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# International Law as a Constitutionalized Legal System

Noppadon Detsomboonrut

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## Abstract

Constitutional approaches have been frequently employed in recent international legal literature. This unavoidably triggers the question of the quality of international law as a constitutionalized legal system. This thesis attempts to answer such a question by determining the necessary and sufficient conditions for a constitutionalized international legal system and whether or not, at present, such minimum requirements have been fulfilled. The main difficulty in the articulation of these conditions is the semantic problem regarding the contours and content of constitutionalism caused by the transfer of this highly contested concept to the international context. In order to understand the destination context, a cosmopolitan paradigm will be consulted to provide explanations for the state-centred character of international law as part of the world's multi-level governance. The thesis argues that the conditions for a constitutionalized international legal system must be articulated based on the viability of the proposed legal structure and its capacity to fulfil the underlying aims of international constitutionalism. The viability criterion demands compatibility with the pluralist structure of international society. The capacity criterion requires that the proposed legal structure can fulfil the underlying aim of international constitutionalism, which is, due to its complementary relationship with domestic constitutional sites, to create international self-governance with a limited mandate for peace and fundamental human rights. Thus, it is proposed that, in order to qualify as a constitutional legal system, international law must first be sufficiently equipped with secondary rules which will provide efficacy for international law to exist as a legal system. Secondly, there must also exist a hierarchy conferring a constitutional status on certain international primary rules protecting peace and fundamental human rights. Finally, international constitutionalization requires the institutionalization of international constituted power. The examination of whether or not each condition has been met in the current international legal structure is undertaken in order to determine the constitutional quality of international law, paying particular attention to the role of *jus cogens* rules and the United Nations in the process of international constitutionalization. It is argued that with the existence

of the three elements, international law has already been constitutionalized to a large extent. However, there remain some deficiencies especially with regard to the legitimacy of the exercise of power on matters of peace and security by the Security Council, which require further constitutionalization.

## Lay Summary

Constitutional approaches have been frequently employed in recent international legal literature. This unavoidably triggers the question of the quality of international law as a constitutional legal system. This thesis attempts to answer such a question by determining the necessary and sufficient conditions for a constitutionalized international legal system and whether or not, at present, such minimum requirements have been fulfilled. The thesis argues that the conditions for a constitutionalized international legal system must be articulated based on the viability of the proposed legal structure and its capacity to fulfil the underlying aims of international constitutionalism. The viability criterion demands compatibility with the pluralist structure of international society. The capacity criterion requires that the proposed legal structure can fulfil the underlying aim of international constitutionalism, which is, due to its complementary relationship with domestic constitutional sites, to create international self-governance with a limited mandate for peace and fundamental human rights. Thus, it is proposed that, in order to qualify as a constitutional legal system, international law must first be sufficiently equipped with meta rules which will provide efficacy for international law to exist as a legal system. Secondly, there must also exist a hierarchy conferring a constitutional status on certain international rules protecting peace and fundamental human rights. Finally, international constitutionalization requires the institutionalization of international constituted power. The examination of whether or not each condition has been met in the current international legal structure is undertaken in order to determine the constitutional quality of international law, paying particular attention to the role of *jus cogens* rules and the United Nations in the process of international constitutionalization. It is argued that with the existence of the three elements, international law has already been constitutionalized to a large extent. However, there remain some deficiencies especially with regard to the legitimacy of the exercise of power on matters of peace and security by the Security Council, which require further constitutionalization.



## Declaration

I declare that this thesis has been composed by myself. It is my own work and it has not been submitted for any other degree or professional qualification.

Noppadon Destomboonrut

18 November 2015





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# Abbreviations

AJIL	American Journal of International Law
BYBIL	British Yearbook of International Law
CUP	Cambridge University Press
CFI	Court of First Instance of the European Union
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
EJIL	European Journal of International Law
EU	European Union
GA	United Nations General Assembly
ICLQ	International and Comparative Law Quarterly
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
LJIL	Leiden Journal of International Law
Max Planck UNYB	Max Planck Yearbook of United Nations Law
Mich JIL	Michigan Journal of International Law
MNP	Martinus Nijhoff Publishers
NATO	North Atlantic Treaty Organization
NYU JILP	New York University Journal of International Law and Politics
OUP	Oxford University Press
OJLS	Oxford Journal of Legal Studies
PCIJ	Permanent Court of International Justice
SC	United Nations Security Council
UN	United Nations
UNCIO	United Nations Conference on International Organization
UNCIO vol. (n)	Documents of the United Nations Conference on International Organization, volume (n)
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOT	United Nations Conference on the Law of Treaties
UNCLOT (1st session)	Official Records of United Nations Conference on the Law of treaties, First Session
UNCLOT (2nd session)	Official Records of United Nations Conference on the Law of Treaties, Second Session
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization



## Chapter I: Introduction

### **I. Setting the Background: Why International Constitutionalism?**

Although the constitutionalist approach has been long invoked in international legal scholarship,<sup>1</sup> being described as the ‘necessary law of nations’ by older scholars,<sup>2</sup> its discussion has stirred up early in the 21<sup>st</sup> century.<sup>3</sup> The reason for this might lie in the belief that international constitutionalism can serve as a cure for the problems of both domestic and international legal systems.

Starting at the domestic level, two shortcomings of domestic constitutional systems can be perceived as a factor that necessitates international constitutionalism. Firstly, state constitutions do not include those from outside their territory or of other nationality into their constituent power-holder, thus ignoring the interests of outsiders who might be affected by constitutional rules and other domestic legislation.<sup>4</sup> In this sense, international constitutionalism can play a complementary role in establishing minimum standards of protection for the basic rights of its constituent power-holder, i.e. all humans, notwithstanding the territorial issue. Secondly, the globalization phenomenon has concealed and emphasized the lack of totality of domestic constitutional governance and state sovereignty which can be

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<sup>1</sup> Verdross explains his concept of the 'constitution of the international legal community' in the foreword to his 1926 book 'Die Verfassung der Völkerrechtsgemeinschaft' ('The Constitution of the International Legal Community') Thomas Kleinlein, 'Alfred Verdross as a Founding Father of International Constitutionalism' (2012) 4 Goettingen Journal of International Law 385; Lauterpacht argued that human beings exist at 'the very centre of the constitution of the world' Hersch Lauterpacht, *International Law and Human Rights* (Stevens & Sons 1950) 570; In his 1961 Article, Opsahl discusses the issue of divergence in the uses of the term 'international constitutional law', Torkel Opsahl, 'An 'International Constitutional Law''? (1961) 10 ICLQ 760.

<sup>2</sup> Philip Allot, 'The Concept of International Law' (1999) 10 EJIL 31, 37.

<sup>3</sup> Jan Klabbers, 'Setting the Scene', *The Constitutionalization of International Law* (OUP 2009) 1; Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (MNP 2011) 1.

<sup>4</sup> See discussions in Andreas L Paulus, 'The International Legal System as a Constitution' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 95–96.

seen in the limits of state constitutions in terms of capability to deal with both international activities and deterritorialized problems as a product of globalization.<sup>5</sup> This necessitates international governance for transnational activities and the behaviour of non-state international actors, which play increasingly important roles.<sup>6</sup> With respect to this issue, international constitutionalism is thought to carry the hope of creating governance for activities beyond the scope of state constitutionalism and in the legitimizing and control of the exercise of political power at the international level, both by states and non-state actors, so as to compensate for the limitations of state constitutions.<sup>7</sup>

At the international level, as illustrated before, globalization has led to an increase in the number of international rules and international organizations to facilitate and regulate international activities and deal with deterritorialized problems. However, international rules, which are largely created according to the wills of states, as well as the power of international organizations, especially that of the Security Council<sup>8</sup>, also need to be properly controlled and legitimized, which might be achieved via a constitutional approach at the international level.<sup>9</sup> Added to this, the development of international governance can be ‘constructively engaged’ in light of international constitutionalism as an analytical tool.<sup>10</sup> Further, on the positive side, the fragmentation of international law represents ‘the rapid expansion of international legal activity into various new fields and the diversification of its objects and

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<sup>5</sup> See the discussion in Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 LJIL 579; Schwöbel (n 3) 91.

<sup>6</sup> See the discussion in Peters (n 5); Jeffrey L Dunoff and Joel P Trachtman, ‘A Functional Approach to International Constitutionalization’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 5–6.

<sup>7</sup> See the approach of international constitutionalism as compensatory constitutionalism in Peters (n 5).

<sup>8</sup> Hereinafter, the ‘SC’.

<sup>9</sup> See e.g. Peters (n 5); Dunoff and Trachtman (n 6) 5–6; Neil Walker, ‘Taking Constitutionalism Beyond the State’ (2008) 56 Political Studies 519, 519.

<sup>10</sup> Walker (n 9) 519.

techniques'.<sup>11</sup> The fragmentation of international law results in 'regulatory competition' and provides 'labor[ies] for development of a new legal instrument', which have contributed to improvements in existing international law and its enforcement.<sup>12</sup> However, the fragmented nature of international law raises serious concerns pertaining to the disunity and uncertainty of international law created by conflicts of norms, jurisdictions and judicial decisions which could be exacerbated by the proliferation of specialized regimes.<sup>13</sup> Constitutionalist approaches are believed to be a proper response to the defects resulting from the fragmentation of international law as they promise the creation of unity and systemic elements within international law by providing hierarchical structures and centralized institutions, or at least a means of coordination.<sup>14</sup> Thus, international constitutionalism carries the hope that there exist certain systemic elements in international law to relieve the concerns caused by the perception of international law as 'merely the aggregate of isolated and often contradictory movements'.<sup>15</sup>

Accordingly, international constitutionalism does not only focus on the defects of international law but also aims to compensate for the shortcomings of domestic constitutional systems. The potential of international constitutionalism offers at least a promising theoretical framework to tackle the defects in both the international legal

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<sup>11</sup> International Law Commission, *Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi), Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion of International Law*, U.N. Doc. A/CN.4/L.682. (hereinafter, ILC Report on Fragmentation of International Law), para 14.

<sup>12</sup> Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 Mich JIL 903, 904.

<sup>13</sup> See e.g. the discussions on fragmentation of international law in ILC Report on Fragmentation of International Law; Gerhard Hafner, 'Pros And Cons Ensuing from Fragmentation of International Law' (2004) 25 Mich JIL 849; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 LJIL 553; Mario Prost and Paul Kingsley Clark, 'Unity, Diversity and the Fragmentation of International Law: How Much Does the Multiplication of International Organizations Really Matter?' (2006) 5 Chinese Journal of International Law 341; Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 Journal of International Law and Politics 791.

<sup>14</sup> Klabbers (n 3) 18; Jan Klabbers, 'Constitutionalism Lite' (2004) 1 International Organizations Law Review 31, 49; See the discussion in Dunoff and Trachtman (n 6) 6–9.

<sup>15</sup> Klabbers (n 14) 49.

realm and the domestic legal system. However, resorting to the notion of international constitutionalism automatically triggers the question of whether international law currently exists as a constitutionalized legal system or is just an attempt to explain or add normative value to recent developments in international law without real constitutional substance,<sup>16</sup> or if this might be just a situation where certain rules of international rules possess a constitutional character, although these are inadequate to turn the whole international legal realm into a constitutionalized legal system.<sup>17</sup>

## **II. Research Question and Methodology**

Although there exists a body of academic literature discussing international constitutionalism, the academic discussions get stuck in semantic issues regarding the content and contours of international constitutionalism as scholars discuss different things whilst giving them the same label of ‘constitutional’. It is the aim of this thesis to tackle the semantic issue of international constitutionalism and to systematically determine the constitutional quality of international law. Accordingly, the research question of this thesis is whether or not international law can at present be perceived as a constitutional legal system and in order to answer this question, two tasks will be tackled. Firstly, a theoretical proposition on the necessary and sufficient conditions for the emergence of an international constitutional legal system will be articulated. Secondly, the proposition articulated in the first task will be applied to assess the quality of international law as a constitutional legal system. Also, where the shortcomings of the current international legal structure are identified, suggestions on how further to constitutionalize international law will be made.

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<sup>16</sup> See the discussion of the use of constitutional language in international law in Wouter Werner, ‘The Never-Ending Closure: Constitutionalism and International Law’ in Nicholas Tsagourias (ed), *Transnational Constitutionalism: International and European Perspectives* (CUP 2007); Rainer Wahl, ‘In Defence of “Constitution”’ in Dobner Petra and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010).

<sup>17</sup> See Grimm as an example of global constitutionalism skeptic taking this stand. Dieter Grimm, ‘The Achievement of Constitutionalism and Its Prospects in a Changed World’ in Dobner Petra and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010).

In the articulation of the necessary and sufficient conditions for an international constitutional legal system, the cosmopolitan paradigm will be consulted to provide a cognitive framework to do so. A cosmopolitan paradigm offers an explanation for the state-centred and mainly decentralized structure of international law.<sup>18</sup> An international constitutional legal structure based on a cosmopolitan paradigm will offer a viable option, unlike those based on statist constitutionalism which necessitate a world state or world sovereign. Further, the importance of states as recognized by international law at the international level leads to the structure of the world's two levels of governance – on the one hand, an international constitutional legal system, on the other, domestic constitutional legal systems – which should complement each other to create a self-governing world of the free and equal. It will be argued in this thesis that the underlying aim of constitutionalism is to create self-governance of the free and equal which should not be compromised during the transfer of the concept of constitutionalism to the international setting. Both the constitutionalization of international law and that of domestic law should be seen as integrated parts of one and the same on-going human attempt to constitutionalize human society.

Based on the idea of complementarity between an international constitutional legal system and domestic constitutional legal systems, the role of the international constitutional legal system shall have a limited mandate for the creation of peace and the protection of fundamental human rights, aka international rights and cosmopolitan rights in Kant's terms. That is to say, the role of international constitutionalism is to provide international peaceful conditions in which the domestic constitutionalism of each state can fully develop and minimum standards of human rights individuals can enjoy without territorial limitations.<sup>19</sup> When domestic

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<sup>18</sup> See a pluralist state-centred structure of international law as a preferable choice to a world-state structure in creating a cosmopolitan world in Immanuel Kant, 'Perpetual Peace' in HS Reiss and HB Nisbet (eds), *Kant: Political Writings* (2nd edn, CUP 1991) 113.

<sup>19</sup> See the three definite articles, aka the cosmopolitan conditions of Kant for creating perpetual peace in *Ibid* 99–108.



constitutionalism in each state is more developed, this will contribute to a stronger link between international constituted power-holders and international constituent power-holders, aka humankind, which is connected by the notion of the state as the representative of its people who are part of international constituent power-holders, as well as the development of a sense of the cosmopolitan citizen involving relevant actors, both state and non-state. As for other matters, apart from peace and fundamental human rights, it should be left to the discretion of states to designate the content of relevant rules in the forms of domestic law as well as state-will-based international law, since democratic legitimacy can develop fully within domestic constitutional legal systems. The complementarity of these two levels of governance will lead to a world as a self-governing society, with a pluralist structure of multiple self-governing states existing side by side, held together by an international constitutional legal system. Therefore, another characteristic of international society is its being part of the world's two levels of governance.

With respect to the methodology of sketching out the current legal structure of international law in the second task, affirmation of the existence of secondary rules which organize the legal structure, via the acceptance of legal officials,<sup>20</sup> will be employed as a theoretical tool to paint a picture of the current structure of international law. Hart's theory of a legal system as a union of primary and secondary rules offers the proper theoretical tool in the context of this research question, as it offers an elaborate account of how a primitive society develops into a more legally developed society with a legal system,<sup>21</sup> and certain developments of secondary rules can also help to identify the legal structures which might be required by different theories of international constitutionalism.

### **III. Outline of the Chapters**

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<sup>20</sup> Herbert Lionel Adolphus Hart, *The Concept of Law* (Joseph Raz and Penelope A. Bulloch eds, 3rd edn, Clarendon Press 2012) 116–117.

<sup>21</sup> *Ibid* 91–97.

In Chapter II, articulation of the conditions necessary and sufficient for an international constitutional legal system will be addressed. First of all, the meanings and interplay of three interconnected key terms – international constitutionalism, the constitutionalization of international law and a constitution of the international community – will be elaborated to reveal the interrelationship among these three terms: international constitutionalism as an idea, the constitutionalization of international law as a process of the actualization of constitutionalism and a constitution of the international community as a product of the constitutionalization of international law. Based on such interplay, it will be proposed that one logical way to determine the constitutional quality of international law is to examine whether or not the current international legal structure, which has been shaped by constitutional rules as a product of the constitutionalizing process of the idea of constitutionalism, can fulfil the ideas entailed in international constitutionalism. Thus, although constitutionalism has a number of dimensions, namely, sociocultural, normative and institutional, the normative aspect<sup>22</sup> of constitutionalism is the focus of this thesis. In the normative aspect, it will be argued, in a very inclusive and very weak sense, that the constitutionalization of international law can be understood as the systematization of international law. Nevertheless, the different ideas on the content of constitutionalism that one holds will impact on how international law shall be systematized. Thus, the process of constitutionalization of international law starts from the systematization and will develop further to meet more necessary conditions required in specific idea of international constitutionalism.

Based on the board understanding of the constitutionalization of international law as the systematization of international law, three propositions can be extracted from various propositions for international constitutionalism, on how international law should be structured or systematized can be found in the current literature. Three such models, a secondary-rule constitutional legal structure, a hierarchical constitutional legal structure and a statist constitutional legal structure, will be

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<sup>22</sup> See e.g. the discussion of the social, institutional and normative dimensions of constitutionalism in Schwöbel (n 3).

discussed. Subsequently, it will be argued that key points for the transfer of the idea of constitutionalism are an understanding of both the original context and the destination context, as well as an understanding of what are the core aims of the idea. Thus, the reconceptualization of constitutionalism in the international sphere must not entail conditions which are too attached to the particularities of domestic societies. Otherwise, it will rule out the viability of the idea of constitutionalism in the international sphere. Also, the core goal of international constitutionalism must not be compromised. This will serve as a criterion of the viability and capacity to fulfil the underlying aim for the reconceptualization of constitutionalism, which will be used to assess whether one of the three models gives a full account of conditions necessary and sufficient for a constitutionalized international legal system. It will be argued in this chapter that none of them does. However, based on the cognitive framework of international order, built on the cosmopolitan paradigm and the underlying aim of constitutionalism, which is to create self-governance of the free and equal individuals, together with analyses of the three models, it will be proposed that the necessary conditions for the emergence of an international constitutional legal system are as follows:

1. International law must be sufficiently equipped with secondary rules which will provide efficacy for international law to exist as a legal system.
2. There must exist a hierarchy of international primary rules providing supremacy for primary rules that protect peace and fundamental human rights.
3. The institutionalization (allocation and limitation) of international constituted power must be achieved in order to establish international self-governance with a mandate for the protection of international peace and fundamental human rights.

In Chapters III–VI, the second task — the determination of whether the three conditions proposed have been met in the current international legal structure — will be tackled. The purpose of Chapter III is to prove the quality of international law as a

legal system by using Hart's concept of a legal system as a union of primary and secondary rules. The rules that function as rules of recognition, of change and of adjudication in international law will be identified in order to determine whether or not international law is sufficiently equipped with secondary rules to deal with legal defects occurring in a primitive society. Then, the hierarchical structure of international primary rules with the supremacy of rules protecting peace and fundamental human rights will be affirmed in Chapter IV. The thesis will propose that the secondary rule of the non-derogability of *jus cogens* and the secondary rule of primacy of the Charter of the United Nations<sup>23</sup> have elevated *jus cogens* rules and the UN Charter to become higher rules of the system. It will further argue that the link between both sets of international constitutional rules and fundamental shared values can provide explanations for their higher and universal character. In other words, the source of the validity of *jus cogens* and the UN Charter as a higher rule derives from the fundamental shared values of the international community. Accordingly, the hierarchical structure of primary rules reveals the content of the unifying rule of recognition, which embraces fundamental shared values as a source of validity of constitutional primary rules. The identification of international constitutional primary rules and their source of validity will also reveal the holder of constitution-making power (constituent power-holder), which will provide the foundation for the discussions in the next chapter. Also, the scope of the application and legal consequences of the rules of the non-derogability of *jus cogens* and the primacy of the Charter will also be addressed in order to paint a more comprehensive picture of how they have shaped the structure of international law. Finally the third condition of the institutionalization of international constituted power, which can compel states to act against their will, with a mandate for peace and fundamental human rights, will be the subject of study of Chapter V. This chapter will explore the institutional structures that have been established, if any, within the regime of *jus cogens* and the UN to see whether any relevant secondary rules allocate international constituted power above state wills to any actor and, if so, whether such powers are

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<sup>23</sup> Hereinafter, the United Nations as the 'UN' and the Charter of the United Nations as the 'UN Charter'.

limited based on the nexus to the international constituent power identified in Chapter IV. It will also attempt to show that based on pluralist-international law and the multi-level governance of the world, the vertical checks and balances between states (and their organs) and the international constituted power-holder can be resorted to in order to limit international constituted power.

The last chapter will summarise the two tasks undertaken in this writing – the proposition for necessary and sufficient conditions of the international constitutional legal system and the assessment of international law as a constitutional legal system in light of its current structure. Suggestions for how international law can be further constitutionalized based on the model proposed will also be made.

## **Chapter II: A Constitutionalized International Legal System**

### **I. Introduction**

To assess the quality of international law as a constitutionalized legal system, among the first issues to be addressed is what the necessary and sufficient conditions for an existence of constitutionalized international legal system are. A key difficulty lies in the content and contours of international constitutionalism having been defined differently from one scholar to another, ranging from a very broad notion of reading international constitutional rules in which any fundamental rules, organizing rules or meta-rules of international society are viewed as constitutional to one strictly based on liberal-democratic statist constitutional legal structures. This semantic problem of global constitutionalism is rooted in the ambiguity over the idea of constitutionalism, even in the domestic contexts in which the idea of constitutionalism originally developed. The transfer of this concept to the international context exacerbates the problem, due to the particularities of international society and international law. The challenge is to contextualize the notion of constitutionalism within the international environment in a way that does not undermine its underlying aims which is to create a self-regulating society. Thus, this chapter seeks to set out the conditions – individually necessary and cumulatively sufficient – for the establishment of a constitutionalized international legal system.

### **II. Semantic Problem and Transfer of the Concept of Constitutionalism to the International Context**

As observed by MacDonald and Shamir-Borer: '[t]here is, of course, no single list of indicators of constitutionalism or constitutionalisation. The number of such lists found in the literature is (at least) equal to the number of authors writing in the field.'<sup>1</sup> Hence the semantic issue that arises with respect to the definition and

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<sup>1</sup> Euan Macdonald and Eran Shamir-Borer, 'Meeting the Challenges of Global Governance' (2008) 2 Select Proceedings of the European Society of International Law 214, 223.

contours of constitutionalism is obviously one of the puzzles that need to be solved in order to assess the quality of international law as a constitutionalized legal system. This difficulty is not confined to the international setting since even in the intra-state context where this concept was originally developed, this issue remains unresolved.<sup>2</sup> Constitutionalism has been described as ‘essentially contested’,<sup>3</sup> ‘deeply contested’<sup>4</sup> and ‘increasingly polymorphic’.<sup>5</sup> Taking the idea of constitutionalism out of the domestic context does, however, complicate the problem, as it involves the transfer of an idea that was originally developed in – and closely attached to – one environment into a very different one, thus necessitating a degree of reconceptualization or remodelling.<sup>6</sup>

As Walker notes, one element of a good ‘translation’ of a concept from one setting to another is to have a ‘thick conception’ of the object of translation, based on a ‘detailed hermeneutic understanding’ of both source and destination contexts.<sup>7</sup> In articulating the basics for the transfer of a concept, Walker also stresses the importance of balancing particularity (which requires susceptibility to relevant particular features of the contexts involved) with generality (which aims to ensure that the concept being transferred retains ‘some interpretive or explanatory purchase’).<sup>8</sup> The requirement for an understanding of the differences between source and destination contexts and some balance between particularity and generality will underpin the effort here to set out the proper criteria to determine whether or not international law now exists as a constitutionalized legal system. Understanding the differences between the domestic and international contexts helps in the formulation

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<sup>2</sup> Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (OUP 2010) 38–39.

<sup>3</sup> Colin Harvey, John Morison and Jo Shaw, ‘Voices, Spaces, and Processes in Constitutionalism’ (2000) 27 *Journal of Law and Society* 1, 3.

<sup>4</sup> Neil Walker, ‘Post National Constitutionalism and the Problem of Translation’ in JHH Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 53.

<sup>5</sup> Neil Walker, ‘The Idea of Constitutional Pluralism’ 65 *The Modern Law Review* 317, 333.

<sup>6</sup> See the discussion on the transfer of the concept of constitutionalism into the inter-state context in Walker (n 4); Krisch (n 2) 35–40.

<sup>7</sup> Walker (n 4) 36–37.

<sup>8</sup> *Ibid* 41–42.

of a conception of international constitutionalism which strikes a balance between particularity and generality. It will avoid the problem of international constitutionalism having been required to meet standards that are too reliant on the particularities of domestic societies, and the problem of the criteria for a constitutionalized international legal system being overly weak or broad. Any plausible conception must reflect the underlying aim of constitutionalism, which should not be compromised for the sake of destination context-fitting.

Accordingly, the semantic problem of the content of international constitutionalism is rooted in the originally much contested content of constitutionalism, even in the domestic realm, as well as the process of the transfer of the concept of constitutionalism to the international sphere. With respect to the process of the transfer of an idea, the articulation of necessary and sufficient conditions for a constitutionalized international legal system must strike a balance between particularity and generality based on an understanding of the differences between the original context and the destination context in order to avoid the criteria being too attached to a statist environment in the domestic context and too general to contribute to a meaningful development of international law.

### **III. Terminology Clarifications: Interactions between International Constitutionalism, the Constitutionalization of International Society and its Law and the Constitution of the International Community as an Idea, a Process and a Product**

Three closely connected terms in international constitutional discourse, ‘international constitutionalism’, the ‘constitutionalization of international law’ and ‘the constitution of the international community’, must be distinguished, and the relations between them set out. It is suggested here that each refers to a different dimension, or component, of the constitutional approach. As the unreflective use of these terms has



caused confusion in the current literature<sup>9</sup>, thus further exacerbating the semantic issues outlined above, clarifying their respective meanings and roles will not only help to dispel confusion, but also provide a foundation of the attempt in this chapter to articulate a set of necessary and sufficient conditions for a constitutionalized international legal system. It should, however, be noted here that, in this section, in order to explain the interactions between these terms, a broad understanding of those three terms will be resorted to in order to provide the most inclusive approach to considering necessary and sufficient conditions for a constitutionalized legal system.

### **3.1. *International Constitutionalism***

Although having different understandings of the contours and content of constitutionalism, scholars agree in seeing constitutionalism as an idea. For example, Klabbers views constitutionalism as ‘an attitude, a frame of mind’, understanding constitutionalism as ‘the philosophy of striving towards some form of political legitimacy’,<sup>10</sup> whilst Schwöbel, sees constitutionalism as the idea of a ‘legal framework that pertains to the coexistence of humans on a given territory’ and ‘a normative framework that is ordered and good’.<sup>11</sup> Construing the relationship of constitutionalism with the other two terms, Tsagourias holds that

...constitutionalism is the ideology behind the process of constitutionalisation and ideology behind constitutions as outcomes. To put it differently, constitutionalism provides the ideological context within which constitutions emerge and constitutionalisation functions.<sup>12</sup>

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<sup>9</sup> Bardo Fassbender, ‘The Meaning of International Constitutional Law’ in Nicholas Tsagourias (ed.), *Transnational Constitutionalism International and European Perspectives* (CUP 2007) 311–312; DZ Cass, ‘The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’ (2001) 12 EJIL 39, 39, 40–41 and 47–49.

<sup>10</sup> Jan Klabbers, ‘Setting the Scene’, *The Constitutionalization of International Law* (OUP 2009) 10.

<sup>11</sup> Christine EJ Schwöbel, *Global Constitutionalism in International Legal Perspective* (MNP 2011) 144.

<sup>12</sup> Nicholas Tsagourias, ‘Introduction’, *Transnational Constitutionalism International and European Perspectives* (CUP 2007) 1.

Based on this understanding, constitutionalism is the idea that drives – and directs – the process of ‘constitutionalization’, a process that has a ‘constitution’ as its product. Constitutionalism thus understood also provides a standard by which putatively ‘constitutional’ rules can be evaluated.

Based on a very broad and weak sense of constitutions as a product of the actualization of constitutionalism, ‘any reasonably developed legal order can be conceived as having a constitution at its disposal’<sup>13</sup> and ‘the fundamental order of any autonomous community or body politic can be addressed as a constitution’.<sup>14</sup> Allot defines a constitution as ‘a structure-system which is shared by all societies’.<sup>15</sup> Thus, constitutionalism might be seen, in a very broad sense, as an idea regarding how society should be legally structured, and so a constitution can exist in any society which is sufficiently structured; naturally, ideas about how each society is to be structured will vary depending on many factors. Therefore, constitutionalism develops divergently in different jurisprudences which cultivate different juridical traditions<sup>16</sup> as ‘a differentiated legal system needs different structures’.<sup>17</sup> Henceforth, international constitutionalism can be broadly understood as the idea of how international society should be legally structured; and due to the fact that the nature of international society differs from that of domestic societies, the content of domestic constitutionalism, which is rooted in the idea of how one specific domestic society should be structured or in particular domestic legal cultures, might not be able to be directly transferred and applied to international society. Further,

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<sup>13</sup> Stefan Kadelbach and Thomas Kleinlein, ‘International Law – a Constitution for Mankind? An Attempt at a Re-Appraisal with an Analysis of Constitutional Principles’ (2007) 50 *German Yearbook of International Law* 303, 308.

