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# Human Rights and the Magic of Jus Cogens

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## Abstract

*There is an almost intrinsic relationship between jus cogens and human rights. Peremptory human rights norms, as projections of the individual and collective conscience, materialize as powerful collective beliefs. As such, they inherently possess an extraordinary force of social attraction that has an almost magical character. This article investigates the legal effects of peremptory human rights norms at both the systemic and contextual levels. If these norms have been successful in providing the societal body with a set of identity values, they have dramatically failed to operate as an ordering factor of social practices. To wonder why this is so and to see what can be done (and by whom) to enhance their impact on the contextual level is the main goal of this article.*

## 1 Introduction

Georges Abi-Saab certainly had a point when he said that even if the normative category of *jus cogens* were to be an 'empty box, the category was still useful; for without the box, it cannot be filled'.<sup>1</sup> Indeed, when the Vienna Convention on the Law of Treaties (VCLT) was adopted, criticism was raised against the choice of leaving the Article 53 box empty.<sup>2</sup> The metaphor of the empty box is intriguing and the profound divergence of opinions on its alleged content has nourished international legal scholarship ever since the formal appearance of *jus cogens*. If a detailed inventory of the contents of the box is difficult to draw, it is nevertheless hard to deny that human rights are contained within it. There is an almost intrinsic relationship between peremptory norms and human rights. Most of the case law in which the concept of *jus cogens* has been invoked is taken up with human rights. Even more revealing is that students, whenever they are asked to come up with examples of peremptory norms,

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<sup>1</sup> Abi-Saab, 'The Third World and the Future of the International Legal Order', 29 *Revue Egyptienne de Droit International* (1973) 27, at 53.

<sup>2</sup> Abi-Saab, 'The Uses of Article 19', 10 *EJIL* (1999) 341.

invariably answer either ‘human rights’, without any further qualification, or refer to particular human rights obligations like the prohibition of genocide or torture. This holds true for both those students who make the grade and those who do not. This simple empirical finding may cause many colleagues to frown but its relevance should not be under-estimated.

Perhaps it is in vain to question why this is so, and to wonder whence this close association comes. Most likely, as is the case with the myth of Lohengrin, if the origin of this link were to be traced and disclosed, the awesome character of the correlation would fade away. One cannot help noticing, however, that even before the adoption of the VCLT, human rights were perceived as inherent to *jus cogens* as opposed to *jus dispositivum*. Judge Tanaka’s dissenting opinion in the *South West Africa* case bears witness to this perception.<sup>3</sup> At a remarkably earlier time, Alfred von Verdross had held that a treaty ‘binding a state to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an inadequate manner the life, the liberty, the honor and the property of men on its territory’ was to be regarded as forbidden in international law.<sup>4</sup> Verdross’ contention, advanced at a time when the international human rights doctrine was not yet looming on the horizon, further attests to the force of the moral intuition that some fundamental human rights should be considered as inderogable by the will of states.

Among the examples provided by the International Law Commission (ILC) of norms which could be characterized as peremptory in character, those concerned with human rights stood out.<sup>5</sup> In many ways, the wide support by states of the notion of *jus cogens* in Vienna, with only one state expressly dissenting,<sup>6</sup> represented the culmination of a process of acceptance the early stages of which had already taken place in academic circles. René-Jean Dupuy, at the time a member of the Holy See’s delegation to the Vienna Conference, accurately noted that the inclusion of Article 53 in the VCLT sanctioned the ‘positivization’ of natural law.<sup>7</sup> In other words, to have codified in a treaty a normative category with an open-ended character, the content of which could become intelligible only by reference to some natural law postulates,

<sup>3</sup> ‘If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*’: Judge Tanaka’s Dissenting Opinion in the *South West Africa* case (*Ethiopia v. South Africa; Liberia v. South Africa*), Second Phase, Judgment [1966] ICJ Rep 298.

<sup>4</sup> Von Verdross, ‘Forbidden Treaties in International Law’, 31 *AJIL* (1937) 571, at 574.

<sup>5</sup> See [1966] *Yearbook of the International Law Commission*, ii, at 248 (UN Doc A/CN.4/SER.A/1966/Add. 1).

<sup>6</sup> It is worth recalling that the VCLT was adopted with only one vote against, that of France, which strongly opposed the inclusion of *jus cogens*. For an analysis of the French position at the Vienna Conference see Deleaux, ‘Les positions françaises à la Conférence de Vienne sur le droit des traités’, 14 *Annuaire français de droit international* (1969) 7, at 14–20.

<sup>7</sup> See René-Jean Dupuy’s remarks at the meeting of the Committee of the Whole on 30 Apr. 1968 (UN Conference on the Law of Treaties, First Session Vienna, 26 Mar.–24 May 1968, Official Records, Summary records of the plenary meetings of the Committee of the Whole, at 258, para. 74).

was tantamount to dignifying the latter's otherwise uncertain foundation by granting it the status of positive law. By opening her box, Pandora let uncontrollable forces into the world, which have profoundly affected the structure and functioning of international law. As in the myth of Pandora, however, some hope is left in the box.<sup>8</sup> Arguably, this will eventually help restore order to the chaos.

## 2 The Magicians

Ever since its inclusion in the VCLT *jus cogens* has been a source of controversy. Before its sanctioning by judicial decisions in the 1990s, *jus cogens* had been largely developed by international legal scholarship. Of particular interest is the debate on the issue of how peremptory norms come into being. The aura of mystery around this issue, somewhat nourished by the ambiguity left by the ILC, has generated a panoply of writings. In particular, the possibility that *jus cogens* could be created by treaty<sup>9</sup> stands in sharp contrast to the view that peremptory norms can emerge only from customary law. The latter interpretation focuses on the wording of Article 53, which makes express reference to peremptory norms being part of general international law. As regards human rights, it has been contended that their coming into being as general rules of international law would not occur through the medium of customary law-making and its reliance on state practice but rather by general principles.<sup>10</sup> General principles would be established by a process similar, but not entirely analogous, to the one that leads to custom. In fact, the required general acceptance and recognition would not need to be based on state practice, as traditionally understood. It would rather result from a variety of manifestations 'in which moral and humanitarian considerations find a more direct and spontaneous "expression in legal form"'.<sup>11</sup> Although this approach to the source of human rights law was presented by Alston and Simma as 'grounded in a consensualist conception of international law', their final reference to Henkin's stance on general principles common to legal systems as reflecting 'natural law principles that underlie international law' reintroduces the same ambiguity about the origin of the sources of human rights that the authors had probably set out to dispel.<sup>12</sup>

The discourse on *jus cogens* and its impact on international law cannot be considered in isolation. The developments that occurred almost at the same time need be

<sup>8</sup> See Kane's contribution in R. Cavendish (ed.), *Mythology. An Illustrated Encyclopedia* (1980), at 122.

