragmentation thus caused i.e. an informal and voluntary dialogue between the different jurisdictions.<sup>107</sup> This dialogue is well under way among the actors and adjudicators, as is shown e.g. by the remarks of the U.S. on

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4 with further references; similarly, Fischer-Lescano & Teubner, *supra* note 28, at 1968: „Each conflict can only be settled within the context of its own entanglement“. The proposal of Günther, *supra* note 94, pp. 13-7, to take the internal view of a „universal code of legality“, while fascinating, disregards the fact that courts are acting within the positive legal system under which they have been set up or, put differently, under their specific terms of reference, which is (are) distinct, and different, from that code.

<sup>104</sup> Cf. e.g. Fischer-Lescano, *supra* note 44, at 737, who claims that the center of the legal system is the court organization and its periphery all other sectors of the system i.e. States, NGOs and other actors of civil society, referring to Stefan Oeter, *International Law and General Systems Theory*, 44 GYIL 72 (2001) at 73 *et seq.*

<sup>105</sup> As the District Court in *Forti v. Suarez-Mason* did not; cf. *supra* note 99.

<sup>106</sup> This is overlooked by Fischer-Lescano, *supra* note 98, 232-3, who considers not only the supranational bodies but also national courts, *ad hoc* tribunals und regional human rights courts as „global organs of judicature“.

<sup>107</sup> Cf. e.g. Fischer-Lescano, *supra* note 44, at 739.

the General Comment 24 of the UN Human Rights Committee (HRC),<sup>108</sup> and, among courts,<sup>109</sup> by a decision of the Italian Supreme Court<sup>110</sup> discussing extensively decisions of a whole range of other courts, even if rejecting in the end all of the latter's approaches. As is also shown by those examples, the inter-jurisdictional dialogue does not prevent or abolish the fragmentation of international law as such but may prevent an unreasoned fragmentation.<sup>111</sup>

In the present context, while, in the last analysis, the pitfalls of fragmentation cannot be avoided, it does not appear at the time of writing that any decision yet has been handed down (or, presumably, any advice been issued) that was not based, on the face of it, on the Kelsenian *Grundnorm* of international law. A good example is the case of *Forti v. Suarez-Mason*<sup>112</sup> where the District Court states:

The legal scholars whose declarations have been submitted in connection with this Motion are in agreement that there is universal consensus as to the two essential elements of a claim for ‚disappearance‘. ... Plaintiffs cite numerous international legal authorities which support the assertion that ‚disappearance‘ is a universally recognized wrong under the law of nations.

This clearly indicates that, in the court's opinion, at least at the time of its decision, a transformation of the perceptions of international civil society into State made consensus law already had taken place.<sup>113</sup> It is therefore allowed to conclude that at present, law made by the civil society is applied by actors and adjudicators only once they perceive it as having been adopted, as consensus law, by the international community of States. While this perception, on occasion, may be disputable, there is no evidence showing courts applying so-called law made by the civil society as such. Such law therefore is not, at present, a direct source of posited law.

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<sup>108</sup> Published in 16 HRLJ 422 (1995). A further example, picked at random, are Comité pour l'élimination de la discrimination raciale, Soixante-sixième session, 21 février - 11 mars 2005, examen des rapports présentés par les Etats parties conformément à l'article 9 de la convention, Observations finales du Comité pour l'Élimination de la Discrimination Raciale, CERD/C/LUX/CO/13, para. 16.

<sup>109</sup> Cf. *supra* note 18.

<sup>110</sup> Italian Supreme Court (*Corte di Cassazione*), *Ferrini v. Federal Republic of Germany* (Cass. Sez. Un. 5044/04), 87 RIVISTA DI DIRITTO INTERNAZIONALE 539 (2004), also available at <http://www.ordineavvocatifrosinone.it/home/sentenze/04-comun1.htm>, visited Apr 5, 2004.

<sup>111</sup> In this sense, Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AJIL 119 (2005) 127 notes that „[t]he [HRC] will probably face an uphill struggle in seeking to implement its views on the extraterritorial application of the ICCPR“.

<sup>112</sup> Quoted *supra* note 99.

<sup>113</sup> Whether the court was correct in so holding is a different question without relevance in the present context. On this question cf. e.g. Fischer-Lescano, *supra* note 98, at 242.

#### 4. The Third Step: Description of the Relevant Legal Facts<sup>24</sup>. The Third Step: Description of the Relevant Legal Facts

This article is about the ways in which international law constitutionalization may contribute to protecting municipal constitutional standards, in first line human rights standards, by elevating them to the international level. A description of the relevant legal facts found on the ground therefore must, first, look at the human rights protection provided for at the international level, second, discuss in how far this protection is generalized i.e. applied throughout the international legal system, and, third, consider in how far the protection achieved is entrenched against later encroachments.

a) First Mode Constitutionalization — Internationalization<sup>3a</sup>) First Mode Constitutionalization — Internationalization<sup>3a</sup>) First Mode Constitutionalization — Internationalization

International human rights provisions are found in a wide array of treaties. Among the earliest was, famously, the prohibition of the slave trade.<sup>114</sup> A more general approach to human rights on the international level is first found in the UN Charter. In its very general human rights provisions, i.e. para. 1 of the preamble and Article 1 (3) concerning the respect for human rights and fundamental freedoms, the purposes of the international community have found expression. Also, Articles 1 (1), 2 (3) and (4) and 39 *et seq.* concerning the maintenance of peace should be considered as the external side of the respect of human rights; indeed, the HRC has held that „every effort [States] make to avert the danger of war ... and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life“.<sup>115</sup>

These general provisions have been fleshed out by the Universal Declaration of Human Rights adopted in 1948 by the General Assembly.<sup>116</sup> This declaration became, in its turn, the source of inspiration for a plethora of human rights treaties. Of those treaties, the International Covenants on Civil and Political Rights<sup>117</sup> (ICCPR) and on Economic Social

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<sup>114</sup> First multi-lateral prohibition in Article LXVIII Schedule 15 of the Final Act of the Vienna Congress (1815) — Declaration of the Powers on the Abolition of the Slave Trade of Feb 8, 1815, reprinted in MARTENS, NOUVEAU RECUEIL GÉNÉRAL DES TRAITÉS ET AUTRES ACTES RELATIFS AUX RAPPORTS DE DROIT INTERNATIONAL, 2nd Series, Vol. II, p. 432.

<sup>115</sup> HRC, General Comment No. 06: *The right to life (Article 6)*:30/04/82.

<sup>116</sup> Quoted in *supra* note 99.

<sup>117</sup> of Dec 19, 1966, entry into force Mar 23, 1976, UNTS vol. 999 p. 171.

and Cultural Rights<sup>118</sup> (ICESCR) are in force on the universal level whereas the ECHR, the American Convention on Human Rights<sup>119</sup> and the African Convention on Human and Peoples' Rights<sup>120</sup> are in force on regional levels. In addition to these instruments which cover quite exhaustively the general human rights there are specific international human rights instruments, *inter alia* the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>121</sup> the Convention on the Elimination of All Forms of Discrimination against Women<sup>122</sup> and the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>123</sup> Without there being any need to go into details, the substantive provisions of all these instruments clearly are relevant to the normative purpose of the present enquiry. They are the result of a first mode constitutionalization. As treaty law, they are also subject to the polynormativity typical for that law.

The same applies to human rights provisions which can be found scattered in some other treaties. For instance, in the field of the judicial protection of foreigners, rights of action in private litigation and in litigation against the *forum* State may be implied in jurisdiction conventions, e.g. the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.<sup>124</sup> According to Article 2 (1) of this convention, „persons domiciled in a Contracting State shall ... be sued in the courts of that State“ which implicitly guarantees the right of the foreign plaintiff to sue in that State.<sup>125</sup> Those rights, of course, are again subject to polynormativity.

Human rights aspects may also be found within the WTO framework.<sup>126</sup> The freedom of commerce<sup>127</sup> has found expression in the broad principles of GATT, GATS and TRIPS i.e.

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<sup>118</sup> of Dec 19, 1966, entry into force Mar 1, 1976, UNTS vol. 993, p. 3.

<sup>119</sup> of Nov 22, 1969, entry into force Jul 18, 1978, UNTS vol. 1144, p. 143.

<sup>120</sup> of Jun 26, 1981, entry into force Oct 21, 1986, ILM 1982, 58.

<sup>121</sup> of Dec 10, 1984, entry into force Jun 26, 1987, GAOR 39th Sess., Resolutions, p. 197.

<sup>122</sup> of Dec 18, 1979, entry into force Sep 3, 1981, UNTS vol. 1249, p. 13.

<sup>123</sup> of Dec 9, 1948, entry into force Jan 12, 1951, GA Res. 260 (III).

<sup>124</sup> of Sep 27, 1968.

<sup>125</sup> The same applies for the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters of Feb 1, 1971, entry into force Aug 20, 1979 (four Contracting States on Oct 29, 2004).

<sup>126</sup> Cf. also *Globalization and its impact on the full enjoyment of all human rights. Preliminary report of the Secretary-General*, UN Doc. A/55/342, Aug 31, 2000, para. 14: „There are points of potential convergence between trade principles and objectives and the norms and standards of international human rights law.“

most-favoured-nation status (e.g. Article I GATT) and national treatment (e.g. Article III GATT).<sup>128</sup> Indeed, provisions of that kind are well known to municipal (composite) constitutions.<sup>129</sup> In addition, seen through the optics of the individual, these principles can be regarded as specific aspects of a human right i.e. the Freedom to Conduct a Business.<sup>130</sup> Subject to polynormativity, they are international constitutional law.

b) Second Mode Constitutionalization — Generalization  
3b) Second Mode Constitutionalization — Generalization

Second mode constitutionalization means to overcome the polynormativity characteristic for international human rights protection *via* treaties. Such generalization may be achieved by the emergence of customary law or the issuance of consensus law (or, of course, by the accession to the treaty of all States not yet States parties). A study of the legal facts on the ground leads to the conclusion that this polynormativity has not yet been overcome to an important degree. Most human rights are at present part of neither customary nor consensus law (nor of truly universal treaty law). Indeed, only a *droit de regard* on the human rights performance of (other) States,<sup>131</sup> and, in the field of the judicial protection of foreigners — closely related to the procedural human rights provided for in municipal constitutions generally without regard to the nationality of the parties, but also in most human rights treaties —<sup>132</sup> guarantees of rights of action according to the national treatment standard or

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<sup>127</sup> In the preamble of the GATT, the contracting governments declare themselves „desirous ... of entering into ... arrangements directed to the ... reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce“.

<sup>128</sup> The same does not apply to the rest of the main agreements and the „additional details“ i.e. other goods agreements and annexes as well as services annexes, and especially for individual countries' market access commitments.

<sup>129</sup> Cf. e.g. Article I Sec. 8 cl. 3 of the U.S. Constitution (interstate commerce clause); Articles 28-30, 39, 43, 49 EC Treaty.

<sup>130</sup> Consecrated in Article 16 of the EU Fundamental Rights Charter. According to the explanations of the Bureau of the Convention, available at [http://www.europarl.eu.int/charter/pdf/04473\\_en.pdf](http://www.europarl.eu.int/charter/pdf/04473_en.pdf), this Article is based on European Court of Justice case-law which has recognized freedom to exercise an economic or commercial activity and freedom of contract, and Article 4 (1) and (2) of the EC Treaty which recognizes free competition.

<sup>131</sup> On such a right of the United Nations, but also „in a variety of other multilateral contexts as well as in bilateral inter-State relations“ cf. Simma, *supra* note 81, at 221-2 with further references.

<sup>132</sup> Cf. e.g. Article 6 ECHR; Article 14 ICCPR.

the international minimum standard,<sup>133</sup> and the prohibition of denial of justice,<sup>134</sup> can be considered as customary law. Of the substantive human rights, the prohibition of torture, and probably the prohibition of genocide and of particularly grave war crimes, have become generalized as consensus law. In addition, there is an argument for a certain generalization of human rights treaty rules as it were by proxy.

aa) Customary Law4aa) Customary Law4aa) Customary Law

There are structural reasons preventing most aspects of human rights from becoming customary law in the narrow sense of the term used in this article. Human rights provisions are, in first line, rules restricting the powers of a State;<sup>135</sup> they proscribe acts violating those rights. Respect of human rights therefore means in first line not to violate them. But refraining from doing something can be understood as actual practice only if this practice is universally respected in a certain set of circumstances.<sup>136</sup> The prohibition to violate human rights, however, is frequently disregarded; the jurisprudence of the treaty bodies, and the annual reports of human rights organizations like Amnesty International,<sup>137</sup> prove that beyond doubt. There is therefore no observable practice and no factual basis for the determination of such customary human rights law.

While the above reasoning does not apply to positive human rights obligations, there is another structural reason why human rights rules generally cannot become customary law. As discussed above, the fundamental reason to consider custom as law is that the development of a custom out of State practice over time proves that the comportement establishing the custom corresponds to Kant's categorical imperative.<sup>138</sup> Consequently, only those rules can emerge as customary international law that are founded on an *international*

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<sup>133</sup> On which, and on their comparison, cf. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 5. Aufl. 1998, at 523-8.

<sup>134</sup> *Ibid.* at 529-30.

<sup>135</sup> Cf. e.g. KELSEN, *supra* note 51, at 230, dealing with the human rights of a municipal constitution; Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001) at 777.