<sup>14</sup> Bardo Fassbender, ‘The Meaning of International Constitutional Law’ in Ronald St. John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism* (MNP 2005) 838.

<sup>15</sup> Philip Allott, *Eunomia: New Order for a New World* (OUP 1990) 167.

<sup>16</sup> Douglas M Johnston, ‘World Constitutionalism in the Theory of International Law’ in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism* (MNP 2005) 15–16.

<sup>17</sup> Brun-Otto Bryde, ‘International Democratic Constitutionalism’, in Ronald St John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism* (Martinus Nijhoff 2005) 105.

individuals from different domestic societies will have different ideas about how international law should be structured. This is the main reason for divergences in the contours and content of constitutionalism in international law as proposed by legal scholars. As illustrated before, however, adopting a very broad idea of international constitutionalism as the notion of how international society should be legally systematized, without taking into consideration the underlying aim of constitutionalism that should be transferred to the international sphere, would not reflect the fundamentality of the idea of constitutionalism which should not be compromised in the process of transfer to the new context. Nor does it reflect any significant development in international law. However, this issue will be discussed in detail later in this Chapter.

### ***3.2. The Constitutionalization of International Society and its Law***

Not so different from the term ‘international constitutionalism’, the constitutionalization of international society, and its law, is an ambiguous term. For instance, Joerges speaks of this term as ‘a trendy concept filled up with a plethora of meanings and messages’.<sup>18</sup> Nevertheless, one shared characteristic of the divergent usages of the term of constitutionalization is ‘the connotation of a process’<sup>19</sup> based on its suffix, i.e. ‘-ization’. Accordingly, in light of the broad meaning of constitutionalism discussed before, the constitutionalization of international society can be simply understood as the process of the actualization of international constitutionalism, resulting in a constitution for the international community; or it can be perceived as the process of moving towards a more constitutionalized international society.

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<sup>18</sup> Christian Joerges, ‘Constitutionalism and Transnational Governance: Exploring a Magic Triangle’ in Christian Joerges and Inger-Johanne Sand, Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004) 373.

<sup>19</sup> Christian Walter, ‘International Law in a Process of Constitutionalization’, *New Perspectives on the Divide Between National and International Law* (OUP 2007) 192.

Nevertheless, the question of what developments in international society can be regarded as the process of the constitutionalization of international society is indeed based on one's opinion of the content and contours of constitutionalism that define the requirements for the product of the process of 'constitutionalization'; as Loughlin puts it, 'the contentious character of constitutionalisation can best be explained by bringing this process into alignment with an account of constitutions and constitutionalism'.<sup>20</sup> Walter observes that 'the term may even imply some degree of imperfection – a situation of transition from one underlying concept to another, the contours of which are not yet entirely clear'.<sup>21</sup> Hence, the process of constitutionalization is to be understood as a matter of degree rather than an all-or-nothing approach; the existence of a certain number of constitutional rules in international law does not put a stop to the process of constitutionalization but it can be viewed as a trend towards constitutionalization; and the greater the number of rules with constitutional status, the more constitutionalized international society becomes. This explains the overlapping situation where some academics refer to a certain set of international rules as evidence of the ongoing process of the constitutionalization of international law, whilst others discuss them as part of existing international constitutional legal system.<sup>22</sup> Human right law is indeed a clear example that scholars refer to as one involving both an already-existing international constitutional legal system and the ongoing process of constitutionalization of international law.<sup>23</sup> In this thesis, the term constitutionalization is used in two different contexts – the constitutionalization of international society and the constitutionalization of international law. The difference is that the former discusses constitutionalization in the international realm in a broader sense, including social, political, cultural and normative dimensions, whilst the latter focuses only on the normative dimension.

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<sup>20</sup> Martin Loughlin, 'What is Constitutionalisation?' in Dobner Petra and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 61.

<sup>21</sup> Walter (n 19) 192.

<sup>22</sup> Schwöbel (n 11) 12.

<sup>23</sup> Ibid.

### 3.3. *Constitution of the International Community*

Constitutions are, essentially, a product of the actualization of constitutionalism, produced through the process of constitutionalization. Allot adopts this broad understanding of constitution, defining a constitution as ‘a structure-system which is shared by all societies’<sup>24</sup> and ‘the fruit of a society’s contemplation of itself in time and space’<sup>25</sup>. Defining society as ‘a sharing of consciousness and a sharing of willing and acting’,<sup>26</sup> he further explains that a ‘constitution, in all its forms, is an essential part of the self-structuring of society, its organization of power’.<sup>27</sup> In this sense, the contours and content of constitutionalism in a given society will be a product of the self-contemplation of that society regarding how it should be structured, and this will vary from society to society, resulting in differences between constitutions of different societies.

In terms of their character, constitutions are sets of rules that are different in character from other rules. The characteristics of universality, primacy and indelibility are proposed as the distinctive features of constitutions.<sup>28</sup> Universality, or inclusiveness, is one of the outstanding characteristics of constitutions. It signifies that constitutions apply to all members of the community they are constituted to regulate, with no exceptions.<sup>29</sup> Constitutions serve as ‘an agreement that establishes an ongoing community creates a web of criss-crossing mutual expectations, duties

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<sup>24</sup> Allott (n 15) 167.

<sup>25</sup> Ibid 133.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 142.

<sup>28</sup> Different scholars have divergent opinions on the distinct features of constitutions. See e.g. Chesterman, Franck and Malone who propose that perpetuity, indelibility and primacy are distinct characteristics of constitutions, Simon Chesterman, Thomas M Franck and David M Malone, *Law and Practice of the United Nations* (OUP 2008) 5–11; Meanwhile Bodansky is of the view that the characteristics of primacy and entrenchment are what distinguish constitutions, Daniel Bodansky, ‘Symposium: The ILC’s State Responsibility Articles: Introduction and Overview’ (2002) 96 AJIL 773, 571.

<sup>29</sup> Bardo Fassbender, ‘The United Nations Charter as Constitution of The International Community’ (1998) 36 Columbia Journal of Transnational Law 529, 581.

and entitlements that, being a carefully knotted skein, are not readily disentangled'.<sup>30</sup> Thus, if one is permitted to opt out, this can be taken as abrogation of the legitimate expectations of all those who remain members, since an act might detrimentally affect the community as a whole.<sup>31</sup> In terms of primacy, constitutions are bestowed with superiority above other legal norms in the community they serve.<sup>32</sup> Constitutions exist as a hierarchically superior form of law for, in cases of conflicts, they surpass ordinary rules,<sup>33</sup> as well as all acts of governance inconsistent with them, no matter whether precedent or subsequent in time, and the only exception to this is amendments to the constitution.<sup>34</sup> After the entry into force of a constitution, all the norms in a legal system that the constitution governs are to be concordant with the standards set by the constitution.<sup>35</sup> The indelibility of a constitution means that constitutions are normally more difficult to amend or change than ordinary rules.<sup>36</sup> This is because 'constitutions address fundamental issues and are intended to provide a stable framework of governance of indefinite duration'.<sup>37</sup> This also reflects the notion of the validity of a constitution, irrespective of the passage of time, i.e. 'every constitution aspires to eternity'.<sup>38</sup> Accordingly, the fact that certain international rules possess the character of universality, primacy or indelibility might signify a constitutional element or the existence of a constitution for the international community.

In terms of composition and form, the constitution of the international community contains two types of rules based on their function; applying Hart's terms, these are

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<sup>30</sup> Chesterman, Franck and Malone (n 28) 5.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 7.

<sup>33</sup> Daniel Bodansky, 'Is There an International Environmental Constitution?' (2009) 16 *Indiana Journal of Global Legal Studies* 565, 571.

<sup>34</sup> Chesterman, Franck and Malone (n 28) 7.

<sup>35</sup> Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (MNP 2009) 103.

<sup>36</sup> Chesterman, Franck and Malone (n 28) 6.

<sup>37</sup> Bodansky (n 33) 571.

<sup>38</sup> Fassbender, *The United Nations Charter as the Constitution of the International Community* (n 35) 107.

primary rules and secondary rules.<sup>39</sup> The first category is constitutional primary rules which are substantive rules establishing obligations for the subjects of international law, i.e. *jus cogens* rules and rules regarding the protection of fundamental human rights.<sup>40</sup> The second type is international secondary rules or meta rules, which are rules about rules.<sup>41</sup> Tomuschat explains that rules governing the creation of, the entry into force of, the implementation of, the adjudication of, the interpretation of or the application of rules are meta rules; and meta rules on law-creation, the operation of the executive and adjudicating functions serve as part of the constitution of any legal system.<sup>42</sup> Likewise, Verdross argues that fundamental international secondary rules that govern the sources of law, subjects of law and their application and jurisdiction are international constitutional rules.<sup>43</sup> Examples of international secondary rules which are commonly proposed as constitutional rules are a rule of the sanctity of treaties (*pacta sunt servanda*),<sup>44</sup> as well as Article 38 of the Statute of the ICJ.<sup>45</sup> Further, constitutional rules can exist in both written and unwritten forms<sup>46</sup> and there exists no requirement that constitutional rules, including international ones, need to exist in a single document.<sup>47</sup>

After discussing those three terms, one vital clarification that needs to be addressed is that international constitutionalism as studied in thesis is the idea of how

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<sup>39</sup> Fassbender, 'The Meaning of International Constitutional Law' (n 14) 842–843; Bodansky (n 33) 570.

<sup>40</sup> Bodansky (n 33) 570; Schwöbel (n 11) 18.

<sup>41</sup> Tomuschat employs the term 'meta rules' rather than secondary rules; however it was clearly explained that it is equivalent or influenced by the idea of secondary rules of Hart (although Tomuschat states that meta rules are equivalent to rules of recognition not secondary rules) Christian Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 *Recueil des Cours* 194, 216; Fassbender, 'The Meaning of International Constitutional Law' (n 14) 842–843.

<sup>42</sup> Tomuschat (n 41) 216.

<sup>43</sup> Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft*, at v as cited in Fassbender, 'The Meaning of International Constitutional Law' (n 14) 842.

<sup>44</sup> Hermann Mosler, 'The International Society as a Legal Community' (1974) 4 *Recueil des Cours* 17, 84–85.

<sup>45</sup> Schwöbel (n 11) 18.

<sup>46</sup> Mosler (n 44) 84–85.

<sup>47</sup> Tomuschat (n 41) 217.

international society shall be legally systematized. Thus, in this thesis, the international ‘constitution’ being discussed is a constitution of the international community, not just a constitution of an international organization. As the statutes of certain organizations ‘constitute’ an organization and can contain certain constitutional features, they might be taken as constitutions; however, the object of the founding statute of an international organization’s object is too restrictive to fit in the meaning of a constitution as the highest law of the community which governs any matter and binds everyone in the community to which they belong,<sup>48</sup> i.e. ‘big-C’ constitution not ‘small-c’ constitution,<sup>49</sup> or ‘macro-constitutionalism’ not ‘micro-constitutionalism’.<sup>50</sup> However, it does not rule out the possibility of certain statutes of international organizations having a constitutional status if they can earn omnipotence and other necessary characteristics of a constitution for the international community.

#### **IV. Broad Understanding of the Constitutionalization of International Law as the Systematization of International Law and The Propositions of a Model for An International Constitutional Legal System in Current Literature.**

In the preceding section, the definitions of international constitutionalism, the constitutionalization of international society (law) and international constitutional rules, and the interaction among them as an idea, a process and a product, have been discussed. In this section, based on the discussion in the last section, the premise that, in a very weak and broad sense, the constitutionalization of international law can be understood as the systematization of international law will be developed to create an understanding of the differences in the proposition for an international constitutional legal structure. This will be helpful in the articulation of the necessary and sufficient

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<sup>48</sup> Mosler (n 44) 32; See further discussion in Fassbender, ‘The Meaning of International Constitutional Law’ (n 14) 839–840.

<sup>49</sup> Matthias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State’ in Jeffrey L. Dunoff, Joel P. Trachtman (eds), *Ruling the World? International Law, Global Governance, Constitutionalism* (CUP 2009) 258–263.

<sup>50</sup> Schwöbel (n 11) 21–22.



conditions for the emergence of a constitutionalized international legal system. After a broad understanding of the constitutionalization of international law as the systematization of international law has been considered, based on the broad understanding of the constitutionalization of international law, an exploration of the proposals in the existing literature on the legal structures that international law needs to possess in order to qualify as a constitutionalized legal system will be conducted.

International constitutionalism entails many dimensions – social, political, cultural and normative. Accordingly, the success of the actualization of international constitutionalism can be measured in different dimensions. The focus of this thesis, however, is the normative aspect of constitutionalism, i.e. the legal structure and its function. The rationale behind this lies in the interaction of constitutionalism as an idea, constitutionalization as a process and constitutional rules as a product. Based on this interaction, despite the different contours of international constitutionalism proposed, the way to assess whether international constitutionalism has been sufficiently actualized in the international realm or not is to seek products which are both constitutional rules and legal structures, with a legal mechanism established by them, and to determine whether the products can satisfy the ideologies or aims underlying the idea. Of course, the impact of the actualization of international constitutionalism will also have a social, political and cultural dimension; however, it is the impact on the legal structure that will be the most tangible, and readily assessable; and the legal structure can also be seen as a tool to achieve the further sociocultural and political purposes of constitutionalism. Thus, the focus here is on the normative dimension of international constitutionalism, i.e. the constitutionalization of international law.

Generally, the normative dimension of international constitutionalism focuses on the identification of specific norms as international constitutional norms which could provide a normative framework for an international constitutional order, i.e. the essence of normative constitutionalism is seen as the existence of constitutional rules

within an international legal realm,<sup>51</sup> reflecting the movement towards relative normativity in the international sphere.<sup>52</sup> For those with a very broad notion of constitutionalism – simply, for example, the idea of subjecting human relations to a framework of legal rules – any rules that contribute to the systematization of such a framework will also appear as contributing to its constitutionalization. Thus, from this perspective, the processes of systematization and constitutionalization come to appear, at least in a very broad and weak sense, as the same thing but with different labels. However, for those who have specific dimensions of or requirements for constitutionalism in mind, especially ones that exclusively attach constitutionalism to a state-like structure, they would set the specific direction of legal systematization or the specific requirements of a legal structure or legal mechanism to accord with the more specific contours of constitutionalism that they have in mind. For example, for those for who hold a very robust understanding of constitutionalism exclusively attached to a state-like structure, far more than a basic systematization tendency will be required before a legal system rule can be appropriately labeled ‘constitutional’. However, despite the differences in the content of international constitutionalism that one might have in mind, the creation of a list of necessary and sufficient requirements for the emergence of what can be called a constitutionalized international legal system can be achieved via a determination of what legal structures international law must possess in order to satisfy one’s specific idea of international constitutionalism.

Patently, the weak but accommodative understanding of the constitutionalization of international law as the systematization of international law is unlikely to help us to articulate the conditions necessary and sufficient for an international constitutional legal system in a meaningful sense. However, let us momentarily adopt this understanding for the specific purpose of gathering together potential models for an

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<sup>51</sup> Ibid 42.

<sup>52</sup> See Stefan Kirchner, ‘Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?’ (2004) 5 *German Law Journal* 47; Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *AJIL* 413.

international constitutional legal structure in a way that is as inclusive as possible. Exploring current relevant literature, this difference in the normative dimension of each different proposal of international constitutionalism varies, based on how international law is to be systematized. At one end, there is a very broad notion of a secondary-rule constitutional structure that defines a constitutional structure as merely a fundamental meta/ secondary/ organizing structure which varies from society to society as a product of the self-contemplation of each society without specifying the underlying core requirements that the legal structure of any kind of society needs to achieve.<sup>53</sup> In the middle of the spectrum is a hierarchical constitutional structure which demands more than constitutional secondary rules and focuses on the hierarchical structure of higher rules established by higher rules and the supremacy of the community interest as a source of higher validity superior to the interests of any individual member of the community or group.<sup>54</sup> At the other end of spectrum is a very narrow statist constitutional structure<sup>55</sup> that, apart from the hierarchical structure, necessitates legal structures with specific legal mechanisms which can only be developed in very centralized societies, such as domestic societies. Such a legal structure is closely connected to statehood or the sovereignty of states that comprehensively centralizes political power in states and enables states to compulsorily and comprehensively regulate their internal structure.<sup>56</sup> It can be seen from this order that meta-rules constitutional structure has the greatest flexibility in terms of allowing such structures to be created in different kinds of society. Located at the other end of the spectrum, it is an international constitutional legal structure which is highly attached to the particularity of the source context – a state structure built upon the idea of state sovereignty – in the sense of the transfer of an idea as discussed earlier.

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<sup>53</sup> Schwöbel (n 11) 43–45; Allott (n 15) 167; Aoife O’Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 15–16.

<sup>54</sup> Bryde (n 17) 104–106; Schwöbel (n 11) 37–39.

<sup>55</sup> See the discussion of Democratic-Statism Constitutional Approach in Mattias Kumm, ‘The Best of Times and Worst of Times’ in Dobner Petra and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 203–212.

<sup>56</sup> See the argument on how sovereignty is essential to the constitutional order in Jeremy A Rabkin, *Law Without Nations?: Why Constitutional Government Requires Sovereign States* (Princeton University Press 2005).

#### *4.1. Secondary-rule Constitutional Legal Structure*

Roth argues that the constitutional legal structure of a legal order supplies a society with ‘secondary rules’ – the rule of recognition by which primary rules of obligation are recognized, the rules of adjudication by which primary rules are adjudicated, the rules of change according to which primary rules are altered.<sup>57</sup>

The secondary/ meta-rule based constitutional structure is probably the oldest version of normative constitutionalism in the international context since the Westphalian era.<sup>58</sup> In his 1926 book ‘Die Verfassung der Völkerrechtsgemeinschaft’, Verdross defines constitutional rules as ‘norms which deal with the structure and subdivision of, and the distribution of spheres jurisdiction in, a community’.<sup>59</sup> Likewise, in discussing the concept of a constitution of the international community, Tomuschat explains:

Generally law-making is the expression of the original power vested in the political forces of the community concerned ... Together with the rule of discharge of the executive and the judicial functions, the rules on law-making form the constitution of any system of governance. All these sets of prescription can be logically characterized as meta rules...<sup>60</sup>

However, Schwöbel makes the observation that, in their later books, both Verdross and Tomuschat put more emphasis on constitutional primary rules.<sup>61</sup> The idea of a meta-rule constitutional structure is also supported, albeit with a focus on the rule of recognition, by Kadelbach and Kleinlein who argue that, in theory and in a modest sense:

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<sup>57</sup> Brad R Roth, *Governmental Illegitimacy in International Law* (OUP 1999) 52.

<sup>58</sup> Schwöbel (n 11) 43.

<sup>59</sup> Alfred Verdross, *Völkerrecht* (5th edn Springer, Vienna 1964) 22 as cited in *ibid.* 43–44.

<sup>60</sup> Tomuschat (n 41) 216.

<sup>61</sup> Schwöbel (n 11) 44–45.

...any reasonably developed legal order can be conceived as having a constitution at its disposal, in the sense of a basic norm (constitution in a logical or systematic sense) or in terms of what legal theorists call “rules of recognition”, i.e. norms which are necessary to bring ordinary law into being and from which it derives its validity.<sup>62</sup>

Schwöbel comments that, to a large extent, secondary-rule-based constitutionalism does not focus on substantive rules, which countenances basic legal values since the concept neither necessitates any values or idealism nor demands the protection of human rights. Added to this, despite the fact that, to some degree, secondary constitutional rules do deal with the institutionalization of power, they are not built on the idea of participation by the people as the constituent-power holder based on political ideology but rather based on the aim of standardization. Thus, she perceives that secondary-rules constitutionalism aims for the progress of society in light of procedural standardization.<sup>63</sup>

#### ***4.2. Hierarchical Constitutional Legal Structure***

A hierarchical constitutional legal structure requires more than the existence of international constitutional secondary rules: it sees the existence of international constitutional primary rules – i.e. the existence of secondary rules that elevate certain international primary rules into constitutional rules –, as a prerequisite to a constitutional structure. Bryde strongly argues that a structure comprising only secondary rules is not adequate to establish a constitutional structure in international society as he rejects the weak conception of international constitutionalism in the sense that divergent legal systems demands different legal structures, since he believes that an international constitution must contain both constitutional primary rules and secondary rules.<sup>64</sup> He perceives that a secondary-rules structure in the Westphalian sense is ‘only well-ordered anarchy’, arguing:

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<sup>62</sup> Kadelbach and Kleinlein (n 13) 6.

<sup>63</sup> Schwöbel (n 11) 45.

<sup>64</sup> Bryde (n 17) 105.

It was a horizontal legal system, which knew no common interest beyond the sum of interest of individual states, no hierarchy of norms, no higher authority than states themselves. With the help of international law the states regulated their international affairs but the regulation of their own affairs (“*domaine réservé*”) knew no restrictions.<sup>65</sup>

He insists that the constitutional model of international law must be based on the verticalization of international law, which embraces a source of validity of primary rules superior to the will of individual states, i.e. a hierarchy of international rules,<sup>66</sup> explaining that the purpose of a constitution is to limit, via a set of higher norms, the omnipotent power of law-making entities in international law, either states or international organizations.<sup>67</sup>

The establishment of a hierarchical structure of primary rules in state-centered international law would necessitate the recognition of a source of validity of primary rules superior to state consent such as the common interest or values or people.<sup>68</sup> In other words, the secondary rule of recognition of the international legal system has to recognize other sources of validity, apart from state consent. In one sense, hierarchies have an effect that can oblige relevant actors to act against what they believe is in their interests,<sup>69</sup> which, in the case of the international sphere, will force states to act against their will. The two prime candidates for higher primary rules are *jus cogens* rules and the UN Charter.

#### ***4.3. Statist Constitutional Legal Structure***

At the other end of spectrum is a statist model which is based on the legal structure of constitutional states. The legal structure of constitutional states comprises: first, a comprehensive legal structure which all the political powers in one limited territory

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<sup>65</sup> Ibid 106.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> See e.g. *ibid*; Erika De Wet, ‘The International Constitutional Order’ (2006) 55 ICLQ 51.

<sup>69</sup> Tanja A Börzel, ‘European Governance: Governing with or without States?’ in Dobner Petra and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 76.

are subject to based on the concept of state sovereignty; and second, a legal mechanism that creates a limited government based on the idea of a self-regulating society.<sup>70</sup>

#### 4.3.1. Comprehensive Legal Structure

Based on statist constitutionalism, constitutions exist as the highest law of the land which constructs the legal system of the sovereign nation-state.<sup>71</sup> This is the conventional understanding of constitutionalism, which is fundamentally connected to the concept of statehood and state sovereignty.<sup>72</sup> According to Grimm, a statist legal constitution in this sense is ‘a coherent and comprehensive regulation of the establishment and the exercising of public power’, which has two preconditions.<sup>73</sup> First, there must be an entity which can be comprehensively governed in a given legal constitutional legal structure. A modern state is such an entity, which is distinguished from earlier polities by the concentration of all public power in a given territory. Grimm explains that ‘(o)nly after public power had become identical with state power could it be comprehensively regulated in one specific law’,<sup>74</sup> i.e. one constitutional legal structure.<sup>75</sup> A second precondition for the constitution is that there is no external entity which also has public power over the given territory of the state. I.e. the constitution cannot distribute domestic public power to a foreign entity, for states that cannot protect their territory or domestic affairs from the intervention of external political power are not capable of providing a comprehensive legal structure.<sup>76</sup> Statehood, sovereignty and statist constitutionalism are deeply attached

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<sup>70</sup> See Dieter Grimm, ‘The Achievement of Constitutionalism and Its Prospects in a Changed World’ in Dobner Petra and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010).

<sup>71</sup> Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State’ (n 49) 265.

<sup>72</sup> Ulrich K Preuss, ‘Disconnecting Constitutions from Statehood’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism* (OUP 2010) 23.

<sup>73</sup> Grimm (n 70) 11.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid 10.

<sup>76</sup> Ibid 12.

to the concept of territoriality. Preuss explains that the existence of an authoritative power that has exclusive control over a given space turns that space into territoriality. The idea of territoriality depersonalizes the exercise of power. Based on such an idea, the ruler of a territory does not exercise power over subordinates on the basis of personal relationships but on the basis of the validity of his/her power over the territory by which he/she can control individuals' actions or events within the physical space of the territory. Such exclusive control over territory is indeed sovereignty<sup>77</sup> and the only entities that can control the legal structure within their territorial can be called states.<sup>78</sup> With an attachment to sovereignty, Fassbenber observes that, based on the idea of separate and legally self-contained states, statist constitutionalism generates the premise that one group of individuals will be subject to only one constitution. However, this is contradictory to the reality where there exists an international legal structure to which states and their constitutions are subject.<sup>79</sup>

#### 4.3.2. Collective Self-Government

Regarding limited government, state sovereignty alone cannot create a constitutional structure as if the sovereign has unlimited or unconditional power to control subordinates, a comprehensive legal structure is unnecessary and meaningless.<sup>80</sup> Accordingly, the constitutionalization of political power is more than the legalization of political power, i.e. not just the submission of political power to law. Without a legal mechanism to limit the exercising of the rule-based power of the sovereign, no matter whom the ruler is, there is a high likelihood that government will become tyrannical and despotic.<sup>81</sup> However, as sovereignty is subject to no political power outside the territory, the limitation of the ruler who exercises control over

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<sup>77</sup> Preuss (n 72) 26–27.

<sup>78</sup> Nick Barber, *The Constitutional State* (OUP 2010) 78.

<sup>79</sup> Fassbender, 'The United Nations Charter as Constitution of The International Community' (n 29) 556.

<sup>80</sup> Grimm (n 70) 11–12.

<sup>81</sup> Preuss (n 72) 24.



subordinates must be created by that very sovereignty in that territory: this is the idea of limited government in the sense of collective self-regulating governance. Thus, a statist constitutional legal structure, in this sense, is a comprehensive legal framework in which collective self-regulating government can emerge.<sup>82</sup> Accordingly, the creation of the self-governance is the underlying purpose of the domestic constitutionalism.<sup>83</sup> Collective self-regulating government is strongly rooted in the notion of the people: ‘We the People’ as the constituent power. According to Paine, ‘a constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting a government.’<sup>84</sup> Based on this caveat, Paine distinguishes constituted power which belongs to government and constituent power, which is held by the people and establishes the notion of the primacy of the people over the government.<sup>85</sup> Limited government is understood as government constituted by the people through their consent for the sake of the people.<sup>86</sup> Therefore, the people are both governors and governed at the same time. Hence, constitutions in this meaning of constitutionalism are the supreme law of the legal system, to which both holders of constituted power (government) and constituent power (people) are bound, based on the mechanism of the rule of law.<sup>87</sup> This constitutional structure as a comprehensive legal structure with collective self-governing government is rooted in liberal-democratic legal culture. In the realm of democratic liberal-statist constitutionalism, i.e. the statist model, there are four elements of legal structure that serve as a mechanism to establish a collective self-

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<sup>82</sup> See the discussion in Mattias Kumm, ‘Global Constitutionalism and the Cosmopolitan State: An Integrated Conception of Public Law’ (2013) 20 *Indiana Journal of Global Legal Studies* 605.

<sup>83</sup> E.g. Grimm takes the creation of self-governance as the achievement of domestic constitutionalism, Grimm (n 70); See also Preuss (n 72) 23–24.

<sup>84</sup> Thomas Paine, ‘Rights of Man’ in Philip S Foner (ed.), *The Complete Writings of Thomas Paine* (The Citadel Place 1945) 278.

<sup>85</sup> Loughlin (n 20) 49.

<sup>86</sup> *Ibid* 47–48.

<sup>87</sup> O’Donoghue (n 53) 16.

government: 1. Rule of Law, 2. Separation of Powers, 3. Democratic Legitimacy and 4. Protection of the Basic Rights of the Constituent Power-holder.<sup>88</sup>

### *A. Rule of Law*

According to Dicey, the rule of law means:

...no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint<sup>89</sup>

Dicey further argues, based on the rule of law: ‘no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’.<sup>90</sup> Essentially, the rule of law requires, as O’Donoghue puts it, that ‘law to be applied equally, created openly and administered fairly’.<sup>91</sup> Hayek proposes that the naked meaning of rule of law without technicalities is that:

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<sup>88</sup> There exist differences in scholars’ opinions on what the key elements of the democratic-liberal model of constitutionalism are, e.g. O’ Donogue takes the position that: ‘the rule of law, division of power and democratic legitimacy are intrinsically linked to the suitability and potential presence of constitutionalism for the operation of a governance order that locates the body it serves at the centre of its operation’, *ibid* 22; Paulus opines that ‘the principles this contribution thereby derives from the Western constitutional tradition are democracy, separation of powers, rule of law and Rechtsstaat, as well as states’ rights and human rights’, Andreas Paulus, ‘The International Legal System as a Constitution’ Andreas L Paulus, ‘The International Legal System as a Constitution’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 92; Kumm, Lang, Tully and Weiner regard human rights, democracy and the rule of law as ‘the trinitarian mantra of the constitutionalist faith’ Mattias Kumm and others, ‘How Large Is The World of Global Constitutionalism?’ (2014) 3 *Global Constitutionalism* 1, 3.

<sup>89</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1939) 110.

<sup>90</sup> *Ibid* 114.

<sup>91</sup> O’Donoghue (n 53) 156.