<sup>9</sup> See [1963] *Yearbook of the International Law Commission*, II, at 199, para. 4 and 211, para. 1. According to the ILC, '[i]t is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*': *Yearbook of the International Law Commission*, *supra* note 5, at 248, para. 2. For Soviet doctrine that *jus cogens* can be created by treaty see Tunkin, 'International Law in the International System', 147 *Recueil des cours* (1975-IV) 1, at 92-93; Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law', 172 *Recueil des cours* (1981-III), at 255-256.

<sup>10</sup> Simma and Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', 12 *Australian Year Book of Int'l L* (1988-1989) 82.

<sup>11</sup> *Ibid.*, at 105.

<sup>12</sup> *Ibid.*, at 108, quoting Henkin, 'International Law: Politics, Values and Functions: General Course in Public International Law', 216 *Recueil des Cours* (1989-IV) 9, at 61-62.

recounted only briefly here. In particular, the emergence of the notion of obligations *erga omnes*,<sup>13</sup> that is obligations owed by states to the international community as a whole, and the somewhat ancillary notion of international crimes, namely a system of aggravated responsibility for serious violations of norms of particular importance to the international community,<sup>14</sup> seemed to purport a restructuring of the international community on a set of common values and interests, for which *jus cogens* provided, at least potentially, a proper ordering factor by postulating the pre-eminence of certain rules and their underlying values.

Relying on these notions, international legal scholarship laid down the theoretical foundations of a world order based on a priority of values reflecting a hierarchy of norms. Thriving on an ever-increasing consolidation of the notion of international community and its foundational normative tenets, such as *jus cogens* and obligations *erga omnes*, numerous scholars have identified fundamental norms with the distinguishing traits of a constitutionalization process.<sup>15</sup> The normative, as opposed to the institutional, dimension of international constitutionalism has been emphasized: hierarchically ordered norms, even without the backing of adequate institutional mechanisms, could fulfil constitutional functions.<sup>16</sup>

If it may be temerity of sorts to say that the contours of *jus cogens* have been moulded by international lawyers, to hold that the latter have created the humus on which the notion could thrive is certainly an accurate representation of its development. In this respect, international lawyers have acted as ‘magicians’, administering the rites of *jus cogens* and invoking its magical power. Acting under the different guise of scholars, counsel, international judges, and legal advisers, international lawyers have succeeded in making *jus cogens* part and parcel of the fabric of the international law discourse.<sup>17</sup>

### 3 The Essence of the Revolution

The primary impulse for such a dramatic change in the structure and functioning of the international legal system was provided by the introduction into international law of *jus cogens*. By postulating a hierarchy of rules, rather than sources, on the basis of their content and underlying values, *jus cogens* has made its way into the very heart of the system. The unprecedented character of a normative category expressly conceived

<sup>13</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment of 5 Feb. 1970 [1970] ICJ Rep 3, at 32, para. 34.

<sup>14</sup> [1976] *Yearbook of the International Law Commission*, II (Part Two), at 95.

<sup>15</sup> See, among others, Mosler, ‘The International Society as a Legal Community’, 140 *Recueil des Cours* (1974, IV) 1; Tomuschat, ‘Obligations Arising for States Without or Against their Will’, 241 *Recueil des Cours* (1993, IV) 195; Simma, ‘From Bilateralism to Community Interest in International Law’, 250 *Recueil des Cours* (1994, VI) 217.

<sup>16</sup> See Peters, ‘Compensatory Constitutionalism: the Function and Potential of Fundamental International Norms and Structures’, 19 *Leiden J Int'l L* (2006) 579.

<sup>17</sup> See Bianchi, ‘Globalization of Human Rights: the Role of Non-State Actors’, in G. Teubner, *Global Law without a State* (1997), at 179, 183 ff.

to accord priority to certain rules to the detriment of others broke away from the traditional principle of mutual flexibility between the sources, whereby treaty and customary law rules could derogate from one another. The not too 'invisible community of scholars' has consolidated its foundations,<sup>18</sup> expanded its scope, and slowly turned it into a notion which is almost impossible to circumvent in the contemporary doctrinal debate.

Certainly, the identification of the content of the normative category of *jus cogens* has never been an easy process. However, human rights rules have been almost invariably designated as part of it. This has occurred either by way of a general reference to the 'bulk of contemporary human rights prescriptions' without any further qualification,<sup>19</sup> or, more frequently, by invoking the peremptory character of particular human rights obligations such as the prohibition of slavery, torture, and genocide. Even the *Restatement (Third) of the Foreign Relations Law of the United States* is incredibly generous in characterizing a fairly high number of human rights norms as having attained peremptory status.<sup>20</sup> In fact, to think of both human rights and *jus cogens* at the same time is an almost natural intellectual reflex. It is as if human rights were a quintessential part of *jus cogens*. The introduction of ethical and moral concerns into the international legal system takes place for the first time in an overt manner. The classical international law attitude of hiding ethical and political considerations behind the screen of the objectivity of positive law rules derived directly or inductively from the will of states yields to the express acknowledgment that rules can be hierarchically ordered on the basis of their underlying values. The inner moral aspiration of the law thus materialized in international law with the advent of *jus cogens*.<sup>21</sup>

To hold that *jus cogens* is nothing but a legal technique aimed at preserving the formal integrity of the system by characterizing as inderogable some of its procedural norms is tantamount to overlooking what the function performed by *jus cogens* was meant to be.<sup>22</sup> The quest for value- and interest-sharing, attested to by the priority accorded to some international rules over others, cannot be quickly disposed of as an act of faith, the 'messianic dimension' of which should not divert the attention of the positive lawyer.<sup>23</sup> Incidentally, the charge of 'messianism' should not pierce the conscience of those who believe that religion, mythology, and even magic are not completely alien to law. As projections of the individual and collective conscience they may materialize as both identity values for the societal body and ordering factors of social practices. The fact that the revolution of *jus cogens* has taken place in the interstices of legal technicalities is of little significance and should not lead us astray. It is an irony of sorts that we know the most about the effects of a violation of *jus cogens* in

<sup>18</sup> The expression is borrowed from the well-known article by Schachter, 'The Invisible College of International Lawyers', 72 *Northwestern U L Rev* (1977–1978) 217.

