Reflections on the Existence of a Hierarchy of Norms in International Law

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1.

As international law is required to govern a fundamentally different society from that within the state, it therefore has specific functions adapted to the needs of that society. Indeed, alleged imperfections so often complained of in international law are for the most part only structural features inherent to the system, since they correspond to the needs of international society.

International law is applicable to relations among independent entities, and so has features which distinguish it from internal state law. States are simultaneously the creators and subjects of its norms; as sole authority on the laws they formulate, states themselves assess their meaning and scope. It is thus the individual states that interpret the obligations to which they – like their partners, the other states – are subject. Finally, it is they who decide as to the legality of their own conduct or that of third parties towards them. Hence the fragmentary nature of international law, and its *relativism*, the consequence of the equal nature and poorly institutionalized structure of international society.

It is however important to assess the proper extent of differences between international and state society. If not, presenting a radical opposition between two models of social structures and two paradigm legal systems (the centralized, institutionalized internal order, and the decentralized, poorly institutionalized international order) would be more an exaggeration than an empirical truth.

2.

However, the development and application of law depend on the nature of the social group to which it refers, and it is clear in this connection that the features of international society sharply contrast with those of the political community at the state

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8 EJIL (1997) 583–595

level. While the latter comprises, if only in principle, centralized and hierarchically organized social groups, international society is essentially a society of sovereign, independent states. Despite the great transformations which international organizations have brought about in the structure of international society, political power is still individually distributed among its members, and international law continues to be an eminently decentralized, little institutionalized, legal system. It is for this reason that in international law, states are both the legislators and the subjects of rules; consent by states is thus logically the keystone in the process of creating international legal rules.

In order for an obligation to be legally binding on sovereign states, they must have taken part in the process of developing it, or they must have accepted it. Apart from the fundamental principles of the international legal order, which are inherent in the existence of the state and which the state cannot evade if it wishes to retain its status as such, no legal rule is universal in scope; it is in this sense that Combacau has stressed that general international law, as distinct from specific commitments among states, exists only as a tendency.

Likewise, since international society lacks the backbone which in state legal systems is represented by the institutionalization of political power, international legal rules are applied in a decentralized fashion. The result is that evaluation of a legal situation involving a state rests, in principle, on the state's discretionary power.

Sovereignty, in fact, implies the right to refuse being arraigned before a third party; hence the voluntary nature of commitment to arbitration, and the optional nature of the contentious jurisdiction of the International Court of Justice. States party to a dispute have systematically and categorically asserted that both must give their consent for the Court to exercise that contentious jurisdiction.

3.

In principle, moreover, most rules of international law are only authoritative for those subjects that have accepted them. The relativism of international law may thus lead to a clash between the unilateral legal claims of states, as each state is free to assess the scope of the obligations it has assumed and is on an equal footing with every other state as regards the interpretation of its commitments.

As Combacau has noted,[1] international norms are *relative* because their scope varies according to states' commitments: each state which has actively or passively subjected itself to the effects of those norms, is bound by them to every other state which has done the same. To be sure, the sovereign state must comply with international law, but it is up to each state to assess the requirements of that law in each situation and in each specific case. In the international legal system, as Reuter notes, the conditions and obligations of those subject to the law differ according to the state

1 J. Combacau and S. Sur, Droit international public (2nd ed., 1995), at 26.

considering them: accordingly, each state assesses positions or legal questions on its own account; each state *'est un foyer à partir duquel s'edifie l'ordonnancement juridique'*.[2]

In consequence, the international system is not a consistent whole in which legality is an objective, homogeneous quality. Rather, it is more a jigsaw puzzle of subjective allegations and claims, all of which have merely presumptive value. As Weil wrote in his *Cours général* at the Hague Academy of International Law, the principle of *'équivalence des prétensions'* required by the equality of states means that *'le système international s'éclate en une multiplicité de représentations subjectives et divergentes'*.[3]

The absence of any international authority superior to the state thus produces a series of legal consequences which shapes the actual physiognomy of international law. Two of these consequences, as Pierre-Marie Dupuy has stressed, are of prime importance: on the one hand, the absence of any objective determination of legality and, on the other, the haphazard nature of the consequences of breaching the law.[4] In other words, the rule of law has in principle no binding force for individual states unless they desired it, or have at least recognized and accepted it; the result is that the existence of a rule never by itself entails its applicability in a specific case that sets two given states against each other.