...government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.<sup>92</sup>

If the element of the rule of law is achieved in the international context, this will create consistency, coherence and predictability within international law and remove arbitrariness.<sup>93</sup>

However, the rule of law focuses on the certainty of the legal system, thus representing only one of the admirable features that a legal system should attain apart from, *inter alia*, justice, equality, democracy and human rights.<sup>94</sup> Thus this sole element of rule of law is insufficient to establish limited government in the sense of 'collective-self government' as it omits a necessary connection between law and morality;<sup>95</sup> as Raz cautions, 'the rule of law is essentially a negative value. It is merely designed to minimize the harm to freedom and dignity which the law may cause in its pursuit of its goals however laudable these may be'<sup>96</sup> and '(t)he law may, for example, institute slavery without violating the rule of law'.<sup>97</sup> Added to this, one of the underlying principles of the rule of law is the existence of independent judicial review,<sup>98</sup> and the judicial function is a linkage between the idea of the rule of law and the next element of democratic-liberal constitutionalism, i.e. the 'separation of powers'.<sup>99</sup>

### *B. Separation of Powers*

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<sup>92</sup> Friedrich August von Hayek, *The Road to Serfdom* (Routledge 1944) 49.

<sup>93</sup> O'Donoghue (n 53) 157.

<sup>94</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 2011) 211.

<sup>95</sup> *Ibid* 224–225.

<sup>96</sup> *Ibid* 228.

<sup>97</sup> *Ibid* 221.

<sup>98</sup> *Ibid* 216–217.

<sup>99</sup> O'Donoghue (n 53) 27–28.

The separation of powers is at the core of the creation of self-governance in the liberal-democratic legal tradition. At its heart, the separation of powers aims to prevent the constitutional actor from turning into an exclusive holder of the constituted power by dividing and distributing the constituted power to multiple actors.<sup>100</sup> According to O’Donoghue, the separation of powers plays a role complementary to other constitutional elements in the establishment of collective-self government. First, the separation of powers helps to tighten the linkage between constituted power-holders and constituent power-holders in order to alleviate the problems of the detachment between constituted power and constituent power as well as the defects in democratic legitimacy. Secondly, the separation of powers serves as a mechanism to permit one constituted power-holder to ensure that others exercise their power within the boundaries set by the rule of law.<sup>101</sup> The separation of powers can be achieved along two axes – horizontal and vertical. On the one hand, classical horizontal separation operates via the division of executive, legislature and judicial powers.<sup>102</sup> This form of separation of powers is based on the idea that the only way to prevent despotism from occurring is to have a mechanism that disallows these three branches of judicial, legislative and executive powers to be integrated.<sup>103</sup> On the other hand, a vertical separation of powers is employed in a federal state’s legal system where power is ‘allocated at various points of distance from constituent power holders depending upon the perceived efficiency in decision-making’.<sup>104</sup> Loveland terms this kind of vertical separation of powers a ‘geographical separation of powers between national and State government’.<sup>105</sup> Discussing the case of the US, Loveland explains that the US Constitution creates ‘a multiplicity of powerful political societies within a single nation-state, each wielding significant political powers within precisely defined geographical boundaries’; however, the constitution

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<sup>100</sup> Ibid 37.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 19.

<sup>103</sup> Schwöbel (n 11) 110.

<sup>104</sup> O’Donoghue (n 53) 19–20.

<sup>105</sup> Ian Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (6th edn, OUP 2012) 301.

imposes restraints on the autonomy of national government by conferring exclusive power over certain matters on the national government.<sup>106</sup>

### *C. Democratic Legitimacy*

Democratic legitimacy can be understood as a nexus between constituent and constituted power which guarantees that the exercise of power is done in a transparent and legitimate fashion, and it establishes a mechanism for dismissal of the constituted power-holder in the case where constituent power-holder sees fit to do so.<sup>107</sup> Democracy requires the individual's right to self-government as well as to the right to political participation to be established in the legal system, thus serving as a link between constituted power and constituent power and generating democratic legitimacy for the actions of the constituted power-holder<sup>108</sup> Therefore, it is seen as being an indispensable element for the establishment of collective self-government and as one of the core elements of this statist international constitutionalism.<sup>109</sup>

Grimm explains that this is not very illuminating, in that democracy is a necessary element of the legitimization of political power. However, if the legitimacy of political power is to be grounded on other stands, the constitution might not be able to function properly. For example if a certain absolute truth, either religious or secular, serves as the basis for the legitimacy of political power, that truth will trump what is written in the constitution. Consequently, this can lead to a situation where certain elites insist that they have the power to rule over others, irrespective of the others' consent, based on their self-claim to possess a better understanding of absolute truth.<sup>110</sup> Although democracy might triumph over other grounds of

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<sup>106</sup> Ibid 13.

<sup>107</sup> O'Donoghue (n 53) 43.

<sup>108</sup> See e.g. Carol C Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (CUP 1990) 45; O'Donoghue (n 53) 40.

<sup>109</sup> O'Donoghue (n 53) 43.

<sup>110</sup> Grimm (n 70) 10.

legitimacy, such as absolute truth based on religion or theory, democracy does not provide a comprehensive account of the legitimacy of government.<sup>111</sup> Democracy is not exactly equivalent to majoritarianism, since if the majority deprive minorities of their basic rights, such as the right to property, the right to vote or the right against enslavement, this is inconsistent with democracy.<sup>112</sup> Thus, the protection of the basic rights of constituent power-holders – another element of the establishment of limited government – also helps to shape the application of democracy. Sunstein argues that equality serves as an ‘internal morality’ for democracy which denies the creation of ‘second-class citizenship’ by law,<sup>113</sup> thus reflecting the underlying idea of the rule of law.<sup>114</sup> Accordingly, other key constitutional elements – the rule of law, the separation of powers and the protection of basic rights, which together help to implement equality between constituent power-holders – will act as restraints on democracy and together provide a full legitimacy basis for liberal-democratic statist constitutionalism.<sup>115</sup>

#### *D. Protection of the Basic Rights of the Constituent Power-holders*

The protection of fundamental human rights is one of the core elements of liberal-democratic constitutionalism.<sup>116</sup> A constitution functions as a tool to set limits on the scope within which the state can invade individuals’ rights and freedoms and to guarantee the rights to political participation and self-determination of the people in society.<sup>117</sup> One of the great implications of two key moments in history for statist constitutionalism – the American and French Revolutions – is that the people vindicated their natural right to remove the existing regime and reconstitute a new limited government with a constitutional legal structure which allows people to

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<sup>111</sup> O’Donoghue (n 53) 40–41.

<sup>112</sup> Cass R Sunstein, *Designing Democracy: What Constitutions Do* (OUP 2001) 97.

<sup>113</sup> *Ibid* 242.

<sup>114</sup> O’Donoghue (n 53) 42.

<sup>115</sup> *Ibid* 41.

<sup>116</sup> Kumm and others (n 88) 3; Paulus (n 88) 92.

<sup>117</sup> Fassbender, ‘The United Nations Charter as Constitution of The International Community’ (n 29) 553.

resort to the courts as guardians of their basic rights.<sup>118</sup> The protection of the fundamental rights of people in the community by the government (in a broad sense, not limited to executive bodies), constituted by such people themselves, reflects the respect for the government as the constituted power over the people as constituent power-holder.

Whilst the other elements of liberal-democratic constitutionalism are more procedural in character, the protection of human rights can be seen as a substantive part of constitutions. This indicates that constitutionalism in this sense is not purely constitutive in nature as it also instils fundamental values into the system.<sup>119</sup> In liberal-democratic constitutional states, fundamental rights are not determined by popular consent or a majority; otherwise, this might lead to the tyranny of the majority.<sup>120</sup> Rawls proposes that one of the constitutional essentials is:

...equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and of association, as well as the protections of the rule of law.<sup>121</sup>

If the scope of fundamental rights is based purely on the will of the majority, this risks the tyranny of the majority. In contrast, if the content of fundamental rights is determined by a minority, that would cause a serious problem for democratic legitimacy. What then should be the basis for the determination of the content of fundamental rights? The idea of public reason-based rights can be seen as one candidate.<sup>122</sup> As Rawls explains:

Public reason is characteristic of a democratic people: it is the reason of its citizens, of those sharing the status of equal citizenship. The subject of their reason is the good of the public: what the political of justice requires of

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<sup>118</sup> Martin Loughlin, *The Idea of Public Law* (OUP 2003) 122.

<sup>119</sup> Bodansky (n 33) 569–570.

<sup>120</sup> John Stuart Mill, *On Liberty* (J W Parker and Son 1859) 12–13.

<sup>121</sup> John Rawls, *Political Liberalism* (Columbia University Press 2005) 227.

<sup>122</sup> Rawls proposes the public reason can ‘specifies certain basic rights, liberties, and opportunities’ in *Ibid* 223.

society's basic structure of institutions, and of the purpose and end they are to serve.<sup>123</sup>

According to Rawls, fundamental rights as 'constitutional essentials' need 'to be justifiable to all citizens as the principle of political legitimacy requires'.<sup>124</sup> For him, citizens have a duty of 'civility to appeal to public reason'. They have to engage in discussions regarding the fundamental rights based on values that others as a free and equal to them 'can reasonably be expected to endorse' and they have to be ready to defend and explain the relevant concepts to others.<sup>125</sup> Accordingly, in a democratic-liberal society, individuals who think of themselves as the free and equal beings are those who determine the legitimate scope of their fundamental rights and liberties based on a mindset in which they solemnly regard others as being as free and equal as themselves; and in such a context, public reason serves as the heart of the articulation of the scope of the restraints imposed on collective self-government with regard to individual rights in the community.<sup>126</sup>

One vital point about the protection of the basic rights of the constituent power-holder is that the implementation of basic rights depends on the existence of legal control over the government and violations of basic rights, notably judicial review. As discussed before, independent judicial review is rooted in the other two key elements of liberal- democratic constitutionalism – the separation of powers and the rule of law. One of the most debated issues in relation to judicial review is, however, the issue of its democratic legitimacy, which is another key element of liberal-democratic constitutionalism due to the lack of any linkage between judicially constituted power and constituent power.<sup>127</sup> Nevertheless, if one takes the public reason-based rights approach, the genuine issue of judicial review will reside not in

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<sup>123</sup> Ibid 213.

<sup>124</sup> Ibid 224.

<sup>125</sup> Ibid 226.

<sup>126</sup> Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State' (n 49) 315.

<sup>127</sup> O'Donoghue (n 53) 28–29; Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State' (n 49) 269.



the problem of democratic legitimacy but rather in the public reasonableness of decision-making organs.<sup>128</sup>

Sceptics of the idea of international constitutionalism model largely base their scepticism on the idea of liberal-democratic statist constitutionalism. They deny the quality of international law as a constitutional legal system due to the lack of a comprehensive legal structure based on centralized power, comparable to state sovereignty in the domestic realm. They also ground their criticisms on the non-existence or lack of development of legal structures that serve as a mechanism limiting constituted power such as the rule of law, democracy, the separation of powers and the protection of the fundamental rights of the constituent power-holder. For instance, Grimm denies the constitutional character of the UN Charter on the ground that, despite ‘its all-encompassing nature, its peacekeeping purpose and its corresponding powers’, the UN structure is ‘far from aggregating all public power exercised on the global level and even farther from the concentrated and all embracing public power of the state’.<sup>129</sup> He suggests that due to the insufficient development of the legitimation and limiting of public power at the international level, and despite the expansion of the regulation of the exercising of public power in the international sphere, it is not capable of fulfilling the requirements of constitutionalism.<sup>130</sup> Paulus rejects taking international law as a constitutionalized international legal system, at least in a strong sense, for two reasons. First, there exists no ‘comprehensive judicial structure or unequivocal judicial hierarchy’ to address conflicts between values, rules and specialized regimes in the international sphere. Secondly, an international legal structure cannot fulfil the core elements of constitutionalism, specifically democratic legitimacy and the rule of law.<sup>131</sup> Of course, the merit of such attacks on international constitutionalism is important; however, equally important but logically a priority is the issue of whether

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<sup>128</sup> Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State’ (n 49) 269–270.

<sup>129</sup> Grimm (n 70) 18–19.

<sup>130</sup> *Ibid* 20–22.

<sup>131</sup> Paulus (n 88) 107–109; See further discussions on the limitation of global constitutionalism in Schwöbel (n 11) 130–132.

international society should be judged based on the cognitive framework of statist international constitutionalism.<sup>132</sup>

In this section, based on an inclusive approach that takes the constitutionalization of international law as the systematization of international law, the spectrum of the requirements for a constitutional legal structure based on the different propositions for international constitutionalism has been demonstrated. In the next part, two key factors that should be taken into consideration in the process of the transfer of the concept of constitutionalism into the international realm – viability in the international context and the capacity to fulfil the underlying aim of constitutionalism – will be discussed in order to provide a foundation for the articulation of the proposed necessary and sufficient conditions for an international constitutionalized legal system, based on an analysis and evaluation of the three models outlined above.

#### **V. Keys for the Transfer of Constitutionalism to the International Level: Viability and the Capacity to fulfil the Underlying Aim of Constitutionalism**

As discussed before, one of the main elements concerning the definitional issue of international constitutionalism is the transfer of the concept of constitutionalism which was originally developed in the domestic setting into the international context. One of the keys for a well-articulated transfer of ideas to another context relies on the viability of the reconceptualization in the destination context, along with its capacity to sustain the core underlying aim of the concept, based on an understanding of both contexts. This means that the generality which is created during the transfer of the concept of constitutionalism must not be so great that it compromises the core purpose of that concept. On the other hand, too much attachment to the source context's particularities should also be avoided for that might create unnecessary conditions that could undermine or rule out the viability of a concept transferred to

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<sup>132</sup> Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State' (n 49) 265–266 and 323.

the destination context. Accordingly, the transfer process must be based on an understanding of the differences between domestic and international contexts in order to determine necessary conditions which are viable in the destination context and which have the potential to fulfil the underlying aim of constitutionalism. Thus, the criteria of the viability and the capacity to fulfil the underlying aim of the constitutionalism will serve as a tool to assess the three models. Before doing so, it would be helpful to understand the characteristics of international society first, as this will provide the foundation for the assessment of three models in the light of its viability and capacity to fulfil the underlying aim of the constitutionalism in the international setting.

### ***5.1. Characteristics of International Society: a Pluralist Structure as Part of World Multi-Level Governance.***

In this part, there will be a discussion of two important characteristics of international society which need to be taken into consideration when determining the viability of the proposals for a model for an international constitutional legal system and the capacity of such proposals to create collective self-governance, which is an underlying goal of constitutionalism. These are, first, a pluralist structure based on the state-centred nature of international society; and second, the character of international society as one of the world's multi-level governance, together with domestic societies.

#### 5.1.1. Pluralist Structure of International Society

A foundational difference between domestic society and international society is that whilst domestic society is essentially a society of individuals, international society membership is composed of both states and individuals, though with a dominant role for states. This points to a problematic issue when statist constitutionalism, based on a cognitive framework which is built on the nature of domestic society, is consulted to articulate necessary and sufficient conditions for a constitutionalized international

legal system or to assess the constitutional quality of international law. Kumm argues that international constitutionalism sceptics who build their argument on the statist model of constitutionalism apply a statist paradigm to provide a cognitive framework for the analysis of contemporary international law. According to him, applying such a cognitive framework is improper as it is very likely to create ‘a general tendency to idealize municipal law and to cast a doubt on international law’. Kumm posits that this is based on the presumption that there exists neither a vital conceptual distinction between domestic and international constitutionalism, nor unique problems attached to the particularities of international or domestic law with respect to legitimacy or compliance.<sup>133</sup> Thus, in order to give a descriptive and analytical account of the current international legal structure fundamental to the articulation of essential components of an international constitutional legal structure, an alternative paradigm must be provided. According to Kumm, suitable alternative paradigms are those which ‘are able to better make sense of legal and political practice as it currently exists than does the statist paradigm of constitutionalism’.<sup>134</sup> In his view, a cognitive framework based on Kant’s cosmopolitan paradigm serves as a better alternative to rectify the problems caused by using a cognitive framework based on the statist paradigm to assess the constitutional quality of international law.<sup>135</sup> The reason for this is that the cosmopolitan paradigm can offer an explanation of the connection of the current legal phenomenon occurring in fragmented international law which is generated by the largely decentralized nature of international society.<sup>136</sup> Further, it also provides a more comprehensive account of the relationship between international constitutionalism and domestic constitutionalism.<sup>137</sup> Thus, the cosmopolitan paradigm will be consulted here to provide an understanding of state-

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<sup>133</sup> Ibid 323.

<sup>134</sup> Ibid 266.

<sup>135</sup> See further discussions in Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State’ (n 49); and also in Garrett Wallace Brown, *Grounding Cosmopolitanism from Kant to the Idea of a Cosmopolitan Constitution* (Edinburgh University Press 2009).

<sup>136</sup> Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State’ (n 49) 312.

<sup>137</sup> Ibid.

centred international society (the destination context for the transfer of the concept of constitutionalism) and its differences from the source context.

One of the vital characteristics of international society is its pluralist structure, in the sense that, as a result of territory-based sovereignty, there are a number of national states, co-existing in international society,<sup>138</sup> which can be the object of the constitutionalization process. Consequently, this results in the pluralist character of the international sphere. Thus, whereas international constitutionalism based on a statist paradigm which demands a world-state structure or world sovereignty does not fit into a state-centred international society, a cosmopolitan perception of the world might be helpful for understanding the pluralist character of state-centred pluralist character of international society. It is suggested by Kleingeld that, ‘a core issue for political cosmopolitanism concerns the role and importance of states’.<sup>139</sup>

Despite some readings of the Kantian cosmopolitan project as supporting a world state/ republic,<sup>140</sup> the position adhered to here is that Kant defends the pluralism of states and rejects a movement towards a world government,<sup>141</sup> i.e. world sovereignty. Kant clearly states a preference for the pluralism of states over a single world state:

...in the light of the idea of reason, the state is still to be preferred to an amalgamation of the separate nations under a single power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy.<sup>142</sup>

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<sup>138</sup> Grimm (n 70) 12.

<sup>139</sup> Pauline Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (CUP 2012) 6.

<sup>140</sup> See further discussions in Brown (n 135) 106–116.

<sup>141</sup> Vlad F Perju, ‘Cosmopolitanism in Constitutional Law’ (2013) 35 *Cardozo Law Review* 711, 713.

<sup>142</sup> Immanuel Kant, ‘Perpetual Peace’ in HS Reiss and HB Nisbet (eds), *Kant: Political Writings* (2nd edn, CUP 1991) 113.

The fear that a world state might become despotic does indeed serve as a compelling ground to reject movement towards having a world state. The despotism of a world state would be a greater peril than that of national states due to the more centralized power of a world state that could negatively affect the rights of people. Further, unlike the case of states where other states might have legitimacy to intervene to some extent<sup>143</sup> and the citizens of an abusive state can flee and earn the status of refugees, if a world state were to become abusive, there would be no external power to intervene and nowhere to run to. Added to this, if the model of a world state is chosen, given the historical data, only a limited number of states would be willing to give up their sovereignty, and so the world might be endangered by the use of force by states to subjugate others claiming legitimacy based on the world-state model.<sup>144</sup>

Nevertheless, Kant admits that the natural state of international society with ‘the separate existence of many independent adjoining states’ is ‘essentially a state of war’ without a federation of free states to prevent inter-state armed conflict.<sup>145</sup> Further, on this point, he explains that a pacific federation (*foedus pacificum*) is required if peace is to be achieved and sustained. However, this kind of federation does not aim to attain sovereignty over state members.<sup>146</sup> Contrariwise, it seeks only to create a partnership among states,<sup>147</sup> for its purpose is ‘to preserve and secure the freedom of each state in itself, along with that of the other confederated states’.<sup>148</sup> The member states of the federation are to defend one another from aggression committed by external entities; however, they must not intervene in one another’s internal conflicts,<sup>149</sup> with arguably an exception in cases of violations of fundamental

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<sup>143</sup> Otfried Höffe, *Kant’s Cosmopolitan Theory of Law and Peace* (Alexander Newton tr, CUP 2006) 199.

<sup>144</sup> Ibid 198–199.

<sup>145</sup> Kant, ‘Perpetual Peace’ (n 142) 113.

<sup>146</sup> Ibid 104; Immanuel Kant, ‘The Metaphysics of Morals’ in HS Reiss and HB Nisbet (eds), *Kant: Political Writings* (2nd edn, CUP 1991) 165.

<sup>147</sup> Kant, ‘The Metaphysics of Morals’ (n 146) 165.

<sup>148</sup> Kant, ‘Perpetual Peace’ (n 142) 104.

<sup>149</sup> Kant, ‘The Metaphysics of Morals’ (n 146) 165.

human rights.<sup>150</sup> Kant proposes that it is practical to believe that a federation of free states would gradually extend to and include all states, resulting in peace.<sup>151</sup> The expansion of such a federation is likely to prevent wars,<sup>152</sup> and by creating peace this would allow freedom, equality and self-government to be successfully achieved.<sup>153</sup> One observation from Kant's federation of free states model is that whilst Kant rejects the option of a world state, which is the most centralized structure of international society, carrying too much risk of despotism, he does not believe that countenancing free and equal sovereignty, the Westphalian international legal system with its highly decentralized structure, can sustain the conditions for perpetual peace.<sup>154</sup> Thus, Kant's cosmopolitan model for a legal structure sits between the world-state model and the Westphalian model in terms of the centralization of public power.

Another very vital point concerning Kant's preference for a pacific federation in the sense of a union of free states is that, unlike in the case of individuals where a natural right can be claimed to demand that men living in a lawless state should forsake it and be subject to the constitution of states, each state possesses a lawful domestic constitution. Therefore, states do not need to submit to the coercive rights of others that demand they be subject to 'a wider legal constitution in accordance with their conception of right'.<sup>155</sup> No states, even those with a despotic constitution, can be required to renounce their constitutions by other states.<sup>156</sup> This marks an important difference of statist constitutionalism that mainly deals with the relationship between of individuals and international constitutionalism that governs the relationship

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<sup>150</sup> Marry Kaldor, 'Humanitarian Intervention: Towards a Cosmopolitan Approach' in Garrett W Brown and David Held (eds), *The Cosmopolitanism Reader* (Polity 2010); Brown (n 135) 191–198.

<sup>151</sup> Kant, 'Perpetual Peace' (n 142) 104–105.

<sup>152</sup> *Ibid* 105.

<sup>153</sup> Perju (n 141) 744.

<sup>154</sup> Brown (n 135) 110–112.

<sup>155</sup> Kant, 'Perpetual Peace' (n 142) 104.

<sup>156</sup> *Ibid* 118.

among states which have their own constitution constituted by their constituent power-holders.

This cosmopolitan paradigm thus rejects international constitutionalism based on a world state whilst believing that states which countenance domestic constitutionalism serve as important mechanisms for increasing human wellbeing and nurturing a cosmopolitan condition.<sup>157</sup> Therefore, based on a cosmopolitan cognitive framework, international law has to recognize the freedom of states, as a result of the fact that states have their own constitutional structures, and aims to preserve the peace among them. The cosmopolitan paradigm offers an explanation for the decentralized nature of international law and the highly consent-based character of international law, with the protection of peace as an exception to state consent. At this point, it should be noted that although the cosmopolitan paradigm recognizes the importance of states, it also moves beyond states as the sole subject of the international constitutional order.<sup>158</sup> The notion of individuals as subjects of international law is also clearly recognized in the cosmopolitan paradigm, in the part on cosmopolitan right. Cosmopolitan right is rooted in the notion that as the world is not unlimited and no human inherently possesses a superior right over any other to dwell in any part of the world, this establishes ‘the right to the earth’s surface’ of all human beings.<sup>159</sup> This right can be understood as ‘the right of a stranger not to be treated with hostility when he arrives on someone’s else’s territory’.<sup>160</sup> In his writing, Kant states: ‘The people of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere. The idea of cosmopolitan right is therefore not fantastic and overstrained.’<sup>161</sup> This type of right is ‘concerned with the status of individuals as human beings, rather than as citizens of states’.<sup>162</sup>

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<sup>157</sup> Brown (n 135) 12.

<sup>158</sup> O’Donoghue (n 53) 219.

<sup>159</sup> Kant, ‘Perpetual Peace’ (n 142) 106.

<sup>160</sup> Ibid 105.

<sup>161</sup> Ibid 107–108.

<sup>162</sup> Kleingeld (n 139) 72.



Cosmopolitan rights can be construed as being reflected in the idea of universal human rights,<sup>163</sup> and thus this explains that, apart from peace, the protection of human rights is another exception to state consent.

### 5.1.2. International Society as Part of Multilevel Governance of the World

A second characteristic of international society is that it is part of the multilevel-governance of the world. This characteristic does not mark a difference between international society and domestic society, as they are both part of the multi-level order of the world. However, this feature must be taken into consideration when articulating the underlying aim of a constitutionalized international legal system as part of the world's multi-level governance together with domestic constitutional legal systems rather than as a self-contained order separate from municipal legal systems

As explained above, an international constitutional legal system is not going to replace or absorb the domestic constitutional legal system. Thus, the world has two levels of governance – the international order and multiple domestic orders. The linkage between these two levels of governance is that states are constituted in the domestic constitutional order by domestic constituent power and recognized and protected by the international constitutional order. However, states are not, at the same time, both the constituted power-holder of the domestic constitutional legal system and the constituent power of the international constitutional legal system. However, it is individuals that serve as the constituent power of both the international constitutional legal system and domestic constitutional legal systems. A state is just the representative of relevant individuals in the international community where there is no direct channel to exercise their constituent power at the international level. However, this issue will be discussed in detail in the section that considers the necessary conditions for a constitutionalized international legal system

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<sup>163</sup> Brown (n 135) 198–202.

The fact that international law exists as part of world multi-level governance should be taken into serious consideration when deciding the role of a constitutionalized international legal system as part of the world's multi-level governance. Kumm suggests that:

The debate about constitutionalism in international law is not appropriately understood exclusively as a debate internal to the public international law. It is also a debate that concerns national constitutional law and its conception of legitimate constitutional authority. The debates about constitutionalism in international law are complemented by highly contentious debates within national constitutional law about how domestic institutions should relate to the structural changes of international law, given national commitment.<sup>164</sup>

Based on the cosmopolitan paradigm which offers an explanation for the state-centred nature of international law, the relationship between an international constitutional legal system and a domestic constitutional legal system must not be understood as that between independent legal systems, as dualists argue.<sup>165</sup> Nor does the international legal system exist as hierarchically superior to domestic ones based on the monist concept, for the international legal system does not subjugate domestic legal systems as a subordinate part.<sup>166</sup> As explained in the last section, whilst an international legal system needs to respect states as a constituted power-holder constituted by their people (which is itself part of the international constituent power-holder), international law provides a framework for peaceful coexistence among them, in which domestic constitutionalism can develop further. Thus, the relationship between a constitutional legal system and national ones will be argued here as being one of complementarity, as each of them has inherently different structures, causing differences in limitations and strengths, whilst arguably having the same aim to create collective self-governance of the free and equal. Thus, these two levels of world governance shall complement each other to create a world as a self-governing regime. The idea of complementarity between an international constitutional legal

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<sup>164</sup> Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State' (n 49) 264.

<sup>165</sup> Ibid 274.

<sup>166</sup> Ibid 273–274; Brown (n 135) 112.

system and domestic constitutional legal systems will be further developed in the next section regarding the underlying aim of constitutionalism

### ***5.2. Underlying Aim of International Constitutionalism***

Apart from understanding the characteristics of the international environment and its differences from the domestic setting as a source context, another key factor for the proper transfer of a concept is the understanding of the core underlying aim of constitutionalism, which must be sustained during the process of transfer. After being stripped of any unnecessary conditions, if the underlying purpose cannot be achieved in the destination context, it could be construed that the concept in question cannot be transferred to the new environment.

Of course, the underlying purpose of constitutionalism will depend on how one defines the concept. However, the vital point to which we have to give some thought first is why international constitutionalism needs to be addressed and discussed. When setting the scene for the increase in constitutional discussion at the international level in Chapter I, to a large extent, the constitutional approach is raised to address the legal problems of both domestic and international law.

Regarding domestic law, domestic constitutions based on the idea of territory lack any comprehensive capacity to deal with international activities and have a problem regarding constituent legitimacy with respect to outsiders affected by the constitution and domestic law. This calls for the international constitution to implement what the domestic constitutional legal system cannot. At the international level, international law has its own own problems owing to its fragmented nature, thus triggering the need for the creation of more unity at the international level. Further, due to the proliferation of international rules and organizations with political power, international law needs to be constitutionalized. Thus, If a very broad idea of constitutionalism is resorted to and its very broad underlying purpose is used as an aim for the project of constitutionalization, it can be said that international law, since

the Westphalian era, has existed as a constitutionalized legal system in the sense that it has been unequivocally regulated by fundamental meta rules, such as the rules regarding states' sovereignty.<sup>167</sup> Also it can be seen as a constitutional legal system in the sense that it has established an international legal community among states as equal members based on the rule of sovereign equality.<sup>168</sup> However, this cannot address the problems that have triggered the international constitutional debate and it should not be regarded as the underlying purpose of the currently ongoing constitutionalizing process.

One vital point that needs to be made here is that the tendency to resort to statist constitutionalism as a model of international constitutionalism occurs not solely because constitutionalism was originally developed in the domestic context. It is also because if the underlying aim of statist constitutionalism, which is to create self-government, can be transferred to the international level and fulfilled, then legal problems which are a cause of constitutional discussion at the international level can potentially be resolved. This strongly suggests that the creation of self-governance might be as the essence of the concept of constitutionalism which should not vary, no matter what type of society, in which the concept of constitutionalism will be actualized.