<sup>19</sup> M.S. McDougal, H.D. Lasswell, and Lung-chu Chen, *Human Rights and World Public Order: the Basic Policies of an International Law of Human Dignity* (1980), at 345.

<sup>20</sup> (1987), at para. 702.

<sup>21</sup> L. Fuller, *The Morality of Law* (rev'd edn, 1965).

<sup>22</sup> R. Kolb, *Théorie du jus cogens international. Essai de relecture du concept* (2001).

<sup>23</sup> *Ibid.*, at 19.

the one area in which they are least likely to be relevant: the law of treaties. It is indeed highly unlikely that two or more states would make a treaty to commit an act of genocide or to subject certain individuals to torture. And yet we know from Article 53 that, as a matter of law, any such treaty would be null and void for the parties to the VCLT and, likewise, for all states as a matter of customary international law. What happens if *jus cogens* rules are violated outside the law of treaties is more controversial. Such an inquiry, however, is compelling because no one still seriously questions whether peremptory norms extend well beyond the law of treaties.<sup>24</sup>

Indeed, the river bank of the law of treaties having been carried away by the force of the flood, *jus cogens* has inundated the plain of international law. Since then, *jus cogens* has nourished unity and division. By fostering a political and normative project, clearly at odds with the paradigms of the past, *jus cogens* has produced a moral force of unprecedented character. A less idealistic portrait would cause one to highlight *jus cogens*' ideologically charged connotations, the materialization of which has turned out to be much more difficult than expected. By imposing shared values and aspirations applicable to all on a global scale, it has also unleashed opposite forces aimed at fostering parochial interests.

The myth of Janus and his double-faceted nature springs to mind. Guardian of the universe and god of the beginning, Janus was celebrated in marriages and births. Most of all, however, he represented a state of transition: from the past to the future, from youth to adulthood, from one condition to another. This explains why he is often represented as two-faced and why he often stood at door thresholds to mark the visitor's passage.<sup>25</sup> However, the Latin myth of Janus as ruler of Latium also casts him as paving the way for the golden age, by introducing money, law, and new agricultural techniques.<sup>26</sup> Change, tension, transition, passage, duplicity, promise, expectation are all elements that underlie the myth of Janus; a symbolic representation not too far removed from the way in which one could portray the normative category of *jus cogens*. In particular, the two faces of Janus suitably epitomize the dual function that peremptory norms are called on to perform. On the one hand, a systemic dimension could be made out in which peremptory norms on human rights are invoked in a general fashion without any particular qualifications. On the other, a contextual dimension exists where specific human rights norms, which have allegedly attained the status of *jus cogens*, are meant to operate as rules apt to be enforced. In this latter dimension, one would also include secondary rules of responsibility applicable in the case of violations of peremptory norms.

<sup>24</sup> See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, at 181–192. See also the *Conclusions of the International Law Commission Relating to Unilateral Acts of States*, Report of the Working Group, in which 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations' (see, in particular, No 8) were adopted (UN Doc A/CN.4/L.706 of 20 July 2006).

<sup>25</sup> See Ferguson's contribution to Cavendish (ed.), *supra* note 8, at 142.

<sup>26</sup> See 'The History of Janus' in A. Banier, *The Mythology and Fables of the Ancients Explain'd from History* (1976), ii, at 261–272.

## 4 Systemic Dimension

In this particular connotation, any further qualification of peremptory human rights norms is redundant. The societal body has an intuitive representation of them which finds its basis in a widely shared moral intuition. The latter, in turn, sanctions its social authority and evocative power. International legal scholarship has thrived on this potential for coalescing societal consensus and has made use of the concept to foster all-encompassing visions of the international legal order and to lay down the foundations of a world community. By shaping the conscience of the community and by giving normative expression to the allegedly universal values of the *πολις*, human rights peremptory norms form the social identity of the group as well as one of the main ordering factors of social relations.

At this point one may legitimately wonder what the practical relevance of such highly abstract considerations could ever be. Empirical evidence suggests that this systemic dimension of *jus cogens* may produce significant legal effects despite its apparently theoretical character. A good illustration of the practical bearing of the systemic dimension of *jus cogens* is represented by the recent reaction of the international societal body to the sweeping anti-terror measures passed by the Security Council. Even though no separation of powers, let alone a system of checks and balances, can be traced to the international legal system,<sup>27</sup> the basic underlying tenet that power must be limited when it tends to aggregate can operate also in a setting characterized by scant institutional development. The following remarks will shed further light on this line of argument.<sup>28</sup>

As is well known, in the aftermath of the terrorist attacks of 9/11, the Security Council (SC) has been at the forefront of the fight against international terrorism. The SC's normative strategy has consisted of a two-fold approach. On the one hand, targeted sanctions have been adopted against individuals and entities suspected of being affiliated with terrorist networks. Individuals and entities that are listed in the SC's 'Consolidated list' are subjected to a worldwide freezing of assets. On the other, the Security Council passed Resolution 1373, which lays down general obligations that states must implement. Such obligations, ranging from the prevention and repression of terrorism financing to international judicial cooperation, were formulated in a general and abstract fashion, which traditionally characterizes statutory law in municipal legal systems. This is the reason why many commentators refer to Resolution 1373 as an exercise in general law-making by the SC. Other SC resolutions, although admittedly not adopted under Chapter VII of the Charter, have called on states to 'prohibit

<sup>27</sup> *Prosecutor v. Dusko Tadic a/k/a 'Dule'*, ICTY, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, at para. 43: '[t]he legislative, executive and judicial division of powers which is largely followed in most municipal legal systems does not apply to the international setting nor, more specifically, to the setting of an international organisation such as the United Nations'.

<sup>28</sup> The following argument is developed in greater length in Bianchi, 'The International Fight against Terrorism and the Quest for Checks and Balances. Why the Calling Sirens of Constitutionalism Should be Resisted', in A. Bianchi and A. Keller (eds), *Counterterrorism: Democracy's Challenge* (2008, forthcoming).

by law incitement to commit a terrorist act', 'to prevent such conduct', and 'to deny safe haven' to those with respect to whom there is credible and reliable evidence that they are guilty of such conduct. An overall consideration of its anti-terror measures clearly attests to the SC's central role in the fight against terrorism as well as to its acting in a world government-like fashion. Whether this is legitimate as a matter of international law is open to doubt, but the reality is that the action of the SC in this particular field is evidence of an almost unprecedented agglomeration of power.