Further, international norms *in no way differ from each other as their legal value and their effects are ultimately based on the will or acceptance of the states alone.* One cannot in fact find in international law either the centralization of power that guarantees respect for the law, nor the hierarchical distinction between modes of elaborating general and individual rules. For Pierre-Marie Dupuy, this is a triple phenomenon of non-differentiation or, more exactly, *equivalence*: equivalence of the legal rules among themselves; equivalence of the rules for issuing these norms; and equivalence of the sources of international law among themselves.[5]

International norms are accordingly, as Combacau notes, *undifferentiated*:[6] their validity, like their effects, has no other ultimate basis than the will of or acceptance by the states for which they are law; unlike the model of domestic law, no hierarchical structuring among them is conceivable. The principal reason for this phenomenon lies in the fact that international legal norms proceed, albeit in different degrees, from the manifestation of the will of sovereign states. This voluntarism is certainly one of the essential features of classical international law. It also explains the existence of the subjectivist and discretionary features specific to a legal order of co-

2 P. Reuter, 'Principes de droit international public'(cours général), 103 *RdC* (1961-II), at 440. '... is a source from which the legal order is constructed'.

3 P. Weil, 'Le droit international en quête de son identité. Cours général de droit international public', 237 *RdC* (1992-VI), at 222. '[E]quivalence of claims' required by the equality of states means that 'the international system breaks down into a multiplicity of subjective, divergent representations'.

4 P.-M. Dupuy, *Droit international public* (3rd ed., 1995), at 14–15.

5 *Ibid*, at 15–16.

6 Combacau, *supra* note 1, at 26.

ordination, namely international law, in which consent by states is one of the key principles.

4.

In a celebrated affirmation, the Permanent Court of International Justice maintained in 1927 that international law governed relations among independent states and that the rules of law binding states derived from their will, manifested by

> conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[7]

The voluntarist conception of international law highlighted in this *dictum*, which constitutes the bible of positivist voluntarism, dates from a period when states were the sole subjects of international law. Today, I feel that *it can no longer be upheld, given the growing repercussions in contemporary international law of the collective, institutionalized aspects of international life.* One cannot in fact deny, as Judge Bedjaoui has stressed,

> les progrès enregistrés au niveau de l'institutionnalisation, voire de l'intégration et de la '*mondialisation*', de la société internationale. On en verra pour preuve la multiplication des organisations internationales, la substitution progressive d'un droit international de coopération au droit international classique de la coexistence, l'émergence du concept de '*communauté internationale* et les tentatives parfois couronnées de succès de subjectivisation de cette dernière. De tout cela, on peut trouver le témoignage dans la place que le droit international accorde désormais à des concepts tels que celui d'obligations *erga omnes*, de règles de *jus cogens* ou de patrimoine commun de l'humanité.[8]

Similarly, as long ago as 1964, Wolfgang Friedmann described in his book *The Changing Structure of International Law* the fundamental developments that had taken place in the structure as well as in the internal dynamics of international law. He analysed the main transformations that had changed the structure of international relations: in this connection, the anachronism of state sovereignty, the growing role of the individual, and the organization of international cooperation at regional and world level seemed to him to constitute the essential features of contemporary international law. Furthermore, this development of international law had an objective,

7 *Lotus Case*, Judgment, 1927 PCIJ Series A, No. 10, at 18.

8 Advisory Opinion of 8 July 1996, ICJ Reports (1996), at para. 13 of the Statement by M. Bedjaoui. '... the progress made in the institutionalization, or integration and "*globalization*", of international society. As proof of this, one may cite the multiplication of international organizations, the progressive substitution of an international law of cooperation for the classical international law of coexistence, the emergence of the concept of an "*international community*", and the attempts, at times successful, at subjectivizing it. Testimony to this development may be found in the standing now accorded by international law to such concepts as obligations *erga omnes*, rules of *jus cogens* or the common heritage of mankind.'