Through the process of configuration to accommodate many changes in human society, Loughlin has a view that constitutionalism 'is now being presented as meta-theory which establishes the authoritative standards of legitimacy for the exercise of public power wherever it is located'.<sup>169</sup> This simply suggests that wherever the public power emerges, the process of constitutionalization is needed to legitimize such a power. Nevertheless, the constitutionalization of international society and domestic society should not be seen as separate projects for the legitimization of public power, but rather as an integrated ongoing process by humankind to legitimize the political power in human society. Although, they differ in their

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<sup>167</sup> Klabbers (n 10) 8–9.

<sup>168</sup> Jürgen Habermas, *The Divided West* (Ciaran Cronin tr., Polity Press 2006) 133.

<sup>169</sup> Loughlin (n 20) 61.

characteristics, both international society and domestic society have individuals as the ultimate stakeholders. Domestic constitutionalism attempts to create self-governance to establish the primacy of the people over the government. Since the globalization has changed the landscape of the world and resulted in issues that cannot be dealt with effectively by the domestic constitutional legal systems, human beings attempt to build and improve a legal structure at the international level to cope with such problems. However, an international legal structure naturally also has certain deficiencies that also need to be legitimized. An attempt to constitutionalize international society and its law should be seen as a furtherance of self-governance of the free and equal which originally began in the domestic arenas, to create the governance that recognizes the primacy of humanity at international level. The lack of totality of domestic constitutionalism reveals its vital shortcoming in fulfilling the creation of self-governance. However, whilst such inherent limits of domestic legal systems are to be accepted, the underlying aim of the creation of self-governance should not be hopelessly ignored and left behind in the domestic sphere. On the contrary, it should be taken into the international sphere to further this underlying aim and cure the defects of domestic constitutional legal systems. Construing the creation of self-governance as an underlying aim of international constitutionalism does not only reflect the process of constitutionalization in a meaningful sense but also serves as a underlying connecting link between domestic constitutionalism and international constitutionalism through the process of the transfer of the concept. Therefore, it is proposed that the creation of self-governance should be taken as the underlying aim of constitutionalism and that the capacity to fulfil this underlying purpose must not be compromised during the process of the transfer of the constitutionalism into the international setting. Because all individuals can be included as part of the constituent power-holder at the international level, understanding the constitutionalization of international law as an integrated part of the constitutionalization of human society, strengthening the legal strictures already established in domestic societies will enable us to create of self-governance of the free and equal, that excludes no one.

However, it must be emphasised again that this does not mean the international constitutionalization of international society must repeat the exact same steps of the domestic constitutionalization; that is, it does not need to have the same legal structure as constitutional domestic legal systems. However, because they have the different characters but share the same goal, functional differentiation would be helpful. Due to the idea of multi-level governance of the world, an international constitutional legal system exists together with domestic constitutional legal systems, and each level will have its own problems and strengths in terms of actualizing the idea of constitutionalism on its own level. The underlying aim of creating a self-governing world will be achieved by the actualization of constitutionalism at both levels, i.e. an international constitutional legal system and a constitutional domestic system should complement each other to achieve this underlying aim. Again, the cosmopolitan paradigm will be consulted here to explain this idea of complementarity. Unlike the statist paradigm which leads to a limited mindset as it is developed at the national level, the cosmopolitan paradigm offers a universal perspective that covers the interactions between domestic constitutions and the constitution of the international community.<sup>170</sup>

Let us start by discussing the idea of self-governance in the cosmopolitan paradigm. Kant's account of self-governance is based on the idea of freedom; he argues that: 'my external and rightful freedom should be defined as a warrant to obey no external laws except those to which I have been able to give my own consent',<sup>171</sup> and collective self-governance is also reflected in his idea of the citizen as co-legislator, in that,

...a public law which defines for every one that which is permitted and prohibited by right, is the act of a public will, from which all right proceeds and which must not therefore itself be able to do an injustice to anyone. And this requires no less than the will of the entire people (since all men decide for

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<sup>170</sup> Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond State' (n 49) 322.

<sup>171</sup> Kant, 'Perpetual Peace' (n 142) 99.

all men and each decides for himself). For only towards oneself can one never act unjustly.<sup>172</sup>

However, the creation of self-governance in the cosmopolitan paradigm relies on the creation of perpetual peace based the fulfilment of conditions both inside and outside states aka cosmopolitan conditions.<sup>173</sup> The three definite articles – the cosmopolitan conditions – of Kant for creating perpetual peace, are: First, ‘the civil constitution of every state shall be republican’; secondly, ‘the rights of nations shall be based on a federation of free states’; and thirdly, ‘cosmopolitan rights shall be limited to the condition of universality hospitality’.<sup>174</sup>

These three cosmopolitan conditions illustrate what are the underlying functions of both domestic constitutionalism and international constitutionalism. Regarding domestic constitutionalism, a republican constitution of states is based on three principles:

...firstly, the principle of freedom for all members of society (as men); secondly, the principle of the dependence of everyone upon a single common legislation (as subjects); and thirdly, the principle of legal equality for everyone (as citizens).<sup>175</sup>

Further, what distinguishes republican constitutions from despotic ones is the mechanism of the separation of powers since as Kant states: ‘Republicanism is that political principle whereby the executive power (the government) is separated from the legislative power’.<sup>176</sup> This corresponds to the four core principles of statist constitutionalism: democracy, rule of law, the separation of powers and the protection of the fundamental rights of constituent power-holders.<sup>177</sup> These

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<sup>172</sup> Immanuel Kant, ‘Theory and Practice’ in HS Reiss and HB Nisbet (eds), *Kant: Political Writings* (2nd edn, CUP 1991) 77.

<sup>173</sup> Perju (n 141) 744; Höffe (n 143) 15.

<sup>174</sup> Kant, ‘Perpetual Peace’ (n 142) 99–108.

<sup>175</sup> Ibid 99.

<sup>176</sup> Ibid 101.

<sup>177</sup> Republican constitutionalism in a Kantian sense can be understood as domestic constitutionalism in a democratic-liberal legal tradition in a contemporary context. It should

fundamental principles of republican will contribute to the legal structure that nurtures the freedom in the sense of ‘the absence of any restraints that are not self-imposed’<sup>178</sup> which is at the heart of the creation of the collective self-governance.<sup>179</sup> As this first cosmopolitan condition sets the principles for a state’s legal structure, this shall be fulfilled by domestic constitutionalism. However, the development of domestic constitutionalism relies on the fulfilment of the other two cosmopolitan conditions.

With respect to international constitutionalism, the constitutional legal structure is to be responsible for the creation of international rights and cosmopolitan rights. As discussed before, the international rights of states recognize freedom (sovereignty of states) which is not to be subject to the coercive rights or constitutions of other states. The main purpose of these rights is to achieve peaceful co-existence among states. The importance of international rights for the creation of perpetual peace is that a federation of free states, the aim of which is protection of the freedom of each state, will extend gradually to encompass all states. Nonetheless, this is not because they need to be subject to the public law of other states or international organizations, but because, as Kant argues:

...if by fortune one powerful enlightened nation can form a republican constitution (which is by its nature inclined to seek perpetual peace), this will provide a focal point for federation association among other states. These will join up with the first one, thus securing the freedom of each state in accordance with the idea of international right, and the whole will gradually spread further and further by a series of alliances of this kind.<sup>180</sup>

Accordingly, this federation will expand further and further and create the condition of peace. Regarding cosmopolitan rights, these can be construed as being enshrined in universal human rights; Kant believed that if the cosmopolitan right, ‘the natural

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be noted Kant’s categorizing democracy as despotism refers to the direct democracy based on the understanding that direct democracy cannot fulfill the idea of separation of powers, see Brown (n 135) 95–99.

<sup>178</sup> Perju (n 141) 723.

<sup>179</sup> Ibid 724.

<sup>180</sup> Kant, ‘Perpetual Peace’ (n 142) 104.



right of hospitality’, can be made possible, then ‘continents distant from each other can enter into peaceful mutual relations which may eventually be regulated by public law, thus bringing the human race nearer and nearer to a cosmopolitan constitution’.<sup>181</sup>

Based on the cosmopolitan paradigm, the international community is obliged to intervene to stop violations of the cosmopolitan norms of human rights whilst, based on its roots in liberal thought, at the same time, rejecting imperialism or hegemony in the guise of constitutional principles.<sup>182</sup> Thus, it can be seen that although the cosmopolitan paradigm emphasises the state independence, cosmopolitan rights will provide a minimum standards for rights fundamental to the development of domestic constitutionalism and the creation of peace. If such rights are violated, this allows the international community to legitimately intervene. The idea of cosmopolitan rights will complement the political rights of citizens based on a republican constitution and international rights, creating universal rights of humanity; and under this condition, perpetual peace can be achieved.<sup>183</sup>

Accordingly, the underlying aims of international rights and cosmopolitan rights are the peaceful co-existence of states and the protection of fundamental of human rights. These two values are two candidates for international primary constitutional rules: both *jus cogens* rules and the UN Charter aim to protect these rights, as will be illustrated in Chapter IV. Based on the ideas of international rights and cosmopolitan rights, the aim of international constitutionalism is to create peace and protect human rights beyond the condition of territory. Based on the main mission, which is to fulfil the international rights of states and the cosmopolitan rights of people, the international constitutional legal system aims for the protection of peace and human rights. Nevertheless, focusing on these two underlying aims might not cover the full and essential composition of an international legal constitutional system. A further

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<sup>181</sup> Ibid 106.

<sup>182</sup> O’Donoghue (n 53) 218.

<sup>183</sup> Kant, ‘Perpetual Peace’ (n 142) 108.

duty of the international constitutional legal system is to legitimize the political power that it creates in seeking to achieve the protection of peace and human rights.<sup>184</sup> To elaborate further, a federation of free states would not have the same centralized power as that of a world state; however, the protection of peace and fundamental human rights could never be achieved without an international constituted power to which states must be subject as far as peace and human rights are concerned. Thus, a federation of free states must have internationally constituted power, to the extent that it can achieve peace and the protection of fundamental human rights. However, such constituted power must be limited by law based on the nexus of the international constituent power-holder, just like limited government in the domestic sphere.

The form of the limitation on power may, however, differ from what has been developed municipally. Thus the underlying idea is that the constituent power of the international constitution will constitute power whose aim is to achieve peace and set the standard for universal human rights, and there must be a legal mechanism to limit this exercise of constituted power to create self-governance at the international level. It should also be noted here that a limited mandate for international constitutionalism for peace and the protection of fundamental human rights would be a more proper option in terms of diversity, to avoid disguised imperialism and hegemony, than the world-state route; as Habermas argues:

If the international community limits itself to securing peace and protecting human rights, the requisite solidarity among world citizens need not reach the level of the implicit consensus on thick political value-orientations that is necessary for the familiar kind of civic solidarity among fellow nationals.<sup>185</sup>

Hence the power of a federation within the scope of peace and fundamental human rights will not put the diversity of the world in danger. On the contrary, as the creation of peace and the protection of fundamental human rights essentially aim to

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<sup>184</sup> See discussions in O'Donoghue (n 53) 174.

<sup>185</sup> Habermas (n 168) 143.

protect the existence of states and individuals and the liberties of individuals, it would create an environment that increases the level of diversity in the world.

However, in order to address the underlying goal of international constitutionalism, which is to create self-governance at the international level in order to determine the legal structure that is required in the next step, it is very important to understand what constituted power and constituent power are in international constitutionalism. With respect to constituent power, based on Kant's political thought that firmly believes in human beings' potential to rule themselves on a rational basis,<sup>186</sup> the cosmopolitan international constituent power derives from individuals, not states. This recognizes that the sovereignty of states in the international sphere occurs because states are constituted by a part of humanity in such states. Also, it is important to preserve a peaceful condition that allows despotic states to turn into republican states based on public reason, not through external coercive power. Further, constitutional domestic states can set up a stronger link between constituent power and constituted power via a democratic method.<sup>187</sup> Thus, although states enjoy certain rights and have law-making power in the international sphere, they are not the international constituent power-holder but they are allocated certain powers because they are themselves constituted by their individual citizens,<sup>188</sup> who are part of the constituent power-holder of international constitutionalism. Thus, pursuant to the cosmopolitan cognitive framework of constitutionalism, international constitutionalism and domestic constitutionalism both have individuals as constituent power-holders, despite differing in their scope. Whilst individuals as a constituent power-holder in the domestic sphere may be limited to the condition of nationality or residence, the constituent power-holder of international constitutionalism embraces all humankind. The idea of humanity as a source of international constituent power establishing the international constitution shows how international constitutionalism can compensate for the defects of domestic constitutionalism that cannot take

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<sup>186</sup> Krisch (n 2) 67–68.

<sup>187</sup> Ibid 86.

<sup>188</sup> O'Donoghue (n 53) 227–228.

account of all individuals or ‘outsiders’, especially those who are outsiders of every state constitution, i.e. ‘stateless persons’. This is because, at least universal human rights as the cosmopolitan right of every human being will set a minimum standard for the rights of every human regardless of their nationality. On the other hand, as the option to create a world state is not favoured due to fears about world despotism and the maintenance of peace, without a world state which is an unviable option, international constitutionalism might not be able to establish a sufficiently strong democratic link between constituted power and constituent power. On this point, Krisch argues:

The global polity is not capable of instituting structures of democratic participation nearly as thick and effective as those possible on the national level. It is too far removed from individuals, and intergovernmental negotiations will never come with the deliberative structures necessary for effective public involvement; moreover, as mentioned above, we face serious limits of communication across cultural, linguistic, and political boundaries.<sup>189</sup>

Hence, the task to create a cosmopolitan self-regulating world relies heavily on the development of domestic constitutionalism in order to create self-governance in domestic societies. When all states have achieved that aim, the world will become a self-governing society with the pluralist structure of multiple self-governing states existing side by side, held together by an international constitutional legal system.

In sum, in terms of the viability of a constitutional legal structure, the cosmopolitan paradigm offers an understanding of international society as a pluralist structure with a multiplicity of states, seeing the international order, together with domestic orders, as part of the multilevel governance of the world. It rejects a world statist legal structure as a viable constitutional legal structure due to fears about world despotism, respect for the constituent power of domestic constitutions and the peace-making condition. With respect to the underlying aim, it is argued here that the underlying purpose of the concept of constitutionalism is the creation of self-governance, and this should be transferred from the domestic setting into the international setting as

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<sup>189</sup> Krisch (n 2) 60.

an underlying purpose of the international constitutional legal system. However, due to its complementary role to the domestic constitutional legal system, the international legal constitution shall have a mandate for the creation and preservation of peace and the protection of fundamental human rights. This, hence, necessitates international constituted power which can make demands of states, against their wishes. Added to this, there must be a legal mechanism that limits such power by creating a nexus between international constituted power and the constituent power-holder, i.e. ‘humanity’, in order to create and self-govern at the international level. The two key factors of viability and the capacity to fulfil the underlying purpose will be used as a threshold to discuss the three models proposed as an international legal constitution in the next part.

## **VI. Discussion of the Three Models**

This section aims to analyze, based on the criteria of viability and the capacity to fulfil the function of international collective self-governance with a mandate for peace and fundamental human rights discussed before, the three models for a constitutional legal structure outlined previously – a secondary-rules constitutional legal structure, a hierarchical legal structure and a statist constitutional legal structure. Of course, the aim is to determine whether any of these three legal structures could serve as a model of international constitutional legal system containing all the necessary and sufficient conditions for a constitutionalized international legal system or not.

### ***6.1. Secondary-rule Constitutional Legal Structure as an International Constitutional Legal Structure***

The secondary (meta/ organizing)-rule constitutional legal system model is the broadest version of the three options as it focuses on the systematic element, i.e. every legal system can be called a constitutional legal system based on this model. Although there must exist a hierarchy of rules in every legal system in the sense that

there exists a rule of recognition, or Grundnorm, that generates the validity of other lower rules,<sup>190</sup> meta-rule constitutional legal systems do not need to possess a hierarchy of primary rules, which will add substantive unity to the system. Further, they do not need to have a specific aim, neither to create peace, nor to protect fundamental human rights nor to establish self-governance of the free and equal. The meta-rule constitutional legal structure focuses on the creation of certain qualities of law, such as legal certainty, legal effectiveness and the capacity to keep up with changes in society. For instance, according to Hart, a legal system exists when a society is adequately equipped with secondary rules to deal with three defects in primitive societies, namely legal uncertainty, legal ineffectiveness and legal stagnation.<sup>191</sup> Raz argues that ‘a test of the general efficacy of legal systems’ is a preliminary test to determine the existence of a legal system; a legal system exists only if it reaches a certain minimum degree of efficacy.<sup>192</sup> Likewise, Dupuy proposes that unity is a prerequisite of a legal system.<sup>193</sup> The existence of fundamental secondary rules to hold international law together as a system will provide the procedural unity.<sup>194</sup>

Basically, according to Hart, secondary rules are rules that ‘specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated or varied, and the fact of their conclusively determined’<sup>195</sup>. Given this, the existence of fundamental secondary rules, which hold international law together as a system of rules, will at least provide procedural unity.<sup>196</sup> Thus, meta-rule constitutionalism will create unity in international law to this extent; however, the existence of secondary

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<sup>190</sup> Paulus (n 88) 74.

<sup>191</sup> Herbert Lionel Adolphus Hart, *The Concept of Law* (Joseph Raz and Penelope A. Bulloch eds, 3rd edn, Clarendon Press 2012) 92–96.

<sup>192</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2nd edn, Clarendon Press 1980) 205–208.

<sup>193</sup> Pierre-Marie Dupuy, ‘The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice’ (1999) 31 *Journal of International Law and Politics* 791, 793.

<sup>194</sup> *Ibid.*

<sup>195</sup> Hart (n 191) 94.

<sup>196</sup> Dupuy (n 193) 793.

rules does not necessarily create a condition for the substance of primary rules, therefore it does not necessarily create substantial unity.<sup>197</sup> Thus, a genuinely state-consensual-based legal system which only sets a procedural requirement for the validity of law, but not a substantive one, can be seen as a constitutional legal system in this sense.

With the flexibility of the secondary-rule constitutional legal model, its legal structure is viable in international society. However, this model of a secondary-rule constitutional legal structure focuses only on the efficacy of the system and does not associate itself with any specific purpose. Thus, it cannot be taken as establishing the minimum conditions for an international constitutional legal system since it does not require the pursuit of the protection of fundamental human rights, not to mention the institutionalization of international constituted power to create collective self-governance to achieve these purposes. Accordingly, the secondary rule constitutional model might pass the viability test but it lacks the capacity to fulfil the aim of a constitutionalized international legal system.

Nevertheless, although the systematic element does not suffice to create an international constitutional legal system, it is one of the necessary conditions to establish an international constitutional legal system, in fact any type of constitutional legal system as the systemic quality ensures that international law has a general efficacy. To elaborate more, the underlying purpose of the systematization of law is to create efficacy in the application and enforcement of the legal system. Efficacy is itself a necessary condition of every constitutional legal system, whatever its underlying purpose, for in its absence, no legal systems would be able to achieve their purpose.

Thus, constitutional secondary rules that hold together international law as a legal system must exist to provide general efficacy for international law to create

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<sup>197</sup> See the procedural unity and substantial unity of the international legal system in *ibid* 793–795.

international self-governance. Put otherwise, the systemic nature of international law is a necessary but not sufficient condition for the establishment of an international constitutional legal system in a cosmopolitan sense.

### ***6.2. Hierarchical Constitutional Legal Structure as an International Constitutional Legal Structure***

As explained earlier, the hierarchical constitutional legal structure differs from the secondary-rules constitutional legal structure, it requires more than the secondary-rules constitutional legal structure. It necessitates the international constitutional primary rules (which requires the existence of international secondary rules that elevate certain international primary rules into constitutional rules), as a prerequisite for a constitutional structure. As primary rules are rules of obligation, the hierarchy of primary rules contributes to substantive unity.<sup>198</sup> As supremacy is one of the essential characteristics of constitutional rules,<sup>199</sup> the hierarchy of rules which is built on the supremacy of constitutional rules is evidence for the existence of one element of a constitutional legal system. As international law is state-centred in nature, to establish a hierarchy of international primary rules, the rule of recognition of an international legal system needs to embrace a source of validity apart from state consent and to regard it as a higher source of validity of international primary rules. To elaborate more, given the state-centred character of international law, if state will is the sole source of validity of international primary rules, then there cannot be a hierarchical structure of international primary rules as every primary international rule will be regarded as equal and subject to nothing but the will of relevant states. In such a genuinely consent-based international legal system, states are able to derogate from any primary rules if relevant states exercise their wills to do so. Hence, this would rule out the establishment of a hierarchically superior status of certain primary

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<sup>198</sup> Ibid 793.

<sup>199</sup> Jeffrey L Dunoff and Joel P Trachtman, 'A Functional Approach to International Constitutionalization' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 10; Schwöbel (n 11) 85.



rules. Further, a hierarchy of primary rules would help in adding unity to international law in which the problem of conflict of norms, due to the decentralized and fragmented nature of international law, can jeopardize the legal certainty of international law.<sup>200</sup>

However, as Fassbender notes, ‘not every increase in legal regulation, and not even every evolution of a hierarchical system of rules, equals “constitutionalization”’.<sup>201</sup> Based on the underlying aim of a constitutionalized international legal system to create international collective-self governance with a mandate for peace and fundamental human rights, a hierarchy of primary rules that can contribute to self-governance at the international level would need to serve the peace-making purpose and the protection of human rights. That is, it would have to ensure that states cannot derogate from constitutional primary rules that impose an obligation to protect peace and fundamental human rights. In other words, the primary rules that protect peace and fundamental human rights must enjoy the status of constitutional primary rules. Added to this, the higher source of validity of primary rules must derive from the constituent power of the international constitutional system, i.e. humanity in a manner similar to the recognition of the people of a state as a form of constituent power-holder, the highest source of validity in domestic constitutional legal systems, linking constituted power and constituent power. A hierarchy of law that recognizes the opinion of certain states or a king in one country as the highest source of validity would not contribute to the establishment of an international legal constitutional legal system.

Although the verticalization of international law to place certain primary rules protecting peace and fundamental human rights, the validity of which derives from humanity as a whole, requires movement towards the centralization of international

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<sup>200</sup> See general discussions on this point in Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (5th edn, CUP 2006) 5–24; Jörg Kammerhofer, ‘Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems’ (2004) 15 EJIL 523, 139–194.

<sup>201</sup> Fassbender, ‘The Meaning of International Constitutional Law’ (n 14) 840.

law to a certain extent, this hierarchical structure is not only a viable but also a necessary condition for a constitutionalized international legal structure. The reason for this is that, in creating such a hierarchical structure, states do not need to give up all of their sovereignty to become part of a world state. They are still masters of their own will over matters apart from peace and fundamental human rights. Further, the non-derogable character of the primary rules protecting peace and fundamental human rights is essential to the survival not only of the international community and states but also of individuals who are the constituent power-holder that creates the constituted power of states. Thus, a portion of states' power will be limited by such a hierarchical structure for the sake of individuals which is an origin of such power. Added to this, based on the idea of collective self-governance, the source of validity must derive from humanity whose will is expressed mainly via states in a state-centred international society. States and their citizens as their constituent power-holders can be seen as co-legislators, and at the same time the subject of such international constitutional primary rules. Therefore, the hierarchical structure of international primary rules that elevate primary rules protecting peace and fundamental human rights, the validity of which derives from humanity as the international a source of international constituent power, is not fundamentally incompatible with but rather essential to the state-centred nature of international society.

However, even if there does exist such a hierarchy of primary rules within a union of primary and secondary rules, does this represent the minimum sufficient conditions for an international constitutional legal system? Should there be a legal mechanism that institutionalizes international constituted power to implement and protect the hierarchical structure of international primary rules that gives supremacy to rules protecting peace and fundamental human rights? This brings us to a controversial issue in Kant's model of a federation of free states. One shortcoming of Kant's federation of free states model is that he does not provide, in Brown's words, a 'practical institutional design'<sup>202</sup> for the federation he proposes. Thus, to use a

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<sup>202</sup> Brown (n 135) 101.

constitutional term, Kant does not provide details for the institutionalization of international constituted power, terms of either allocation or the limitation of powers. Covell argues that is because Kant does not see the necessity of having institutions or international organizations that have been conferred international constituted power that can be exercised against states' wills to create cosmopolitan conditions.<sup>203</sup> Thus, there has been an interpretation that Kant did not agree with the right of a federation of free states to use coercive power to enforce international rules regarding peace and fundamental human rights.<sup>204</sup> However, although the right to use the coercive power of a federation of free states could be abused, such a power as far as the enforcement of rules protecting peace and fundamental human rights is concerned is in practice necessary for the protection of peace and fundamental human rights. On this issue, Habermas argues for the legitimacy of humanitarian intervention based on the reality of the world politic:

...now the danger was violence of a previously unimaginable level of savagery, the transgression of elementary and previously "inviolable" inhibitions, the wholesale trivialization and normalization of absolute evil. Confronted with this new form of evil, international law could no longer cling to the main premise underlying the prohibition on intervention.<sup>205</sup>

However, he also proposes that the exercise of such power should be under the control of the courts, regarding its legitimacy.<sup>206</sup> Further, Habermas who, like Kant, regards a world state as an unsuitable model,<sup>207</sup> argues for the necessity of the institutionalization of constituted power at international level, explaining:

What is missing in classical international law is not an analogue of a constitution that founds an association of free and equal consociates under law, but rather a supranational power above competing states that would equip the

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<sup>203</sup> Charles Covell, *Kant and the Law of Peace: A Study in the Philosophy of International Law and International Relations* (Palgrave 1998) 137.

<sup>204</sup> Ibid 137–140; Brown (n 135) 93–94.

<sup>205</sup> Habermas (n 168) 158.

<sup>206</sup> Ibid 153.

<sup>207</sup> Ibid 134.

international community with the executive and sanctioning powers required to implement and enforce its rules and decisions.<sup>208</sup>

Thus, Habermas takes the institutionalization of international constituted power as part of the constitutionalization of international law enabling relevant the international organization to tackle the problem of peace and fundamental human rights without creating a world government or a single demos.<sup>209</sup> Habermas' opinion is referred to here in support of the claim that the mere existence of constitutional primary rules with a higher status regarding peace and the protection of human rights cannot of itself fulfil the creation and protection of human rights. International law does need a mechanism that can effectively put an end to the violation of or derogation from such rules. Indeed the allocation of international constituted power that can be exercised against the will of states triggers another risk of the abuse of power and the use of force by such an international constituted power-holder. However, the centralization of power only in the area of peace and fundamental human rights is not as concentrated as that of the world state, and also the centralization of power to that extent is necessary for the peaceful co-existence of states that holds the pluralist structure together. Indeed, the allocation of power to such a constitutional actor necessitates legal mechanisms to limit the exercise of power of the constituted power-holder when implementing peace-making and human rights primary rules based on the nexus between international constituted power and international constituent power. Thus, the allocation of international constituted power to the scope of peace and the protection of fundamental of human rights needs to be achieved in order to enforce the primary constitutional rules and protect the hierarchical order. Accordingly, the hierarchy of primary rules of the international legal system is a necessary but insufficient condition for the establishment of an international constitutional legal system. The institutionalization of international constituted power to enforce and protect the constitutional primary rules is another element that is needed.

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<sup>208</sup> Ibid 132.

<sup>209</sup> Ciaran Cronin, 'Editor's Preface', *The Divided West* (Polity Press 2006) xi.

### ***6.3. Statist Legal Constitutional Legal Structure as an International Constitutional Legal Structure***

As noted previously, the statist approach to global constitutionalism requires two elements of the legal structure. First, there must exist a comprehensive legal structure based on sovereignty and which is not subject to external power to juridify all political power in one constitutional site. Secondly, it must provide a legal mechanism that sets limitations on the remit of the constituted power which is constituted and allocated by a constitution, based on the nexus of constituted power and constituent power.

The first condition, requiring a comprehensive legal structure, is argued here as not being viable, or at least improper, as a model for an international legal structure, as such a legal structure must be built on the existence of world sovereignty which would contribute greatly to the risk of despotic government, which is at the opposite end of the spectrum to the creation of self-governance. Given that each state has its own constitutional structure constituted by its constituent power-holder, or at least the potential to have it, other states or any international organization shall have a right to demand that any state be subject to another constitution. Added to this, from history, this idea is impractical as it can be expected that very few states, if any, would be willing to subject themselves to a world state. Thus this makes the use of coercive force the only possible way to create a world government with global sovereign power. Consequently, it is possible that the idea of a world state might be used as a ground for legitimating the use of coercive power to subject one state to another or to an international organization. This would jeopardize the peace-creating environment and respect for the constituent power, i.e. the people in domestic states. Added to this, as now, a world state does not fit into the diversified nature of the world and it could easily lead to serious problems of imperialism and hegemony in terms of the sociocultural aspect. Therefore, the use of a statist paradigm to articulate an international constitutional legal structure ignores the state-centred nature of international society and offers an unviable – or at least deeply unattractive – option.

On the point of the necessity of a state-like legal structure and the emergence of constitutions, Habermas argues for the separateness of states and constitutions:

The terminus ad quem of the process of juridification of political power is the very idea of a constitution that a community of free and equal citizens gives itself. We must distinguish between “constitution” and “state.” A “state” is a complex of hierarchically organized capacities available for the exercise of political power or the implementation of political programs; a “constitution,” by contrast, defines a horizontal association of citizens by laying down the fundamental rights that free and equal founders mutually grant each other.<sup>210</sup>

Thus, without a world-state structure, international constitutionalism is still achievable via a movement towards ‘governance without government’;<sup>211</sup>. However, this requires a structure that can achieve the underlying purpose of constitutionalism, international collective self-governance with a constituted power overseeing peace and the protection of fundamental human rights, grounding on the cosmopolitan idea of the complementarity of international law and domestic law to create a world as a self-governing society. An international constitutional legal structure would aim for the creation of conditions for the development of domestic constitutionalism, ‘the creation of peace’, and compensates for the shortcomings of domestic constitutionalism.