If in the early stages, the anti-terror policy of the SC benefited from the widespread conviction that security concerns were a compelling priority, the side effects of that policy materialized soon thereafter. In particular, the inevitable encroachment of such measures on fundamental rights and freedoms of individuals has become a source of concern for the international community and its different components.<sup>29</sup> Not only have academic circles and professional associations drawn attention to this issue,<sup>30</sup> but international and non-governmental organizations have also voiced concern about human rights violations occurring as a result of the implementation of anti-terror measures.<sup>31</sup> The examples are numerous and need not be recounted here. Suffice to mention the insistence with which the General Assembly has emphasized the need to respect human rights while countering terrorism with unfaltering regularity,<sup>32</sup> thus creating the necessary momentum to cause a shift of policy. The SC felt compelled to incorporate in its resolutions express references to the need for states to respect their other obligations under international law, including humanitarian, human rights, and refugee law.<sup>33</sup> Furthermore, in 2006 the Global Anti-terror Strategy was adopted by consensus by the General Assembly, in which respect for fundamental rights is characterized as a basic pillar of the UN overall strategy against international terrorism.<sup>34</sup>

What is even more interesting for our purposes is that recently the Court of First Instance of the European Communities (CFI) indirectly reviewed the legality of SC anti-terror resolutions against the background of human rights peremptory norms.<sup>35</sup> In a number of actions for the annulment of relevant EC regulations imposing financial

<sup>29</sup> See Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', 17 *EJIL* (2006) 903 and 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview', 4 *J Int'l Criminal Justice* (2006) 1059.

<sup>30</sup> See the recently adopted 'Ottawa Principles on Anti-terrorism and Human Rights', available at: [www.rightsandantiterrorism.ca](http://www.rightsandantiterrorism.ca).

<sup>31</sup> See *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report prepared by Professor Iain Cameron for the Council of Europe (2006).

<sup>32</sup> See A/RES/57/219, A/RES/58/187, A/RES/59/191, A/RES/60/158.

<sup>33</sup> See para. 6 of the Declaration attached to SC Res 1456 (2003), preamble to SC Res 1566 (2004) and para. 4 of SC Res 1624 (2005).

<sup>34</sup> See A/RES/60/288.

<sup>35</sup> Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005; Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI, 21 Sept. 2005; Case T-253/02, *Chafiq Ayadi v. Council of the European Union*, Judgment of the CFI of 12 July 2006; Case T-41/04, *Faraj Hassan v. Council of the European Union and Commission of the European Communities*, Judgment of the CFI of 12 July 2006.

sanctions on individuals and entities allegedly affiliated with the Al-Qaeda network, the CFI held that it was 'empowered to check, indirectly, the lawfulness of the resolutions of the SC in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible'.<sup>36</sup> Regardless of their outcome and the somewhat convoluted reasoning of the CFI,<sup>37</sup> it is of note that an international tribunal exercised judicial scrutiny of SC resolutions on the basis of *jus cogens* norms, qualified as constituting an international public order of sorts.

Little matter if such judicial scrutiny can be aptly characterized as an exercise of judicial review with the connotations that the latter expression encompasses in domestic legal orders. What matters most for the purposes of the current analysis is that the societal body has responded to an unprecedented agglomeration of power at the international level by a diffuse reaction where formal and informal controls, including judicial ones, have materialized.<sup>38</sup> It is of particular note that the international bodies which have exercised judicial scrutiny over SC resolutions have done so against the background of *jus cogens*. In other words, human rights peremptory norms have in some sense performed as 'constitutional' parameters against which the legality of SC anti-terror measures has been tested.

## 5 Contextual Dimension

Violations of human rights norms having a peremptory nature may be invoked in various contexts. The issue of their application may arise before international as well as national jurisdictions. Normative standards and interpretive techniques may vary accordingly. As is known, the area in which the application of human rights having a peremptory character has been most frequently invoked is that of jurisdictional immunities. In particular, the issue of whether the breach of peremptory human rights norms by a state or one of its organs should lead to the lifting of immunities to which they are entitled under international law has come to the fore in various jurisdictions.

<sup>36</sup> *Kadi*, *supra* note 35, at para. 226; *Yusuf*, *supra* note 35, at para. 277.

<sup>37</sup> As is well known, the CFI found in *Kadi* and *Yusuf* that the temporary deprivation of property as a consequence of asset freezing, as well as the right to a fair hearing and the limitations of the applicants' rights of access to a court, were not violations of *jus cogens* norms, and that their right to be heard was not violated by Community institutions which had no discretion in implementing SC relevant resolutions. Furthermore, the CFI held in *Ayadi* and *Hassan* that the Member States have an obligation under Art. 6 TEU, promptly to ensure that the case of individuals and entities challenging their inclusion in the list is 'presented without delay and fairly and impartially to the [Sanctions] Committee': *Chafiq Ayadi*, *supra* note 35, at para. 149; *Faraj Hassan*, *supra* note 35, at para. 119. Should states fail to fulfil this obligation, individuals should be allowed to bring an action for judicial review before the national courts against the competent national authorities.

<sup>38</sup> In this context I have spoken in terms of 'spontaneous' checks (along the lines of what Roberto Ago described as 'spontaneous law' directly emerging from the societal body), not directly amenable within traditional tenets of domestic constitutionalism and separation of powers concerns: see Bianchi, *supra* note 28.

The *jus cogens* argument had been invoked by some lower courts in the United States until the Supreme Court in the *Nelson* case closed the door to any human rights exception to the Foreign Sovereign Immunities Act by arguing that, ‘however monstrous such an abuse may be, a foreign State’s exercise of the power of its police has long been understood as sovereign in nature’.<sup>39</sup> A narrow reading of domestic state immunity statutes has also prevailed in other Anglo-Saxon jurisdictions, but civil law courts, too, have shown little sympathy for the argument. Reasoning on the basis of the general rule/exception paradigm, courts in different jurisdictions have found that there would be no established peremptory human rights norms exception to the general rule of immunity.<sup>40</sup> The hierarchy of rules argument has rarely been tackled head on, and when this has occurred it has eventually been discarded.<sup>41</sup> This has been done either on the ground that the procedural nature of immunity rules could not logically collide with the substantive nature of peremptory norms, as jurisdictional immunities would simply divert violations of peremptory norms to other methods of settlement;<sup>42</sup> or by distinguishing the exercise of civil jurisdiction over foreign states from the exercise of criminal jurisdiction over foreign states’ organs.<sup>43</sup> To be fair, however, even in the *Pinochet* case, where one could trace several references to *jus cogens* in the Law Lords’ individual opinions,<sup>44</sup> the rule of decision was provided by the UN Convention against Torture and its domestic enabling legislation.<sup>45</sup>

It is an irony of sorts that not even in the *Distomo Massacre* and *Ferrini* cases, decisions rendered by the Greek Areios Pagos,<sup>46</sup> and the Italian Court of Cassation respectively,<sup>47</sup> in which the immunity of the foreign state was lifted, reliance on *jus cogens* appears not to have provided the rule of decision.