'necessary' nature: states were caught up in a movement of cooperation because, in both economic and technical terms, they had become objectively interdependent.

In the light of these changes, Friedmann went on to consider, in the second part of his book, some of the theoretical foundations of international law. In his view, there was a need to distinguish between the international law of coexistence – governing inter-state relations of a diplomatic nature – and the international law of cooperation, reflecting the growing integration of the international social environment.

For Wolfgang Friedmann – as Charles Leben rightly emphasized in his Introduction to this Symposium[9] – international law was experiencing a twofold movement of extension: a *horizontal* extension following the great wave of decolonization, and a *vertical* one bringing within the field of international law questions hitherto treated only in national terms.

5.

Other authors, in contrast, drew attention to the risks of a weakened international law, even going so far as to speak of an international law *enfeebled by its own norms*. The international normative system, as Weil stressed,[10] is ultimately, and has always been, none other than an instrument for achieving a threefold objective: to ensure each state respect for its sovereignty within its frontiers, and to regulate inter-state relations of coexistence and of cooperation.

In recent years, part of the French school of international law, as Charles Leben has noted,[11] has in fact sought to show what Jean Combacau calls the 'specific genius' of international law: namely, the presence of a unilateralist logic specific to a decentralized legal order constructed on the unilateral assessments of states with equal sovereignty. This logic does not disappear with the growth of international organization but, on the contrary, tends to perpetuate itself within that very organization.

The international legal system obeys a mode of organization that ignores power, whether it be of another state or of the community that the states or their peoples are deemed to constitute together. There follows a general principle according to which, Combacau insists, neither legal acts nor legal facts, whose legal effects are predetermined by the existence of an objective rule ordering them, will automatically produce the same effect in international law as they would in domestic law.[12]

6.

In my view, the functions of international law remain the assurance of inter-state coexistence and cooperation. However, I share Pierre-Marie Dupuy's view[13] in stres-

9 'By Way of Introduction', 8 *EJIL* (1997), 399, at 402.
10 Weil, *supra* note 3, at 37–38.
11 Leben, *supra* note 9.
12 Combacau, *supra* note 1, at 24–26.
13 P.-M. Dupuy, *supra* note 4, at 286–287.

sing that the breadth, size and implications of these objectives have nothing in common with what they were in 1927, when the Permanent International Court of Justice gave its judgement in the *Lotus* case.[14]

The need for states to cooperate is becoming essential in a growing number of areas, where their interdependence is as apparent as their sovereignty. Thus, if some progress in international law exists today, it is undoubtedly due to this increasingly widespread perception of states' mutual dependence.

It seems clear to me that the international legal system has become less 'anarchical', because in the balance between coexistence and cooperation, the relative weight of these two elements has been shifting greatly in favour of the latter. In other words, the key point is that international society is perceived as a single human collectivity, and in consequence a multilateral approach to international law is required. From this approach stems the notion of a *community of states as a whole* (rather than as a collectivity of individual states) which, however imprecisely, evokes the idea of a sort of solidarity and profound unity of international society that transcends particular oppositions among states.

This progressive affirmation of the notion of international community in contemporary practice and doctrine, together with the action long exercised by international organizations on the structure of the international legal system, explain the undeniable loss of ground by relativism, with the appearance of the notions of *peremptory rules and obligations erga omnes in contemporary international law.*

7.

In my view these three notions mark an ideological evolution of international society resulting from the advance of interdependency, which is in the course of changing the nature of international law. International life remains dominated by inter-state relations, but recourse to the notion of international community – an idea that ranks with those that Hauriou called the '*grandes idées civilisatrices*'[15] – is increasingly frequent because of the evocative force of the terms expressing it and because of the subordination of individual sovereignties to the common good that they suggest.