<sup>136</sup> Cf. Hulsroj, *supra* note 100, at 243, with further references. This fact is overlooked by Roberts, *supra* note 135, at 777, who states that „[b]reaches [of human rights obligations] are sensational and likely to attract attention, but that should not be allowed to obscure a general pattern of less publicized observance”.

<sup>137</sup> The Amnesty International Report 2005, available at <http://web.amnesty.org/report2005/index-eng>, visited Jul 21, 2005, documents human rights violations for the year 2004 in 149 countries and territories.

<sup>138</sup> Cf. text at *supra* note 68.

practice.<sup>139</sup> In international law, three categories of rules can be distinguished according to their addressees: rules concerning the relationship between the international community and the States, rules concerning the relationship among the States, and rules concerning the relationship between the international community or the States and individual persons. An international practice can only emerge out of *comportement* concerning either the relationship among the States or the relationship between the international community and one of the other classes, that is out of *comportement* that is immediately relevant under international law.<sup>140</sup> This imports that rules concerning the relationship between the State and individual persons are not a possible subject of customary international law,<sup>141</sup> at least insofar as they cannot be seen as concerning also the relationship to other States. In relation to rules that cannot be so seen, in particular human rights guarantees concerning the citizens of the respective State, it cannot meaningfully be stated that there is an *international* practice. On the one hand, it is, for any State, primarily an internal affair to respect, or not to respect, the human rights of its own citizens; neither is a way to act which could found a practice relevant under international law.<sup>142</sup> On the other hand, on the international level, there are no possible criteria to gauge the practicability of the one or the other.

It is therefore not by chance that in the field of international human rights law exactly the *droit de regard* has been singled out as a customary rule.<sup>143</sup> this rule controls the relationship among the States and their relationship to the international community. Neither is it by chance that customary law guarantees the judicial protection of foreigners.<sup>144</sup> It is the implied reciprocity of the standards providing for that protection which allows them to be seen as being based on an *international* practice. Only human rights rules of this type i.e. rules concerning relations that are inter-State at least on the basis of reciprocity therefore may be generalized as customary law within second mode constitutionalization.

bb) Consensus Law4bb) Consensus Law4bb) Consensus Law  
α) In General5α) In General5α) In General

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<sup>139</sup> And cf. International Law Association Committee, *supra* note 83 at 15, *à propos* of omissions: „there could have been other reasons, *unconnected with international law*, why a State might have abstained“ (my italics). Cf. also *ibid.* at 37.

<sup>140</sup> Helmut Steinberger, § 173: *Allgemeine Regeln des Völkerrechts*, in VII HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 534 (J. Isensee/ P. Kirchhof, eds., 1992), para. 16; Mendelson, *supra* note 70, at 188.

<sup>141</sup> Cf. also Roberts, *supra* note 135, at 777, with further references in note 206.

<sup>142</sup> But cf. Roberts, *ibid.*, with further references in note 207-8.

<sup>143</sup> Cf. text at *supra* note 131.

<sup>144</sup> Cf. text at *supra* note 132.



While there are structural reasons preventing the bulk of international human rights law from becoming customary law, there are no such reasons concerning consensus law. Still, there are only a few rules of human rights consensus law. Certainly, there are some indications for a consensus of the international community on the question whether certain human rights are universal international law.<sup>145</sup> There are the Universal Declaration and the Vienna Declaration<sup>146</sup>; the latter, however, does not enumerate any human rights with the exception of the prohibition of torture. There are the different human rights treaties transforming, to a large extent, the Universal Declaration, for their respective States parties, into treaty law. There are Security Council resolutions, e.g. Res. 1386 (2001),<sup>147</sup> „*Stressing* that all Afghan forces must adhere strictly to their obligations under human rights law, including respect for the rights of women, and under international humanitarian law“.<sup>148</sup> And there are verbal acts of some States indicating their persuasion that all, or at least many (without however specifying which), of the clauses of the Universal Declaration are universal international law.<sup>149</sup> One possible source of such verbal acts, i.e. protests, however, appears to be rather dry: „States do not usually make claims on other States or protest violations that do not affect their nationals“.<sup>150</sup>

Not all of these indications have the same quality. Both the Universal and the Vienna Declarations were adopted by the States, without any doubt, without the intention of making law.<sup>151</sup> As the voting, or the consensus achieved, did not express, in either case, an intention

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<sup>145</sup> According to Fischer-Lescano, *supra* note 44, at 733-5, this is a value consensus which, while real enough, is meaningless: values do not allow the decision of value conflicts.

<sup>146</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF. 157/23 of Jul 12, 1993.

<sup>147</sup> of Dec 20, 2001.

<sup>148</sup> Preamble, para. 9.

<sup>149</sup> Cf. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 287 (1995) at 327 *et seq.*, quoting statements of the five Nordic States, of Bolivia, Azerbaijan, Chile, Colombia, Mexico, Nicaragua, the United States, Uruguay, and Venezuela, as well as letters of Austrian, Azeri, Czechoslovakian and Senegalese officials to the author; however, concerning the latter, it must be doubtful whether such private correspondence can be of any legal relevance. Cf. also for Canada Statement 95/1, *Notes for an address by The Honourable Christine Stewart, Secretary of State (Latin America and Africa), at the 10th annual consultation between non-governmental organizations and the Department of Foreign Affairs and International Trade in preparation for the 51st session of the United Nations Commission on Human Rights (January 30 - March 10, 1995)*, Ottawa, Ontario, January 17, 1995. Cf. also the verbal acts quoted in the text at *supra* notes 82, 84 and 86. And cf. the discussion by Simma, *supra* note 81, at 213 *et seq.*

<sup>150</sup> OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE (1991), quoted from HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 226 (2nd ed 2000) at 228.

<sup>151</sup> In the case of the Vienna Declaration this is shown most clearly by para. II 4 where „[t]he World Conference on Human Rights strongly recommends that a concerted effort be made to

to be bound by the declarations, they cannot found international consensus law. The same applies for the universal human rights treaties; the — important — number of their States parties<sup>152</sup> is not sufficient to consider them as truly universal treaties — even leaving out of account the important number of reservations made by States parties — given, in particular, that they do not represent all important groups of the international community.<sup>153</sup>

Neither is it possible to combine the two indications in this sense that a consensus of the international community on the status of a certain human right as a rule of general international law can be assumed in all those cases in which that right is mentioned in the Universal Declaration *and* protected by multilateral and regional human rights treaties.<sup>154</sup>

Rather, two indications neither of which, taken alone, is sufficient for the emergence of consensus law, do not, without more, reinforce one another if combined. The ICCPR, concluded effectively to make parts of the Universal Declaration binding in law for its States parties, cannot at the same time express a consensus on the question whether that declaration is already binding law. That would not be a permissible interpretation of the ratification of the ICCPR by its States parties.

The Security Council resolution quoted above<sup>155</sup> may be seen as „declaratory and describ[ing] the *status quo* of international public law that limits all sovereigns of the world“. <sup>156</sup> Seen thus,

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encourage and facilitate the ratification of and accession or succession to international human rights treaties and protocols adopted within the framework of the United Nations system with the aim of universal acceptance“.

<sup>152</sup> As of Jun 9, 2004, 152 States have ratified the ICCPR and eight more, including China, have signed it; cf. Status of Ratifications of the Principal International Human Rights Treaties, available at <http://www.unhchr.ch/pdf/report.pdf>, visited Jan 20, 2005.

<sup>153</sup> Cf. text after *infra* note 164. — Francisco Forrest Martin, *Human Rights and the Hierarchy of International Law Sources and Norms: Delineating a Hierarchical Outline of International Law Sources and Norms*, 65 SASK. L. REV. 333 (2002) at 344-5 claims that non-derogable rights guaranteed by widely adopted multilateral treaties have *jus cogens* status binding all the States. This appears not to be arguable. In addition, the reference made by Martin to *Pinkerton and Roach v. United States* (1987), Inter-American Commission on Human Rights 3/87, Annual Report 1986-1987, available at <http://www.cidh.org/annualrep/86.87eng/chap.3.htm>, visited Jan 7, 2005, is misleading: while the Commission held „that in the member States of the OAS there is recognized a norm of *jus cogens* which prohibits the State execution of children. This norm is accepted by all the States of the inter-American system, including the United States“ (para. 56), this finding was not founded on the basis „that approximately 70 per cent of OAS members were states-parties to the ACHR“, as Martin, *ibid.*, claims, and it was not decisive of the case (cf. para. 60).

<sup>154</sup> Cf., in a slightly different context, on the right to life ECtHR, case of *Streletz, Kessler und Krenz v. Germany* (appl. nos. 3044/96, 35532/97 and 44801/98), judgment of Mar 22, 2001, para. 96: „The convergence of the [Universal Declaration, the ICCPR and the ECHR] is significant: it indicates that the right to life is an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights“. But of course, most human rights are protected at the same time by the three instruments mentioned, and also by other human rights instruments.

<sup>155</sup> *Supra* note 148.

as the relevant language is in the preamble and not in the binding part of the resolution, it joins the above mentioned verbal acts of some States indicating their persuasion that certain human rights are universal international law which are in any case the most promising indications of a consensus. If those acts had not been disputed by other States, it might be possible to conclude on a corresponding consensus of the international community.<sup>157</sup> But there are numerous States, in particular from Asia, which expressly have contradicted that persuasion, at least at the present stage of their economic development.<sup>158</sup> In particular, it has been claimed that „[t]he myth of the universality of all human rights is harmful if it masks the real gap that exists between Asian and Western perceptions of human rights. The gap will not be bridged if it is denied“.<sup>159</sup> Rather, it is a view widely held by Islamic and Asian States that human rights are relative and dependent on the respective culture.<sup>160</sup> It corresponds to this view that some provisions of the Islamic Sharia law are scarcely compatible with certain human rights.<sup>161</sup> Also, it has been claimed, with good reason, that „[i]t is evident ... that the exclusion of indigenous peoples from participation in the processes

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<sup>156</sup> Thus Michael Bothe & Andreas Fischer-Lescano, *Protego et oblige. Afghanistan and the paradox of sovereignty*, 3 GERMAN LJ No. 9 (2002), at para. 14.

<sup>157</sup> It has been claimed by Dinah Shelton, *Human Rights and the Hierarchy of International Law Sources and Norms: Hierarchy of Norms and Human Rights: Of Trumps and Winners*, 65 SASK. L. REV. 299 (2002) at 304, that „John Finnis has convincingly shown that the moral values underlying human rights are universal“. The quotation following (from JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) c. IV) deals with human life, different forms of sexual relations, truth, cooperation, friendship, property, and religion. While it is easy to recognize in this bundle of values a conservative agenda, which might appeal to Asian governments generally not inclined to accept human rights treaty obligations, it is quite impossible to find there the enlightenment values of individual freedoms central to the human rights catalogues of the ECHR or the ICCPR e.g. freedom of expression.

<sup>158</sup> Cf. the short indications given by STEINER & ALSTON, *supra* note 150, at 538, the position of the Singapore Prime Minister, reproduced *ibid.* at 546, and the White Paper of the Information Office of the State Council (Beijing 1991), reproduced *ibid.* at 547.

<sup>159</sup> Bilhari Kausikan, *Asia's different Standard*, 92 FOREIGN POLICY 24 (1993) reproduced in excerpts by, and here quoted from, STEINER & ALSTON, *ibid.* at 539, 541. Kausikan is a „government official“ in Singapore; cf. *ibid.* at 549. And cf. Mark Hong, *Postscript. U.S. and Asian Views on Human Rights. Prospects for Convergence*, in THE UNITED STATES AND HUMAN RIGHTS. LOOKING INWARD AND OUTWARD 377 (David P. Forsythe, ed., 2000) at 381: „responsibility and discipline are paradoxically also human rights! Human rights are essentially expressions of values, and responsibility and discipline are as much values as freedom“.

<sup>160</sup> Cf. e.g. Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400 (1984); and the contributions in I ETHIK DER MENSCHENRECHTE. ZUM STREIT UM DIE UNVERSALITÄT EINER IDEE (H.-R. Reuter, ed., 1999). And cf. Martti Koskeniemi, *Hierarchy in International Law: A Sketch*, 8 EJIL 566 (1997) at 582: „Official Western views are ... raised to the level of ‚universality‘, while non-Western values are relegated to the realm of exotic cultures“.

<sup>161</sup> Cf. e.g. on the Islamic Hudud punishments MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (2003) at 75 *et seq.*; on the freedom to change one's religion *ibid.*, at 188 *et seq.* and the *comments* by Abdullahi An-Na'im, 15 EJIL 400 (2004) at 401.

of erecting, and later developing, an international law of human rights resulted in an ... outcome [that] was, from the perspective of indigenous peoples, ... a generally illegitimate framework<sup>162</sup>. Certainly, the Vienna Declaration, accepted also by those States in consensus, states expressly that „[a]ll human rights are universal, indivisible and interdependent and interrelated<sup>163</sup>“. However, this is no serious objection as those human rights are nowhere named in the Declaration. Both this Declaration, and occasional indications that the purported differences between the respective human rights conceptions of the West and Asia could not justify serious human rights violations,<sup>164</sup> are therefore too indetermined to put aside the principled objections of the Islamic and Asian States. As those States form an important group of the international community — one has to count among them most of the 31 Members of the United Nations (nearly one sixth of the total of 191) having not signed the ICCPR, which include important States such as Indonesia, Malaysia, Myanmar, Pakistan, Qatar, Saudi Arabia, Singapore and the United Arab Emirates —, without their participation consensus law cannot emerge.<sup>165</sup>

But the civil society of some of these States has pronounced, by adopting the Asian Human Rights Charter, its perception that human rights are indeed universal international law.<sup>166</sup> Of course, within the Kelsenian *Grundnorm* the expression of a consensus by the States cannot be surrogated by a similar expression by the civil society. Outside that *Grundnorm*, as discussed above,<sup>167</sup> perceptions of the civil society gain a secure status as law only if they are (i.e. once they have been) applied by the courts. This does not appear (yet) to have happened in the case of the Asian Charter. For the majority of those human rights guaranteed by

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<sup>162</sup> RICHARD FALK, LAW IN AN EMERGING GLOBAL VILLAGE: A POST-WESTPHALIAN PERSPECTIVE (1998) at 196.