<sup>39</sup> *Saudi Arabia v. Nelson*, 113 S Ct 1471 (1993), at 1480.

<sup>40</sup> *Bouzari v. Islamic Republic of Iran* (Superior Court of Ontario, Swinton J), 124 ILR 427, at 446, paras 72–73, and *Bouzari v. Islamic Republic of Iran* (Ontario Court of Appeal), 71 OR (rrd) 675, at 694–696. See also the German Supreme Court’s decision in *Greek Citizens v. Federal Republic of Germany* (The Distomo Massacre Case) 42 ILM 1030, 1032 (2002).

<sup>41</sup> Lee M. Caplan, ‘State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory’, 97 AJIL (2003), at 741–781.

<sup>42</sup> See *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, House of Lords, Judgment of 14 June [2006] UKHL 26, paras. 43–45 quoting in para. 44 Hazel Fox, *The Law of State Immunity*, Oxford, 2002, p. 525: ‘State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of state immunity upon which a jus cogens mandate can bite.’

<sup>43</sup> Eur. Court H.R., *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, Reports of Judgments and Decisions 2001-XI, para. 61.

<sup>44</sup> For a detailed analysis of the case see Andrea Bianchi, ‘Immunity v. Human Rights: the Pinochet Case’, 10 EJIL 237–277 (1999).

<sup>45</sup> In fact, the Judicial Committee of the House of Lords found, by a majority of 6 to 1, that General Pinochet was not immune from torture and conspiracy to commit torture as regards acts committed after 8 Dec. 1988, when the ratification by the UK of the Torture Convention, following the coming into force of s. 134 of the Criminal Justice Act 1988 implementing the Convention, took effect.

<sup>46</sup> Gavouneli and Bantekas, ‘Prefecture of Voiotia v. Federal Republic of Germany, Case No.11/2000, May 4, 2000’, 95 AJIL (2001) 198.

<sup>47</sup> *Ferrini v. Federal Republic of Germany*, 128 ILR (2004) 658. See on this case Bianchi, ‘Ferrini v. Federal Republic of Germany. Italian Court of Cassation, March 11, 2004’, 99 AJIL (2005) 242.

Although, undoubtedly, the courts' reasoning relies heavily on a more or less coherent argument about the primacy of peremptory norms, both the territorial nexus and the consequent applicability to the case of the tort exception *qua* customary law leave doubts about the 'cogency' of the *jus cogens* argument. In particular, it is noteworthy that the two courts did not limit themselves to drawing any 'mechanical' inference from the peremptory nature of the norms that had been allegedly violated by the defendant state, but embedded their reasoning in a much wider interpretive framework where notions of international public order, of which peremptory norms would be the pillars, seem to have been decisive in leading the court to remove the jurisdictional immunity from the foreign state.<sup>48</sup>

Analogous considerations apply to the decision of the European Court of Human Rights in the *Al-Adsani* case.<sup>49</sup> Whereas the minority argued that the peremptory character of the international prohibition of torture should trump the conflicting rule of immunity, the majority refused to accept this conclusion. Even though the qualification of the prohibition of torture as *jus cogens* was not called into question, the majority held that there would be no 'firm basis' for concluding that, 'as a matter of international law', a foreign state is deprived of the immunity it enjoys under international law before the domestic courts of another state when it is accused of having committed acts of torture.<sup>50</sup> The Court distinguished cases of individual criminal liability, such as *Pinochet* and *Furundzija*, for which immunity could be lifted, and upheld the idea that foreign states benefit from immunity as regards alleged acts of torture committed in their own territory. Considerations of political expediency and judicial policy, as they emerge from some individual opinions,<sup>51</sup> may well have inspired the Court's decision. However, the difficulty of relying on the inderogable character of peremptory norms to sweep away lower ranking rules of international law has turned into an overall failure, where the primacy of *jus cogens* risks being identified with a rhetorical tool of dubious utility and little practical impact.

## 6 The Role of the International Court of Justice

Indeed, to transpose lock, stock, and barrel the inderogability paradigm from the law of treaties into other contexts has proved to be a difficult exercise. The rigidity introduced by the inderogable character of *jus cogens* has caused a great deal of reluctance on the part of domestic and international courts to draw mechanical conclusions from the hierarchical superiority of peremptory norms over any other rule of international law. To go back to the myth of Lohengrin, it is as if once Lohengrin's nature – or, out of the metaphor, the effects of *jus cogens* – is revealed, he is doomed to disappear

<sup>48</sup> *Ibid.*, at 247.

<sup>49</sup> *Al-Adsani v. United Kingdom*, 2001-XI ECtHR 79, 34 EHRR (2002) 11.

<sup>50</sup> *Ibid.*, at para. 61.

<sup>51</sup> See Concurring Opinion of Judge Pellonpää Joined by Judge Bratza, stressing that the 'basic framework for the conduct of international relations' advises against lifting immunity in these cases and that on general questions of international law the ECtHR should not take 'the role of a forerunner'.

and, with him, *jus cogens*. This seems to have been the reason for the International Court of Justice (ICJ) to keep quiet for many years on the issue of *jus cogens*. Mindful of its rigid operational modalities, the Court has refused until recently to sanction the existence of such a normative category. Even in cases in which treatment of or reference to *jus cogens* would have been compelling, the ICJ has carefully eschewed doing so. To borrow from Samuel Beckett's famous play 'Waiting for Godot', one could say that through all the recent case law of the Court we have been waiting for Godot – *jus cogens* – to appear but somehow it has never materialized.<sup>52</sup> In its 1996 Advisory Opinion on the *Legality of Use or Threat of Use of Nuclear Weapons*, the Court created the cacophonous neologism of 'intransgressible principles of humanitarian law' to avoid referring to *jus cogens*.<sup>53</sup> The fact that the ICJ was never fond of *jus cogens* – admittedly not a legal category of its own creation – is further attested to by the Court's alternative use of the notion of obligations *erga omnes*. While the two notions may be complementary, they remain distinct, and to consider them as synonyms risks undermining the legal distinctiveness of each category. Paradoxical consequences were reached in the Advisory Opinion on the *Israeli Wall*, when the ICJ endorsed the ILC's approach on the consequences of a serious violation of peremptory norms, but took that regime to refer to violations of *erga omnes* obligations instead.<sup>54</sup> This unfortunate choice created a great deal of confusion in international law circles and was probably a reason for the Court to hasten recognition of *jus cogens* in its subsequent case law.