This ideological aspect has strengthened recently, and the absorption into contemporary international law of the values it encompasses has been rapid. This is the explanation for the ban on the use of force; the promotion of the right of peoples to self-determination; the recognition of human rights and efforts aimed at protecting them; the proclamation of such concepts as 'the interest of mankind as a whole', the 'international community of states as a whole' or the 'common heritage of mankind'.

14 *Supra* note 7.

15 Hauriou, quoted in J. A. Carrillo Salcedo 'Droit international et souveraineté des Etats. Cours général de droit international public', 257 *RdC* (1996–II), at 132.

These formulae to varying degrees express an ideology that consists chiefly in picturing international society as a single human collectivity, the global nature of which consequently compels a multilateral approach to international law.

Under the influence of varied, heterogeneous factors associated with the growing awareness of interdependency, the steady affirmation of the existence of an international community, formed around a number of interests common to all its members, seems to me in fact undeniable. Weil too does not hesitate, despite his criticisms of this multiform concept, to accept that the notion of international community is '*la plus fréquemment invoquée, la plus riche aussi en potentialités de tous ordres*'.[16]

However, he maintains that substituting a 'community-based' international law for a 'state-based' international law, in Sir Robert Jennings' words,[17] would be unrealistic and even dangerous at a time when the system has not just to ensure the coexistence of nearly two hundred state entities but also to organize cooperation among them. The utopian vision of an international community that is already deemed to exist, he insists, creates the illusion of progress without the reality. A realist vision of the society of states, founded on the distinction between the world as it is and the world one is seeking to create, is in his view the foremost factor for progress, and the only necessary one.

Nonetheless, Weil himself recognizes that whatever connotation be attributed to the expression 'international community', reference to it is tending to replace atomized, fragmented international society, made up of a tissue of bilateral relations dominated by national interests and *do ut des,* by the vision of a united and interdependent community. The society of states as it was known to classical international law, he writes,

> privilégiait l'Etat et sa souveraineté; la communauté internationale, telle que l'affectionne le droit international moderne, met l'accent sur ce qui rassemble plutôt que sur ce qui sépare. La référence à la communauté internationale dépasse l'effet de style et de mode : derrière le glissement sémantique se profile une évolution dans la conception même du système international.[18]

8.

The concept of international community is in fact at the root not just *of a transformation in the nature of international law,* but also of *the acceptance of the existence of*

16 Weil, *supra* note 3, at 306 '... the most frequently invoked and also the richest in all sorts of potentials'.

17 Jennings, 'Treaties as Legislation', in G. Wilner (ed.), *Jus et Societas. Essays in Tribute to Wolfgang Friedmann* (1979) 159; B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994-VI) 221, at 243–249; Tomuschat, 'Die internationale Gemeinschaft', *Archiv des Völkerrechts* 33 (1995) 1.

18 Weil, *supra* note 3, at 309 '... favoured the state and its sovereignty; the international community, of which modern international law is so fond, puts the stress on what brings together rather than on what separates. Reference to the international community transcends the effect of style and fashion: behind the semantic shift what is emerging is evolution in the very conception of the international system.'

rules of international ordre public: the law regarded as peremptory, or international *jus cogens*. The rules of international law, whatever their nature, are always legally binding. Yet while there exist norms of discretionary international law that can be changed by the states as they see fit, there are others, of a peremptory nature, over which states have no power, since only a rule of the same type can change their substance.

The appearance of the notion of *jus cogens* in international law is the direct consequence of the social and historical development of international society, which has had a profound influence on the development of international law. The multiplication of links among states has in fact created a position where ordered coexistence becomes impossible without some sort of *international ordre public, and indeed without certain specific rules requiring strict compliance.*

These, then, are rules from which no derogation is permitted, and which can be amended only by a new general norm of international law of the same nature; rules that engender rights whose protection from the legal point of view concerns all states; and finally, rules which, if breached, bring specific legal consequences in relation to the duties and rights resulting from them for each of the states.