<sup>163</sup> Para. 5. According to Habermas, *supra* note 7, at 164-5 the convocation of the Vienna World Conference for Human Rights confirms the necessity of an inter-cultural dialogue on the disputed interpretation of the UN's own principles.

<sup>164</sup> Thus the Singapore Foreign Minister at the Vienna World Conference for Human Rights, cf. STEINER & ALSTON, *supra* note 150, at 546.

<sup>165</sup> It may well be that not cynicism but honesty are at the basis of this refusal to sign the ICCPR. Indeed, the internationalization of human rights protection can be seen as, or lead to, protectionism; cf. e.g. Kelly-Kate Pease, *Economic Globalization and American Society*, in THE UNITED STATES AND HUMAN RIGHTS, *supra* note 159, 31 at 46-7.

<sup>166</sup> Cf. in particular para. 2 (2) of the Asian Human Rights Charter – A Peoples' Charter (available at <http://www.ahrchk.net/charter/pdf/charter-final.pdf>, visited Jan 24, 2005): „We believe that rights are universal, every person being entitled to them by virtue of being a human being. Cultural traditions ... do not detract from the universalism of rights which are primarily concerned with the relationship of citizens with the state and the inherent dignity of persons and groups.“

<sup>167</sup> Cf. text at *supra* notes 104 *et seq.*

international treaties it is therefore scarcely arguable that they are protected, on the universal level, at the same time also by international consensus law,<sup>168</sup> and thereby generalized.

β) The Prohibition of Torture in Particular  
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This conclusion, however, does not apply, in particular, to the prohibition of torture.<sup>169</sup> This prohibition is laid down not only in the two general human rights declarations — the freedom from torture is the only traditional right expressly mentioned in the Vienna Declaration —<sup>170</sup> but also in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>171</sup> and not only in the general, universal and regional human rights treaties, but also in specific treaties, in particular the UN Anti-Torture Convention.<sup>172</sup> And there are at least 28 other international instruments against torture.<sup>173</sup> However, this textual abundance does not lead, as such, to the emergence of international consensus law. The Anti-Torture Declaration of the UN General Assembly was expressly adopted „as a guideline for all States and other entities exercising effective power”, and therefore not in the intention to make law. The UN Anti-Torture Convention has been ratified by only 136 States, and signed by twelve more,<sup>174</sup> and is therefore not a universal treaty as understood in the present context. The one or the other applies also to the remainder of the relevant instruments.

Rather, it is the verbal acts mentioned above which are decisive, whether they refer generally to the Universal Declaration including the prohibition of torture or concern that prohibition specifically,<sup>175</sup> together with the fact that no State has objected against the persuasion

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<sup>168</sup> It is noteworthy that ICJ, Advisory Opinion of Jul 9, 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 86-113, does not mention consensus (or customary) human rights law among the rules against which it measured the erection of the wall. But cf. e.g. Hannum, *supra* note 149, at 352 *et seq.*

<sup>169</sup> As restrictively defined in Article 1 (1) (2) of the UN Anti-Torture Convention, cited *supra* note 121, according to which „pain or suffering arising only from, inherent in or incidental to lawful sanctions“ are not covered by the term „torture“ within the meaning of the Convention.

<sup>170</sup> Paras 54 *et seq.*

<sup>171</sup> Resolution 3452 (XXX) of the UN General Assembly of Dec 9, 1975.

<sup>172</sup> Cited *supra* note 121.

<sup>173</sup> Enumerated by Jean-Bernard Marie, *International Instruments relating to Human Rights. Classification and status of ratification as of 1 January 1998*, 10 REVUE UNIVERSELLE DES DROITS DE L'HOMME 59 (1998).

<sup>174</sup> As of Jun 9, 2004; cf. Status of Ratifications, *supra* note 152, visited Jan 24, 2005.

<sup>175</sup> Cf. for instance the statement by U.S. President G.W. Bush quoted in the text at *supra* note 82.

expressed in those pronouncements.<sup>176</sup> On the contrary, many of those governments that are in principle opposed to the idea of universal human rights have made an express exception in the case of torture: „No one claims torture as part of his cultural heritage.”<sup>177</sup> In spite of the innumerable violations of the prohibition of torture<sup>178</sup> which appears, in addition, to be routinely applied by many States at least in the questioning of suspected terrorists, there is therefore a strong case for the assumption that the international community has adopted, in addition to the prohibition of torture laid down in treaties, international consensus law having basically the same contents, and thereby generalized that prohibition.

cc) Generalization by Proxy4cc) Generalization by Proxy4cc) Generalization by Proxy

A certain generalization of human rights treaty rules also has been achieved by the jurisprudence of treaty bodies in this way that States parties are bound by the respective treaty when acting as members of an international law-making body, be it a body set up under a different treaty, e.g. the Security Council, or the international community as a whole. However, this generalization is purely negative in this sense that it does not extend the application of the treaty rules as such to States not party to the respective treaty but only prevents the making of rules in conflict with treaty rules. As this effect is similar, or even identical, to an entrenchment of those rules, it is best dealt with when discussing third mode constitutionalization.<sup>179</sup>

c) Third Mode Constitutionalization — Entrenchment3c) Third Mode Constitutionalization — Entrenchment3c) Third Mode Constitutionalization — Entrenchment

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<sup>176</sup> Cf. U.S. Amicus Curiae Memorandum: „... no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture“, quoted from U.S. Circuit Court of Appeals, 2nd Circuit, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980), ILM 19 (1980), at 966, 974.

<sup>177</sup> Thus the Singapore Foreign Minister, reproduced by STEINER & ALSTON, *supra* note 150, at 547. In the same vein, Kausikan, *supra* note 159, at 543, recognizes „a clear consensus on a core of international law [prohibition of genocide, murder, torture or slavery] that does not admit of derogations on any grounds”.

<sup>178</sup> Cf. e.g. ECtHR, case of *Selmouni v. France*, judgment of Jul 28, 1999, paras. 82 *et seq.*, and the press reports on the torture applied by U.S. forces in Iraq which apparently were not just transgressions of individual soldiers, e.g. Seymour M. Hersh, *Chain of Command*, THE NEW YORKER, May 17, 2004, at 38; MARK DANNER, TORTURE AND TRUTH. AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004). Cf. also the reports on „extraordinary rendition“, e.g. Jane Mayer, *Outsourcing Torture. The secret history of America's „extraordinary rendition“ program*, THE NEW YORKER, Feb 14 & 21, 2005, at 106.

<sup>179</sup> Cf. *infra sub III 4 c cc.*

In discussing questions of entrenchment it is important to distinguish between two modes i.e. a relational entrenchment *vis-à-vis* other (and therefore inferior) norms and a procedural (absolute) entrenchment which simply indicates that it is procedurally difficult, or even impossible, to amend, or to abolish, the rule thus entrenched. Of course, in municipal settings characterized by posited and hierarchical law those two modes are so closely connected that they are nearly indistinguishable: if a constitution is entrenched, that means that it cannot be amended by simple statute law *and* that it can only be amended in a particularly complex procedure.<sup>180</sup> The case of both treaties as micro-legal systems embedded in general international law, and international consensus law, is different. In the case of treaty rules, the entrenchment within the micro-legal system regularly (i.e. with the exception of systems which know of secondary legislation) is only procedural whereas it is very much the question whether there is any relational entrenchment i.e. entrenchment *vis-à-vis* later treaty rules, or rules of general international law. Similarly, the entrenchment of consensus law as such appears to be only procedural. In contrast, the purported entrenchment by *jus cogens* appears to be mostly relational.<sup>181</sup>

The question of the entrenchment of international law rules is double edged. On the one hand, entrenchment is essential in the present context because without the creation of entrenched rules, international law constitutionalization will remain incomplete. Recent developments in international law appear to show that it would be naïve to believe that internationalization of the protection of individual rights as such (i.e. first mode constitutionalization) effectively can guarantee such rights in times of international insecurity (the „war on terror“). Rather, in such times, there appears to be a pronounced international tendency to roll back human rights guarantees<sup>182</sup> by allowing politics-as-usual, as expressed e.g. in Security Council resolutions, to encroach upon them.<sup>183</sup> Only the entrenchment of norms allows to protect those norms, to some degree, against later encroachments. This

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<sup>180</sup> A rule issued by a legislator in a more complex procedure regularly is entrenched against a rule issued in a less complex procedure; cf. SCHILLING, *supra* note 51, at 437-47.

<sup>181</sup> Unfortunately, it is inevitable, in the context of the present contribution, to open „for the Nth time, the debates about, say, *jus cogens* ... and the other staples of the hierarchy discourse“, as Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, 8 EJIL 583 (1997) at 595 quotes J.H.H. Weiler/ Andreas L. Paulus, *The Structure of Change in International Law or is There a Hierarchy of Norms in International Law?*, 8 EJIL 545 (1997) at 546, thereby slightly diverging from their published text.

<sup>182</sup> Cf. e.g. Anthea Roberts, *Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11*, 15 EJIL 721 (2004) 733.

<sup>183</sup> This is a sure recipe for eventually undermining the latter and one of the problems of Article 103 of the UN Charter. The problem is discussed by Theodor Schilling, *Der Schutz der Menschenrechte gegen Beschlüsse des Sicherheitsrats. Möglichkeiten und Grenzen*, 64 ZAÖRV (HJIL) 343 (2004); *idem*, *Is the United States bound by the International Covenant on Civil and Political Rights in Relation to Occupied Territories?*, GLOBAL LAW WORKING PAPER GLWP 08/04, available at [http://www.nyulawglobal.org/workingpapers/GLWP\\_0804.htm](http://www.nyulawglobal.org/workingpapers/GLWP_0804.htm), visited May 13, 2005.

holds good for both procedural and relational entrenchment. On the other hand, some adjustments of human rights protection may indeed be necessary in times of international insecurity. In view of the procedural entrenchment of both multilateral human rights treaties and consensus law, an additional (relational) entrenchment might lead to a petrification of human rights law which normatively may not appear desirable. In addition to the discussion of these issues, it is necessary to discuss a relational entrenchment as it were by proxy of human rights treaty rules.

aa) Procedural Entrenchment<sup>4aa</sup>) Procedural Entrenchment<sup>4aa</sup>) Procedural Entrenchment

The procedural entrenchment of treaty rules generally is very strong. It is brought about by the very form of a multilateral treaty; to change such a treaty normally requires the unanimity of the States parties, and the ratification of the amendment by the legislatures of all States parties, i.e. a procedure generally even more demanding than that provided for in the case of municipal amendments of entrenched constitutions. In this context, it even may be appropriate to speak of over-entrenchment, or petrification, of treaty rules. The UN Charter, in particular the provisions concerning the permanent members of the Security Council, may be a topical case in point. There is also, seen from the view-point of the municipal legal systems, a certain procedural entrenchment of rules at least of those ratified treaties directly effective within the municipal system which lies in the very fact of the internationalization of those rules; human rights treaties, even insofar as they may be denounced by their States parties,<sup>184</sup> cannot be denounced with immediate effect.<sup>185</sup>

Also consensus law is without more procedurally entrenched. This entrenchment is quite important: leaving aside the possibility of a later treaty, or the later emergence of customary law, once consensus law has been made, it can only be changed, it appears, in the same form as it came about i.e. by a declared consensus of a majority of States which at the same time is representative for all important groups of the international community.<sup>186</sup> It follows that any one such group can prevent an amendment, or the abolishment, of an established rule of consensus law. To take an example: as long as, say, „old Europe“ insists on the consensus law rule prohibiting torture, this rule cannot be changed by the international community.

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<sup>184</sup> On this question, cf. text at *infra* note 251.