With the same shrewdness by which the Court had previously avoided taking a stance on *jus cogens*, the ICJ eventually referred to it in its ruling on jurisdiction and admissibility of the application in the recent case concerning *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda*.<sup>55</sup> The ICJ, in tackling the argument advanced by Congo that the Rwandan reservation to Article IX of the Genocide Convention ought to be considered null and void as it was contrary to the peremptory prohibition of genocide, held that the peremptory character of an international rule may not provide a basis for the jurisdiction of the Court, which is always grounded in the consent of the parties.<sup>56</sup> One may wonder why the Court decided to give express recognition to *jus cogens* in this particular case. A straightforward answer may be that the Court was simply answering an argument raised by one of the parties. There may, however, have been more compelling reasons of judicial policy which prompted the Court to do so. On the one hand, this has allowed the Court to re-establish the distinction between *erga omnes* obligations and peremptory norms as different legal concepts. Incidentally the *jus cogens* box, according to the Court, is not empty, as at least the prohibition of genocide is in there. On the other hand, the

<sup>52</sup> Bianchi, 'Dismantling the Wall: the ICJ's Advisory Opinion and its Likely Impact on International Law' [2004] *German Ybk Int'l L* 343, at 383–387.

<sup>53</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 266, at para. 79.

<sup>54</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion [2004] ICJ Rep 200, at para. 159.

<sup>55</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, Jurisdiction and Admissibility [2006] ICJ Rep 1, at paras 64 and 125.

<sup>56</sup> *Ibid.*, at para. 64.

Court made it clear that the peremptory nature of a rule cannot be used to trump the consent requirement to establish the jurisdiction of the Court.

The self-evident and fairly convincing arguments set out by the Court in the context of the case might induce the reader to avoid any further interpretive query. Given that the Court has a very strong perception of its role as the guardian of international law, particularly with a view to preserving its cohesion, reference to *jus cogens* after so much time may not have come by chance. Additional guidance on what may have inspired the Court's acknowledgment could perhaps be provided by Judge *Ad Hoc* Dugard's separate opinion. Interestingly enough, Judge Dugard's analysis focuses on the contextual dimension of *jus cogens*, devoting one entire section of his opinion to 'jus cogens in international litigation'.<sup>57</sup> Having specified that '[t]he 'judicial decision is essentially an exercise in choice', given that judges often have to opt for one solution rather than another when authorities are divided, Dugard maintains that judges should be guided in making such choices both by principles, identified as 'propositions that describe rights', and policies, namely 'propositions that describe goals'.<sup>58</sup> This would be instrumental in enhancing the effectiveness and integrity of international law by promoting solutions that are coherent with the general goals of the international legal order. According to him, peremptory norms 'are a blend of principle and policy' and enjoy hierarchical superiority *vis-à-vis* other norms of international law. This is so because not only do 'they affirm high principles of international law, which recognize the most important rights of the international order', but they also 'give legal form to the most fundamental policies or goals of the international community'. Since 'norms of jus cogens advance both principle and policy...they must inevitably play a dominant role in the process of judicial choice'.<sup>59</sup>

Whilst attributing such a predominant interpretive role to peremptory norms, Dugard denies that peremptory norms may 'trump' a norm of general international law universally recognized by the international community as a whole, namely the principle of consent to the jurisdiction of the Court. This would, according to Dugard, have been a 'bridge too far'<sup>60</sup> and would have overstepped the limits that must be placed on the operation of peremptory norms. Interestingly enough, by so arguing Dugard seems to propose an authoritative interpretation and to provide further specifications of what the Court as a whole actually intended to say.

It is submitted that Judge Dugard's analysis points to the wisest way forward. *Jus cogens* may not sweep everything away when applied to a case. It may not be applied regardless of context and policy. There must be limits. And yet it would be a defeat for the international community to get rid of the concept altogether, reneging on the difficult but ultimately successful building up of communitarian values. The inderogability paradigm and its mechanical application may bring about anti-systemic effects and eventually jeopardize even the role that *jus cogens* may play in its symbolic

<sup>57</sup> *Congo v. Rwanda* Judgment, *supra* note 55, Separate Opinion of Judge *ad hoc* Dugard, at paras 3–14.

<sup>58</sup> *Ibid.*, at para 10.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, at para. 13.

dimension. The solution once again lies in purposeful interpretation. Rather than focussing on the hierarchical superiority of the rule and its mechanical application, regard should be had to implementing effectively its underlying values, taking context duly into account. The way in which the ILC has envisaged the consequences of a serious violation of a peremptory norm of international law seems to be inspired by such considerations,<sup>61</sup> as well as the attempt, made by the Trial Chamber of the ICTY in the *Furundzija* case, to spell out the consequences of the violation of the prohibition of torture at both inter-state and individual levels.<sup>62</sup> What matters most is not that the rule takes formal precedence in case of conflict, but rather the modalities of implementation of the underlying value, which ought to be given precedence at the interpretive level. This solution, advocated by the present writer in the context of the law of state immunity and violations of peremptory norms, seems also to be in tune with the principle of ‘systemic integration’ recently proposed by the ILC in its study on the fragmentation of international law.<sup>63</sup> As is known, the principle finds its roots in the potentially harmonizing role of Article 31(3)(c) of the VCLT for the purposes of treaty interpretation.<sup>64</sup> However, if one looks at the principle more broadly as ‘a reasonable or even necessary aspect of the practice of legal reasoning’,<sup>65</sup> its potential application to fostering interpretive solutions that are more consonant with the general goals and communal values of the international community is indeed enormous.<sup>66</sup> The need to consider ‘the emergence of values which enjoy an ever-increasing recognition in international society’ seems compelling, particularly in hard cases.<sup>67</sup> By systematically interpreting rules and principles against the wider background of the international normative order, the interpreter may have recourse to ‘a balancing of interests’

<sup>61</sup> Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001), Art. 41.