The paradox that at present characterizes *jus cogens* can be stated as follows: the acceptance of its existence in general international law seems increasingly less disputed, but without knowledge of its content being necessarily better than in 1969. In this connection the *Restatement of the Law*, by the American Law Institute, says that 'although the concept of *jus cogens* is now accepted, its content is not agreed on'.[19] Indeed, one of the shortcomings of the Vienna Convention on the Law of Treaties lies in the fact that the notion of 'an international community of states as a whole' is a vague one. This is the basis for Weil's criticisms.[20] He stresses that the fascination that the theory of *jus cogens* has for lawyers, presumably because of the importance it allots to the moral foundations of international law, has not prevented many of them from bringing an implacable indictment against it.

Of the most frequently levied accusations, Prosper Weil underlined three in his *Cours général* at the Hague Academy of International Law: *'la difficulté, confinant à l'impossibilité, d'identifier les règles de* jus cogens; *le risque qu'elle comporte pour la stabilité des traités; son incompatibilité essentielle, viscérale presque, avec la structure du système international'*.[21]

Weil however recognizes that the theory of *jus cogens* is today part of positive law. It is nonetheless the case that the practical applications remain as rare as before the Vienna Convention.

19 American Law Institute, *Restatement of the Law, Third, Foreign Relations Law of the United States*, 2 vols. (1987-89).

20 *Ibid*, at 274.

21 *Ibid*, at 269 '... the difficulty, verging on impossibility, of identifying the rules of *jus cogens*; the risk it brings for the stability of treaties; and its essential, almost visceral, incompatibility with the structure of the international system'.

However, the introduction of the notion of *jus cogens* into treaty law has had the effect of causing two antagonistic and perhaps even irreconcilable logics to coexist within the international legal order: the traditional one of the subjectivism of horizontal relationships among equally sovereign states; and the revolutionary one of the objectivism inherent in the notion of binding norms imposed on states.

The coexistence of these two contradictory conceptions, difficult in itself, is complicated by the existence of a gap between the respective strengths of each: for in the absence of an impartial third party empowered to decide what the peremptory rules of international law are, *jus cogens* is inevitably taken over by an intersubjective logic that could undermine the reasons that led to its consecration.

It would indeed be naïve to believe that, given the frequent manifestations of this antinomy in a large number of questions, the second logic, namely the integrated hierarchical order, will end up replacing the former, the lateral dispersion of power among equal sovereignties.

9.

Moreover, it must be borne in mind that the appearance of the notion of *jus cogens* in contemporary international law came during a period marked by the legal revisionism defended by the states emerging from the decolonization process and the so-called 'socialist' states.

This period, as Serge Sur has noted,[22] is today over, and one may have the impression that *jus cogens* mainly raised academic controversies, and has had little influence on practice. However, the idea of peremptory norms will not, in my view, inevitably disappear, since 'it could be utilised in the opposite direction, in favour of humanitarian law and rules for the international protection of the fundamental rights of the human person'.[23]

In this connection, the International Court of Justice stresses in its opinion of 8 July 1996 that a large number of rules of international humanitarian law applying in armed conflict are so fundamental to respect for the human person and for 'elementary considerations of humanity' (in the expression used by the Court in its ruling of 9 April 1949 given in the *Corfu Channel* case[24]) that they are binding on 'all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.[25]

The fact nevertheless remains that determining what principles and rules of contemporary international law are of a peremptory nature is certainly not an easy task. In this connection, it should be recalled that the distinction between *delicts* and *crimes*

22 Combacau and Sur, *supra* note 1, at 161.
23 *Ibid.*
24 ICJ Reports (1949), at 22.
25 ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, para. 79.

adopted in 1980 by the International Law Commission[26] in the context of its work on the international responsibility of states only suggests some guidance in this area.

10.

Be that as it may, in seeking to define the content of international *jus cogens,* we are compelled to think in terms of an institutionalized legal system marked by constant reference to the notion of 'international community as a whole'. The problem is that the logic of the peremptory rules requires the involvement of a judge, and that the international system does not have obligatory jurisdication.