The second condition for a statist constitutional legal structure is the existence of legal mechanisms to limit the exercising of power by a government based on the nexus between constituent and constituted power. Unlike constituted power in the statist sense, international constituted power is not kind of a comprehensive power in that it has only limited mandate for the furtherance of peace and fundamental human rights based on the character of international society which is pluralist and as part of multi-level governance. However, despite its limited scope, there needs to be a legal

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<sup>210</sup> Habermas (n 168) 131.

<sup>211</sup> Höffe (n 143) 198–199; See further in James N Rosenau, ‘Governance, Order, and Change in World Politics’ in James N Rosenau and Ernst-Otto Czempiel (eds), *Governance without Government Order and Change in World Politics* (CUP 1992).

mechanism that limits international constituted power based on the nexus between constituted power and the constituent power-holder, i.e. ‘humanity’. Thus in the case that international constituted power is conferred on certain actor enabling them to force a state to act against its will, there must be a legal mechanism to limit such power. As Paulus puts it:

Where, however, the international constitutional order itself resembles in effectiveness and coercion the domestic legal order – as the example of the terror lists of the Security Council has shown – international law needs to respect similar limitations to its power. As in the domestic sphere, constitutionalization may lead to a limitation rather than an extension of international power.<sup>212</sup>

In domestic constitutionalism, four core elements that domestic legal structures need to contain to qualify as a constitutional legal system are: 1. the rule of law, 2. the separation of powers, 3. democratic legitimacy and 4. protection of the basic rights of the constituent power-holder.

However, with the differing nature of domestic and international legal structures, these four elements might not be found, or not in exactly the same way as in domestic systems, in the international legal structure. Considering those four elements, despite the need for their adaptation, the rule of law, the separation of powers and the protection of fundamental human rights elements are not much troubled to be developed within the pluralist structure of international law without a world state. However, the element of democratic legitimacy is the most problematic of all to transfer to the international constitutional legal structure due to the lack of a common ‘demos’<sup>213</sup> Added to this, there is the question of whether democracy can be developed in the context of a pluralist structure of state-centred international law in which multiple demoi exist, i.e. a ‘demoicracy’.<sup>214</sup> It is argued here that as a

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<sup>212</sup> Paulus (n 88) 107.

<sup>213</sup> Krisch (n 2) 56.

<sup>214</sup> Paulus (n 88) 94; See the discussion on the idea of ‘demoicracy’ in Kalypso Nicolaïdis, ‘Our European Demoi-Cracy: Is This Constitution a Third Way for Europe?’ in Kalypso Nicolaïdis and Stephen Weatherill (eds), *Whose Europe? National Models and the*

cosmopolitan world constitutionalism denies a world state, a common demos is not an avenue that international constitutionalism needs to go down. Further, notwithstanding whether a ‘demoicracy’ can be achieved or not, at the moment it does not exist, as not all states are democratic. However, as illustrated earlier, the international constitutional legal structure does not need to resemble that of a state and all four elements have their own defects and in themselves cannot contribute to self-governance. Thus, the element of democracy might not be an inclusive factor to decide whether or not an international constitutional legal structure exists. However, with or without democratic legitimacy, there must exist legal mechanisms that set limits on international constituted power by establishing a link between international constituted power and humanity as a source of international constituent power-holder. This stance is also shared by Paulus who argues that ‘while an international ‘demoicracy’ is yet to be established, the strengthening of deliberation and the inclusion of the individual stakeholders in international decision making may lead to a better legitimacy...’.<sup>215</sup> Another point that should be taken into account is that the domestic constitutional legal structure is not complete in itself and needs to be independent of the international constitutional legal structure. Likewise, the necessary and sufficient conditions for an international constitutional legal structure do not aim to create complete self-governance in themselves but rather to establish an international legal structure to complement domestic constitutionalism.

Accordingly, based on the analytical account in this section, none of the three models represents the necessary and sufficient conditions for a constitutionalized international legal system. Therefore, in the next part, it will attempt to make a proposition for the necessary and sufficient conditions for a constitutionalized international legal system.

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*Constitution of the European Union* (OUP 2003); Samantha Besson, ‘Institutionalising Global Demoicracy’ in Lukas H Meyer (ed), *Legitimacy, Justice and Public International Law* (CUP 2009).

<sup>215</sup> Paulus (n 88) 108.



## **VII. Conclusion: Proposal for the Necessary and Sufficient Conditions for an International Legal Structure**

None of the three models, then, in itself, entails all the necessary and sufficient conditions for an international legal constitutional legal structure based on the criteria of viability in the state-centred international society and the capacity to create international self-governance with a mandate for peace and the protection of fundamental human rights. Thus, in this part, a proposition for the necessary and sufficient conditions for a constitutionalized international legal system that can rectify the shortcomings of the three models will be made.

A statist constitutional structure cannot be seen as a viable option in the international context as an international state-like, comprehensively centralized legal structure, necessitating world sovereignty or a world state, is fundamentally incompatible with the pluralist nature of the international sphere. Although it might not be impossible to achieve such a model, the use of coercive force seems to be the only alternative to do so given states' unwillingness to give up their sovereignty, thus destroying the peace and disrespecting the constituent power of the domestic constitutions. Added to this, even if a world state can be achieved, it also carries a serious risk of a despotic world government with no possibility of external intervention to assist where violations are committed by the world government and with no safe places to seek refuge. Nevertheless, it is argued here that the underlying purpose of international constitutionalism is the creation of self-governance similar to statist legal constitutionalism. However, based on the cosmopolitan paradigm of the two-level governance of the world, in order to create a self-governing world, international constituted power has a limited mandate only for international peace and the protection of human rights, i.e. to create the conditions for the development of states into republican states and to compensate for the shortcomings of domestic constitutionalism. The international constitutional legal system should leave matters other than peace and fundamental human rights to states' will in order to respect the constituent power held by peoples in democratic states. This also prohibits

international intervention into undemocratic states apart from cases of violation of fundamental human rights in order to allow domestic constitutionalism to grow from within.

The secondary-rules constitutional legal structure represents a necessary condition but not a sufficient condition, as it focuses on the efficacy of the law which is required for every kind of constitutional legal structure to achieve its purpose. However, the purpose of creating self-governance with constituted power to create peace and protect fundamental human rights is not an element required by this model. Specifically, albeit based on the idea of sovereign equality, the Westphalian meta-rules constitutional legal model in which the only source of validity of primary rules is state consent cannot achieve the purpose of peace creation and the protection of fundamental human rights as it does not create a non-derogable duty for states to protect peace and fundamental human rights. However, the systemic elements created by the operation of international secondary rules are here proposed as the first condition that international law needs to fulfil in order to develop into a constitutionalized international legal system, as it allows international law to fulfil its purpose, whatever that may be.

The hierarchical constitutional legal structure demands a hierarchical structure of primary rules which is necessary to create the supremacy of those primary rules that protect peace and fundamental human rights, which is the main purpose of an international constitutional legal structure. The purely state-consent based international legal system, lacking a hierarchical structure of primary rules, is not capable of creating peace and protecting fundamental human rights as it permits states to derogate from or opt out of obligations regarding peace and fundamental human rights. Thus, in state-centred international law in which states are attributed international law-making power, the hierarchical structure that establishes the obligations to protect the peace and fundamental human rights as absolute and non-derogable obligations is the second condition that international law needs to fulfil in order to qualify as a constitutionalized legal system. Added to this, the supremacy of

the protection of human rights can serve as one element to create a nexus between international constituted power and the international constituent power-holder, 'humanity'. However, even if there exist within a legal system constitutional primary rules aiming at peace and fundamental human rights, whose validity derives from international constituent power, this is still insufficient for the existence of a constitutionalized international legal system. Not until that system has allocated international constituted power to certain actors to enforce the primary rules and protect the hierarchical structure can it be said to be meaningful constitutionalized. This allocation of international constituted power, in turn, necessitates a legal mechanism for limiting the exercise of constituted power that can compel states to act against their wishes. Therefore, the third condition for the emergence of a constitutionalized international legal system is that international law must possess a legal mechanism to allocate international constituted power to certain actors to implement the hierarchical legal structure of international law and to limit the exercising of such constituted power by establishing a link between the international constituted power and the international constituent power. That is to say, the institutionalization of the international constituted power regarding peace and fundamental human rights must exist in the international constitutionalized legal system. This is where the legal mechanism in the domestic constitutional legal system that imposes limitations on constituted power, namely the rule of law, the separation of powers, the protection of the fundamental rights of the constituent power-holder and democratic legitimacy, can offer guidance for the establishment of self-governance at the international level. Nonetheless, again, the differences between domestic society and state-centred international society must be taken into consideration.

Thus, based on an analysis of the three models, the nature of international law as a pluralist legal structure and as a part of world multi-level governance and its underlying aim to create international collective self-governance with a mandate for peace and fundamental human rights, the proposed conditions – individually

necessary and cumulatively sufficient – for the existence of a constitutional international legal system can be set out as follows:

1. International law must be sufficiently equipped with secondary rules which will provide efficacy for international law to exist as a legal system.
2. There must exist a hierarchy of international primary rules providing supremacy for primary rules that protect peace and fundamental human rights.
3. The institutionalization (allocation and limitation) of international constituted power must be achieved in order to establish international self-governance with a mandate for the protection of international peace and fundamental human rights.

Thus, if current international law satisfies these three conditions, it can be held to be a constitutionalized legal system. However, this does not mean that an all-or-nothing approach is taken; rather, the articulation of these three conditions will help to set the criteria to determine whether or not important elements of the constitutional legal structure exist or are developing. Thus, the existence of legal rules which help in fulfilling any of these three conditions can provide evidence of an ongoing process of constitutionalization, and the more there are of them, the more international law can be said to have been constitutionalized.

Whereas this chapter has aimed to lay out all of the necessary conditions for an international legal system in theory, based on the cosmopolitan paradigm which is compatible with the nature of international society, the following chapters, III, IV and V, will aim to examine whether each of the three conditions has been met in the current legal structure of international law, starting by with an examination of its systematic nature.



## Chapter III: International Law as a Legal System

### I. Introduction

In this chapter, the aim is to determine the quality of international law as a legal system, which is one of the necessary conditions for the establishment of an international constitutional legal system. A systematic element to create the basic efficacy necessary for any legal order to achieve its underlying purpose, including that of a constitutionalized international legal system, which is to create international collective self-governance with a mandate for peace and fundamental human rights.

There exist a number of theories offering explanations of the systemic quality of law. However, Hart's theory of a legal system as the union of primary rules and secondary rules will be consulted here to determine the systematic element of international law. The advantage of applying Hart's theory of a legal system is that his distinction between secondary and primary rules will be helpful in distinguishing the systemic element based on the existence of secondary rules to uphold international law as a system and the hierarchy of primary rules in international law which is another necessary condition for a constitutionalized international legal system. Added to this, Hart illustrates, in detail, the transition from a primitive society with a disunified set of primary rules into a more developed society with a legal system reflecting the ongoing nature of both systematization and constitutionalization. The focus by Hart on transition hinges on the existence of secondary rules to cope with certain legal defects. In other words, legal systematization, in the sense of Hart, is based on the existence of secondary rules. However, the identification of secondary rules based on the acceptance of international legal officials can be also used to determine the hierarchical structure of primary rules that is created by the secondary rules that govern the relationship between sources of the validity of primary rules. Also, It can help to indicate the institutionalization of international constituted power by identifying the secondary rules that constitute and empower constitutional institutions that have a peace and

fundamental rights mandate, and the secondary rules that establish a limitation on exercising the constituted power of such a constitutional institution. Thus, Hart's theory of secondary rules will be helpful in determining each of the three international legal structures necessary for a constitutionalized international legal system. When discussing the meta-rules' constitutional structure, Tomuschat points out the importance of secondary rules in the constitutional structure, in that:

These rules do not only enjoy logical precedence, as the sign posts of the legal order in which they operate. They also reflect the distribution of powers within a given community. Every modern system of governance is operated through law-making, administration and adjudication.<sup>1</sup>

The confirmation of secondary rules as a rule of the international legal system based on the internal view of international officials is obviously helpful in the international context, given that international law remains an ongoing process of both systematization and constitutionalization, so that secondary rules may not have been fully codified into written rules like those in most domestic jurisprudence.

It will be argued in this chapter that international law meets Hart's criteria of a legal system. However, due to its largely decentralized character, the international legal system is expected to have a serious problem of conflicts between rules that can undermine its systemic quality. Thus, a brief discussion regarding the specific problem of conflicts between international rules to determine whether the international legal system is adequately equipped with secondary rules that can solve normative conflicts will also be pursued in this chapter.

Accordingly, this chapter will begin with the discussions on Hart's conception of legal system as a union of primary and secondary rules.

## **II. Hart's Concept of a Legal System**

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<sup>1</sup> Christian Tomuschat, 'Obligations Arising for States without or against Their Will' (1993) 241 *Recueil des Cours* 194, 216.

In this section, Hart's concept of a legal system as a union of primary and secondary rules will be discussed to provide a theoretical foundation for a determination of the quality of international law as a legal system in this chapter, as well as other issues in subsequent chapters for which the notion of primary or secondary rules can offer a theoretical background.

Hart develops the concept of a legal system as the union of primary and secondary rules. The distinction between primary and secondary rules enables Hart to offer an explanation for both the existence and role of power-conferring rules, whilst Austin's command theory fails to do this.<sup>2</sup> According to Hart, primary rules are rules under which 'human beings are required to do or abstain from certain actions, whether they wish to or not'.<sup>3</sup> Primary rules are simply rules that impose obligations. On the other hand, secondary rules regulate how primary rules may be conclusively ascertained, introduced, eliminated or varied, and how the fact of their violation may be determined.<sup>4</sup> In other words, as Payandeh puts it, secondary rules are 'rules about rules'.<sup>5</sup> Power-conferring rules fall into the category of secondary rules.<sup>6</sup>

Hart expounds that the function of secondary rules is to deal with defects in the legal order of a primitive society. A primitive society is a society without a legislature, courts or officials of any kind, where the only social control mechanism is the general attitude of the people in society towards the standards of their own behaviour, which constitutes, in Hart's term, primary rules of obligation.<sup>7</sup> This type of social control is what we call customs.<sup>8</sup> Hart posits that 'only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable

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<sup>2</sup> HLA. Hart, *The Concept of Law* (Joseph Raz and Penelope A. Bulloch eds, 3rd edn, Clarendon Press 2012) 27–29.

<sup>3</sup> Ibid 81.

<sup>4</sup> Ibid 81, 94.

<sup>5</sup> Mehrdad Payandeh, 'The Concept of International Law in the Jurisprudence of H.L.A. Hart' (2011) 21 EJIL 967, 973.

<sup>6</sup> Hart (n 2) 96.

<sup>7</sup> Ibid 91.

<sup>8</sup> Hart refrains from using the term 'custom', as he thinks it might imply that the rules are 'very old and supported with less social pressure than other rules', Ibid.



environment' could prosper with such a simple regime based only on unofficial primary rules of obligation. Hence, under other conditions, such a simple form of social control will prove ineffective, with at least three defects.<sup>9</sup> First of all, there will be doubts regarding what the rules of the system are as well as the clearly delineated scope of the application of specific rules; and without rules to clarify such doubts, this will result in legal uncertainty.<sup>10</sup> The next defective characteristic is the static character of the rules. In a primitive society, the only way to change primary rules is via a 'slow process of growth whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed'.<sup>11</sup> Thus, the rules cannot be altered by a deliberate process designed to react promptly to changes in society, and this therefore renders the primitive regime static.<sup>12</sup> The 'inefficiency of the diffuse social pressure by which the rules are maintained' is the third shortcoming of simple social control.<sup>13</sup> In the absence of an agency specially empowered to have a final and authoritative say regarding the determination of the facts of rule violations, disputes as to whether or not rules have been broken will always emerge and will continue endlessly. Moreover, in a society without a special agency with the authority to administer punishments for breaches of rules, or any other modes of social pressure, rules are enforced by individuals affected or by a large group of people in society. Therefore, this results in a waste of time due to the disorganized character of their efforts to capture and penalize offenders. These factors contribute to the inefficiency of the rules system.<sup>14</sup>

Hart explicates that the cure for these three main shortcomings of such a simplest form of social structure lies in the emergence of different kinds of secondary rules to

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<sup>9</sup> Ibid 92.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 92–93.

<sup>12</sup> Ibid 93.

<sup>13</sup> Ibid 93.

<sup>14</sup> Ibid 93.

facilitate the operation of primary rules of obligation.<sup>15</sup> To deal with the uncertainty of primary rules, a rule of recognition which provides ‘conclusive affirmative indication’ of the rules of the society which are to be maintained by the social pressure, has to be established.<sup>16</sup> Regarding how their static character can be overcome, this is achieved by the introduction of rules of change, which are rules authorizing an individual or a group of individuals to articulate new primary rules and eliminate old ones.<sup>17</sup> In solving the issue of the inefficiency of the diffusion of social pressure existing in a regime with only primary rules, a third supplement, rules of adjudication, which consist of secondary rules empowering individuals to determine authoritatively questions of the violation of primary rules, should be introduced.<sup>18</sup>

Hart takes the rule of recognition as the core of a legal system. He explicates that if there exists any situation deserving to be regarded as the foundation of a legal system, it is a situation where ‘a secondary rule of recognition is accepted and used for the identification of primary rules of obligation’ since, in such a situation, certain truths regarding important features of law can be clearly elucidated and their importance can be accurately evaluated.<sup>19</sup> A rule of recognition not only provides the criteria by which the validity of other rules is determined, but also regulates the relationship and order of precedence between these criteria as well as the supreme criterion. According to Hart, a criterion for the legal validity or source of law is considered as having primacy if:

...rules identified by reference to it are still recognized as rules of the system, even if they conflict with rules identified by reference to the other criteria whereas rules identified by reference to the latter are not so recognized if they conflict with the rule identified by reference to the supreme criterion.<sup>20</sup>

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<sup>15</sup> Ibid 94.

<sup>16</sup> Ibid 94–95.

<sup>17</sup> Ibid 95.

<sup>18</sup> Ibid 96–97.

<sup>19</sup> Ibid 100–101.

<sup>20</sup> Ibid 106.

A rule of recognition is the ultimate rule of the legal system, in the sense that it provides criteria for the validity of other rules in the system. However, in the case of a rule of recognition itself, there is no rule providing criteria for its legal validity. Thus, a question over the validity of a rule of recognition cannot arise as it cannot be valid; nor can it be invalid. Henceforth, the question is simply whether or not it is accepted as an appropriate criterion for determining the validity of other rules. Put another way, the existence of a rule of recognition is to be treated as a matter of fact.<sup>21</sup>

Based on his construction of a legal system as a union of primary and secondary rules, Hart develops the idea that there are therefore two minimum conditions that are necessary and sufficient for the existence of a legal system. Primary rules of obligation, which are valid according to the rule of recognition, must be generally obeyed. The second condition is that the rule of recognition, rules of change and rules of adjudication must be effectively accepted by the system's officials as 'common public standards for official behaviour'.<sup>22</sup>

### **III. Definition and Scope of International Law**

In the last section, Hart's concept of a legal system as a union of primary and secondary rules is discussed in order to provide a theoretical tool for the assessment of the systematic quality of international law. In this section, in order to determine the quality of international law, as either law or a legal system, unavoidably, the definition and scope of international law must be discussed in order to demarcate the scope of what can be deemed to be the object of assessment.

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<sup>21</sup> Ibid 107–110.

<sup>22</sup> Ibid 112–117.

Based on Bentham's classic definition of international law, it is defined as a collection of rules governing the relations between states.<sup>23</sup> Contemplating this classic definition and current international jurisprudence, international law has evolved considerably from its origins. In 1927, the PCIJ expounded that international law was law governing the relationship between free states, and accordingly its binding force arose from the consent of states – express or implied.<sup>24</sup> Thus, this results in the widely accepted notion that international law is exclusively applicable to states; as Oppenheim explicates,

Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. This means that the Law of Nations is a law for the international conduct of States, and not of their citizens. Subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.<sup>25</sup>

Nonetheless, the exclusivity of international law to states is not an incontestable theory. Notably, other than states, among the many candidates to be a subject of international law, international organizations and individuals have been treated as an important subject of international law in current international jurisprudence.

In the case of international organizations, the question of the personality of international organizations in international law was authoritatively decided by the International Court of Justice<sup>26</sup> in the *Reparation* case where the court held that the UN has an international legal personality.<sup>27</sup> A consequence of the determination that international organizations possess an international legal personality is that they can

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<sup>23</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Batoche Books 2000) 10.

<sup>24</sup> *The SS Lotus* (1927) PCIJ Ser A No 10, p 18.

<sup>25</sup> Lassa Francis Oppenheim, *International Law. A Treatise. Volume I (of 2) Peace* (2nd, Longmans, Green and Co 1912) 19.

<sup>26</sup> Hereinafter, the 'ICJ'.

<sup>27</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, 174.

be taken to be one of the subjects of international law, together with states, and are considered capable of attaining rights and duties according to international law.<sup>28</sup>

With respect to individuals, even in the jurisprudence of the Permanent Court of International Justice<sup>29</sup>, the court ruled that although international agreements cannot directly create rights and obligations for individuals, they can bind states to adopt definite domestic rules creating rights and obligations for individuals to be enforced by domestic courts if the intention of state parties can be proved.<sup>30</sup> Further, there is a series of international treaties granting individuals direct access to international adjudicating bodies, e.g. the 1969 Inter-American Convention on human rights, the 1966 Optional Protocol to the International Covenant on Civil and Political Rights, the 1965 International Convention for the Elimination of All Forms of Racial Discrimination and the 1965 Convention on the Settlement of Investment Disputes.<sup>31</sup> This demonstrates that, in certain contexts, individuals enjoy ‘the right *intuitu personae*, which they can vindicate by international actions’.<sup>32</sup> Added to this, in terms of obligation, the Nuremberg Tribunals clearly affirmed that international law may impose duties and liabilities upon individuals in the form of responsibility for international crimes committed by individuals, not by abstract entities, and such international criminal law can actually be enforced only by the punishment of individuals.<sup>33</sup>

At present, apart from international organizations and individuals, whether governmental or non-governmental, international law has expanded to include transnational companies as well as terrorists. Although not all of them have a legal

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<sup>28</sup> Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 1298.

<sup>29</sup> Hereinafter, the ‘PCIJ’

<sup>30</sup> *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15 (Mar. 3), 17–18.

<sup>31</sup> Shaw (n 28) 259.

<sup>32</sup> James Crawford, *Brownlie’s Principle of Public International Law* (8th edn, OUP 2012) 121.

<sup>33</sup> Shaw (n 28) 400.

personality, their actions, to some extent, shape international law.<sup>34</sup> The expansion of international law may be attributable to the fact that an array of contemporary issues, such as human right violations, the environment and terrorism, may not be dealt with effectively only at the domestic level or by governmental sectors. This necessitates the internationalization of such issues as well as the participation of non-state entities at the international level. Nonetheless, notwithstanding the expansion of actors and participants in international law, states are still perceived to be the most important subject of international law and as a centre for social interactions of humanity as well as for international law.<sup>35</sup> Thus, despite the greater complexity of international law, it is vital to take into consideration the primacy of states for, as Friedmann propounds, quoting Jessup's statement: 'the world is today organized on the basis of the co-existence of States, and that fundamental changes will take place only through State action, whether affirmative or negative'<sup>36</sup>, Friedmann propounds that:

...the States are the repositories of legitimated authority over peoples and territories. It is only in terms of State powers, prerogatives, jurisdictional limits and law-making capabilities that territorial limits and jurisdiction, responsibility for official actions, and a host of other questions of co-existence between nations can be determined ... This basic primacy of the State as a subject of international relations and law would be substantially affected, and eventually superseded, only if national entities, as political and legal systems, were absorbed in a world state.<sup>37</sup>

Thus, it is clear that international law today does not exclusively pertain to states; however, it is valid to conceive that international law is still state-centric in character.

However, in this study, European Union law will not be covered within the scope of international law due to its debatable character of *sui generis*, in the sense that the

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<sup>34</sup> Ibid 196–197.

<sup>35</sup> Ibid 197.

<sup>36</sup> Philip G Jessup, *A Modern Law of Nations* (Macmillan Company 1948) 17.

<sup>37</sup> Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964) 67.

European Union<sup>38</sup> goes beyond being an international organization but is less than a state system.<sup>39</sup> The EU has developed more into a comprehensive system, similar to a municipal legal system, rather than a sub-system of international law; thus, to include the EU in this study might blur its scope which is to examine the process of the constitutionalization of international society. The *Kadi* Case of The European Court of Justice (ECJ)<sup>40</sup> can be construed as reflecting the separateness of international law and the European Union. Whereas the Court of First Instance (CFI)<sup>41</sup> ruled that it is empowered to review indirectly the lawfulness of the SC resolutions, to the extent of its conflict with *jus cogens* rules, understood as higher rules of international law,<sup>42</sup> the ECJ reversed the decision of the CFI on the issue of the power to review the validity of SC solutions. The ECJ ruled that it has no jurisdiction to review the lawfulness of a resolution adopted by an international body, although that review was limited to examination of the conflict between SC resolutions and *jus cogens* rules.<sup>43</sup>

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<sup>38</sup> Hereinafter, the 'EU' .

<sup>39</sup> For further discussions, see e.g. the paper by Marek Hlavac, 'Less than a State, More than an International Organization: The Sui Generis Nature of the European Union' (2010) SSRN paper <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1719308](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719308)> accessed 10 July 2015; Jane Jenson and Denis Saint-Martin, 'Is Europe Still Sui Generis? Signals from The White Paper on European Governance Fostering Social Cohesion, Working Paper No.9 (Prepared for the Eighth Biennial International Conference, European Union Studies Association, 27–29 March 2003, Nashville, TN).

<sup>40</sup> Hereinafter, the 'ECJ' .

<sup>41</sup> Hereinafter, 'CFI'.

<sup>42</sup> *Kadi v Council and Commission*, Judgment of The Court of First Instance (Second Chamber, Extended Composition), 21 September 2005, Case T-315/01, para. 226.

<sup>43</sup> Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, paras 286-288, 316 and 326-327; see discussions in Peter Hilpold, 'EU Law and UN Law in Conflict: The Kadi Case' 13 Max Planck UNYB 141; Albert Posch, 'The Kadi Case: Rethinking The Relationship Between EU Law And International Law?' (2009) 15 The Columbia Journal of European Law Online 1; Jan Willem Van Rossem, 'Interaction between EU Law and International Law in the Light of Intertanko and Kadi: The Dilemma of Norms Binding the Member States but Not the Community' (2009) CLEER Working Paper 2009/4 <[http://www.asser.nl/upload/documents/11172009\\_42019cleer09-4comb.pdf](http://www.asser.nl/upload/documents/11172009_42019cleer09-4comb.pdf)> accessed 10 July 2015.

#### **IV. Assessment of International Law as a Legal System**

After setting the scope of international law, which is a step towards searching for a systematic element, in this section, based on Hart's concept of a legal system as a union of primary and secondary rules, an assessment of the systemic quality of international law will be pursued. However, in addition to Hart's minimum conditions of the existence of legal system, one section will specifically deal with the issue of conflicts of international rules which is often regarded as a serious threat to the systematic quality of international law.

Whilst Hart's theory of a legal system as a union of primary and secondary rules will serve as a theoretical tool to assess the systemic quality of international rules, Hart himself disproves the perception of international law as a legal system. He based his position on 'the absence of an international legislature, courts with compulsory jurisdiction, and the centrally organized sanctions' which exist in modern municipal law.<sup>44</sup> Hart opines that this makes international law resemble the 'simple form of social structure' which can be found in primitive societies, comprising mainly primary rules with no existing secondary rules, neither rules of recognition, nor rules of change, nor rules of adjudication on the international level.<sup>45</sup> However, Hart's equating of the international community with a primitive society remarkably contradicts the resemblance between international law and municipal law that he also ponders in *Concept of Law*;<sup>46</sup>

In form, international law resembles such a regime of primary rules, even though the content of its often elaborate rules are very unlike those of a primitive society, and many of its concepts, methods, and techniques are the same as those of modern municipal law.<sup>47</sup>

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<sup>44</sup> Hart (n 2) 214.

<sup>45</sup> Ibid 214.

<sup>46</sup> GJH van Hoof, *Rethinking the Sources of International Law* (Kluwer Law and Taxation 1983) 54–55.

<sup>47</sup> Hart (n 2) 227.



Hart's approach of denying the systematic quality of international law has been criticised by scholars in other respects which will be discussed throughout this chapter.<sup>48</sup> Nevertheless, one factor that needs to be taken into consideration here is that, in Hart's time, the establishment of a legal system of international law, if it existed, would have been less manifest than what we can perceive in the contemporary international context. Payandeh makes the observation that at the time when the 'Concept of Law' book was first published, the world was still in the aftermath of the Second World War, reflecting on the collapse of the League of Nations and its inability to prevent armed conflict. The newly established United Nations could not be seen as representing new hope, primarily because the system of collective security was almost immediately crippled right after the beginning of the Cold War due to the veto system.<sup>49</sup> This signified the ill-constructed beginning of international law of the UN era. Thus, the developments and advances that international law achieved in the second half of the twentieth century may not have been foreseen by Hart, as he himself embraced the fact that international law was, in his time, in a stage of transition.<sup>50</sup> Therefore, the assessment of international law as a legal system based on Hart's concept of a legal system, as a union of primary and secondary rules, as well as his arguments against international law as a legal system, will be revisited here.