<sup>62</sup> *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, ICTY Trial Chamber II, Judgment of 10 Dec. 1998, at paras 155–156. According to the Tribunal, which had previously qualified the prohibition of torture as a peremptory norm, at the inter-state level *jus cogens* serves internationally to de-legitimize any legislative, administrative, or judicial act authorizing torture. At the individual level, one of the consequences of *jus cogens* is that every state is entitled to investigate, prosecute, and punish or extradite individuals accused of torture.

<sup>63</sup> In order to address the numerous problems that fragmentation has brought about in the international legal system, the study of the ILC on the fragmentation of international law emphasizes the need to shift from a logic of conflict and invalidity to one of interpretation and interpretive priorities: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, Appendix, A/CN.4/L.682/Add.1, at 15.

<sup>64</sup> See McLachlan, ‘The Principle of Systemic Interpretation and Article 31 (3)(c) of the Vienna Convention’, 54 *Int'l and Comp LQ* (2005) 279 and French, ‘Treaty Interpretation and the Incorporation of Extraneous Legal Rules’, 55 *Int'l and Comp LQ* (2006), 281; and Combacau and Sur, ‘Principe d’integration’, in J. Combacau and S. Sur, *Droit international public* (2004), at 175.

<sup>65</sup> A/CN.4/L.682, at 213, para. 423.

<sup>66</sup> *Ibid.*, at 244, para 480: ‘[b]ut law is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of “systemic integration” it would be impossible to give expression and to keep alive, any sense of the common good of humankind, not reducible to the good of any particular institution or “regime”’.

<sup>67</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal [2002] ICJ Rep 3, at 85, para 73.

on a case-by-case basis, which is more suitable to solving complex cases of potential conflict of norms and values.<sup>68</sup> In this interpretive process, the role of *jus cogens* must be predominant, as suggested in Dugard's separate opinion.

Inevitably, any particular interpretive solution must enjoy the support of the international societal body. It is somewhat significant that the ICJ has acknowledged the applicability of Article 41 of the Articles on state responsibility to the violation of the principle of self-determination as well as intransgressible principles of international humanitarian law.<sup>69</sup> It is to be hoped that the focus will be shifted from the mechanical paradigm of inderogability to the more flexible level of interpretation to ensure that *jus cogens* can be implemented at the contextual level with a higher degree of effectiveness and coherence.

## 7 *Jus Cogens* under Threat

At such a critical time, one would expect the concept of *jus cogens* to have been fundamentally called into question also by those who have contributed to moulding it and to making it an integral part of international law, namely scholars. Early warnings voiced by some commentators about the risk of relativizing normativity left their mark and continue to be quoted mostly to caution against excessive reliance on *jus cogens*.<sup>70</sup> Uncertainty remains about the operational mode of this normative category. Grand theories have been elaborated to construe an all-encompassing vision of the non-derogability effects of peremptory norms,<sup>71</sup> whereas other recent reviews of the concept stress its ethical underpinnings and the difficulty in identifying common goals in contemporary international society.<sup>72</sup> Frontal attacks on *jus cogens* remain sporadic and their proponents often fail to make a convincing case against it.<sup>73</sup>

One overt attempt to challenge *jus cogens* has consisted of taking exception to the definition and the scope of application of particular norms. This is certainly the case for the prohibition of torture. As is known, the United States has endeavoured to provide a restrictive interpretation of torture for the purpose of allowing the use of particularly harsh interrogation techniques on terrorist suspects and providing broad defences to exempt state officials from criminal liability. The notorious 'Torture Memos'<sup>74</sup> and the

<sup>68</sup> *Ibid.*, at 85, para. 75: '[a] balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights of the two scales are not set for all perpetuities.'

<sup>69</sup> *Supra* note 54, at 200, para. 159.

<sup>70</sup> Reference is made here to the seminal article by Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413.

<sup>71</sup> A. Orakhelashvili, *Peremptory Norms in International Law* (2006).

<sup>72</sup> Shelton, 'Normative Hierarchy in International Law', 100 *AJIL* (2006) 291, at 323.

<sup>73</sup> Glennon, 'De l'absurdité du droit impératif (*jus cogens*)', 110 *Revue générale de droit international public* (2006) 529.

<sup>74</sup> All the relevant Memoranda and other documents are aptly assembled in K.J. Greenberg and J.L. Dratel (eds), *The Torture Papers: the Road to Abu Ghraib* (2005). For a general appraisal of the US policy see Alvarez, 'Torturing the Law', 37 *Case Western Reserve J Int'l L* (2006) 175.

submissions made by former high-ranking lawyers in the administration<sup>75</sup> are evidence of a policy directed to reducing torture to the most extreme cases of the imposition of physical suffering or to practices that may cause permanent mental damage. The public outrage raised by this policy has been a reason for the US to change strategy and focus on the argument that the UN Convention against Torture is not applicable to situations of armed conflict – as the US characterizes the so-called ‘war on terror’ – and that in any event it does not cover individuals under a contracting party’s jurisdiction but outside its territory.<sup>76</sup> These and other contentions as regards the scope of application of the Convention have been reprimanded by the Committee against Torture in its concluding observations to the US report.<sup>77</sup>

In what may be considered by many as an odd reversal of perspectives, it is submitted that one of the major threats posed to the concept of *jus cogens* is the tendency by some of its most fervent supporters to see it everywhere. To illustrate this risk, reference could aptly be made to the Inter-American Court of Human Rights’ Advisory Opinion on the juridical condition and rights of undocumented migrants.<sup>78</sup> The opinion, issued at the request of Mexico, aimed at ascertaining whether undocumented workers are entitled to fundamental workplace rights. The Court unanimously found that the principles of non-discrimination, equality before the law, and equal protection before the law *qua* peremptory norms impose on all states respect for workers’ human rights once an employment relationship is established, regardless of the fact that workers are undocumented. It has to be conceded that reference to *jus cogens* may have been instrumental in reaching out to the United States, not a party to the Inter-American Convention on Human Rights.<sup>79</sup> Be that as it may, the somewhat axiomatic reasoning of the Court, linked with fairly vague notions of natural law,<sup>80</sup> is unlikely to foster the cause of *jus cogens*, particularly among the sceptics.

<sup>75</sup> J. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2007).