I wish, however, to stress the importance, in relation to the scope of *jus cogens* in contemporary international law, attaching to two features intrinsic to it: in the first place, these rules are all prohibitive; in the second place, and this is an essential point, they have a strong ethical connotation, to the extent that *jus cogens* tends to set certain greater values above power. This is why, despite the shortcomings of binding law and the difficulties of implementing it, the situation created by the juxtaposition of two logics – the objectivist and the subjectivist one – is, I feel, one of the most fertile in contemporary international law.

11.

Finally, the growing acceptance of the existence of obligations *erga omnes*, a notion closely bound up with that of *jus cogens*, also in my view constitutes new testimony to the transformations that have come about in contemporary international law. It means in fact a serious restriction of the relativism that had inspired and characterized classical international law, according to which a legal obligation existed for a state only to the extent to which it had accepted it, and that a set of legal conditions could not be applied to a state unless it had taken part in its creation or had recognized it.

Hopes were raised when international jurisprudence began to recognize that the legal effects of certain objective situations were applicable *erga omnes*: thus, in its Advisory Opinion of 11 April 1949 regarding the case on *Reparation for Injuries Suffered in the Service of the UN*,[27] the International Court of Justice maintained that the members of the United Nations had created an entity endowed with objective international personality, and not just an entity recognized by them. It followed that the recognition of the personality of the Organization of the United Nations was applicable *erga omnes* and that the Organization could therefore engage in action against a non-member state, not just against Member States.

Yet it was in its ruling of 5 February 1970 regarding the *Barcelona Traction* case that the International Court of Justice elaborated more clearly the extent of obligations *erga omnes*. It distinguished between, on the one hand, obligations towards the

26 *Yearbook of the ILC* (1980 – I), at 73-98.
27 ICJ Reports (1949), at 174

whole of the international community and, on the other, obligations of one state towards another state in the context of diplomatic protection. By their nature 'the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'.[28]

In contemporary international law, the Court added in a celebrated *obiter dictum*, that these obligations *erga omnes* result from

> the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.[29]

Later, the Court again referred to obligations *erga omnes* in its Advisory Opinion of 21 June 1971[30] and in its rulings of 20 December 1974.[31] Finally, having noted the consequences inferred in its opinion of 28 May 1951[32] from the object and aim of the Convention on the Prevention and Punishment of the Crime of Genocide, the Court affirmed, in its ruling of 11 July 1996 regarding territorial problems associated with application of the Convention, that 'the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*'.[33]

The International Court of Justice thus found that the duty on each state to prevent and repress the crime of genocide was not territorially limited by the Convention. The Convention was therefore applicable without special consideration for the circumstances associated with the domestic or international nature of a conflict, as long as the acts contemplated in its Articles 2 and 3 had been perpetrated. In other words, the Court insisted, whatever the nature of the conflict during which such acts occur, the obligations of prevention and repression imposed on the states party to the Convention remained identical.[34]

This affirmation, is in my view, fundamental, because it has undoubtedly contributed to the progressive acceptance of the idea that in contemporary international law there exist norms which, since they are binding and not discretionary in nature, are set above the will of states.

Weil even goes further when he recognizes that the development in favour of the obligation *erga omnes* is certainly irresistible, because the theory tends to promote

28 ICJ Reports (1970), at para. 33.
29 *Ibid*, para. 34.
30 *On Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971), at 16 *et seq.*
31 *Nuclear Tests Case (Australia v. France)*, ICJ Reports (1974), at 253-55. *Nuclear Tests Case (New Zealand v. France)*, ICJ Reports (1974), at 457 *et seq.*
32 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951), at 15 *et seq.*
33. ICJ Reports (1996), at para. 31 of the ruling.
34 *Ibid.*

moral values such as solidarity by making the respect for certain obligations fundamental for each state a matter for all. He does not hesitate to write that *'la théorie de l'obligation erga omnes répond à une nécessité du monde international d'aujourd'hui'*.[35] However, the notion of obligations *erga omnes* calls for elaboration and for mastery in its usage which have to date been lacking. Thus, the International Court of Justice's ruling of 30 June 1995 in the *East Timor* case[36] clearly marked the limits on the rules of *jus cogens* and on obligations *erga omnes* in contemporary international law.