According to Hart, the two minimum conditions that are necessary and sufficient for the existence of a legal system are:

1. Primary rules of obligation, which are valid based on the rule of recognition, must be 'generally obeyed'.

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<sup>48</sup> E.g. Ian Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (MNP 1998) 6; Hoof (n 46) 54–55; Raphael M Walden, 'Customary International Law: A Jurisprudential Analysis' (1978) 13 *Israel Law Review* 86, 90; Payandeh (n 5).

<sup>49</sup> Payandeh (n 5) 979.

<sup>50</sup> Hart (n 2) 236–237.

2. The secondary rules of recognition, the rules of change and the rules of adjudication must be ‘effectively accepted as common public standards of official behaviour by the officials of the system’.<sup>51</sup>

Regarding the first condition, there exist two diverging schools of thought on obedience to primary rules in international law. On the one hand, international law sceptics take the view that international law is often violated, thus it is not generally obeyed. This group of scholars supports their argument with a long list of infamous treaty violations, e.g. the U.S. invasion of Iraq and the North Atlantic Treaty Organization's<sup>52</sup> intervention in Kosovo.<sup>53</sup> On the other hand, international law optimists adhere to Henkin's famous statement that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’.<sup>54</sup> The international law optimists perceive the notorious breaches of international rules referred to by international law sceptics as the exception rather than a regular phenomenon.<sup>55</sup> They argue that the expanding network of trade and investment international agreements, together with the countless ways in which international law governs current globalized life, is a consequence of the standardized operation of international rules.<sup>56</sup> Thus, international law is generally obeyed. Considering the factual situation within the international community, although it is undisputable that there are a number of cases where international law is violated, this does not rule out the fact that, generally, international law is complied with, given the endless compliance of states to their long list of obligations which occurs every day. This can be also seen in the situation in the international community, which is far too stable for one to be able to come to the conclusion that international law is normally violated. Added to this, according to Koh, empirical

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<sup>51</sup> Ibid 116.

<sup>52</sup> Hereinafter, ‘NATO’.

<sup>53</sup> Harlan Grant Cohen, ‘Finding International Law: Rethinking the Doctrine of Sources’ (2007) 93 Iowa Law Review 65, 67.

<sup>54</sup> Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, Columbia University Press 1979) 42.

<sup>55</sup> Cohen (n 53) 67–68.

<sup>56</sup> Ibid 68–69.

research conducted by legal scholars largely confirms that primary rules in international law are generally obeyed.<sup>57</sup> Also, in irregular situations where states can be deemed to be primarily or obviously not honouring their international obligations, states have a tendency to justify their actions by relying on legal arguments rather than accepting that they are not complying with international law.<sup>58</sup> The ICJ in the *Nicaragua* case has interpreted this pattern of behaviour as reflecting their internal view that they are bound by international rules, not otherwise, explaining that:

If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.<sup>59</sup>

With respect to the second condition, this lies at the heart of the assessment of international law as a legal system by applying Hart's concept of the union of primary and secondary rules, since Hart's denial of international law as a legal system relies on this condition. Hart propounds that the introduction of each of three kinds of secondary rules, providing remedies for three types of defects – uncertainty, stagnation and inefficiency – emerging in primitive society might, in itself, be considered a differentiating step in moving from a pre-legal order towards a legal system. Moreover, certainly, the existence of these three remedies together is sufficient to convert the regime of primary rules into what is indisputably a legal

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<sup>57</sup> The examples cited by Koh include Robert E. Hudec, *Enforcing international trade law: the evolution of the modern GATT legal system* (Butterworth Legal Publishers 1993); Churchill & J.R. Young, *Compliance with Judgments of the European Court of Human Rights and Decisions of the Committee of Ministers: The Experience of the United Kingdom, 1975–87* (1992) 62 BYBIL 283; James Cameron et al., *Improving Compliance with International Environmental Law* (Earthscan 1996); See more details in Harold Hongju Koh, 'Why Do Nations Obey International Law?' (Yale Law School 1997) Yale Law School Faculty Scholarship 2599-2560.

<[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers)> accessed 10 July 2015.

<sup>58</sup> Andrew Jacovides, *International Law and Diplomacy* (MNP 2011) 232.

<sup>59</sup> *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America) Merits*, ICJ Reports 1986, para. 182.

system.<sup>60</sup> Accordingly, the acceptance of three kinds of secondary rules, of recognition, of change and of adjudication, in international law by officials is adequate to prove that international law qualifies as a legal system. Thus, despite the fact that Hart treats a rule of recognition as a founding rule of the system,<sup>61</sup> he does not articulate that the acceptance of a rule of recognition by officials is sufficient for the existence of a legal system. Hence a determination of the actuality of international law as a legal system will be made here by examining whether or not there exist all three kinds of secondary rules which are accepted by officials in international law, rather than focusing only on the rule of recognition, whilst recognising the utmost importance of a rule of recognition at the same time.

However, before exploring the existence of the three secondary rules on the international plane, the term ‘officials’ in the international context shall be contemplated, given the diverging nature of the international community and municipal communities on which Hart bases his concept of law.

#### ***4.1. International Officials***

This section aims to provide an understanding of the scope of international officials, whose internal views are the tool to determine the existence of accepted secondary rules in international law, as well as their scope and content.

Prior to a particular examination of international officials, a general understanding of the idea of officials should be crafted first. In his *Concept of Law*, repeatedly, Hart employs the terms ‘private persons’ and ‘officials’; however, he does not provide any explicit definition of the term ‘officials’. Tamanaha suggests that this may be based on his presumption that we understand who qualifies as legal officials.<sup>62</sup> According to Hart, the second condition for the existence of a legal system

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<sup>60</sup> Hart (n 2) 94.

<sup>61</sup> Ibid 100–101.

<sup>62</sup> Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) 139.

relies on the officials of the system. The officials must treat secondary rules as ‘common standards of official behaviour’ and ‘critically appraise their own and each other's deviations as lapses’.<sup>63</sup> Hart points out that ‘obedience’ is not a term properly used to express the way in which these secondary rules are respected by courts and other officials as rules. Hart explains that when legislators conform to law-making rules, or judges comply with a rule of recognition, it involves the internal view that what they do is ‘the right thing both for themselves and for others’, whilst obeying does not necessarily involve such a thought.<sup>64</sup> In other words, secondary rules must be ‘effectively internalised’ by officials of the system.<sup>65</sup> Therefore, what Hart demands is that there should be a unified or shared official acceptance of secondary rules, especially the rule of recognition, which is taken by Hart as a founding step of the system.<sup>66</sup> This elaborates that the existence of secondary rules alone is inadequate to affirm the existence of a legal system, as they are to be uniformly and sharedly accepted by officials of the system.<sup>67</sup>

Thus, the notion of ‘officials’ is a vital part of Hart’s concept of a legal system. However, this concept is also a source of the problem of circularity in Hart’s theses. At the heart of the problem of the circularity in Hart’s concept of law is that the rule of recognition that Hart perceives as the foundation of a legal system seemingly presupposes the prior existence of a legal system as Hart posits that the attainment of a rule of recognition relies on its acceptance by officials, and identification of whom the officers are may occur only if the legal system has already been established.<sup>68</sup> Regarding this point, Ian Duncanson expounds: ‘[W]ho is an official, and how is he constituted as such? He can only be a person, natural or corporate, whose ‘officiality’

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<sup>63</sup> Hart (n 2) 117.

<sup>64</sup> Ibid 115.

<sup>65</sup> Mario Prost, *The Concept of Unity in Public International Law* (Hart Publishing 2012) 87.

<sup>66</sup> Hart (n 2) 116.

<sup>67</sup> Prost (n 65) 87.

<sup>68</sup> Matthew H Kramer, *Legal Theory, Political Theory and Deconstruction against Rhadamanthus* (Indiana University Press 1991) 120.

has been conferred by a rule or norm, justified by reference to a rule or rules.’<sup>69</sup> Many scholars have come to rescue Hart’s thesis from being sunk by the problem of circularity.<sup>70</sup> One of them is Shapiro, who claims to provide a way out of such endless circularity by proposing that:

The problem with this objection is that it presupposes a certain relationship between rules and authority that Hart rejected. We should not confuse Hart’s claim that courts have the authority to generate the rules of the system with the false claim that they have this authority by virtue of their status as courts. On the contrary; for Hart, a court is a court because it plays a role in generating and sustaining the rule of recognition. Courts have the power they do as a conceptual matter: it is part of our concept of a social rule that these rules govern conduct in a group because, and only because, members of that group guide their conduct accordingly. It is not necessary, therefore, for courts to be pre-authorized by some legal or moral rule to generate the secondary rules of the legal system. Because rules of recognition are social rules, courts are able to create such rules simply by engaging in a certain practice with the appropriate critical attitude.<sup>71</sup>

He further elaborates on his argument that, as the concept of ‘official’ also regularly arises in non-legal contexts such as the social context, this concept does not belong exclusively to the legal realm. Take, for example, the heads of academic institutions and referees who are also officials in a non-legal context. Added to this, he expounds that: ‘what makes an official an official is that the rules that create the office occupied designate the occupant as having certain power’.<sup>72</sup> Hence, with an understanding of the function of secondary rules of change and of adjudication, the concept of ‘official’ can be comprehended as a non-legal concept.<sup>73</sup> This position of Shapiro is shared by Tamahana, who explicates that: ‘A legal official is whomever, as a matter of social practice, members of the group (including legal officials

<sup>69</sup> I.W. Duncanson, ‘The Strange World of English Jurisprudence’ (1979) 30 *Northern Ireland Legal Quarterly* 207, 219–220.

<sup>70</sup> See e.g. Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978); Scott J Shapiro, ‘On Hart’s Way Out’ (1998) 4 *Legal Theory* 469.

<sup>71</sup> Shapiro (n 70) 474.

<sup>72</sup> Scott J Shapiro, *Legality* (The Belknap Press of Harvard University Press 2011) 94.

<sup>73</sup> *Ibid.*

themselves) identify and treat as legal officials.<sup>74</sup> Likewise, Greenawalt suggests that the way to break the circle is to resort to whom ‘the population at large’ perceive to be officials.<sup>75</sup> Thus, the idea that determines officials by referring to a social practice can offer rescue from the issue of circularity in Hart’s theory.

Social-practice theory does not only help to solve the issue of circularity in Hart’s theory, it may also be applied to construe the scope of the term ‘official’. Based on Tamanaha’s social-practice approach to define the term ‘official’, d’Aspremont proposes that the practice in which the content of a rule of recognition is grounded must not be confined to narrowly-defined law-applying officials but must also cover other social actors who participate in law-applying activities.<sup>76</sup> Of course, this proposition shall not be restricted to law-applying officials but shall also apply to other types of officials whose practice will be a basis of secondary rules, such as law-creating, law-ascertaining and law-enforcing officials.

With regard to international law, the proposition for a wider interpretation of officials that covers other social actors who participate in relevant activities, such as law-making, law-ascertaining, law-applying and law-enforcing activities, is more compatible with the non-centralized nature of the international community. This point has been well illustrated by d’Aspremont, particularly on law-ascertaining officials. He argues that, given the lack of any vertical and institutional hierarchy, this wider concept of law-applying officials can help to provide a better understanding of who actually participates in the social practices that ascertain international legal rules and create the social practice of law ascertainment. Such an expansion resolves the shortcoming of a limited understanding of law-applying officials, as well as serving ‘the necessity of not restricting the production of

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<sup>74</sup> Tamanaha (n 62) 142.

<sup>75</sup> Kent Greenawalt, ‘The Rule of Recognition and the Constitution’ (1987) 85 Michigan Law Review 621, 624 at footnote 6.

<sup>76</sup> Jean d’Aspremont, ‘Herbert Hart in Today’s International Legal Scholarship’, in Jean d’Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014) 134.

communitarian semantics to the practice of the judiciary authorities only'.<sup>77</sup> The broader definition of 'official' in an international-law context is also supported by Cohen, who suggests that the actors whose internalization of secondary rules on which international law is built may include other actors apart from states and their agents.<sup>78</sup>

In the international sphere, it is extremely difficult to argue against the participation of other social actors in law-ascertaining activities. Their practice should be counted towards the determination of communitarian semantics based on the convergence of social practices which constitute the law-ascertaining secondary rules.<sup>79</sup> As the ascertainment of international secondary rules is vital to the affirmation of the content and structure of international law, either a systematic structure, a hierarchical structure or an institutional structure, some space will be dedicated here to a discussion of two types namely domestic courts and international legal scholars. These two actors have no powers to make or apply international law; however, their international law-ascertaining roles are recognized by international law. Another interesting point of these two actors is that whilst international scholars are non-state actors, albeit constituted by domestic law of states, domestic courts are less politically influenced compared to other state officials. Thus, they are actors which are less attached to national interests and whose roles in the ascertainment of international rules are recognized by international law.

Article 38 (1) (d) of the Statute of the ICJ provides for: 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.<sup>80</sup> Although, in light of this article, judicial decisions and the teachings of highly-respected scholars are frequently

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<sup>77</sup> Ibid.

<sup>78</sup> Harlan Grant Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community' (2012) 44 NYU JILP 1049, 1064.

<sup>79</sup> d'Aspremont, 'Herbert Hart in Today's International Legal Scholarship' (n 76) 134; See the discussion of communitarian semantics as law-ascertainment criteria in Jean d'Aspremont, *Formalism and the Sources of International Law* (OUP 2011) 196–203.

<sup>80</sup> Article 38 of the Statute of ICJ.



misleadingly referred to as secondary sources of international law, at least in the context of this article 38 (1) (d), judicial decisions and scholars' writings do not function as a source of law in the sense that judges and scholars have law-making power.<sup>81</sup> The phrase 'as subsidiary means for the determination of rules of law' does not only denote that courts' judgments and the teachings of highly qualified scholars are not attributed with the status of a source of international rules in a formal sense, unlike treaties, customs and general principles, but also distinguishes the law-making method and law-determining process.<sup>82</sup> Borda suggests that the law-determination function of Article 38 (1) (d) comprises first, 'a verification of the existence and state of rules of law'; and secondly 'a verification of the proper interpretation of rules of law'.<sup>83</sup> Accordingly, Article 38 (1) (d) can be taken as reflecting the acceptance of judges and scholars as international ascertaining officials in international society.

Specifically discussing domestic courts as a law-ascertaining official of international law, although domestic adjudicating bodies are established by domestic law, the wording of Article 38 (1) (d)<sup>84</sup> is not limited to international adjudicating bodies, domestic judicial bodies can also be taken as an actor that practises international law-ascertainment activities. Crawford explains that certain domestic judicial decisions have value in international law, *inter alia* in the sense that they offer 'an independent investigation of a point of law and a consideration of available sources and thus may offer a careful exposition of the law'.<sup>85</sup> D'Aspremenont argues that due to the

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<sup>81</sup> See the discussion in Hoof (n 46) 169–178.

<sup>82</sup> Ibid 170; see also Georg Schwarzenberger, *International Law: International Law as Applied by International Courts and Tribunals* (Stevens & Sons 1957) 26–28; Jörg Kammerhofer, 'Law-Making by Scholars' (2012) SSRN paper 2–5 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2182547](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182547)> accessed 10 July 2015.

<sup>83</sup> Aldo Zammit Borda, 'A Formal Approach to Article 38(1) (d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals' (2013) 24 649, 650.

<sup>84</sup> However, national courts are also treated as evidence of the emergence of customary international rules under Article 38 (1) (b). For example, in *German Interests in Polish Upper Silesia*, the PCIJ opines: 'From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures', *German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7 (May 25), para 52. See the further discussion in Borda (n 83) 657–658.

<sup>85</sup> Crawford (n 32) 41.

expansion of the '*ratione materiae*' of international law to govern matters that used to be governed by domestic law, international law has increasingly permeated into the domestic sphere, resulting in a rise in the application of international law by municipal adjudicating bodies.<sup>86</sup> According to him, the application of international law by domestic courts occurs in two different scenarios. First, courts of one state may apply international law, which is readily incorporated as law of its municipal system. Secondly, in scenarios where specific international rules have not been incorporated into the law of the system, if there exist domestic secondary rules demanding that domestic courts interpret municipal law in conformity with international law, domestic courts may need to interpret both domestic law and international rules in order to avoid conflicts in interpretation.<sup>87</sup> D'Aspremont argues that because of the increasing application of international law due to the expansion of the object of international law, as well as the fact that states are more willing to comply with international rules, it is unequivocal that domestic courts engage in law-ascertaining practice.<sup>88</sup> Thus, domestic courts can be construed as law-ascertaining officials in the international legal system.

Regarding legal scholars' teaching, historically, when the natural law dominated international law and state practices did not have the importance they have today, the teachings of prominent scholars such as Grotius and Vattel were of utmost importance in articulating the form, scope and substance of international rules.<sup>89</sup> However, with the increasing influence of positivism, the importance of scholars in international law-ascertainment declined.<sup>90</sup> Nonetheless, with the largely decentralized nature of international law in which the hierarchy of rules and

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<sup>86</sup> Jean d'Aspremont, 'Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law', in Jean d'Aspremont, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 29.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Shaw (n 28) 112; d'Aspremont, 'Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law' (n 86) 30–31.

<sup>90</sup> Shaw (n 28) 113.

institutions is ambiguous, Shaw opines that international legal scholars can play a vital role in creating coherence or systematic quality in international law<sup>91</sup> since, as Shaw puts it:

...states in their presentations of claims, national law officials in their opinions to their governments, the various international judicial and arbitral bodies in considering their decisions, and the judges of municipal courts when the need arises, all consult and quote the writings of the leading juristic authorities.<sup>92</sup>

On the face of it, the ICJ seems rarely to refer to scholars' writings in its decisions. Nevertheless, Crawford makes the observation that this is because of the process of the collective drafting of decisions that disfavors the selection of citations from academic writing by individual judges; however, the references to publicists' writings are manifest in separate or dissenting opinions.<sup>93</sup> Thus, although legal scholars do not have a law-applying authority and they do not either directly engage in law-applying social practice, their law-ascertaining practice directly and hugely influences the practice of law-applying officials.<sup>94</sup> Therefore, international legal scholars serve as another important type of law-ascertaining official of the international legal system. D'Aspremont views international legal scholars as 'grammarians of the language of international law' whose ultimate duties are 'the systematization and the fine-tuning of the criteria for the distinction between law and non-law'.<sup>95</sup>

The modifier 'the most highly qualified' can be understood as being widely recognized. However, the determination of which scholars are the most highly qualified or widely recognized can be very subjective.<sup>96</sup> According to Crawford, this

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Crawford (n 32) 43.

<sup>94</sup> See the discussion in d' Aspremont, 'Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law' (n 86) 31.

<sup>95</sup> Ibid.

<sup>96</sup> See the discussion in Hoof (n 46) 176.

phrase is ‘not given a restrictive effect, but authority naturally affects weight’.<sup>97</sup> International legal scholars in the context of Article 38 (1) (d) should be understood as including groups of legal scholars in the form of commissions or committees which act in a non-state capacity.<sup>98</sup> The patent examples for this are, of course, the International Law Commission (ILC)<sup>99</sup>, the Institut de Droit International and the International Committee of the Red Cross.<sup>100</sup>

Accordingly, although national courts and legal scholars do not possess the formal authority to apply international law, their law-ascertaining practices shape and craft the criteria of international ascertainment. Their roles are officially recognized under Article 38 of the Statute of ICJ which is also applied as a tool to identify international rules beyond the context of the ICJ. Thus, this practice should be seen as reflecting the acceptance of secondary rules by international legal officials and the content of such rules. Thus, both national courts’ decisions and the relevant teachings of international highly qualified legal scholars, especially the highly respected work of the ILC, will be consulted here, from time to time, to reflect the existence of secondary rules as well as their content.

#### ***4.2. Existence of Accepted Rules of Recognition, Rules of Change and Rules of Adjudication in International Law***

In this section, the aim is to determine whether there is general acceptance of three types of secondary rules – rules of recognition, rules of change and rules of adjudication – by officials in the international community, which Hart deems necessary and sufficient to confirm the existence of an international legal system.

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<sup>97</sup> Crawford (n 32) 43.

<sup>98</sup> Crawford opines that the work of the International Law Commission is analogous to and at least as equally authoritative as the writing of legal scholars mentioned in Article 38(1)(d), *Ibid.*

<sup>99</sup> Hereinafter, the ‘ILC’.

<sup>100</sup> D’Aspremont, ‘Herbert Hart in Today’s International Legal Scholarship’ (n 76) 134; d’Aspremont, ‘Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law’ (n 86) 30.

#### 4.2.1. Rules of Recognition in International Law

According to Hart, rules of recognition are rules about rules, and they serve to deal with legal uncertainty caused by doubts over what the primary rules are and what the precise scope of the given rules is<sup>101</sup> by providing criteria by which the validity of other rules in the system can be assessed. According to Hart, to affirm that rules are valid is to recognize that the rules satisfy all the tests required by rules of recognition.<sup>102</sup>

A rule of recognition is of the utmost importance in constituting a legal system since, as elucidated by Hart, the point when a secondary rule of recognition is accepted and used for the identification of a primary rule deserves to be called the foundation of a legal system.<sup>103</sup> When a rule of recognition is accepted, both private persons and officials are equipped with authoritative criteria for identifying primary rules.<sup>104</sup>

Regarding the existence of accepted rules of recognition in international law, Hart states that international law does not necessarily contain a rule of recognition, explaining that:

We shall not discuss the merits of these and other rival formulations of the basic norm of international law; instead we shall question the assumption that it must contain such an element. Here the first and perhaps the last question to ask is: why should we make this a priori assumption (for that is what it is) and so prejudge the actual character of the rules of international law? For it is surely conceivable (and perhaps has often been the case) that a society may live by rules imposing obligations on its members as 'binding', even though they are regarded simply as a set of separate rules, not unified by or deriving their validity from any more basic rule. It is plain that the mere existence of rules does not involve the existence of such a basic rule ... Yet if rules are in fact accepted as standards of conduct, and supported with appropriate forms of

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<sup>101</sup> Hart (n 2) 92.

<sup>102</sup> Ibid 101–103.

<sup>103</sup> Ibid 100.

<sup>104</sup> Ibid.

social pressure distinctive of obligatory rules, nothing more is required to show that they are binding rules, even though, in this simple form of social structure, we have not something which we do have in municipal law: namely a way of demonstrating the validity of individual rules by reference to some ultimate rule of the system.<sup>105</sup>

However, Walden and Hoof comment that Hart does not provide any positive arguments to affirm that international law does not have a rule of recognition.<sup>106</sup> Hoof further observes that, when it comes to international law, seemingly, Hart's approach becomes much more restrictive. He argues that when addressing international law, Hart implies that a rule of recognition necessitates the existence of a legislative institution. This is more limited compared to his general theory regarding the rule of recognition which is articulated in a broader fashion as a rule identifying some features or feature possession accepted as conclusive affirmative determination that certain rules are the rules of the system.<sup>107</sup>

Thus, the issue of the existence of accepted rules of recognition in international law should be revisited. There are two characteristics of rules of recognition that may need to be pointed out with regard to the assessment of the existence of rules of recognition and their acceptance in international law. First, the acceptance of a rule of recognition will help significantly in alleviating the legal uncertainty regarding what law is and what its precise scope is. However, a rule of recognition, in itself, may entail uncertainty to some extent since, Hart expounds, all rules contains 'a fringe of vagueness' or 'open texture' due to 'the duality of a core of certainty and penumbra of doubts when we are engaged in bringing particular situations under general rules'.<sup>108</sup> This is of course also the case when the rule of recognition is applied to identify rules of the system. The second point is that Hart admits that a rule of recognition may be multiple and a source of primary rules may take various forms.<sup>109</sup> On this second point, Hoof observes that the contours of a rule of

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<sup>105</sup> Ibid 323–324.

<sup>106</sup> Walden (n 48) 90; Hoof (n 46) 53.

<sup>107</sup> Hoof (n 46) 55.

<sup>108</sup> Hart (n 2) 123.

<sup>109</sup> Ibid 101.

recognition can range from ‘very simple to extremely complex’, and in some cases it may be partially unrevealed, meaning that it cannot be fully comprehended at first sight.<sup>110</sup>

As the function of a rule of recognition is to provide criteria for the validity of norms, i.e. determining what the valid norms of the system are,<sup>111</sup> in order to seek rules of recognition in international law, the rules that fulfil this function must be identified. As Article 38 of the ICJ Statute is frequently treated by scholars as a rule governing the source of international rules,<sup>112</sup> it can serve as a good starting point.

*A. Article 38 of the ICJ Statute and Rules of Recognition in International Law*

Although whether or not Article 38 of the ICJ serves as an exhaustive list of the sources of international law remains debatable,<sup>113</sup> the use of this article as a tool to identify primary rules in international law has been firmly established. As, Rubin has profoundly articulated, imagine the journey from morality to law as a ‘not well-marked’ walk passing through ‘a fairly well-defined swampy area’ which may be dangerous to someone lost. The major signposts to guide someone wandering through this swampy area shall be codification of the sources declared in Article 38 of the statute of the PCIJ,<sup>114</sup> on which Article 38 (1) of the Statute of the ICJ is almost identically modelled.<sup>115</sup> Some scholars perceive that this Article functions as a rule of recognition regarding the source of international law. Take, for example, Hargrove, who posits:

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<sup>110</sup> Hoof (n 46) 55.

<sup>111</sup> Hart (n 2) 100–101.

<sup>112</sup> Jan Klabbbers, ‘Constitutionalism and the Making of International Law: Fuller’s Procedural Natural Law’ (2008) 5 *No Foundations: Journal of Extreme Legal Positivism* 84, 84.

<sup>113</sup> See e.g. Hugh Thirlway, *The Sources of International Law* (OUP 2014) 19–30.

<sup>114</sup> Alfred P Rubin, *Ethics and Authority in International Law* (CUP 2007) 192.

<sup>115</sup> Only the adding of the phrase ‘whose function is to decide in accordance with international law such disputes as are submitted to it’ is the difference in content between Article 38 of the statute ICJ and Article 38 of the statute PCIJ.

International law does not lack for rules for identifying the rules of the system. Article 38 (1) of the Statute of the International Court of Justice, while by its terms a statement of the rule governing law-finding by the Court, is a fair approximation of a universally accepted “rule of recognition” for the whole of public international law.<sup>116</sup>

Likewise, Thirlway is of the view that since Article 38 entails enumeration of the sources of international primary rules elaborating how the primary rules may be made or altered, this article can be seen as functioning as a rule of recognition to some extent.<sup>117</sup> However, contrariwise, Klabbers observes that despite the fact that most international legal textbooks regard Article 38 as an authoritative enumeration of the sources of international law, this is only true for ‘everyday purposes’, as Article 38 ‘lacks constitutional ambitions and is at any rate fairly unspecific’. Although it entails a list of norms the ICJ may apply to decide its cases, it does not stipulate the criteria for how these norms are articulated and come into existence, rendering Article 38 as no more than a good starting point.<sup>118</sup>

By examining the content of Article 38, Klabbers makes a sound observation which is shared here. Article 38 does not provide sufficient criteria for the condition of how law from each source of law is created; more importantly, it also does not explain the secondary rules behind the binding character of each source of law. Thus, Article 38 alone does not suffice to function as a rule of recognition in international law. Supplementation by other rules is indeed needed if Article 38 is to function as a rule of recognition. For example, regarding treaties as a source of international law, the secondary rule of *pacta sant servanda* or other relevant secondary rules codified in the Vienna Convention on the Law of Treaties of 1969<sup>119</sup> may need to be included to provide complete criteria. Further, it is essential to note that, based on its text, it is unequivocal that this article applies only to the ICJ. Thus, Article 38 of the ICJ does

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<sup>116</sup> John Lawrence Hargrove, ‘International Law as Law, Law as A System of Rule-Governed Conduct’ (2011) 56 Villanova Law Review 509, 516.

<sup>117</sup> Hugh Thirlway, ‘The Sources of International Law’ in Malcolm D Evans (ed), *International Law* (4 th, OUP 2014) 110; See also Payandeh (n 5) 589–590.

<sup>118</sup> Klabbers (n 112) 84.

<sup>119</sup> Hereinafter, ‘VCLT’.



not, at least in and of itself, function as a comprehensive rule of recognition in international law. Nonetheless, It is proposed here that although such an article may not serve as a rule of recognition, at least not a complete one, the wide acceptance of Article 38, within and outside the ICJ context, as a reference for how to identify what international law is, at least reflects two important systematic implications of international law. First, the sources listed in such an article are generally accepted as a source of international law. Secondly, the rules of recognition behind each source listed in this article are generally accepted in identifying the international rule deriving from each source of law. Accordingly, as Article 38 of the ICJ's statute, and its predecessor in the statutes of the PCIJ, originates from an attempt to codify the secondary rules of the source of international law,<sup>120</sup> then, if the secondary rules relevant to each listed source of primary rules can be demonstrated, this will allow us to see the accepted rules of recognition in international law and how each of them is formed as part of the unifying rule of recognition. Thus, as the next step, this research will attempt to clarify the rules of recognition with regard to each source of international law listed in Article 38.

#### *B. Rules of Recognition with regard to Treaties*

With regard to treaties, Hart rules against the proposal that the *pacta sunt servanda* principle may serve as a rule of recognition in international law, arguing that not all obligations created by international law are based on contractual relationships (*pacta*).<sup>121</sup> However, as illustrated before, Hart himself admits that in a modern legal system where there is a variety of 'sources' of law, the rule of recognition is complex and the criteria for identifying the law can be multiple. Thus, although it is errorless to insist that not every international norm is based on the *pacta sunt servanda* principle, the notion does not necessarily prevent the *pacta sunt servanda* principle from being perceived as part of the unifying rule of recognition, but definitely not as the sole source of the rule of recognition.