<sup>185</sup> Cf. e.g. ECHR, „Article 58 - Denunciation (1) A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties. (2) Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.“

<sup>186</sup> Cf. text at *supra* note 79.



bb) Relational Entrenchment Proper4bb) Relational Entrenchment Proper4bb) Relational Entrenchment Proper

α) It used to be the most fundamental difference between municipal legal systems and international law that the former were perceived as objective systems whereas the latter was perceived as merely the sum of subjective legal relationships. However, this difference has been put into question by the emergence of international *jus cogens*, or peremptory norms. Originally, *jus cogens* is a civil law term; here, the concept indicates those norms of private law from which parties to a contract must not derogate;<sup>187</sup> it therefore restricts the freedom of individuals to derogate from State law. In contrast, the exact meaning of international *jus cogens* is by no means clear. To draw an international parallel to the civil law situation is inherently at odds with the traditional concept of international law which did not provide for a law above the will of the individual States.<sup>188</sup> But it is clear, if words are to have any meaning, that international *jus cogens* rules in some way must restrict — *ante* or *post factum* — the freedom of States to make law. As such a legal consequence is only feasible on the basis of an objective conception of the legal order of which *jus cogens* is part, the latter's emergence had to go hand in hand with the emergence of an objective concept of the international legal order,<sup>189</sup> and therefore it can be claimed that it has revolutionized<sup>190</sup> the very structure of international law.<sup>191</sup>

Because of the very different context of *jus cogens* in international law as compared to municipal law, quite naturally the former purportedly has developed features different from its civil law origin. In particular, international law does not appear to distinguish between *jus cogens* and *ordre public* or public policy norms<sup>192</sup> whereas, in civil law, this distinction is an

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<sup>187</sup> Cf. Hermann Mosler, *Jus cogens im Völkerrecht*, 25 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALES RECHT 9 (1968) at 14-5.

<sup>188</sup> Cf. Weil, *supra* note 8, at 273: „Une théorie inadaptée à la structure du système international“.

<sup>189</sup> Cf. ALBERT BLECKMANN, ALLGEMEINE STAATS- UND VÖLKERRECHTSLEHRE. VOM KOMPETENZ-ZUM KOOPERATIONSVÖLKERRECHT (1995) at 844: „Die Entwicklung zwingenden Rechts setzt ... voraus, daß die alte Konzeption des Völkerrechts als eines Bündels von subjektiven Rechtsverhältnissen durch eine objektive Konzeption der Völkerrechtsordnung überwunden wird.“

<sup>190</sup> The expression is used by Weil, *supra* note 8, at 263.

<sup>191</sup> For *jus cogens* as „a functional equivalent of national constitutions“ cf. Bothe & Fischer-Lescano, *supra* note 156, at para. 16.

<sup>192</sup> When *jus cogens* is said to involve „the irrelevance of protest, recognition, and acquiescence: prescription cannot purge this type of illegality. Moreover, it is arguable that *jus cogens* curtails various privileges“ (BROWNLIE, *supra* note 133, at 514), it is understood as the sum of international public policy norms having derogatory supremacy over other norms of international law. And Sztucki, *supra* note 78, at 131, notes that „[i]t is, indeed, difficult to

important one.<sup>193</sup> Rules of international *jus cogens* are said therefore to combine legal attributes kept separate in municipal legal systems:<sup>194</sup> being entrenched with regard to contracts/treaties, and being entrenched with regard to other general rules (*jus dispositivum*). International *jus cogens* is meant to be not only, as is civil law *jus cogens*, law which may not be derogated from by private contract or, in the international context, by treaty;<sup>195</sup> it is also law meant to prime all other law and only to be modified by another rule of *jus cogens*;<sup>196</sup> under Article 53 of the VTC, *jus cogens* rules are entrenched also with respect to *jus dispositivum*.<sup>197</sup>

Article 53 of the VTC does not specify whether rules of any source of international law can be *jus cogens*; it refers only to general i.e. universal international law. While, according to some, *jus cogens* must be customary law,<sup>198</sup> there is no intrinsic reason why consensus law or, indeed, treaty rules (provided they are universal international law)<sup>199</sup> should not acquire that status. It must also be borne in mind that those who consider that only customary law may be *jus cogens* include, in their notion of customary law, also consensus law. It therefore appears safe to regard at least both international customary law and international consensus as a possible source of *jus cogens*.

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dissociate oneself fully from the construction [of international public policy], once one accepts the category of international *jus cogens* — and, especially, if one at the same time wishes to avoid a direct association with natural law theories“.

<sup>193</sup> Mosler, *supra* note 187, sharply distinguishes between *jus cogens* as limitation of the freedom of contract (at 14-22) and *jus cogens* and the public order of the international community (at 22-6). Similarly, Sztucki, *supra* note 78, at 66-9 distinguishes between the application of *jus cogens* to treaties and to unilateral acts. But there are points of contact in civil law, too; cf. *infra* note 211.

<sup>194</sup> The list, given by Bassiouni, *supra* note 61, at 801-2, of divergences among scholars concerning practically all imaginable attributes of *jus cogens* is quite impressive.

<sup>195</sup> This is the primary legal consequence of a rule's being *jus cogens* according to Article 53 of the Vienna Convention: „A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.“

<sup>196</sup> This is the definition of *jus cogens* according to Article 53 of the Vienna Convention: „a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character“.

<sup>197</sup> But Shelton, *supra* note 157, at 322 notes correctly that „the only established sanctions for the breach of a *jus cogens* norm are ... the invalidity of a conflicting treaty“.

<sup>198</sup> Cf. e.g. BROWNLIE, *supra* note 133, at 513.

<sup>199</sup> Cf. e.g. BLECKMANN, *supra* note 189, at 844-52 and, particularly clear, at 847 who considers even treaties protecting certain values as *jus cogens*. Contra: Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AJIL 55 (1966) at 61.

Three tests appear to be discussed for determining whether a given international law rule has acquired the status of *jus cogens*: two procedural ones and a contents based one.<sup>200</sup> The first procedural test (*jus cogens* according to Article 53 of the VTC) has found expression in Article 53 of the VTC, quoted above.<sup>201</sup> As it has been put forward in a treaty it cannot decide on the customary law category of *jus cogens*;<sup>202</sup> but it may be understood as the expression of a customary law norm.<sup>203</sup> As has been said correctly, „[t]he criteria [this clause] relies on are utterly formalistic“.<sup>204</sup> The second procedural test (*jus cogens* according to precedent) has been relied on repeatedly by municipal and international courts.<sup>205</sup> It simply applies the general judicial method of determining international law to the question of the emergence of *jus cogens*. It differs from Article 53 of the VTC in putting greater weight on judicial decisions and other authorities and looking less directly to the acceptance and recognition of a rule as *jus cogens* by the international community as a whole. There is an obvious advantage to both tests: norms of *jus cogens* having passed one of them are firmly integrated into international law; they are positive law adopted by the international community or recognized by judicial precedents and therefore international law within the Kelsenian *Grundnorm*.

The contents based test may have found expression in the fact that „almost all authors having dealt with the issue are unanimous in holding that the justification for the superior legal force of a peremptory norm must be sought in its contents, inasmuch as it reflects

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<sup>200</sup> Similarly, according to Shelton, *supra* note 157, at 322, „*jus cogens* ... can be viewed either as a new and non-consensual source of legal obligations or as a consensual identification of certain norms in positive law that are given a normative status higher than others“. — On the possible sources of *jus cogens*, cf. Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BYIL 273 (1977) at 282-3; Sztucki, *supra* note 78, at 73-6. — According to Martin, *supra* note 153 at 343, „*Jus cogens* is non-derogable, peremptory law“. It is not quite clear how this author determines the rules complying with that legal consequence turned definition. According to him, one source of such norms are widely adopted multilateral treaties.

<sup>201</sup> In *supra* note 196.

<sup>202</sup> Cf. Sztucki, *supra* note 78, at 106-8 discussing the paradox that the Convention is particular law but purports to introduce the category of „peremptory norms of general international law“.

<sup>203</sup> But cf. the cautious remarks of the Special Rapporteur, quoted from Sztucki, *supra* note 78, at 151, that the rule embodied in Article 53 of the VTC should not be regarded „as a total invention“ or as „a completely new rule“. And cf. Sztucki, *ibid.*, at 94: „[I]n the light of international practice, ... there has been nothing to codify“; Christian Tomuschat, *International Law*, in THE UNITED NATIONS AT AGE FIFTY. A LEGAL PERSPECTIVE (Chr. Tomuschat, ed.; 1995), 281 at 297: „innovative features“.

<sup>204</sup> Christian Tomuschat, *Obligations arising for States without or against their Will*, 241 RDC 197 (1993 IV), at 223.

<sup>205</sup> Cf. e.g. ECtHR, *Al-Adsani v. UK*, appl. no. 35763/97, judgment (Grand Chamber) of Nov 21, 2001, para. 60-1.

common values essential for upholding peace and justice in the world“.<sup>206</sup> This fact may be taken as a case of „the teachings of the most highly qualified publicists of the various nations“ which are a „subsidiary means for the determination of rules of law“ within the meaning of Article 38 (1) (d) of the ICJ Statute. This position can be taken either to describe the most likely reasons for the international community to elevate a norm, in the form provided for by Article 53 of the VTC, to the position of *jus cogens* (weak version), or to define the contents of a norm as sufficient reason for that elevation (strong version). The first alternative, dealing only with the „legislative“ motives the international community regularly has when defining a *jus cogens* norm, effectively accepts (one of) the procedural test(s). In contrast, *jus cogens* defined according to the second alternative (*jus cogens* according to its contents) is pure natural law and therefore not easily reconcilable with the idea of the international community as a man-made construction.<sup>207</sup> Also, to consider a rule as entrenched for purely substantive reasons i.e. because its contents are derived from a more general norm — e.g. that there ought to be peace and justice in the world — runs the obvious risk that its rules are not readily ascertainable. On the one hand, it presupposes that such a deduction can only lead to rules compatible with one another i.e. to non-contradictory rules.<sup>208</sup> But the opposite is the case: different people can, and do, reasonably maintain that peace and justice are best served by the absolute proscription of torture, and by its permitted application in certain cases, respectively. This approach therefore generally does not allow to determine which one of two contradictory norms is *jus cogens*, and thereby entrenched with regard to the other. On the other hand, „it would be only too easy to postulate as a norm of *jus cogens* a principle which happened neatly to serve a particular ideological or economic goal“.<sup>209</sup>

To remedy this problem, it has been proposed to define *jus cogens* as those rules of international law regarded by the community of states as so essential for the system of

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<sup>206</sup> Tomuschat, *supra* note 204, at 223, with further references in note 35. Cf. also Carrillo Salcedo, *supra* note 181, at 592 who stresses that all rules of *jus cogens* „have a strong ethical connotation, to the extent that *jus cogens* tends to set certain greater values above power“; Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EJIL 59 (2005) 62. An example is the claim that an international crime will be part of *jus cogens* if it affects the interests of the international community as a whole because it threatens the peace or security of humankind, and if it shocks the conscience of humanity; cf. M Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 (4) LAW AND CONTEMPORARY PROBLEMS 63 (1996) at 69.

<sup>207</sup> Tomuschat, *supra* note 204, at 234-6, correctly insists on this idea.

<sup>208</sup> While it is true that „there remain objective indicators of acceptance of [certain] norms as fundamental values“, as Shelton, *supra* note 157 at 330 notes, this is only part of the problem; the more difficult question is which applicable norms can be deduced from those value norms. Cf. also Fischer-Lescano, quoted in *supra* note 145.

<sup>209</sup> IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* (2nd ed. 1984) at 222.

international law as a whole that the willingness to respect these rules has become absolutely indispensable in the sense of an international *ordre public* in order for a new state to be admitted to the international community and such that the community of states is even prepared to accept difficulties in international relations as a result.<sup>210</sup>

But this test has the inconvenience that it can only be applied in the rather rare cases in which the adherence to a norm has been made the precondition of the recognition of a State (which happens, for factual reasons, increasingly seldom), and therefore cannot be taken to define norms of *jus cogens* exhaustively.

The three tests discussed to define the *jus cogens* status of a norm — the two procedural ones and the strong version of the contents based one — are all quite unknown to municipal systems where it is generally a question of the interpretation of an individual norm whether or not it is to be considered as *jus cogens*.<sup>211</sup> They are also clearly quite different among themselves. It does not appear possible to decide that the one or the other of those tests is the correct one; rather, they appear to coexist. It follows that those norms *jus cogens* according to Article 53 of the VTC, those norms *jus cogens* according to precedent, and those norms *jus cogens* according to their contents may very well be different norms. While, for practical reasons, it is rather unlikely that a norm *jus cogens* according to Article 53 of the VTC, or according to precedent, is not at the same time a norm *jus cogens* according to its contents — for what other reasons than for its contents would the international community, or a court, elevate a norm to the category of *jus cogens*? —, it is very likely that there are norms considered, at least by some, as *jus cogens* according to their contents that will not fulfill the procedural test either of Article 53 of the VTC or of precedent.<sup>212</sup>

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<sup>210</sup> Christian Hillgruber, *The Admission of New States to the International Community*, 9 EJIL 491 (1998) at 506, referring to JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* (1987) at 123-7.

<sup>211</sup> For instance, a norm which declares a contract concluded *contra bonos mores* to be void, or that a contract on the sale of immovables must be concluded by a deed of a notary public, will be interpreted as *jus cogens* because it is perceived as a public policy norm intended to protect the weaker party to a contract.

<sup>212</sup> A telling example is the discussion whether there is a peremptory norm completely prohibiting commercial whaling „because of the special characteristics of whales as intelligent creatures“ or whether „what has emerged as a new peremptory norm is not prohibition, but sustainability“; cf. Douglas M. Johnston, reported in *Chairman's Report*, Legal Workshop on Assessment of Actions of the International Whaling Commission under the International Convention for the Regulation of Whaling (ICRW, 1996), *sub* II. Have the Rights and Duties of States under the ICRW been Violated? — Role of the Vienna Convention on the Law of Treaties, available at [http://luna.pos.to/whale/icr\\_legal\\_chair.html](http://luna.pos.to/whale/icr_legal_chair.html), visited Jan 5, 2005, who, however, concludes that „[t]he argument for either position is too vague to be considered definitive“. And cf. the examples given by Weil, *supra* note 8, at 270-1.