In that case, the ruling asked for by Portugal would, according to the Court, have had effects equivalent to those of a decision stating that Indonesia's entry into and occupation of East Timor were unlawful and that in consequence Indonesia had no power to conclude treaties relating to the resources of the East Timor continental shelf. This explains why the Court decided, in a questionable verdict, that a ruling of this nature would run directly counter to the principle that the Court can exercise its jurisdiction over a state only with its consent.

12.

Be that as it may, in conclusion, I wish chiefly to stress that one can no longer defend an exclusively voluntarist conception of international law like the one expressed by the Permanent International Court of Justice in its 1927 ruling in the *Lotus* case,[37] since the existence of norms of international *jus cogens* and of obligations *erga omnes* shows that it has to an extent been transcended.

The ban on torture, for instance, is binding not just on the states parties to the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Punishments or Treatment, but also on the whole international community, since it is a peremptory norm of general international law. The regulation by convention banning torture is undoubtedly more specific, apart from the fact that it institutes a number of specific guarantee procedures. Accordingly, as the Human Rights Committee set up by the International Covenant on Civil and Political Rights noted in its General Observation number 24 of November 1994,[38] the ban on torture is a general principle of contemporary international law, where it has the rank of *jus cogens* and consequently binds the whole of the international community, that is, all states whether or not they are parties to the 1984 UN Convention.

35 Weil, *supra* note 3, at 290.'... the theory of the obligation *erga omnes* meets a need of today's international world'.

36 ICJ Reports (1995), at para. 29.

37 *Supra* note 7.

38 Human Rights Committee, *General Comment No. 24* (52), CCPR/C/21/Rev. 1/Add. 6, adopted by the Committee on 2 November 1994; Higgins, 'Introduction', The British Institute of International Law and Comparative Law, *Reservations and Human Rights* (1997) XV; Cohen-Jonathan, 'Les réserves dans les traités institutionnels relatifs aux droits de l'homme. Nouveaux aspects européens et internationaux', *Revue Générale de Droit International Public* (1996) 915.

It thus seems undeniable that, despite the difficulties and ambiguity of the notions of *jus cogens* and of obligations *erga omnes*, they have considerably limited the relativism of classical international law and contributed to the progressive affirmation of a development of international law including binding rules from which states cannot exempt themselves as long as they claim to be members of the international community.

That is why I consider that the notion of rules of *jus cogens has introduced a hierarchy into contemporary international law, despite its indubitably inter-state features.* I am sorry that I am opening, despite the suggestion by Weiler and Paulus, 'for the Nth time, the debates about, say, *jus cogens*, Obligations *erga omnes*, Crimes of States, Custom and Treaty, Norm and Consequence and the other staples of the hierarchy discourse'[39]; I am also sorry for having set the debate on the level of the hierarchy of norms, not the level of methods as Professor Martti Koskenniemi might perhaps have wished. Yet I believe that, faithful to the spirit that animated Wolfgang Friedmann, we must take into account the complexity of contemporary international society and the new developments in international law.

To be sure, its institutional dimension has not overshadowed the relational character of international law, which seems irreducible. As the late René-Jean Dupuy stressed,[40] the forced coexistence of an integrated international society and one formed by the juxtaposition of state interests makes the task of organizing and unifying the international community, as it were, 'captive' to that antinomy. Yet the evolution of the international community and its legal order, international law, has had the consequence of increasingly clearly bringing out the insufficiency of classical international law, which is fundamentally individualist, and the need for a common order adapted to the dimensions of the planet and charged with protecting the general interest, if not indeed guaranteeing the survival of humanity.

39 Weiler and Paulus, paper presented at the Symposium on 'The Changing Structure of International Law Revisited', 27-28 March 1997.

40 R.-J. Dupuy, 'Communauté internationale et disparités de dévelopement', 165 *RdC* (1979-IV); *Idem, La Communauté internationale entre le mythe et l'histoire* (1986); *Idem, Le droit international* (8e ed., 1990), at 121.