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<sup>120</sup> Cohen (n 78) 1056.

<sup>121</sup> Hart (n 2) 233–234.

As is generally understood, treaties are constructed based on states' will/ consent. However, state consent cannot of itself create legally-binding obligations. On this point, Franck astutely argues:

It is quite wrong to think that treaties bind states because they have consented to them. If states were sovereign, the mere act of entering into a treaty could not "bind" them in any accurate sense. States are not bound only because they agree to be bound, in the sense in which neighbors in an apartment building might informally agree, for their mutual convenience, to turn off their television sets by 10 o'clock every evening. ... They believe themselves to be bound – which can only be understood as evidence of their acquiescence in something demonstrable only circumstantially: an ultimate rule of recognition.  
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Likewise, Goldsmith and Levison propose that state consent may not result in the creation of a legal norm unless some pre-existing rules establishing a link between the consent and validity of legal obligation exist. Thus, if in the international legal order state consent generates binding norms, it must be because of the virtue of a certain background rules of international law that make inter-state consensual agreements have legally-binding consequences.<sup>123</sup> In other words, there must exist secondary rules that create the bindingness of consent. The secondary rule of *pacta sunt servanda* can play such a role and help bridge the gap between state consent and the binding legal obligations of treaties. As the secondary rule of *pacta sunt servanda* has been generally accepted, it functions as an accepted rule of recognition, which indicates that binding primary rules may derive from consensual agreement as a source of primary rules.

### *C. Rule of Recognition with regard to Customary International Law*

Regarding customary international law, Hart refuses to regard the rule that '[s]tates

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<sup>122</sup> Thomas M Franck, 'Legitimacy in the International System' (1988) 82 *The American Journal of International Law* 705, 755.

<sup>123</sup> Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 *Harvard Law Review* 1791, 1847.

should behave as they have customarily behaved' as a rule of recognition. He argues that it elaborates nothing more than that one who accepts certain rules must also comply with a rule that the accepted rules ought to be complied with. Thus, it is perceived by Hart as a 'mere useless reduplication of the fact that a set of rules is accepted by states as binding rules'.<sup>124</sup> Nonetheless, contrariwise, Walden has a different opinion, pointing out Hart's failure to address the nature of customary law in a society possessing both primary and secondary rules.<sup>125</sup> In other words, if a secondary rule regarding the creation of customs emerges in society, will this affect the nature of customs. Intriguingly, Walden proposes that in a society with a rule of adjudication, tribunals, which are empowered to make authoritative decisions regarding the violation of customary law, are to decide, first of all, the issue of the existence of the allegedly violated customary law. In order to resolve this issue, tribunals have to apply secondary rules specifying what kinds of practices, engaged in by whom and for how long they must have been followed, can create such customary law. Next, the question of to whom the customary law applies is also to be answered. Thus, secondary rules relating to the scope of application of the rule will have to be articulated. Based on this explanation, the emergence of rules of adjudication, and the consequent application of customary rules to settle disputes, unavoidably involves the articulation of secondary rules regulating the validity and scope of the application of customary rules.<sup>126</sup> He makes two observations that may be used to support the existence of an accepted rule of recognition in international law. First, doubts arising as to the content, scope and existence of customary international law are resolved not by a factual benchmark but by the application of legal criteria based on the secondary rules of recognition specifying under what conditions that customary international law may come into existence. Secondly, customary international law can have a binding effect on states that have not participated in its creation. Henceforth, the binding effect on such states must derive

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<sup>124</sup> Hart (n 2) 236.

<sup>125</sup> Walden (n 48) 88.

<sup>126</sup> Ibid 89.

by virtue of a secondary rule.<sup>127</sup>

Moreover, the loosening of the requirements for two constitutive elements of customary international law – state practice and *opinio juris* – also supports the existence of an accepted rule of recognition for customary international rules. Take for example, the acceptance by the ICJ that a short period of time may be sufficient to create a new customary law<sup>128</sup> and its reliance on the voting statistics of states within international forums as well as on the decisions and resolutions of international organizations to determine the emergence of customary international law, particularly the existence of *opinio juris*.<sup>129</sup> The reason underlying such a phenomenon is that there exists an accepted rule of recognition to specify the general features of a rule of recognition which courts can apply to determine whether a norm in question counts as customary international law. Thus, when courts apply it, it is possible that courts may construe each requirement differently from earlier precedents, and this has resulted in modification of the requirement for two constitutive elements of customary law. Apparently, this cannot happen if there are no accepted rules of recognition since, without them, customary international law creation would be based on, to use Hart's words, a 'slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory',<sup>130</sup> like those in a primitive society, where modification of the requirements for the condition of the existence of customary law is not possible.<sup>131</sup>

#### *D. Rule of Recognition with regard to General Principles of Law*

Along with treaties and customary international law, general principles are listed as a

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<sup>127</sup> Ibid 90.

<sup>128</sup> *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, para. 74.

<sup>129</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) ICJ Rep, paras 70–73, *Military and Paramilitary Activities in and against Nicaragua*, (Merits) Case, para. 188.

<sup>130</sup> Hart (n 2) 92.

<sup>131</sup> See the discussion on the traditional and modern approaches of customary international law in Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757.

source of law that the ICJ may apply to deem its case. Considering the legal texts describing this source of international law, there appear to be two conditions for identifying norms from this source of law: first, ‘general principles’, and secondly, ‘recognized by civilized nations’.<sup>132</sup> Nonetheless, the latter condition on the part of ‘civilized nations’ has lost its legal significance since, at least after the inception of the UN Charter, there has been a presumption that all member states of the UN exist as civilized states.<sup>133</sup> Regarding the part ‘recognized by civilized nations’, this has been interpreted by Root and Phillimore as requiring that such principles must be accepted in the domestic law of all civilized states.<sup>134</sup> However, Oppenheim adds a further condition that the general principles of municipal jurisprudence may be resorted to inasmuch as they are applicable to inter-state relations.<sup>135</sup> Thus it may be construed that from the rule of recognition regarding general principles of norms, norm X can be regarded as valid binding international law provided that norm X is a ‘general principle’, is ‘accepted in the domestic law of all civilized states’ and ‘can be applicable to the relations of states’.

The practice of adjudicating bodies to identify general principles of law is not very clear since, as Crawford argues, usually general principles become part of the legal reasoning of international courts without being expressly referred to or labelled.<sup>136</sup> However, the practice of the courts to identify general principles of law based on a secondary rule of recognition is reflected in the *Barcelona Traction* case in which, relying on the concept of limited liability, the court ruled that:

If the Court were to decide the case in disregard of the relevant institutions of municipal law it would, without justification, invite serious legal difficulties. It would lose touch with reality, for there are no corresponding institutions of international law to which the Court could resort. Thus the Court has, as indicated, not only to take cognizance of municipal law but also to refer to it. It

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<sup>132</sup> M Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1989) 11 Michigan Journal of International Law 768, 768.

<sup>133</sup> Ibid.

<sup>134</sup> Crawford (n 32) 34.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid 36.

is to rules generally accepted by municipal legal systems which recognize the limited company whose capital is represented by shares, and not to the municipal law of a particular State, that international law refers.<sup>137</sup>

*E. State wills as a Source of the Validity of International Primary Rules*

After discussing the three sources of international law listed in Article 38 of the ICJ Statute, a clearer picture of the accepted rules of recognition behind each source of law has been painted. However, all the separate rules of recognition discussed earlier are part of the basic unifying rule of recognition, and if the common features or shared character of separate rules of recognition can be found, this will help to craft an understanding of the unifying rule of recognition that holds the set of separated primary rules together as a legal system.

Based on each of the specific rules of recognition for treaties, customary international law and general principles of law, state will is a common constitutive element of the validity shared by treaties, customary international law and general principles recognized by states.

In the case of treaties, the binding force of an international agreement is based on the principle that agreements are binding '*pacta sunt servanda*', which, as discussed before, operates as an accepted rule of recognition regarding treaties. The principle of *pacta sunt servanda* makes states consenting to be bound by a treaty bound by it. Moreover, based on the maxim '*pacta tertiis nec nocent nec prosunt*', treaties create neither obligations nor rights for a third state without its consent.<sup>138</sup> Therefore, state consent serves as a base of validity for the source of law in the case of treaties. Consequently, the lack of genuine consent of relevant states is one of the common traits of the grounds for the invalidity of treaties,<sup>139</sup> namely error,<sup>140</sup> fraud<sup>141</sup> or the

<sup>137</sup> *Barcelona Traction, Light and Power Company, Limited, Judgment*, I.C.J. Reports 1970, 46.

<sup>138</sup> This rule has been codified in VCLT Article 34.

<sup>139</sup> SE Nahlik, 'The Grounds of Invalidity and Termination of Treaties' (1971) 65 AJIL 736, 741-744.

coercion of a representative of a state,<sup>142</sup> or of states themselves,<sup>143</sup> as well as corruption of a state's representative.<sup>144</sup>

When discussing the role of state wills in the formulation of customary international law, the issue of whether state consent is a source of validity of customary international law has been a highly debatable topic within international legal scholarship. Some scholars posit that the validity of customary international law derives from the consent of states. On this point, Judge Fitzmaurice propounds that:

Where a general rule of customary international law is built up by the common practice of States, although it may be a little unnecessary to have recourse to the notion of agreement ... it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law.<sup>145</sup>

Likewise, Smith holds that 'the general consent of States must be obtained, directly or indirectly, by express agreement or by tacit acquiescence, before we can say with certainty that any given change has acquired the force of binding law'.<sup>146</sup>

As for the rule of a persistent objector, in order not to be bound by a rule of customary international law, states have to make their objection publicly known on a consistent basis,<sup>147</sup> and this must be done before the time the practice finally transforms into customary international law.<sup>148</sup> This rule has been employed to support a consent-based approach towards customary international law. The

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<sup>140</sup> Article 47 of the VCLT.

<sup>141</sup> Article 49 of the VCLT.

<sup>142</sup> Article 51 of the VCLT.

<sup>143</sup> Article 52 of the VCLT.

<sup>144</sup> Article 50 of the VCLT.

<sup>145</sup> Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law' (1953) 30 BYBIL 1, 68.

<sup>146</sup> Herbert Arthur Smith, *The Crisis in the Law of Nations* (Stevens & Sons 1947) 33–34.

<sup>147</sup> Andrew T Guzman, 'Against Consent' (2012) 52 Virginia Journal of International Law 747, 776.

<sup>148</sup> Ted L Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 Harvard International Law Journal 457, 458.

argument goes that, in light of the persistent-objector principle, every state has the opportunity to opt out of a particular customary international law if it explicitly objects to its formation and can thus be considered a persistent objector. This reflects a voluntarist threshold relying on consent. Hence, when comparing treaties and customary international law, one can say that treaties are an opt-in regime since states will be bound by treaties if and only if they have explicitly given their consent to be bound by relevant treaties; whilst differently, customary international law is an opt-out regime as states are bound by customary rules unless they expressly object on a persistent basis to their creation.<sup>149</sup> Alternatively, states can opt out of already formed customary international law by entering into a treaty that alters the content of customary international law. Nevertheless, there exists a legal opinion that the consent approach cannot properly account for the creation of customary international law. Regarding the persistent-objector principle, Guzman argues that the failure to object to a norm is not equivalent to consent, since a state might fail to object for any number of reasons which are irrelevant to consent. Take, for example, states which opt to avoid objecting for political reasons or due to their speculating that usage is not transforming into custom.<sup>150</sup> Guzman is correct in articulating that a failure to object to usage can be exactly perceived as the consent of a state. Nevertheless, the consent theory may avail itself of support for this issue from the concept of acquiescence and estoppel, or the principle of reasonableness which is proposed to form part of a secondary rule for the creation of customary international law to make a failure to object to usage equivalent to the consent of a state to be bound by customary international law.<sup>151</sup> On this issue, MacGibbon holds that the involvement of the rule of acquiescence represents ‘artificiality in stressing the element of consent

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<sup>149</sup> Niels Petersen, ‘The Role of Consent and Uncertainty in the Formation of Customary International Law’ (the Max Planck Institute for Research on Collective Goods 2011) Preprints of the Max Planck Institute for Research on Collective Goods 2 <<http://www.coll.mpg.de/publications/2611>> accessed 10 July 2015.

<sup>150</sup> Guzman (n 147) 776.

<sup>151</sup> See Anthony D’Amato, ‘Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law’ (2010) SSRN Northwestern Public Law Research Paper No. 10–70 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1704049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1704049)> accessed 10 July 2015; IC MacGibbon, ‘Customary International Law and Acquiescence’ (1957) 33 BYBIL 115.



in general rules of customary law based on the common practice of States' to some extent; however, he argues that such artificiality involves only the aspect of how state consent can be manifested or presumed, and thus the validity of customary international rules can still be deemed as directly based on state consent.<sup>152</sup> As states can cancel out the effect of such presumption or artificiality by expressing their objection based on the persistent-objector rule, the involvement of other rules in creating the presumption of state consent does not deprive the state-consent-based nature of the customary international rule of its state-consent-based nature.

Another alleged defect of consent theory revolves around newly-emerging states. Assuming that a particular consent-based theory of customary international law is correct, new states will logically be entitled to consider which customary international rules they wish to be bound to, and which they do not. However, this does not tally with reality since no state has ever been granted such an entitlement.<sup>153</sup> It was argued by Lauterpacht that newly-emerging states 'cannot repudiate a single rule' of existing customary international law.<sup>154</sup> Further, new states cannot avail themselves of assistance from the rule of a persistent objector, as the challenged practice has already become law by the time they earn their independence or status as a state.<sup>155</sup> Nevertheless, this argument against the necessity for consent to the formation of customary international law is still subject to challenge. As Waldock observed in 1962, no states had ever made an argument before the Court that it was exempt from the bindingness of particular customary international rules on the ground that it was a newly-emerging state that had already expressed an objection to the relevant rules,<sup>156</sup> and this situation has remained unchanged until now. Further, there exists a theory objecting to the inability of newly-emerging states to refuse to

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<sup>152</sup> MacGibbon (n 151) 117.

<sup>153</sup> D'Amato (n 151) 3.

<sup>154</sup> Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration (Contributions to International Law and Diplomacy)*. (London, New York: Longmans, Green and Co. Ltd., 1927), 53, as cited in *Ibid*.

<sup>155</sup> Stein (n 148) 467.

<sup>156</sup> Humphrey Waldock, 'General Course on Public International Law' (1962) 106 *Recueil des cours* 1, 52.

be bound by particular customs. Tunkin holds that new states have a legal entitlement to choose not to be bound by certain customary norms of international law. However, in the case where a new state enters the international community without making any official reservations acknowledged by other states, this would mean that such a state accepts a whole body of principles and norms of existing international law according to the basic principles of international inter-state relations.<sup>157</sup> It can be directly inferred from Tunkin's opinion that in the case where a new state enters the international community with reservations about particular customs, the customs objected to will not bind that state. However, as d'Amato has noted, no new state has entered the international community with such reservations.<sup>158</sup> The reason behind this is perhaps that, considering state interest and political pressure in the international relationship, newly-emerging states may prefer not to reject a particular customary international rule but to opt to show courtesy for existing international law and at the same time endeavour to alter the content of customary international law to better meet their needs.<sup>159</sup> Considering the arguments both for and against the consent basis of customary international law, the position taken here is that state consent is a necessary component for the creation of customary international law, as the secondary rules of the binding effect of customary international law permit states to opt out. Further, in theory, allowing newly-emerging states the opportunity to refuse to be bound by customary international law, whose formation they have not participated in, and which they do not desire to be bound by, would be fairer to new states. Nevertheless, a secondary rule apart from consensual theory that a failure to object to transforming usage is equivalent to the consent of the state failing to do so must exist. This, however, does not deprive customary international law of its consensual nature as it does not absolutely preclude the possibility of states refusing the binding nature of customary international law on them when customary rules are forming, and states can later opt out from entering into treaties with different content.

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<sup>157</sup> G.I. Tunkin, 'Remarks on the Juridical Nature of Customary Norms of International Law' (1961) 49 *California Law Review* 419, 428.

<sup>158</sup> D'Amato (n 151) 4.

<sup>159</sup> *Ibid.*

With respect to the relationship between general principles recognized by states as a source of law and state consent, legal opinions diverge. On one side, it may be perceived that the validity of general principles of international law is grounded in the implicit consent of states. This argument relies on the fact that the general principles of international law derive from states' own domestic principles and their content is ascertained through an inductive process. Added to this, assuming that express consent is required as a source of validity for general principles, empirical evidence that principles exist in the national legal system will satisfactorily fulfil the condition.<sup>160</sup> On the other side, Pellet is of the contrary position that there is no relevance between state wills and the creation of general principles of international law, expounding that:

Of course, it is plain that State will has nothing to do with such rules. Most certainly, they do exist in national legal orders; but in no way have they been created to apply at the international level and, in fact, there are cases when they do not apply. This has nothing to do with State will: it depends entirely on the question of whether or not the international society can be compared with national society.<sup>161</sup>

However, the former proposition is taken. Of course, it may be true that whether or not the principle can apply at the international level may depend on the compatibility of domestic societies with international society with respect to the relevant context of such principles. Nevertheless, if such principles are not commonly recognized by states, notwithstanding the compatibility of the principles to the international community, then the principles cannot be regarded as a valid international norm and cannot be applied at the international level.

After considering the three sources of international norms stipulated in Article 38 of the ICJ Statute, arguably, it can be concluded that the bindingness of the three kinds of primary rules in this article – treaties, customary international law and general

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<sup>160</sup> Bassiouni (n 132) 786.

<sup>161</sup> Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1988) 12 *Australian Year Book of International Law* 22, 38.

principles of law – on a state relies on that state's will to be bound by the specific primary rule; therefore, there exists an essential link of validity between each source of primary rules and state wills. Therefore, at this point, it may be construed that the unifying rule of recognition international law embraces state wills as one of the source of validity of primary rules.

The embracing of state wills as source of validity of primary rules by the unifying rule of recognition has also been reflected in accepted sources of international law not identified in Article 38, such as unilateral acts. The link between the validity of unilateral acts and state wills can be comprehended since, according to Shaw, the intention to be bound is a key issue, along with the criteria of publicity and notoriety, in deciding whether unilateral acts may create a legal obligation.<sup>162</sup> This, to some extent, reflects the system approach to identifying primary rules in international law, based on the unifying rule of recognition. Accordingly, the notion of a unifying rule of recognition that embraces state wills as a common dominator or common constitutive element of norms has shown a systematic element in international law to a certain extent. Added to this, from cosmopolitan international constitutionalism, a rule of recognition that embraces the will of states as a source of validity of primary rules would signify the aim of a peace-creating condition in the international legal system. To elaborate more, states could not be made to agree to be bound by international law by means of force or other means or made to distort their will, which would lead to a situation where the peace is violated or at least threatened. Moreover, in scenarios where relevant states achieve domestic constitutionalism, respect for the will of states which is exercised via constituted power-holders established by the people would mean respect for the right to self-governance of the people in such states.

Although this part does not deal exhaustively with all rules potentially functioning as a rule of recognition in international law, the existence of an accepted rule of recognition for the main sources of international rule listed in Article 38 of the

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<sup>162</sup> Shaw (n 28) 122.

Statute of the ICJ and their links to state will as a constitutive element of their validity can explain the largely decentralized character of the international legal system. This clearly shows that international law is not without adequate criteria for the validity of primary rules that both international officials and private persons can use to determine what the rules of the system are and to deal with the legal uncertainty regarding the identification of rules and determination of scope of their application to a large extent. Nevertheless, mention must be made here that there is another important candidate for a rule of recognition in international law that has not yet been discussed here, which is Article 53 of the VCLT. Article 53 of the VCLT provides that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>163</sup>

From its content, this article can be construed as a rule of recognition for *jus cogens* rules. However, as such, this Article is very relevant to the existence of a hierarchy of international primary rules and the superior source of validity to state wills which is another necessary condition for a constitutionalized international legal system, which will be considered in the next chapter. Thus, a full discussion of Article 53 of the VCLT will be conducted in the next chapter.

#### 4.2.2. Rules of Changes in International Law

In this section, an exploration of the existence of accepted international secondary rules of change, which will enable international law to respond promptly to social changes, will be pursued.

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<sup>163</sup> Article 53 of the VCLT.

On this issue of rules of change in international law, Hart denies the existence of secondary rules of change due to a lack of legislative institutions,<sup>164</sup> thus insisting that international law is, in its structure, similar to a primitive regime entailing only primary rules or customs.<sup>165</sup> He also criticized some theorists, claiming that they tend to minimize such formal differences and overrate the analogies between international law-making and municipal legislation for the purpose of defending the status of international law as law.<sup>166</sup> Nevertheless, Hart is criticized in that he does not engage in a detailed and thorough analytical account of international law-making mechanisms in coming to his position.<sup>167</sup>

A position contrary to that of Hart will be defended here. On this point, Franck argues that law-making institutions exist at the international level, one patent example of which was the well-structured multilateral negotiations at the Law of the Sea Conference in the 1970s.<sup>168</sup> The importance of international institutions for development of the international law-making process is explained by Harrison that:

In few cases does the significance of international institutions stem from their formal status and powers. Rather, their importance lies in their ability to act as a forum in which states can meet and agree upon mutually acceptable approaches to common problems ... One of the most important law-making events in this field was the Third United Nations Conference on the Law of the Sea. Although the Conference was only an ad hoc institution, it had a significant impact on the modern law of the sea through its ability to garner widespread support for the 1982 United Nations Convention on the Law of the Sea. Today, this instrument is widely considered as providing the legal basis for the modern law of the sea. While the Convention still falls short of universal application, it is nevertheless considered by many to create a universal legal order for the oceans.<sup>169</sup>

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<sup>164</sup> Hart (n 2) 214.

<sup>165</sup> Ibid 232.

<sup>166</sup> Ibid.

<sup>167</sup> Payandeh (n 5) 982.

<sup>168</sup> Franck (n 122) 752.

<sup>169</sup> James Harrison, *Making the Law of the Sea : A Study in the Development of International Law* (CUP 2011) 23.

Thus, superficially, international law seems to lack a legislative mechanism that is comparable to those in a municipal legal system, as primary rules of international law mainly come into existence through contractual agreements between states or through the slow process of the creation of customary international law. However, the context of the law-making approach in international law has been altered and developed in order to cope with the changes in society with sufficient speed. The treaty-making mechanism has been institutionalized in a way that reduces the importance of a bilateral process. Currently, the adoption of international treaties regularly occurs through majority votes or consensus procedures without engaging in any formal voting process.<sup>170</sup> Added to this, international organizations also play an important organizing role to facilitate and institutionalize inter-state multilateral negotiations in many aspects.<sup>171</sup> Although this institutionalized character does not remove the necessity for state ratification and each state still decides whether to be bound by a specific treaty, it does show that the process by which multilateral treaties are created is more like an institutionalized parliamentary scenario for legislation than an ad-hoc bilateral bargaining scenario.<sup>172</sup> This institutionalized law-making process based on multilateral negotiations with a voting system or a consensus procedure consumes much less time than those based on bilateral negotiations, and this, at some level, enables the international community to react to new problems promptly, therefore overcoming the defect of legal stagnation. Regarding this point, Hargrove propounds that the multilateral treaty-making process can function as a ‘reasonable approximation’ to general legislative institutions, subject to the broadness of states engaging in the process.<sup>173</sup>

Regarding customary international law, Hart employs the notion of a slow process of custom creation in a primitive society in contrast to the more flexible and

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<sup>170</sup> Karl Zemanek, ‘Majority Rule and Consensus Technique in Law-Making Diplomacy’ in J Macdonald and DM Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine, and Theory* (MNP 1986) 857.

<sup>171</sup> See e.g. Jose Alvarez, ‘The New Treaty Makers’ (2002) 25 *Boston College International & Comparative Law Review* 213.

<sup>172</sup> Payandeh (n 5) 982.

<sup>173</sup> Hargrove (n 116) 520.

sophisticated legislative process of legislation in a modern municipal legal system.<sup>174</sup> Nonetheless, given the contemporary understanding of customary international law, its creation differs from the creation of customs in many respects. As expounded earlier, customary international law differs from customary law in primitive societies as the creation of customary international law involves secondary rules and the secondary rules involved may be changed or modified to correspond to political or socioeconomic changes within the international community.

One important change in the secondary rules regarding customary international law is that the requirement for two constitutive elements – customary state practice and *opinio juris* – has been eased. In the *North Sea Continental Shelf* case, the ICJ insisted that state practice over a short period of time may suffice to create a new rule of customary international law if the practice of states is in general consistent.<sup>175</sup> Moreover, the court tends to rely on the voting statistics of states within international forums and the decisions and resolutions of international organizations when it has to determine the emergence of customary international law, particularly the existence of *opinio juris*.<sup>176</sup> Accordingly, based on the development of the concept of customary international law, unlike the creation of customs in a primitive community, the creation of customary international law does not represent a slow and incremental process grounded on a factual basis.<sup>177</sup>

Hargrove makes a legitimate point, noting that despite a number of law-making mechanisms, the rules of change in international law are less effective and more demanding than those of a parliament in a domestic system. Nevertheless, these mechanisms can be deemed as capable of supporting international law as a system far into the future, given their compatibility with the decentralized and fragmented

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<sup>174</sup> Hart (n 2) 92–93 and 95–96.

<sup>175</sup> *North Sea Continental Shelf* case, para. 74.

<sup>176</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), paras 70–73, *Military and Paramilitary Activities in and against Nicaragua, (Merits)* Case. 14, para. 188.

<sup>177</sup> Payandeh (n 5) 983.



character of international realpolitik.<sup>178</sup> Albeit not as effective as those in the domestic sphere, international legislative processes which are based on accepted rules of change allow the international community to cope with emerging new problems on the international plane, as an international legal system, and with a number of accepted rules of change, the international community has clearly developed far beyond primitive social communities in terms of secondary rules of change.

#### 4.2.3. Rules of Adjudication in International Law

After the existence of secondary rules of recognition and change in international law has been adequately affirmed, finally, it is time to deal with international secondary rules of adjudication, the function of which is to provide efficient mechanisms for the enforcement of international primary rules.

One ground on which Hart bases his argument against the existence of rules of adjudication or adjudicative institutions in international law is that states cannot be brought before any international dispute-settlement bodies if they have not given their prior consent to the process.<sup>179</sup> It is certainly true that there is no genuinely compulsory dispute-settlement system existing on the international plane, as even though the term ‘compulsory jurisdiction’ has been employed in certain contexts of international law, they are not genuinely compulsory. Alexandrov explains that, regarding the ICJ’s compulsory jurisdiction, such jurisdiction is compulsory on the ground that a state has given its consent to jurisdiction of the ICJ in advance. Consequently, when a dispute which falls within the scope of consent emerges, a state is bound by its own consent already expressed and subject to the Court’s jurisdiction.<sup>180</sup> Does this ground suffice to negate the existence of accepted rules of

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<sup>178</sup> Hargrove (n 116) 521.

<sup>179</sup> Hart (n 2) 232.

<sup>180</sup> Stanimir A Alexandrov, ‘The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?’ (2006) 5 Chinese Journal of International Law 29, 35; See a

adjudication in international law? A negative answer to this question is chosen here. To begin with, it should be accepted that non-compulsory dispute settlement emanates from the very nature of the non-centralized character of the international community. Thus it may be argued that, considering the nature of the society which it serves, an optional dispute settlement mechanism may not necessarily be a defect, and possibly a more compatible choice. For example, Hargrove posits that it is crucial to take into consideration the fact that, very frequently, disputed states with competing claims under international rules can reach a compromise over their differences through optional procedures based on mutual consent, and, by chance, they typically respect the resolution. Hence, this proves that the non-compulsory settlement mechanisms available on the international plane serve as effective mechanisms in practice.<sup>181</sup> Further, even in a domestic legal system, a comprehensive compulsory mechanism does not exist in certain areas, e.g. disputes regarding constitutional issues, especially the power of public officials and constitutional actors.<sup>182</sup> Take, for example, the United Kingdom where the principle of parliamentary sovereignty has prevented any court conducting a judicial review of parliamentary acts.<sup>183</sup> Likewise, in the US, Goldsmith and Levinson observe that a large proportion of constitutional disputes will not be decided before any court but rather by non-judicial political actors at different levels and in different branches of government. If those political actors hold divergent interpretations of constitutional issues, such differences will be settled through political compromise rather than the authoritative say of judicial bodies, thus reflecting the decentralized element of the dispute-settlement process for constitutional issues in the US system.<sup>184</sup>

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detailed discussion on the compulsory jurisdiction of the ICJ in Section 3.1.4 of Chapter V on The International Court of Justice, 251-252.

<sup>181</sup> Hargrove (n 116) 518.

<sup>182</sup> Payandeh (n 5) 985; See the further discussion in Goldsmith and Levinson (n 123) 1801–1822.

<sup>183</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1939) 38.

<sup>184</sup> Goldsmith and Levinson (n 123) 1813.