β) On international *jus cogens* generally, it has been remarked that [i]n general, theory and practice diverge: there seems to be a pronounced gulf between the views of scholars and those of states and most international tribunals on the supremacy of human rights law, either totally or partially. Despite the efforts of proponents, state practice and judicial decisions are sparse in recognizing and giving effect to ... the doctrine of *jus cogens*.<sup>213</sup>

This appears to indicate that there is no *jus cogens* within the Kelsenian *Grundnorm* of general international law. But the jurisprudence of national and international courts on *jus cogens* cannot simply be put on the same side of the divide as State (i.e. government) practice; rather, it is situated somewhere in the middle between the views of scholars and that practice. It also is more complicated. It is most developed in torture and war crimes cases.

The pivotal judicial decision on the *jus cogens* character of the prohibition of torture is the judgment of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case *Prosecutor v. Furundzija*.<sup>214</sup> The Chamber there held that the other major feature of the principle proscribing torture relates to the hierarchy of rules in the international normative order. Because of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force. ...

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be

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<sup>213</sup> Shelton, *supra* note 157, at 303.

<sup>214</sup> Cf. Trial Chamber of the ICTY, *Prosecutor v. Furundzija* (Dec 10, 1998), case no. IT-95-17/II-T, 38 INTERNATIONAL LEGAL MATERIALS (1999) 317.

asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".

Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. ...

It would seem that other consequences include the fact that torture may not be covered by a statute of limitations, and must not be excluded from extradition under any political offence exemption.<sup>215</sup>

This discourse was, in *Furundzija*, clearly *obiter*<sup>216</sup> (and aptly called a „jurisprudence commando“) <sup>217</sup> as is demonstrated *inter alia* by the fact that the Appeals Chamber of the ICTY, seized of an appeal against the judgment quoted, upheld the judgment but did not mention *jus cogens* with one single word.<sup>218</sup> Nevertheless, while the brazen founding of that discourse in natural law („because of the importance of the values it protects“) has not been repeated widely by other courts, the Trial Chamber's decision was quite influential in municipal and international jurisprudence. It is now widely admitted that the prohibition of torture is a *jus cogens* rule.<sup>219</sup> But there is dispute as to the test on the basis of which it may be

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<sup>215</sup> Paras 153, 155-7; footnotes omitted.

<sup>216</sup> Accord Erika de Wet, *The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law*, 15 EJIL 97 (2004) 97.

<sup>217</sup> Pierre-Marie Dupuy, *L'unité de l'ordre juridique internationale*, 297 RDC 9 (2002) at 312.

<sup>218</sup> Cf. ICTY, Appeals Chamber, *Furundzija*, judgment of Jul 21, 2000, *supra* note 214.

<sup>219</sup> Cf. ECtHR, *Al-Adsani*, *supra* note 205, para. 61; Supreme Court of Canada, *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, paras 62-65; UK Court of Appeal (Civil Division), *Ronald Grant Jones v. The Ministry of the Interior Al-Mamlaka Al-Arabyia as*

found to be such a rule, and as to the consequences that may flow from its being *jus cogens*. In this context, it is striking that, as far as I can see, no judicial decision has adopted the first procedural test provided for in Article 53 of the VTC.

Clearly, according to *Furundzija*, the prohibition of torture is *jus cogens* according to its contents. In contrast, in *Al-Adsani* the ECtHR stated that it „accepts, on the basis of these authorities [quoted in the preceding paragraph i.e. treaties and judicial decisions], that the prohibition of torture has achieved the status of a peremptory norm in international law“.<sup>220</sup> These differences about the legal basis of the *jus cogens* character of the prohibition of torture correspond to a certain degree to different legal consequences flowing therefrom (if any, because in most cases, as in *Furundzija* itself, the statement of the *jus cogens* quality of the prohibition of torture remains *obiter*).<sup>221</sup> Put shortly, and leaving aside possibly important details, it appears that those jurisdictions founding their decisions on *jus cogens* according to its contents assumed, true to the natural law test they applied for determining *jus cogens*, on the basis of the values protected by the rule considered as *jus cogens*, a wide array of legal consequences going well beyond those laid down in Article 53 of the VTC,<sup>222</sup> whereas those jurisdictions presumably applying the second procedural test (i.e. precedent) looked at general international law as it stood at the time of their respective decision (which presumably is still the law at the time of writing) for determining those consequences.

Some courts have specifically refused to draw certain consequences from the fact that the defendant State had acted in violation of *jus cogens*. While not always clearly stating on the basis of which test they accepted the *jus cogens* character of the proscription of torture, or of particularly heinous war crimes, or accepting that character for argument's sake only, when deciding on the legal consequences to be drawn from it, they did not accept the natural law approach chosen in *Furundzija*. In particular, *Al-Adsani* did not find it „established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for

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*Saudiya (The Kingdom of Saudi Arabia) & Anor. et al.*, judgment of Oct 28, 2004, [2004] EWCA Civil 1394 (appeal pending; it appears that according to a press release, the case has been listed for hearing before the House of Lords on Apr 25-27, 2006), para. 17, *per* Mance, LJ, para. 108, *per* Lord Phillips of Worth Matravers, MR; IACtHR, *Maritza Urrutia v. Guatemala*, judgment of Nov 27, 2003, [2003] IACHR 6, para. 92.

<sup>220</sup> ECtHR, *Al-Adsani*, *supra* note 205, para. 61, my italics.

<sup>221</sup> This appears to be the case, beside the cases quoted *infra* in the text, in *Suresh v. Canada*, *supra* note 219, para. 75, where the finding that „international law rejects deportation to torture“ stands independently of the question whether the prohibition of torture is, or is not, *jus cogens*; and in *Urrutia v. Guatemala*, *ibid.*, where torture was prohibited under Inter-American law.

<sup>222</sup> Cf. *Furundzija*, *supra* note 214, para. 153-7.



crimes against humanity“.<sup>223</sup> The Highest Special Court of Greece held „that according to the current state of international law there still exists a generally recognized international norm, which prohibits that a State be sued in another State for damages in relation to crimes which were committed on the territory of the forum state with the participation of troops of the defendant State in times of war as well as in times of peace“;<sup>224</sup> those crimes having been war crimes of the most heinous kind. Similarly, the German Supreme Court, also dealing with war crimes, held that „there have recently been tendencies toward a more limited principle of state immunity, which should not apply in case a peremptory norm of international law (*jus cogens*) has been violated ... According to the prevailing view, this is not international law currently in force ...; otherwise the principle of immunity would be of little use“.<sup>225</sup>

In contrast, in *Jones v. Saudi Arabia*, summarizing the Law Lords' speeches in the *Pinochet* case,<sup>226</sup> it was held that „a state cannot assert immunity *ratione materiae* in relation to a criminal prosecution of torture in as much as torture is a breach of *jus cogens* under international law“.<sup>227</sup> This was so because a breach of a *jus cogens* prohibition cannot constitute a legitimate State policy; especially, „torture can no longer fall within the scope of the official duties of a state official“;<sup>228</sup> „torture cannot constitute an act of government“.<sup>229</sup> *Jones v. Saudi Arabia* has extended this reasoning to civil proceedings brought not against a foreign State (which itself remains immune *ratione personae*)<sup>230</sup> but individually against a State official.<sup>231</sup> The *jus cogens* or, more exactly, the *ordre public* character of the prohibition of torture thus has been used

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<sup>223</sup> ECtHR, *Al-Adsani*, *supra* note 205, para. 66, as applied in ECtHR, *Kalogeropoulou v. Greece and Germany*, appl. no. 59021/00, decision of Dec 12, 2002, The Law D.1.(a). Cf. also ECtHR, *Al-Adsani*, para. 61, where the Court was „unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged.“

<sup>224</sup> Highest Special Court of Greece (*Anotato Eidiko Dikasterio*), *Germany v. Margellos*, Case no. 6/17-9-2002, judgment of Sept 17, 2002, unreported [data taken from de Wet, *supra* note 216, at 109 note 61], quoted from German Federal Supreme Court (*Bundesgerichtshof*), case no. III ZR 245/98, judgment of Jun 26, 2003, NEUE JURISTISCHE WOCHENSCHRIFT 3488 (2003), English translation and German text 42 ILM 1030 (2003) at 1034.

<sup>225</sup> German Supreme Court, *ibid.*, at 1033.

<sup>226</sup> House of Lords, *R v Bow Street Magistrate, ex parte Pinochet (No. 3)*, 2000 1 AC 147.

<sup>227</sup> *Jones v. Saudi Arabia*, *supra* note 219, para. 124, *per* Lord Phillips, MR.

<sup>228</sup> *Ibid.*, para. 126.

<sup>229</sup> *Ibid.*, para. 129.

<sup>230</sup> *Ibid.*, para. 128.

<sup>231</sup> *Ibid.*, esp. paras. 128-31.

normatively (if possibly contrafactually)<sup>232</sup> to circumscribe, as a matter of international law, the admissible scope of State functions.<sup>233</sup> But it is also possible to understand *Jones v. Saudi Arabia* in the terms of *Furundzija* as „internationally delegitimis[ing] any [municipal] act authorizing torture“ and thereby giving „additional legal effects [to] peremptory norms, which could even include the abrogation of intra-state measures that obstruct the effective enforcement of a *jus cogens* norm“. <sup>234</sup> This understanding would imply a kind of a hierarchical argument i.e. that *jus cogens* primes obstructing (not necessarily directly conflicting) municipal law.

Similarly, though with a different reasoning, the Italian Supreme Court (*Corte di cassazione*) has held in the *Ferrini* case<sup>235</sup>, quoting *Furundzija*, that norms prohibiting war crimes (in the case discussed, deportation for the purpose of forced labor) are *jus cogens* norms prevailing over every other international law norm and, therefore, also those concerning immunity.<sup>236</sup> In reaching this conclusion, the Court relies exclusively on „the particularly grave violation ... of the fundamental rights of the human person, whose protection is upheld by *peremptory* norms of international law“, <sup>237</sup> thereby applying the natural law test. This decision reflects two earlier „Courts of First Instance [cases which] assumed that the stronger normative quality of the *jus cogens* prohibition of torture would extinguish all colliding non-peremptory norms“. <sup>238</sup> This reasoning presupposes that there is a conflict between State immunity rules and the *jus cogens* rule in question;<sup>239</sup> the assumed hierarchy of norms can only assist in resolving such conflicts. But of course, similarly to the *Jones v. Saudi-Arabia* case, a policy argument is possible according to which *jus cogens* primes also all merely obstructing international law.

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<sup>232</sup> Cf. *supra* note 178.

<sup>233</sup> This view is vigorously opposed by many authors; cf. Andrea Gattini, *War Crimes and State Immunity in the Ferrini Decision*, 3 JICJ 224 (2005) 234 note 41 and the quotations there. And cf. Italian Supreme Court, *Ferrini* case, *supra* note 110, which states that it cannot be doubted that the acts reproached to Germany as the defendant were an expression of *imperium* given that those acts were done in the course of war operations.

<sup>234</sup> Cf. de Wet, *supra* note 216, at 98.

<sup>235</sup> *Supra* note 110.

<sup>236</sup> „... e, quindi, anche su quelle in tema di immunità“.

<sup>237</sup> para. 9 of the judgment (the Court's italics); translation quoted from Pasquale de Sena & Francesca De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16 EJIL 89 (2005) at 101.

<sup>238</sup> De Wet, *supra* note 216, at 106, quoting U.S. District Court for the District of Columbia, *Princz v. The Federal Republic of Germany*, 26 F 3d at 1168, and Court of First Instance of Leviaia, Greece, *Prefecture of Voiotia v. Federal Republic of Germany*, case 137/1997, summarized by Bantekas, 92 AJIL 765 (1998).

<sup>239</sup> Also this view is vigorously opposed by many authors; cf. Gattini, *supra* note 233, at 236-7, with further references also for the contrary opinion.

This overview over judicial decisions allows the tentative conclusion that it is universally accepted by municipal and international courts alike, if in some decisions for argument's sake only, that the prohibition of torture, and also the prohibition of war crimes, constitutes *jus cogens*. In international law as applied by the ECtHR as well as by the German and Greek courts a violation of a *jus cogens* rule (*jus cogens* according to precedent) by a State does not affect the power of that State to rely on its immunity before the courts of another State. In international law as applied by the English courts a violation of a *jus cogens* rule (also *jus cogens* according to precedent) deprives the State of the immunity *ratione materiae* in criminal prosecutions and, because violations of *jus cogens* cannot constitute *acta jure imperii*, in civil proceedings against an individual official. In international law as applied by the Italian courts *jus cogens* rules (*jus cogens* according to its contents) are hierarchically superior to other international law or prime even all merely obstructing such rules. At present, it does not appear possible to generalize these very specific statements.