<sup>76</sup> See *Second Periodic Report of the United States of America to the Committee against Torture* (UN Doc CAT/C/8/Add. 3/Rev. 1, 13 Jan. 2006), available with all relevant documents at: [www.ohchr.org/english/bodies/cat/cats36.htm](http://www.ohchr.org/english/bodies/cat/cats36.htm).

<sup>77</sup> See *Conclusions and Recommendations of the Committee against Torture: United States of America* (UN Doc CAT/C/USA/CO/2, 18 May 2006).

<sup>78</sup> *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, Inter-American Court of Human Rights (ser. A) No. 18 (2003). See the case-note by Cleveland in 99 *AJIL* (2005) 460.

<sup>79</sup> See *Juridical Condition and Rights of the Undocumented Migrants*, *supra* note 78, at para. 110: ‘the contents of the preceding paragraphs are applicable to all the OAS Member States. The effects of the fundamental principle of equality and non-discrimination encompass all States, precisely because this principle, which belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals.’ In fact, the Advisory Opinion was delivered in the aftermath of the US Supreme Court’s decision in *Hoffman Plastic Compounds v. NLRB*, 535 US 137 (2002), where the Court held that undocumented migrant workers were not covered by the relevant provisions of the National Labour Relations Act as regards the right to back pay as a remedy for wrongful termination of union activity.

<sup>80</sup> See, in particular, the long Separate Opinion appended by the Court’s President, Judge A.A. Cançado Trindade, in which he expounds his theory of *jus cogens* as an emanation of human conscience and the *opinio juris communis* of all the subjects of international law. Conscience would stand above the will of states in the making of international law (para. 87).

At a time when many uncertainties remain as to ‘who will identify the fundamental values [of the international community] and by what process’,<sup>81</sup> any excess in characterizing rules as peremptory ones, without carefully considering whether or not such characterization is shared by the international community,<sup>82</sup> risks undermining the credibility of *jus cogens* as a legal category, distinct from natural law and apt to perform important systemic functions.<sup>83</sup>

## 8 Conclusion

The reader will have noticed by now the occasional references throughout this article to mythological figures of different provenance: Janus, Pandora, and Lohengrin. One might be tempted to think that such references are but the affectation of erudition by not too humble an author. The irony is that the same author despises such affectations. And yet he must confess that those myths sprang naturally to mind while thinking of *jus cogens*. The explanation may lie in the very notion of myth, symbolic narration, and fundamental stage in the cognitive experience, which satisfies a primordial need for both the knowledge and the ordering of the surrounding reality.<sup>84</sup> Anthropologists and sociologists have long known the value and efficacy of symbols in society. It suffices to recall Levi-Strauss’ theory on the effects that symbolic power may have on the structural hierarchy of any given society,<sup>85</sup> or Pierre Bourdieu’s theory of symbolic violence, elaborated in the field of law.<sup>86</sup> Certainly, symbols reflect the values imposed by the prevailing social forces. However, once they materialize and become the pivotal structures of society, they may in turn coerce the power of the very same social forces from which they emanate. The development of forms of control of the agglomeration of power in the SC in the fight against terrorism against the background of *jus cogens* seems to provide support for this finding.

As previously noted, it would be desirable to stabilize the referential value of *jus cogens* also in its contextual dimension. This might in turn reinforce its symbolic value and, arguably, the cohesion of the international societal body. But whose task should this be? How can one reconcile these two dimensions and make them a coherent whole in which either can preserve its own specificity and functionality? The answer

<sup>81</sup> Shelton, *supra* note 72, at 323.

<sup>82</sup> The need to undertake a rigorous test to ascertain that the peremptory character of a norm enjoys acceptance and support by a large majority of states was emphasized by the Inter-American Commission of Human Rights in its Report No. 62/02, Merits, Case 12.285, *Michael Domingues/United States*, 22 Oct. 2002, at para. 50.

<sup>83</sup> Meron, ‘International Law in the Age of Human Rights. General Course on Public International Law’, 301 *Recueil des Cours* 9 (2003) 420.

<sup>84</sup> See Lévi-Strauss, ‘La structure des mythes’, in C. Lévi-Strauss, *Anthropologie structurale* (1958), at 227–255. See also Cavendish’s introduction to Cavendish, *supra* note 8, at 8–12.

<sup>85</sup> Lévi-Strauss, *supra* note 84.

<sup>86</sup> Bourdieu, ‘Les modes de domination’, [1976] *Actes de la recherche en sciences sociales* 122, ‘The Force of Law: Toward a Sociology of the Juridical Field’, 38 *Hastings LJ* (1986–1987) 814, and ‘Social Space and Symbolic Power’, 7 *Sociological Theory* (Spring, 1989) 14.

to this query can be found by resorting to an analogy the meaning of which will easily be grasped.

Pierre Bourdieu was right in claiming that magic can come in handy to explain the specific force of law, all the more so as regards peremptory human rights norms, which inherently possess an evocative power apt to coalesce social consensus. This extraordinary force of social attraction has an almost magical character. The French ethnologist and sociologist Marcel Mauss in his work on ‘A General Theory of Magic’<sup>87</sup> maintained that the social support for magic lies in the widely shared collective belief in the powers that the magician unveils. What does the essence of magic consist of? Mauss attempts to explain it by resorting to the concept of *mana*, which he draws from Melanesian culture. *Mana* well epitomizes the common denominator of almost all known notions and traditions of magical power. It ‘is not simply a force, a being, it is also an action, a quality, a state’.<sup>88</sup> Indeed, ‘the confusion between actor, rite and object’ seems to be one of the fundamental features of magic.<sup>89</sup> *Mana* is an ‘abstract and general’ concept, ‘yet quite concrete’.<sup>90</sup> It involves the notion of *efficacité pure* and can be described as follows:

At the same time as being a material substance which can be localized, it is also spiritual. It works at a distance and also through a direct connexion, if not by contact. It is mobile and fluid without having to stir itself. It is impersonal and at the same time clothed in personal forms. It is divisible, yet whole.<sup>91</sup>

Here is, once again, the same duplicitous character as the double-faced Janus as well as the two dimensions of *jus cogens*. What is then the answer to our query? Who partakes in the essence of magic? Who unveils its hidden powers and its efficacy? Who takes advantage of the symbolism of magical rites to consolidate the extant structures of power in a given society as well as their individual ascendancy on the societal body?

The magicians. The future of *jus cogens* is primarily in their hands.

<sup>87</sup> M. Mauss, *A General Theory of Magic* (1972).

<sup>88</sup> *Ibid.*, at 108.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, at 109.

<sup>91</sup> *Ibid.*, at 117.