Neither it is necessary to do so in the present context of the discussion of *jus cogens* entrenchment. Indeed, the *obiter dictum* in *Furundzija* apart, no court has ever held that the *jus cogens* character of a rule leads to the latter's entrenchment in this sense that it could not be affected by a subsequent treaty or that it could only be abolished, restricted or amended by another rule having the same character. While apparently no case posing that exact question ever was before any court the fact remains that there is no judicial pronouncement in this respect (although these questions, as least insofar as it concerns *jus cogens* according to Article 53 of the VTC, expressly are dealt with by that provision). There is therefore no evidence of a general international law rule within the Kelsenian *Grundnorm* replicating the *jus cogens* definition in Article 53 of the VTC i.e. claiming that a general international law norm may become relationally entrenched. Indeed, the aspect that *jus cogens* is meant to prime all other (existing) law does not necessarily have this effect of protection against future developments. It is one thing for a court to try to fix the position of a *jus cogens* rule within the existing body of international law, even, as the Italian Supreme Court did, thereby disregarding another international law rule that would merely obstruct the full efficiency of the *jus cogens* rule. It is quite another thing to disregard purported international law — customary, consensus or treaty law — not *jus cogens* that had been developed by the (international community of) States after the emergence of the relevant *jus cogens* rule. Thus, in spite of the emergence of the category of *jus cogens*, it cannot (yet) be demonstrated that general international law provides for the relational entrenchment of those rules.<sup>240</sup>

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<sup>240</sup> The legal possibility of such an entrenchment is discussed *infra sub 6 b aa*.

There may be, however, treaty based developments which, while not necessarily constitutive of the relational entrenchment of rules of general international law, may emulate its consequences to some extent. Of course, a relational entrenchment proper of human rights treaties does not appear arguable in the present positive international law system. Under Article 30 of the VTC, reflecting customary law, a successive treaty relating to the same subject-matter may supplant an existing treaty for those States parties to both treaties. In the case of conflicting treaty obligations of one State in relation to different other States, all the treaty rules are valid although the international responsibility of the first State might be engaged.<sup>241</sup> Finally, according to its Article 103, which is the subject of a proviso in Article 30 (1) of the VTC, the UN Charter (including, under Article 25, Security Council resolutions) is entrenched *vis-à-vis* all other treaties including human rights treaties. Concerning general international law, it is undisputed that there is no hierarchical relationship between treaty law and customary law so that a treaty may be amended or even extinguished by the development of a new and contradicting rule of customary law<sup>242</sup> and, presumably, consensus law.<sup>243</sup>

But a relational entrenchment by proxy may follow from general treaty law. By entrenchment by proxy I understand that, while treaty rules may well be affected by certain later and conflicting rules, and therefore are not properly entrenched *vis-à-vis* the latter, the States parties to the treaty may be prohibited, under that treaty, to participate in the making of such conflicting rules, or even obligated to prevent, within their respective legal possibilities, such making. The effect of such a duty, if respected, may be to prevent the emergence of conflicting rules and thereby to maintain those treaty rules which, by that means, effectively become entrenched beyond their mere procedural entrenchment. Such a prohibition or obligation may flow from the „obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attached to a State which has signed a treaty“,<sup>244</sup> recognized under general international law,<sup>245</sup> and specifically from the central

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<sup>241</sup> Wolff Heintschel von Heinegg, § 12: *Der Geltungsbereich von Verträgen*, in KNUT IPSEN, *VÖLKERRECHT* 124 (4th ed. 1999) at 131.

<sup>242</sup> Wolff Heintschel von Heinegg, § 15: *Ungültigkeit von Verträgen und Fortfall der Vertragsbindung*, in *ibid.*, 146 at 179.

<sup>243</sup> Cf. the decisions cited in *supra* note 75.

<sup>244</sup> Thus the formulation of the International Law Commission (ILC), *Draft Articles on the law of treaties with commentaries*, YBILC 1966, II, 187, 202, Article 15 comm. (1).

<sup>245</sup> Cf. e.g. ICJ, *Case concerning the Gabčíkovo-Nagymaros Project*, ILM 1998, 195 *et seq.*, diss. op. Fleischhauer; BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, Reprint ed. 1987, at 117: „it follows that it is not permissible, whilst observing the letter of the agreement, to evade treaty obligations by ... ‚indirect means‘“. In the

undertaking given by the States parties to the human rights treaties i.e. to respect and to ensure to all individuals subject to their jurisdiction the rights guaranteed by those treaties.<sup>246</sup> Indeed, this undertaking has been developed in the jurisprudence of different treaty bodies to include a duty to refrain from certain ways of participating in international decision-making which would produce rules detrimental to those rights.

According to the ECtHR, the decisions taken by the United Kingdom in a two-step EC procedure which led to a measure of the EC depriving the inhabitants of Gibraltar of their right to vote in the elections to the European Parliament<sup>247</sup> were an exercise of jurisdiction and therefore to be judged against the said undertaking. In the framework of the EC procedure, the United Kingdom first assented to a decision of the Council of the EC, which had to make a proposal by unanimous vote, and then adopted that proposal — together with the other Member States — in accordance with its constitutional requirements. The measure therefore was basically a treaty. The Court held the United Kingdom, together with all the other Member States of the EC, responsible for that measure. It expressly rejected the United Kingdom's contention that, „[i]n the case of the provisions relating to the election of the European Parliament, the United Kingdom had no [effective] control [over the act complained of]“.<sup>248</sup> The ECtHR's reasoning, it is submitted, is based on only two aspects: that the United Kingdom could have prevented the measure (even if it had no positive control over it), and that it had a duty under the ECHR to do so as the measure failed to secure human rights protected under that treaty.<sup>249</sup> Its decision therefore is authority for the proposition that States parties must not affect, by concluding subsequent<sup>250</sup> treaties, the rights guaranteed under the ECHR.

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Vienna Convention on the Law of Treaties, this obligation is even recognized for the time predating the ratification of a treaty; cf. Article 18 of the Convention.

<sup>246</sup> Cf. e.g. Article 2 (1) of the ICCPR, Article 1 of the ECHR.

<sup>247</sup> ECtHR, case of *Matthews v. United Kingdom* (appl. no. 24833/94), judgment of Feb 18, 1999, REP. 1999-I, 251, paras 33-34, confirmed in ECtHR, case of *Prince Hans Adam II of Liechtenstein v. Germany* (appl. no. 42527/98), judgment of Jul 12, 2001, para. 46. The only relevant decision of the HRC — comm. no. 217/1986, *H.v.d.P. v. the Netherlands*, views of Apr 8, 1987 — concerns the case of a staff measure taken by the administration of an international organization and does not discuss the question under review.

<sup>248</sup> ECtHR, *Matthews* case, *ibid.*, paras 26, 34.

<sup>249</sup> The further reference by the Court to the fact that EC and Gibraltar legislation had the same effects on the population of Gibraltar (*ibid.*, para. 34) is meant to show that the right to vote to the European Parliament is, for that population, part of the guarantee of a practical and effective right to vote in general.

<sup>250</sup> ECtHR, *Matthews* case, *ibid.*, para. 32.

The HRC has expressed the view, in a General Comment,<sup>251</sup> that the parties to the ICCPR deliberately intended to exclude the possibility of a denunciation of the latter. It has based that view *inter alia* on the consideration that [t]he rights enshrined in the [ICCPR] belong to the people living in the territory of the State party. The [HRC] has consistently taken the view ... that once the people are accorded the protection of the rights under the [ICCPR], such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the [ICCPR].<sup>252</sup>

The last clause („any subsequent action“) clearly covers also the conclusion of subsequent treaties which would divest the peoples of those rights. Therefore, this General Comment is authority for a proposition analogous to the one stated above.

In a slightly different context, the UN Committee on Economic, Social and Cultural Rights (CESCR) has considered, also in a General Comment, „that the provisions of the [ICESCR] ... cannot be considered to be inoperative ... solely because a decision has been taken that considerations of international peace and security warrant the imposition of sanctions“.<sup>253</sup> And the CESCR continued: „it should also be recalled that every Permanent Member of the Security Council has signed the Covenant“.<sup>254</sup> This clearly implies that, in the CESCR's view, those members have to respect that Covenant even when voting in the Security Council,<sup>255</sup> and must not vote for a measure detrimental to ICESCR rights. The assumption is not farfetched that the same applies, in the CESCR's view, to the conclusion of subsequent treaties that would affect the rights guaranteed by the ICESCR. Again, therefore, this General Comment is authority for an analogous proposition.

In these various ways, the treaty bodies consider the respective treaties as protected against encroachments by subsequent treaties or other developments based on the States parties'

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<sup>251</sup> HRC, General Comment No. 26: Continuity of obligations : . 08/12/97. CCPR/C/21/Rev.1/Add.8/Rev.1, paras. 1-3.

<sup>252</sup> But the HRC did not challenge the successor States of the USSR which „have generally preferred to accede rather than succeed to the human rights treaties adhered to by the predecessor State“: Menno T. Kamminga, *State Succession in Respect of Human Rights Treaties*, 7 EJIL 469 (1996) at 483.

<sup>253</sup> CESCR, *The relationship between economic sanctions and respect for economic, social and cultural rights*: 12/12/1997.E/C/12/1997/8, CESCR. General Comment 8, para. 7.

<sup>254</sup> *Ibid.*, para. 8.

<sup>255</sup> On the question whether it is a valid defense against the reproach of having committed a violation of the ICCPR in occupied territory for the U.S. to claim that this violation was authorized by a Security Council resolution cf. Schilling, GLWP, *supra* note 183, at 21-38.

consent (e.g. the adoption of a Security Council resolution or, if it is submitted, the adoption of consensus law) in this sense that the States parties, individually or acting together,<sup>256</sup> are prohibited from concluding such treaties, or to grant their consent to such a resolution or such a law. There are two sides to that entrenchment: on the one hand, there is a certain measure of third mode constitutionalization of the treaty rules themselves, protecting them against encroachments by general international law. However, as the treaties are not universally applicable, and are therefore subject to the usual polynormativity of international law, this third mode constitutionalization is not matched by a constitutionalization in the second mode.

But on the other hand, in a kind of snowball effect, the States parties' undertaking to respect and secure the treaty rules, if respected, is likely to prevent, on the universal level, the emergence of rules in conflict with those treaty rules. Indeed, while the undertaking applies only within the respective jurisdiction of the States parties, as the treaty States, even in the case of regional human rights treaties, form an important group of the international community, its respect must prevent the emergence of a consensus on rules, and thereby the adoption of consensus law, in conflict with those treaty rules. By the same token, an actual State practice in conflict with those treaty rules, which might lead to the emergence of corresponding customary law, evidently cannot develop if the undertaking is respected. Similarly, as four of the permanent members of the Security Council are States parties to the ICCPR, and three of them also of the ECHR, the respect of the undertaking must prevent the adoption of Security Council resolutions in conflict with the treaty rules and applicable in the jurisdiction of any of the States parties of those treaties, that jurisdiction covering the territory of those States parties but also their security forces even if acting outside their respective territory.<sup>257</sup> In this way, while the treaty rules themselves remain subject to international law's usual polynormativity, they prevent, if respected, on the universal level the formation of new law in conflict with them. With that negative effect, they therefore may be considered as constitutionalized in the third but also in the second mode.

##### 5. Second Excursus: Treaty Constitutionalization as a Model for General International Law Constitutionalization

25. Second Excursus: Treaty Constitutionalization as a Model for

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<sup>256</sup> Indeed, the ECtHR made its decision in the *Matthews* case much more powerful by pronouncing not only the defending State but all the States participating in the multilateral action (all of which were at the same time States parties of the ECHR) to be responsible for that measure. Cf. ECtHR, *Matthews* case, *supra* note 247, para. 33.

<sup>257</sup> On the scope of the international law „obligation of good faith to refrain from acts calculated to frustrate the object of the treaty attached to a State which has signed a treaty“ cf. Schilling, GLWP, *supra* note 183, at 32-4.

General International Law Constitutionalization<sup>25</sup>. Second Excursus: Treaty Constitutionalization as a Model for General International Law Constitutionalization<sup>258</sup>

Before moving on to the fourth step, the question should be asked whether the discussion of general international law constitutionalization might benefit from aspects of the debate on the constitutionalization of treaty systems. That debate largely ignores the procedural entrenchment as an aspect of the constitutionalization of human rights treaty systems. Rather, the fact that most human rights treaties provide — at least as an option — for individually available judicial or quasi-judicial remedies against human rights violations committed by their States parties often and correctly is seen by itself as an aspect of their constitutionalization.<sup>259</sup> But those provisions also open ways to strengthen the constitutional character of the said treaty systems even further. They allow the respective treaty bodies to systemize and develop the rights provided for in the treaties, and thereby to achieve results equivalent to, or even surpassing, municipal human rights guarantees as protected in the more advanced States. This systemizing and developing jurisprudence is sometimes described as, and certainly is an aspect of, the constitutionalization of the subsystems established by those treaties.<sup>260</sup> The ECtHR, of course, is the body most successful, and most influential even outside its own treaty system, in this endeavour.<sup>261</sup>

In the same way in which the systemizing jurisprudence of the treaty bodies contributes to the constitutionalization of the respective treaty system, two strands of jurisprudence discussed above, the one mainly of municipal courts and the other one of treaty bodies, may be seen as contributing to the constitutionalization of general international law by systemizing it. The basis of any systemization of a legal order, of course, is an objective conception of that order. As mentioned above, such a conception of international law went hand in hand with the emergence of international *jus cogens*.<sup>262</sup> Building on this basis, the mainly municipal judicial decisions discussed above<sup>263</sup> have created — positive or negative

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<sup>258</sup> *Supra* note 49 applies *mutatis mutandis*.

<sup>259</sup> Cf. text at *supra* note 25.

<sup>260</sup> Bryde, *supra* note 4, at 67, stresses the importance of the universal treaty bodies' jurisprudence for the subject under discussion.

<sup>261</sup> The ECtHR has been described as a „sort of world court for human rights“ by John B. Attanasio, *Rapporteur's Overview and Conclusions: of Sovereignty, Globalization, and Courts*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 373 (Thomas M. Franck and Gregory H. Fox, eds., 1996) at 383.

<sup>262</sup> Cf. text at *supra* note 189.

<sup>263</sup> Italian Supreme Court, *Ferrini* case; ECtHR, *Al-Adsani* case; UK Court of Appeal, *Jones* case; Highest Special Court of Greece, *Margellos* case; German Federal Supreme Court, case no. III ZR 245/98; cited respectively in *supra* notes 110, 219 and 224.



— correlations between quite different strands of international law rules which had hitherto generally been considered as strictly separate i.e. between those human rights rules considered as *jus cogens*, and the rules of State immunity. While there is no agreement, between the different jurisdictions, as to the effective form that correlation takes, the mere fact that it has been created at all is an important step in the constitutionalization of international law. Similarly, the jurisprudence of the treaty bodies leading to the generalization and entrenchment by proxy of human rights treaty rules<sup>264</sup> contributes to the constitutionalization of general international law even beyond the fact of that entrenchment by integrating treaty law into general international law and thereby helping to systemize international law as a whole. Seen thus, the constitutionalization of those treaty systems serves indeed as a model for the constitutionalization of general international law.

But the modeling goes beyond that fact; it extends to some degree to the judicial protection of individual rights which is a hallmark of human rights treaties.<sup>265</sup> While it is true that the court protection of generalized international human rights is much less systematic than the rather well developed (quasi-)judicial protection of treaty-guaranteed human rights, still some such protection is available. On the municipal level, the concept of universal jurisdiction or, more restrictedly, the concept of jurisdiction over foreign crimes against a State's own citizens has permitted some courts to deal with certain human rights violations committed in foreign parts.<sup>266</sup> This jurisdiction may be criminal as well as civil.<sup>267</sup> At least in civil matters the access to the courts is individually available. While it emphatically is not available on the level of general international courts, the ICJ repeatedly has been called upon to give its opinion on similar questions.<sup>268</sup> It appears therefore that we witness a — certainly slow — constitutionalization of general international law also in a way precast by the debate on the constitutionalization of international subsystems.

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<sup>264</sup> ECtHR, *Matthews* case; HRC, General Comment No. 26; ESCRC, General Comment 8; quoted respectively in *supra* notes 247, 251 and 253.

<sup>265</sup> Cf. e.g. Article 34 of the ECHR and the Optional Protocol to the ICCPR.

<sup>266</sup> The best known case is House of Lords, *R v Bow Street Magistrate, ex parte Pinochet (No. 3)*, *supra* note 226. Also members of the Argentine Junta were subject to extradition procedures; cf. e.g. BBC News of Aug 20, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3584424.stm>, visited Apr 16, 2005.

<sup>267</sup> Cf. UK Court of Appeal, *Jones* case, *supra* note 219; Italian Supreme Court, *Ferrini* case, *supra* note 110. For the U.S., the Alien Tort Statute cases must be mentioned in this context; cf. in particular Supreme Court, *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

<sup>268</sup> Cf. ICJ, Advisory Opinion of Jul 8, 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, para. 25; ICJ, *Construction of a Wall*, *supra* note 168, para. 102-13, 127-31, although, in the latter opinion, the ICJ refrained from considering customary or consensus law.

6. The Fourth Step: Structural Possibilities of International Law Constitutionalization<sup>26</sup>. The Fourth Step: Structural Possibilities of International Law Constitutionalization<sup>26</sup>. The Fourth Step: Structural Possibilities of International Law Constitutionalization

We have found that at present, international law is strongly constitutionalized in the first mode i.e. that it contains many human rights rules applicable to many States. There is also some constitutionalization in the second mode i.e. some rules protecting human rights are part of general international law: prominent among them are the *droit de regard* as customary law and the proscription of torture as consensus law. Further, there is a constitutionalization in the third mode insofar as human rights treaty rules and consensus law are procedurally entrenched. In addition, there is some constitutionalization in the form of a systemization of general international law, and of the availability of judicial protection of human rights. In contrast, although the concept of *jus cogens* is rather widely accepted by international and municipal courts, this acceptance has not (yet) led to a constitutionalization in the third mode in the form of a relational entrenchment of human rights rules in international law (even if there is some entrenchment by proxy). The next and last step of the enquiry therefore must be to ask whether a further constitutionalization of general international law in the second and third modes is legally possible, normatively desirable, and factually likely.

a) Second Mode Constitutionalization — Generalization<sup>3a</sup>) Second Mode Constitutionalization — Generalization<sup>3a</sup>) Second Mode Constitutionalization — Generalization

As stated above, there are structural reasons preventing most aspects of human rights from becoming customary law,<sup>269</sup> but not from becoming consensus law. A further generalization of international human rights law by the issuance of consensus law is therefore possible. That it is normatively desirable cannot really be in doubt. To answer the question whether it is factually likely — especially in view of the opposition of an important group of States which hitherto has prevented the issuance of such consensus law —<sup>270</sup> it must be asked under which conditions human rights consensus law might be expected to be issued. Consensus law, it has been stressed, is posited law as is treaty law and municipal statute law. It might therefore be illuminating to look at the circumstances in which human rights have been guaranteed in municipal systems, and in treaties.

In municipal systems, there is ample evidence that human rights generally have been enacted in times in which politics-as-usual temporarily was suspended i.e. either after a successful revolution or once a repressive regime had been ended by other means. Leaving aside the Magna Carta Libertatum, this applies to the four oldest human rights legislations i.e. the

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<sup>269</sup> Cf. text at *supra* note 135.

<sup>270</sup> Cf. text at *supra* note 158 *et seq.*

English Habeas Corpus Act of 1679, the English Bill of Rights of 1689, the French Déclaration des droits de l'homme et du citoyen of 1789 and more or less the 1st to 10th Amendments to the U.S. Constitution of 1791. It applies also, in more recent history and to name but a few, for the Italian Constitution of 1947 and the German Basic Law of 1949, and for the post-1989 constitutions of the Eastern European States. It is one common aspect of those legislations that they were drafted in a serene „constitutional moment“<sup>271</sup> in which the solemnity of the occasion prevented politics-as-usual from encroaching on the higher aspirations of the drafters, making it possible to disregard countervailing interests to a degree not generally accepted in less serene times.

While the Universal Declaration on which the human rights treaties are substantially based may be considered as having been drafted, still in the aftermath of the Second World War, in a „constitutional moment“ similar to those at the basis of municipal human rights legislations, most human rights treaties were not drafted themselves in such a moment. It is therefore no surprise that the protection the resulting treaties provide generally is not fully equivalent to the protection achieved municipally in the more advanced States, as is witnessed by the clauses safeguarding existing human rights, routinely included in those treaties:<sup>272</sup> in general, and in normal times, no State knowingly would accept treaty human rights obligations going beyond its own municipal obligations.<sup>273</sup>

Concerning human rights consensus law, such law is based on verbal acts of States which are given in full view of the critical international public<sup>274</sup> and therefore dictated to a higher

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<sup>271</sup> The expression is Bruce Ackerman's, first used, it appears, in his *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) 489. His definition, in his *A Generation of Betrayal*, 65 FORDHAM L. REV. 1519 (1997) 1519, is this: A constitutional moment „occurs when a rising political movement succeeds in placing a new problematic at the center of American political life“. The expression has been applied to international law by Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002), and to European law by Neil Walker, *The Legacy of Europe's Constitutional Moment*, 11 CONSTELLATIONS 368 (2004). My use of the term differs slightly from Ackerman's, as is evident from the text.

<sup>272</sup> Cf. e.g. Articles 53 of the ECHR, 5 (2) of the ICCPR.

<sup>273</sup> The famous U.S. reservations, declarations and understandings, International Covenant on Civil and Political Rights, 138 Cong.Rec. S7481-01 (daily ed., April 2, 1992), of which the HRC „believes that, taken together, they intended to ensure that the United States has accepted only what is already the law of the United States“ (HRC, Concluding Observations of the Human Rights Committee: United States of America.03/10/95.CCPR/6/79/Add.50; A/50/40, paras. 266-304, at para. 279) only made into law the expectations most treaty States have at least originally.

<sup>274</sup> It is here that the „global civil society“ (on which cf. e.g. FALK, *supra* note 20, at 81-102) plays an indirect but increasingly important rôle in international law-making that is respectful of individual rights. On the origins of that society, cf. Mary Calder, *The Ideas of 1989: The Origins of the Concept of Global Civil Society*, in REFRAMING THE INTERNATIONAL: LAW, CULTURE, POLITICS 70 (2002, Richard Falk *et al.*, eds.) at 70: „These ideas centered on the coming together of peace

degree by ethical considerations than their actual acts,<sup>275</sup> and, to some degree, it is legitimized by that fact under aspects of democracy.<sup>276</sup> One might therefore assume that such law-making might emulate a constitutional moment. But, up to the present, this is not demonstrated by actual developments. Therefore, in all likelihood, an actual constitutional moment (that actually would be grasped by the leaders of the world) would be required for the emergence of comprehensive human rights consensus law. As such a moment, one could perceive a decisive victory over terrorism, however defined: if the leaders of the leading nations of the world would make statements, at such a moment, to the effect that, to commemorate that victory, and to prevent the resurgence of terrorism, they would consider, say, the rights pronounced in the Universal Declaration henceforth as binding law, it is probable that no group of States would object, and that corresponding consensus law thus would be made.<sup>277</sup> In this way, a higher degree of second mode constitutionalization of general international human rights law might be achieved.

b) Third Mode Constitutionalization — Entrenchment  
3b) Third Mode Constitutionalization — Entrenchment

aa) Legal Possibility  
4aa) Legal Possibility  
4aa) Legal Possibility

Article 53 of the VTC defines *jus cogens* as entrenched.<sup>278</sup> But the entrenchment of *jus cogens* rules with regard to other general international law rules is not really made out.<sup>279</sup> It should be recalled that apparently no court or tribunal was yet called upon to decide on such an entrenchment, and that no court applied the *jus cogens* test provided for in Article 53 of the VTC, so there is no guidance to be gleaned from (quasi-)judicial decisions. As to publicists, concerning the *jus cogens* concept according to Article 53 of the VTC, it has been remarked that „[t]he final relative clause in Article 53 [of the VTC] is badly drafted“.<sup>280</sup> But it is not just

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and human rights ... . The highly contested concept of ... Global Civil Society can be said in some sense to encompass or encapsulate these strands of thinking“.

<sup>275</sup> Cf. Schilling, *supra* note 62, at 248. This could be seen as one instance of global civil society instrumentalizing the State; cf. FALK, *supra* note 20, at 100.

<sup>276</sup> Doubtful Kumm, *supra* note 3, at 915.

<sup>277</sup> As the leaders of democratic nations are democratically more accountable than officials integrated in transnational networks, this kind of consensus law to some degree might be immunized against the critique by Kumm, *ibid*.

<sup>278</sup> Cf. quotation in *supra* note 196.

<sup>279</sup> Critical on „The Question of Dynamism of Peremptory Norms“ also Sztucki, *supra* note 78 at 108-14.

<sup>280</sup> Akehurst, *supra* note 200, at 285 note 5.

badly drafted; it is deeply flawed as a rule of recognition of *jus cogens* rules.<sup>281</sup> Indeed, to derogate from, or to modify, *jus cogens* according to Article 53 of the VTC, there are inevitably, in addition to subsequent *jus cogens* norms and, of course, *desuetudo*, at least two ways. The first possibility to derogate from such *jus cogens* is a truly universal treaty.<sup>282</sup> Under the procedural view of *jus cogens*, which of course is the view of Article 53 of the VTC, such a treaty, concluded by (nearly) all the States, must be considered as apt to change preëxisting *jus cogens* as those selfsame States, acting together as the international community, are considered as the legislature accepting and recognizing *jus cogens*. As to the second possibility, it has been claimed that, according to the principle of *acte contraire*, „a rule of *jus cogens* will cease to be *jus cogens* if the overwhelming majority of States decide that it is no longer *jus cogens* — even though it may still remain a rule of law“.<sup>283</sup> It is not clear, however, whether international law provides for such a possibility separately to take away the attribute of *jus cogens* from a norm.<sup>284</sup> But in any case, this is a needlessly complicated construction. If a new general international law rule emerges as customary law, or is issued as consensus law — e.g. a rule permitting the use of force against a State for the purpose of arresting a war criminal found on that State's territory —,<sup>285</sup> and if this rule is not reconcilable with an existing *jus cogens* rule, it will without more first (partially) „demote“, and then change or restrict, the *jus cogens* rule without however necessarily being itself *jus cogens*.<sup>286</sup> To take another example, if a consensus of the international community had emerged, as it has not, supporting the position of the U.S. Justice Department paper concerning torture of al-Qaeda suspects,<sup>287</sup> then even the most clearly established *jus cogens* rule of them all — the proscription of torture — would have suffered an exception, and it is difficult to see on which basis (other than a

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<sup>281</sup> It is telling that Martin, *supra* note 153 at 344, finds the greater legal authority of *jus cogens* in the claim that „states do not need to consent to a *jus cogens* norm to be legally bound by that norm“.

<sup>282</sup> Cf. Sztucki, *supra* note 78, at 112-3 and 115 with further references.

<sup>283</sup> Akehurst, *supra* note 200, at 285 note 5.

<sup>284</sup> In the somewhat parallel case of municipal legislation it must be distinguished between the decision on the contents of a law, typically made by a parliament, and the order that a law with those contents indeed be law, typically made by the Head of State. Generally, the Head of State cannot revoke that order once it has been given; positive law will not allow for such an *actus contrarius*. Cf. SCHILLING, *supra* note 51, at 95-6.

<sup>285</sup> And cf. Cassese, *supra* note 26, at 24-5, welcoming an emerging doctrine in international law allowing, under stringent conditions, the use of forcible countermeasures to impede a State from committing large-scale atrocities on its own territory.

<sup>286</sup> Cf. Weil, *supra* note 8, at 271: „A cela s'ajoute que le mécanisme qui permet à une norme ordinaire de passer au rang supérieure d'une norme impérative ... ressemble comme un frère à celui qui donne naissance à toute norme, même ordinaire, du droit coutumier“.

<sup>287</sup> Available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>, visited Jan 6, 2005.

pure natural law basis)<sup>288</sup> anybody could have denied the validity of such a change in the law. Seen thus, the entrenchment of *jus cogens* according to Article 53 of the VTC with regard to other general international law rules is more apparent than real; such law cannot be protected against encroachments by later consensus law issued by the international community as „legislature“. Its entrenchment therefore does not go beyond the protection of human rights consensus law provided for by the latter's procedural entrenchment.<sup>289</sup> The same, it appears, would apply to *jus cogens* according to precedent.

In the last analysis, therefore, it appears that the importance of *jus cogens* for a hierarchization of general international law is largely exaggerated. It may be useful in treaty law although it aptly has been remarked that „it may be taken for granted that arrangements of that nature [i.e. contrary to *jus cogens*] would never be given the status of treaties to which the concept of *jus cogens* might apply“. <sup>290</sup> The concept was also useful in this sense that it triggered off the realization that international law has become systemized.<sup>291</sup> But this, it is submitted, has exhausted the usefulness of *jus cogens* in general international law.<sup>292</sup> Concerning its proper function as entrenched law, in the context of general international law it must be considered a red herring.<sup>293</sup>

bb) Normative Desirability4bb) Normative Desirability4bb) Normative Desirability

There remains the normative question as to the desirability, or legitimacy, of a relational entrenchment proper of human rights rules beyond the procedural entrenchment of treaty and consensus law. The normative approach here chosen considers it desirable to transpose

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<sup>288</sup> On which cf. text at *supra* note 207.

<sup>289</sup> On which cf. text at *supra* note 186.

<sup>290</sup> By Sztucki, *supra* note 78, at 21 and n. 67, who also discusses „Claims of Voidness of Treaties“ *ibid.* at 29-33. Recent arrangements coming to mind that might be considered as contrary to *jus cogens* include the „Operacion Condor“, i.e. the (apparently quite formal) agreement between Latin American military rulers on the disappearance of their supposed enemies (cf. e.g. Pierre Abramovici, «*Opération Condor*», *cauchemar de l'Amérique latine*, LE MONDE DIPLOMATIQUE 24-5 (May 2001), and the agreements between the U.S. and a host of other States necessarily underlying the policy of „extraordinary rendition“ on which cf. Mayer, *supra* note 178. Weil, *supra* note 8, at 273 mentions „[l']accord passé par l'Allemagne nazie avec tel ou tel de ses voisins pour échanger des juifs contre des camions“. And cf., on a completely different subject, Johnston, *supra* note 212, on Article 64 of the VTC and the ICRW.

<sup>291</sup> Cf. text at *supra* note 189.

<sup>292</sup> And cf. Weil, *supra* note 8, at 282: „il faut laisser ... [la] théorie [de *jus cogens*] au droit des traités, dont elle n'aurait jamais dû sortir.“

<sup>293</sup> For Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EJIL 113 (2005) at 122, international *jus cogens* is kitsch: it has „no clear reference in the world but ... invoke[s] a longing for such reference and create[s] a community out of such longing“.

the achievements of the constitutional State system to the international level. One of those achievements is the protection of human rights which, in the municipal context, is guaranteed by the (procedural and relational) entrenchment of the respective provisions in the constitution. But this kind of entrenchment, while its details differ between different States, in no State excludes the adaptation of human rights provisions to changing circumstances. Indeed, the possibility to change the constitution, including its human rights provisions, by democratic means is itself an achievement of the constitutional State system.<sup>294</sup>

The transposition to the international level of this form of the protection of human rights rules therefore requires a certain measure of, but not an absolute, entrenchment of human rights rules; a certain adaptability of protected rules to possibly changing circumstances is desirable also on the international level. It is submitted that the procedural entrenchment of consensus law and human rights treaties corresponds to, but is also sufficient — in the case of human rights treaties largely sufficient — for, the purpose of preventing frivolous restrictions of human rights. In contrast, a relational entrenchment proper of human rights rules by *jus cogens* — implying that courts must disregard purported international law, whether customary, consensus or treaty law, that had been developed by the (international community of) States after the emergence of the relevant *jus cogens* rule but had not itself the character of *jus cogens* — might well lead to a petrification of human rights rules on the international level that might prove counterproductive. In any case, it would go beyond what is required under the normative approach here chosen. Under that approach, the relational entrenchment of human rights rules as provided for by *jus cogens* therefore does not appear desirable.

In this result, the normative approach here chosen is on all fours with requirements flowing from the assumption of a proto-democratic character of the international community relying on the (tenuous) democratic legitimation of international law which can be expressed in this way that „general international law bases its legitimacy on decisions of, ideally democratic, national processes of decision-making“.<sup>295</sup> Under the aspect of (proto-)democracy, any immutability of the law, including international human rights law, must be anathema. This applies with particular force to *jus cogens* according to its contents which is completely outside State control and by necessity left to the determination by „unaccountable“ (*George W. Bush*)

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<sup>294</sup> Note that under Article 79 (3) of the German Basic Law, only amendments affecting the basic principles *inter alia* of Article 1 are inadmissible. Relevant in the present context is Article 1 (3) according to which „[t]he following basic rights shall bind the legislature ... as directly enforceable law“. Those following basic rights themselves may well be amended, and in fact very often have been amended.

<sup>295</sup> Andreas L. Paulus, *Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and The Role of the State*, 25 MICH. J. INT'L L. 1047 (2004) at 1050.

international judges. The ICTY's „jurisprudence commando“<sup>296</sup> in *Furundzija*,<sup>297</sup> elevating the proscription of torture to the rang of *jus cogens*, is a clear example of an attempt at such judicial law-making. It could succeed only, insofar as it was successful (as it was only in part concerning the legal consequences flowing from a violation of the proscription), because there existed a consensus of the international community on the proscription of torture (although not necessarily on its relational entrenchment). Indeed, it is suggestive that those few *jus cogens* rules recognized in judicial decisions closely reflect the few generally admitted rules of international consensus law (which are procedurally entrenched as such, and which for their part reflect what might be perceived as natural law rules).

Doubts as to the normative desirability of *jus cogens*, and indeed as to the conduciveness of that concept to sound law, extend to other purported legal consequences of *jus cogens* rules. It appears that it might be a more convincing approach e.g. to finding a solution of the conflict between the prohibition of grave violations of human rights and the law of State immunity, perceived in *Ferrini*,<sup>298</sup> to try to balance the respective values protected by those purportedly conflicting rules. In this way, while the values for which *jus cogens* according to its contents is considered as *jus cogens* in the first place are taken into account, as clearly they must be, the killer argument „*jus cogens*“ could be avoided, and a true balancing between the different values involved could take place, of course with a less certain result. The only legal requirements for such a balancing exercise are the realization that both sets of values are represented by international law rules, and that that law forms a system.

Such a balancing exercise would also permit to take into account the democratic legitimacy of an envisaged solution. Indeed, transposition of the achievements of the constitutional state system cannot be restricted to the substantive achievements i.e. human rights but must extend, as far as possible, to procedural achievements including the protection of individual rights and, of particular interest in the present context, democracy. Under this aspect, it is doubtful whether the restriction of sovereign immunity which some decisions infer, as a matter of international law, from the *jus cogens* character of the proscriptions of torture and war crimes has any democratic legitimacy. This inference appears to be rather at odds with State practice. It has been remarked, correctly, that it was difficult for the [Italian Supreme] Court to come to terms with the manifest scarcity of useful judicial precedents. ... The only decisions on which the Court can eventually rely are decisions taken by US judges on the basis of the 1996 amendment to the Foreign Sovereign Immunity Act, ... However, the

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<sup>296</sup> Cf. text at *supra* note 217.

<sup>297</sup> *Supra* note 214.

<sup>298</sup> Cited *supra* note 110.



dubious value of those judgments is indirectly admitted by the Court on account of the unilateral nature and political overtones of the US approach.<sup>299</sup>

These overtones are underlined, and the U.S. approach discussed is countermanded, as a matter of international law, by the quite uncompromising stance the U.S. itself takes in all questions concerning its own, and its soldiers' and officials', immunity in particular from the jurisdiction of the ICC.<sup>300</sup> But it is not only the U.S. which insists strongly on its sovereign immunity before foreign or international courts. Rather, its view is shared by proponents from the supposedly opposite camp. Indeed, it has been claimed that „the neo-colonial international law which has assumed shape in the last decade has been premised on the retreat of the state. ... In the face of these developments to condemn the principle of sovereignty is to side with powerful states against the weak“.<sup>301</sup> In view of this opposition from both sides of the international power spectrum it appears doubtful whether an international law development leading to important inroads into State immunity has any democratic legitimacy at all.

Therefore, under the aspect as well of the relational entrenchment of *jus cogens* rules as of the legal consequences purportedly flowing from such rules such entrenchment is incompatible with the democratic legitimation of international law and therefore cannot be considered as normatively desirable under the approach here chosen.

cc) Factual Likelihood4cc) Factual Likelihood4cc) Factual Likelihood

A relational entrenchment proper of general international law rules, we have just stated, is neither legally possible nor normatively desirable. Of course, there might be different opinions as to these two points. But a — purported — relational entrenchment is also factually unlikely. In municipal constitutions, relational entrenchment of the constitution is a means for the framers of the constitution, or of an amendment to the constitution, to

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<sup>299</sup> Gattini, *supra* note 233, at 230.

<sup>300</sup> Cf., most recently, Security Council Resolution 1593 (2005), adopted by the Security Council at its 5158th meeting, on Mar 31, 2005, para. 6 of which was inserted on the insistence of the U.S.: „Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State“ — According to Neha Jain, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*, 16 EJIL 239 (2005), this kind of resolution is illegal.

<sup>301</sup> B.S. Chimni, *Towards a Radical Third World Approach to Contemporary International Law*, 5 no. 2 ICCLP REVIEW 14 (2002) at 23-4.

withhold the power to modify their enactment from the general legislature.<sup>302</sup> But there is, in international law, no distinction comparable to that between those different constituent and legislative bodies. There is only the international community which can act indirectly in such a way that customary law emerges, or directly by the issuance of consensus law. There is no reason whatsoever for the international community to take away from itself the power to modify or to annul rules it has made itself, or to make the exercise of this power unduly difficult.<sup>303</sup> Therefore, such an entrenchment, even if it were possible, would be very unlikely to happen.

#### IV — Conclusion1IV — Conclusion1IV — Conclusion

This article has discussed the question whether general international law constitutionalization may be, under structural aspects, a means of transposing the achievements of the constitutional State system, in particular in the protection of human rights, to the international level. It does not come up with a clear-cut answer. On the one hand, many rules of constitutional protection have been internationalized, mainly by multilateral treaties. Those rules have achieved a remarkable degree of protection, substantively, because it is very difficult to change existing treaties, and procedurally, as many of those treaties provide for judicial or quasi-judicial treaty bodies to control the States parties' respect of their obligations. Those obligations include the one not to act in a way that would frustrate the objects of those treaties. In a different development, a certain systemization of international law has been achieved, correlating certain fundamental human rights rules with other sectors of international law and thereby arguably enhancing their protection. On the other hand, while the international community is able to issue international consensus law, and thereby e.g. to generalize human rights protection globally, up to now it has not made extensive use of this ability. Any hope that it will do so in the future, near or far, may well prove utopian. But insofar as the international community has issued, or will issue, such consensus law, while an entrenchment of that law against amendments or abolition by later consensus law appears neither feasible nor likely, nor even normatively desirable, it only may be amended by the issuance of such law which can be prevented by any one important group of States.

Overall, general international law has achieved a remarkable degree of constitutionalization. A legal framework for transposing the achievements of the constitutional State system to the international level appears to be in place. Considering the glass as half full, one might remark that most human rights provisions that are familiar from municipal constitutions have been internationalized. Considering it as half empty, however, one must remark that nearly none

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<sup>302</sup> Or, in the case of the *pouvoir constituant originaire*, even from the amendment procedure.

<sup>303</sup> And cf. the quotation from Weil, *supra* note 8, in *supra* note 48.

of those rights is part of general international law. The responsibility henceforth to make possible the issuance of further human rights rules as consensus law falls squarely in the field of those States whose objections up to now have prevented such an extension of the scope of international human rights protection. At the present stage of international law development, and as long as those States form an important group of the international community, it appears there is nothing that community can do about it against the opposition of those States.