Moreover, if a determination of the existence of rules of adjudication or adjudicative institutions is to be based on a comparison with the highly developed regime of domestic criminal and private law, one may perceive that there are no such rules of adjudication or adjudicative institutions existing on the international plane. However, the comparison itself seems to have some fundamental shortcomings. Given the decentralized and fragmented nature of international society, which is much more diffuse than a centralized national community, and the fact that related international actors vary greatly in size, power, interests and domestic structure, this difference between international and domestic communities is not to be ignored. In light of such a significant difference, it is argued here that a more legitimate way to approach this issue is to contemplate it in light of the specific functioning of rules of adjudication, which is to overcome the problem of inefficiency of the legal order. On the international plane, today, apart from the ICJ which is the principal judicial organ of the United Nations with general jurisdiction, the international adjudicating mechanism consists of an array of courts and tribunals at either global or regional levels with specialized jurisdictions. Take for example the World Trade Organization's<sup>185</sup> panels and the Appellate Body, the ECJ and The International Tribunal for the Law of the Sea, as well as international arbitration. The verdicts of these tribunals are, in general, binding, final and authoritative determinations of violations of international primary rules.<sup>186</sup> Rules specifying the international responsibility of states for wrongful acts and rules regarding the conditions for the rightful resort to countermeasures by injured states may, to some extent, be perceived as further evidence for the existence of accepted secondary rules of adjudication.<sup>187</sup> Many international agreements confer jurisdiction on international tribunals and provide rules of evidence and procedures for relevant tribunals to apply when deciding a case.<sup>188</sup> Added to this, it is undeniable that there exists an array of unwritten secondary rules that are widely accepted in international dispute

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<sup>185</sup> Hereinafter, 'WTO'

<sup>186</sup> Payandeh (n 5) 985–987.

<sup>187</sup> Pierre-Marie Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 *Journal of International Law and Politics* 791, 793.

<sup>188</sup> Franck (n 122) 752.

settlements, such as *res judicata*, litispence, *compétence de la compétence* and many more regarding the jurisdiction and admissibility of tribunals, due process or evidence. One example that reflects general acceptance of the rules of adjudication by international officials is the *Corfu Channel* case where the court ruled, with respect to the allowance of circumstantial evidence in the procedure, that ‘this indirect evidence is admitted in all systems of law, and its use is recognized by international decisions’.<sup>189</sup>

Even though, undoubtedly, these developments do not create comprehensive and compulsory adjudication, such developments have, to a large extent, helped to create a mechanism to mitigate the problems of the inefficiency of the international legal order. Hence, it is very difficult to come to the conclusion that the international legal order is a legal regime with an absence of adjudication.

Another ground that may be raised to support the non-existence of rules of adjudication in the international legal order is the lack of any centralization of social pressure within it. According to Hart, the centralization of social pressure would alleviate the problem of the inefficiency of a legal order. In a more developed legal system, the primary rules prohibit or restrict the use of force and self-help by private persons, which is an ineffective way to enforce primary rules and may be a danger to society in some aspects. Instead, rule-based society establishes an official monopoly of sanctions.<sup>190</sup> In so doing, the system introduces additional secondary rules of adjudication which govern possible punishments for violations of primary rules and grant to judges, where the fact of a violation is affirmed by them, the exclusive authority to stipulate punishment by other officials. This is how the centralization of sanctions of the legal system emerges.<sup>191</sup> In international law, there only exists an early-developed system of centralized sanctions. One might argue that the power of the SC regarding the use of force reflects the existence of a centralized system of

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<sup>189</sup> *Corfu Channel* case, Judgment of April 9th, I.C.J. Reports 1949, 18.

<sup>190</sup> Hart (n 2) 93; See also Payandeh (n 5) 987.

<sup>191</sup> Hart (n 2) 97–98.

sanctions in international law. Unfortunately, although the SC has a monopoly over the power to authorize the use of force, apart from cases of self-defence, based on Article 43,<sup>192</sup> it does not have its own military force and needs to rely on state members to provide it with military force; however, agreement to provide military force to the SC by member states has never been reached.<sup>193</sup> Consequently, the SC has to rely on authorization for the use of force by individual states or a group of them, instead of commanding the use of force itself, in order to fulfil its peace-and-security purpose,<sup>194</sup> e.g. in the case of military measures against Iraq due to its 1990 invasion of Kuwait.<sup>195</sup> Nonetheless, considering the divergent nature of the international and domestic communities, the development of a mechanism for legal sanctions in international law may not need to follow the model of municipal law. There have been developments in international law that may resolve the issue of the inefficiency caused by the diffusion of social pressure. One solid example is the notion of collective self-defence, which allows other states, rather than the state unlawfully attacked, to lawfully use force against the attacking state.<sup>196</sup> Likewise, the concept of *erga omnes*, which creates a kind of obligation that a state owes towards the international community as a whole, rather than an obligation arising vis-à-vis another state,<sup>197</sup> constitutes a more effective mechanism to enforce the law. In cases where an obligation *erga omnes* is violated, international law allows all states to utilize enforcement mechanisms. More importantly, all states are obliged to cooperate to put an end to serious breaches of such norms entailing the international community's important shared values. Further they are required not to recognize any

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<sup>192</sup> Article 43 of the UN Charter provides: 'All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security...'

<sup>193</sup> Payandeh (n 5) 987.

<sup>194</sup> Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11 EJIL 541, 567; Payandeh (n 5) 987.

<sup>195</sup> SC Resolution 678 (1990).

<sup>196</sup> See MA Bowett, 'Collective Self-Defence under the Charter of the United Nations' (1955) 32 BYIL 130.

<sup>197</sup> *Barcelona Traction* case, paras 32–33.

situation created by such serious breaches as lawful or to provide any help in maintaining such situations.<sup>198</sup> Obviously, such a mechanism does not reflect the progress towards a more centralized law-enforcement mechanism, rather it is based on the aim of utilizing international co-operation as a tool to enforce the law and, to some extent, there is a possibility that cooperation between all states in the international community may lead to sufficiently effective sanctions to enforce the law. Added to this, on careful scrutiny, centralization of the power to use force at the discretion of a handful of states so as to ensure obedience to international rules may result in illegitimate inequalities among states as well as potentially grave risks to international security,<sup>199</sup> since this could be used abusively to satisfy the hegemonic or imperialist attempts of those who control the world's centralized enforcement power. Thus, the development of a law-enforcement mechanism based on international co-operation would serve as a proper approach in the context of international law and also reflect the truth that there exist law-enforcement institutions or secondary rules regarding this issue.

#### ***4.3. Normative Conflicts and Conflict Rules in Fragmented International Law***

It has been shown that primary international rules have been generally obeyed and international law has been sufficiently equipped with rules of recognition, change and adjudication to deal with legal uncertainty, legal stagnation and legal ineffectiveness. Thus, two minimum conditions for the emergence of a Hartian legal system have been met. Nevertheless, as the rule of recognition of international legal system recognize state-will as a main source of validity of international primary rules and other types secondary rules also recognize the importance of state-wills, international law is largely decentralized in its nature. Although the largely decentralized character of international law does not equal the lack of normative development, it poses another problematic issue for the systematic quality of

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<sup>198</sup> Art. 41 of Draft Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>199</sup> Samantha Besson and John Tasioulas, 'Introduction (The Emergence of the Philosophy of International Law)', in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford, New York: OUP, 2010), 11.

international law, which is the fragmentation of international law.<sup>200</sup> The major problem of fragmented international law entailing threats to the quality of international law as a system is one about normative conflicts. Pauwelyn defines normative conflicts as ‘[e]ssentially two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other’.<sup>201</sup> Conflict between rules are a cause for legal uncertainty in international law as multiple norms refer to the same type of behaviour, and so the subject of law may not physically be able to act in conformity with multiple norms.<sup>202</sup> Furthermore, when multiple norms may apply to the fact, the outcome of the question is very likely to vary if different applicable norms are applied. Accordingly, in legal systems which are very decentralized in structure, normative conflicts are a potential menace to the systematic quality of such legal systems. However, in case of international law, the international legal system is already equipped with an array of secondary rules to employ by international official to solve normative conflicts and identify the applicable rule for the disputes.<sup>203</sup> Most of them are will-based conflict rules which solve conflicts by determining which norm most precisely serves or most accurately reflects the wills of relevant states. There exist two sub-types of state-will-based conflict rules, which are those resulting in the ceasing to exist of one conflicting norm and those resulting in the priority of application of one norm. The conflict rules that reside in the former category are the termination of an earlier treaty by the conclusion of a later treaty by the same parties with the intention that the matter should be governed by the later treaty, the expressed prohibition of later norms by

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<sup>200</sup> See general discussions of the fragmentation of international law in ILC, ‘Fragmentation of International Law’; Gerhard Hafner, ‘Pros And Cons Ensuing from Fragmentation of International Law’ (2004) 25 Mich JIL 849.

<sup>201</sup> Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (5th edn, CUP 2006) 175–176; See also the narrower definition of conflict of norms in C Wilfred Jenks, ‘Conflict of Law-Making Treaties’ (1953) 30 BYIL 401, 426; also see further discussions in Erich Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17 EJIL 395.

<sup>202</sup> Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (1st edn, Routledge 2011) 139.

<sup>203</sup> See e.g. Pauwelyn (n 201); Jan B Mus, ‘Conflicts between Treaties in International Law’ (1998) 45 Netherlands International Law Review 208; Jenks (n 201); Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003).

earlier norms, and illegal *inter se* modification and suspension according to Articles 48 and 59 of the VCLT. Within the second category are conflict clauses, *lex posterior* and *lex specialis* rules. Nonetheless, there exists another type of conflict rules which is not based on the wills of states as, apparently, those rules impose a limit on the exercising of state will to change or modify international law and prevent states from derogating from certain norms.<sup>204</sup> Such conflict rules are the secondary rule of non-derogability of *jus cogens* codified in Article 53 of VCLT and the secondary rule of primacy of the UN Charter stipulated in Article 103 of the UN Charter.<sup>205</sup> The existence of these conflict rules enables international law to tackle with the problem of legal uncertainty caused by normative conflicts, firmly holding international law as a legal system.

#### **V. Conclusion: Systematic Element of International Law**

Throughout this chapter, the existence of accepted secondary rules for each type of rule of recognition, rule of change and rule of adjudication has been proven, and those secondary rules hold international law together as a legal system. This position is shared by Franck, who explains the systemic quality of international law in the Hartian sense:

[The international system] has an extensive network of horizontally coherent rules, rule-making institutions, and judicial and quasi-judicial bodies to apply the rules impartially. Many of the rules are sufficiently determinate for states to know what is required for compliance and most states obey them most of the time. Those that do not, tend to feel guilty and to lie about their conduct rather than defy the rules openly. The system also has means for changing, adapting and repealing rules.<sup>206</sup>

Although the secondary rules of international law do not bring about a centralized system as municipal law, it is not to be concluded that international law is a primitive

<sup>204</sup> Michael Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211, 220.

<sup>205</sup> See the detailed discussion in Chapter IV.

<sup>206</sup> Franck (n 122) 753.



version of domestic society. The decentralized nature of international law is grounded in on the fact that the rule of recognition of international law embraces state wills as one of the sources of validity of the primary rules of the system, and other secondary rules respect state autonomy which is an agent of the people in such states. This is necessary for a peace-creating condition for the world and to allow states as representatives of their constituent power-holder at the international level to exercise the power conferred on them by the people to designate international law as long as it does not impair the protection of peace and fundamental human rights. The importance of embracing state will as a source of validity of international rules for the protection of peace is reflected in the preamble of the VCLT that stipulates that, in agreeing with such a agreement, state parties have in mind:

...the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all.<sup>207</sup>

The recognition of state wills as a source of validity by the unifying rule of recognition of the international legal system is equivalent to the allocation of international law-making power to states. The international legal system, and a number of fundamental secondary rules of the system have been developed based on the embracing of state will as a source of validity by a unifying rule of recognition, such as *pacta sunt servanda*, the rule of recognition of customary international law of state practice and *opinio juris*, the rule of recognition for general principles, the rule of non-compulsory jurisdiction of the international courts, arbitration and the state-centred rules of law-enforcement. These fundamental secondary rules can be taken as part of secondary constitutional rules, as they provide a fundamental framework for how law is made, changed, adjudicated and enforced. Thus, it can be construed that there is a largely decentralized systematic structure of international law which is based on one of its underlying aims – respect for the sovereignty of states and the

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<sup>207</sup> Preamble of the VCLT.

creation of peace among them. However, the largely decentralized structure of international law generates another problematic of normative conflict which can undermine the systematic quality of international law. Nevertheless, international law is sufficiently equipped with secondary rules which can be used to solve normative conflict and help to hold fragmented international law as a coherent system.

In light of the idea of the complementarity of the domestic constitutional legal system and the international constitutional legal system, the respect for states and the allocation of power to states is due to the status of a state as the representative of its constituent power-holder, 'the people'. Peters, who advocates a compensatory role for international constitutionalism, explains this point thus:

My conclusion on the international constitutional status of states is that states are not ends in themselves, but merely instrumental for the rights and the needs of individuals. This finalité makes states indispensable in a global constitutionalized order, but also calls for their constitutional containment.<sup>208</sup>

Accordingly, states are allocated legal power by the international legal system; however, such power shall be limited by the international legal system, as unlimited power for states could jeopardize the peace and human rights purpose of the international constitutional legal system. Thus, to exist as a constitutionalized international legal system, international law must possess legal mechanisms that can provide limitations on the international-law-making power of states and this is where the centralization or hierarchization of the international law needs to be achieved. It will be proposed that the two conflict rules of non-derogable of *jus cogens* and the primacy of the UN Charter which have a restricting effect on the international law-making power of states have established such an international verticalized legal structure. However, this is the issue that will be comprehensively engaged in the next chapter.

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<sup>208</sup> Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 201.

All things considered, to a large extent, international law and the international community are well equipped to deal efficiently with issues of legal uncertainty, inertia and ineffectiveness, given the decentralized nature of international society. Thus, international law contains an adequate systematic element to be taken as a legal system, based on Hart's conception of a legal system as the union of primary and secondary rules.

The systemic element will provide international law with the basic efficacy necessary to fulfil its underlying purpose and serve as one of the necessary foundations for an international legal constitutional system to some extent; but if international law exists as a constitutional legal system, then the further systematization of international law to establish international self-governance with a mandate to create peace and protect fundamental human rights, the legitimacy of which is based on its nexus with humanity, aka 'constitutionalization', must be further proven. Thus, in the next chapter, the second condition for an international constitutional legal system, which is the hierarchical structure of international primary rules conferring constitutional status on certain international primary rules protecting peace and fundamental human rights, will be proven to confirm that despite its largely decentralized character, the obligations of states to protect peace and fundamental human rights are given a non-derogable and non-compromisable nature by the international legal system.

## **Chapter IV: Hierarchical Structure in International Law with Supremacy for International Primary Rules Protecting Peace and Fundamental Human Rights**

### **I. Introduction**

In the last chapter, the systemic structure of international law was proven. Although international law is a more decentralized legal system than domestic ones, this is for the peaceful co-existence of states and respect for states and their constituent power – their people –. However, if international law were a purely consent-based legal system – a horizontal legal system – fulfilment of the underlying purpose of international constitutionalism, the creation of international self-governance with a mandate for peace and fundamental human rights, would be beyond the reach of international law. On this point, Bryde comments on the shortcomings of state-will-based horizontal international law without a hierarchical structure:

It was a horizontal legal system which knew no common interest beyond the sum of interest of individual states, no hierarchy of norms, no higher authority than states themselves. With the help of international law the states regulate their international affairs, but the regulation of their own affairs (“*domaine réservé*”) knew no restrictions.<sup>1</sup>

Accordingly, a horizontal system seems to lack a shared underlying purpose that it and its members need to fulfil. A state-will-based international legal order does necessarily not create an obligation for states not to cause a negative situation with regard to peace, i.e. an obligation not to use force apart from where it is necessary to protect peace and fundamental human rights. Added to this, if international law were a purely state-will-based legal system, even if an obligation not to use force exists, it would be inadequate to create and maintain international peace as states can enter into new international law that exempts them from such an obligation. Thus, a

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<sup>1</sup> Brun-Otto Bryde, ‘International Democratic Constitutionalism’, in Ronald St John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism* (Martinus Nijhoff 2005) 106.

hierarchy of primary rules in which international primary rules prohibiting the use of force are placed at the top is necessary to create peace. Similarly, if the international constitutional legal system has an underlying goal to protect fundamental human rights, then primary rules creating an obligation to protect fundamental human rights must be elevated to a higher rule of the international legal system as well. Hence, the hierarchy of international primary rules granting supremacy to primary rules that protect peace and fundamental human rights is another necessary element of a constitutionalized international legal system.

Based on the idea of the hierarchical primacy of constitutional rules, constitutions are bestowed with superiority over other legal rules in the society they govern.<sup>2</sup> Existing as hierarchically superior rules, constitutions surpass ordinary rules in cases of conflict with ordinary rules,<sup>3</sup> thus establishing a normative hierarchy within the community. Among a number of conflict rules available to the international legal system, two secondary rules can be proposed as establishing a hierarchy of primary rules in international law as they do not solve conflicts by determining which norms best serve the will of relevant states; rather, such rules impose a limit on the exercising of state will to change or modify international law and prevent states from derogating or opting out from certain norms,<sup>4</sup> hinting at a hierarchical structure in the international legal system. Such conflict rules are the non-derogability rule of *jus cogens* and Article 103 of the UN Charter, which arguably represents the secondary rule of primacy of the UN Charter. Therefore, this chapter will examine whether or not each of these two secondary rules have hierarchized international law and if so, how they have shaped the legal structure of international law in order to affirm whether or not the hierarchy of international primary rules with the supremacy for

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<sup>2</sup> Simon Chesterman, Thomas M Franck and David M Malone, *Law and Practice of the United Nations* (OUP 2008) 7.

<sup>3</sup> Daniel Bodansky, 'Is There an International Environmental Constitution?' (2009) 16 *Indiana Journal of Global Legal Studies* 565, 571.

<sup>4</sup> See e.g. how the rule of non-derogability of *jus cogens* limits the law-making ability of states in Michael Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic Journal of International Law* 211, 220.

rules protecting peace and fundamental human rights exists in the international legal system.

## **II. The Secondary Rule of Non-derogability of *Jus Cogens* Rules**

A literal translation of the term '*jus cogens*' is cogent law, and this reflects a key characteristic of *jus cogens* rules, which is that they are 'compelling'.<sup>5</sup> At the United Nations Conference on the Law of Treaties (UNCLOT)<sup>6</sup>, Suarez, the Mexican delegate, made a helpful suggestion for the meaning of *jus cogens*: 'the rules of *jus cogens* were those rules which derived from principles that the legal conscience of mankind deemed absolutely essential to coexistence in the international community'.<sup>7</sup> Due to their undoubted importance to the international community, *jus cogens* rules were bestowed with a non-derogable character distinguishing them from other rules of international law. Thus, *jus cogens* rules are peremptory in character and no derogation from rules qualifying as *jus cogens* is permitted, with no exceptions,<sup>8</sup> Rules that conflicts with them is null and void.<sup>9</sup> It could be argued that *jus cogens* rules are hierarchically superior rules and such that they reflect the existence of public-interest-based rules which govern the legal relationship involving the common interest of the international community as a whole.<sup>10</sup> The rule of non-derogability of *jus cogens* is reflected in Article 53 of the VCLT itself, as well as in Article 53 of the 1982 Vienna Convention on Treaties Between States and International Organizations or Between International Organizations.

<sup>5</sup> Karen Parker and Lyn Beth Neylon, '*Jus Cogens*: Compelling the Law of Human Rights' (1989) 12 Hastings International Comparative Law Review 411, 415.

<sup>6</sup> Hereinafter, 'UNCLOT'.

<sup>7</sup> See the United Nations Conference on the Law of treaties, First session (Hereinafter 'UNCLOT (First Session)'), (UN Doc. A/CONF.39/11), 52th Meeting of the Committee of the Whole, 294.

<sup>8</sup> Kamrul Hossain, 'The Concept of *Jus Cogens* and the Obligation Under the U.N. Charter' (2005) 3 Santa Clara Journal of International Law 72, 73.

<sup>9</sup> ILC Report on Fragmentation of International Law, para 404.

<sup>10</sup> Andreas L Paulus, '*Jus Cogens* in a Time of Hegemony and Fragmentation: An Attempt at a Re-Appraisal' (2005) 74 Nordic Journal of International Law 297, 313.

Thus, the non-derogability of *jus cogens* as such is argued here as establishing limitations on the international-law making power of states and the hierarchical structure of the primary rules of the international legal system. In doing so, first, this section will discuss the rule of recognition of *jus cogens* rules in the hope of understanding the reason why they exist as higher rules in the international legal system, protected by the secondary rule of the non-derogability of *jus cogens*. The proposition which will be made here is that the validity of *jus cogens* rules does not derive from state wills but rather from fundamental shared values of the international community. Then, after demonstrating the link between *jus cogens* and fundamental shared values, the last part will discuss the scope and legal consequences of the secondary rule of the non-derogability of *jus cogens* to show the role of *jus cogens* rules in the establishment of a hierarchical structure of international primary rules, providing supremacy for primary rules that protect peace and fundamental human rights.

### ***2.1. Rule of Recognition vis-à-vis Jus Cogens Rules***

In the largely decentralized international legal system where state consent serves as the main source of the validity of international primary rules, in order to confirm and understand the hierarchical structure established by the secondary rule of non-derogability of *jus cogens*, the rule of recognition for *jus cogens* must be examined first. This will help to determine what serves as the source of validity for *jus cogens* and to understand the reason why that source of validity can generate hierarchically superior primary rules that take precedence over state-will-based primary rules.

Article 53 of the VCLT provides that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from

which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>11</sup>

Based on this Article, the rule of recognition in the case of *jus cogens* can be said to be twofold: first, rules that will develop into *jus cogens* must exist as part of general international law. Second, such rules are to be recognized and accepted by the international community as a norm from which no derogation is permitted.<sup>12</sup> This two-stage creation of *jus cogens* is key to understanding the conflict between the idea that *jus cogens* rules originally emerge as state-will-based international law and the effect whereby *jus cogens* binds all states in the international community, including those dissenting, and their non-derogable character at the time that they transform into *jus cogens*.

#### 2.1.1. First Condition: Existing as Part of General International Law

For the first condition, Pauwelyn explains that ‘the rules of this general international law are, by their very nature, binding on all states’; however, he also observes that ‘this does not mean, of course, that states cannot “contract out” of general international law’.<sup>13</sup> Likewise, according to Weil, the term ‘general international law’ originally denotes ‘a rule applicable except in the event of a particular derogation’<sup>14</sup>. Thus, general international law denotes generality rather than universality and this indicates that rules that are part of general international law but

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<sup>11</sup> Article 53 of the VCLT

<sup>12</sup> Paulus proposes a twofold test for the creation of *jus cogens*: ‘rules of *jus cogens* must first become (general) international law – customary law or general principles of law pursuant to Article 38, para. 1 of the Statute of the International Court of Justice – and may then be elevated to *jus cogens* by the international community’, Paulus (n 10) 302; meanwhile Akehurst suggests that ‘a rule, in order to qualify as *jus cogens*, must pass two tests – it must be accepted as law by all the States in the world and an overwhelming majority of States must regard it as *jus cogens*’, Michael Akehurst, ‘The Hierarchy of the Sources of International Law’ (1975) 47 BYBIL 273, 285.

<sup>13</sup> Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (5th edn, CUP 2006) 148 and footnote 194.

<sup>14</sup> Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 AJIL 413, 436.



have not yet earned the status of *jus cogens* do not possess a non-derogable character.

There are very diverse opinions on what is meant by general international law in Article 53.<sup>15</sup> On the one hand, there exists a legal opinion taking general international law as equivalent to international customary law.<sup>16</sup> For example, according to Weil, the idea behind this terminological permutation is to form a contrast between a conventional rule, which only binds states, parties and rules, and customary international law which is more generally binding on states.<sup>17</sup>

In contrast, Akehurst contends that the rules of *jus cogens* may derive from both customary international law and treaties, observing: ‘a treaty which has been ratified by all or almost all the States in the world is as much a part of general international law as most customary rules’.<sup>18</sup> Similarly, Tunkin argues that, currently, the progress of the international legal system is to a large extent shaped by treaties.<sup>19</sup> A number of general multilateral treaties have become part of general international law, e.g. the Briand-Kellog Pact of 1928 and the UN Charter.<sup>20</sup> On this point, the opinion of Akehurst and Tunkin is shared here, i.e. that general international law can exist in the form of either customs or treaties, since what is required in this condition is the generality of law not the form of it, and both of them can generate law that is generally binding on members of the international community

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<sup>15</sup> Akehurst (n 12) 282.

<sup>16</sup> James Crawford, *Brownlie's Principle of Public International Law* (8th edn, OUP 2012) 594; Lauri Hannikainen, *Peremptory Norms (jus Cogens) in International Law* (Helsinki Finnish Lawyers' Publishing Co 1998) 226–242 as cited in Anthea Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 AJIL 757, 783; Weil made an observation that in the North Sea Continental Shelf Judgment, the terms ‘customary international law’, ‘general international law’, ‘general or customary law rules’, or ‘a general rule of international law’ or ‘a general rule of law’ were employed interchangeably, Weil (n 14) 436.

<sup>17</sup> Weil (n 14) 437.

<sup>18</sup> Akehurst (n 12) 284.

<sup>19</sup> Grigory Tunkin, ‘Is General International Law Customary Law Only?’ (1993) 4 EJIL 534, 541.

<sup>20</sup> *Ibid* 538.

Paulus argues differently, i.e. that customary law and general principles can serve as a source of rules that will become *jus cogens*.<sup>21</sup> With respect to the general principles of law, Onuf suggests that although, by definition, ‘general principles of law recognized by civilized nations’ can generate rules of general international law, a very small number of rules are perceived as deriving from this source. Moreover, they are typically procedural rules for international tribunals which are unlikely to qualify as having a peremptory character.<sup>22</sup> He also argues that given the intrinsic nature of the generality of general principles, they are ‘inefficient for identifying individual instances of deviant behaviour’; therefore, it might be considered that ‘their function is not specifically constraint-oriented’, which is a character rule of *jus cogens*.<sup>23</sup> Onuf’s point is very important since apart from its character that might not be able to create rules of obligations, perceiving general principles of law as a source of *jus cogens* rules is likely to grant too much leeway to the discretion of law-applying or law-ascertaining officers, thus running the risk of the abuse of *jus cogens* rules.

One important observation regarding this requirement is that the fact that certain rules exist as part of general international law does not result in the non-derogability or universality of *jus cogens* since. No matter whether they derive from either international customs, treaties or even general principles of law, they exist in the form of state-will-based rules. As a result, state wills serve as a source of their validity, which means the binding effect on any state relies on the consent of a state. Accordingly, a state is still able to contract out from rules of general international law that have yet to qualify as *jus cogens*. It follows that the requirement that the rules that will be developed into *jus cogens* need to be part of general international law is just a prerequisite requirement; the differentiation of *jus cogens* from ordinary general international law will start with the second condition – the acceptance by the international community of their peremptory characters; and when this is fulfilled,

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<sup>21</sup> Paulus (n 10) 302.

<sup>22</sup> Richard K Birney and N.G. Onuf, ‘Peremptory Norms of International Law: Their Source, Function and Future’ (1974) 4 *Denver Journal of International Law and Policy* 187, 191.

<sup>23</sup> *Ibid* 196.

the non-derogable and universal character of *jus cogens* will be ascribed to the norms in question.

2.1.2. Second Condition: Accepted by the International Community as a Whole as a Norm from which no Derogation is Permitted

With regard to the second requirement for the rule of recognition of *jus cogens*, rules that will develop into *jus cogens* must be recognized and accepted as a norm from which no derogation is permitted, i.e. as law with a peremptory character by the international community as a whole. Two elements are entailed in this condition of the rule of recognition for *jus cogens*: first, acceptance by the international community of states as a whole; and secondly, the non-derogable character of rules that will be identified as *jus cogens*.

Pertaining to acceptance by the international community of states as a whole, the addition of the phrase ‘accepted and recognized by the international community of States as a whole’ was among the latest modifications to Article 53 of the VCLT that was made during UNCLOT<sup>24</sup> before the current version.<sup>25</sup> Despite its lack of clarity, some delegates were of the opinion that the inclusion of this phrase does, to some extent, improve the content of this article in terms of dealing with the legal uncertainty created by the ambiguity over how *jus cogens* rules emerge and are identified and ascertained.<sup>26</sup>

<sup>24</sup> UNCLOT (First Session), 52<sup>nd</sup>–57<sup>th</sup> and 80<sup>th</sup> meetings of the Committee of the Whole and the United Nations Conference on the Law of treaties, Second Sessions (hereinafter ‘UNCLOT (Second Session)’), (UN Doc. A/CONF.39/II/Add.1), 19<sup>th</sup> and 20<sup>th</sup> Plenary Meetings.

<sup>25</sup> The original text of Article 50 (Article 53 currently) ILC Draft submitted to UNCLOT reads as follows: ‘A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’

<sup>26</sup> E.g. Mr. Groepper, Federal Republic of Germany, commented that: ‘[the] definition contained in article 50 [was] satisfactory and complete. In order to become *jus cogens* a norm had to fulfill two conditions: it had not only to be accepted, it had also to be recognized as such by the international community as a whole — not, be it noted, by a more or less numerous group of States, but by the international community as a whole. Moreover, the

The reference to the international community as a whole reflects that the underlying rationale of the rule of non-derogability of *jus cogens* is rooted in the embracing of the superior interests of the international community over the interests of individual members or groups of members of the international community. Verdross and Danilenko share the same position, i.e. the key threshold to identify *jus cogens* rules is the premise that such rules serve the interests of the international community as a whole, which is superior to the needs of individual states. Their role in the protection of the fundamental interests of the international community renders such norms peremptory and absolute in character.<sup>27</sup> In contrast, as other rules only serve the interests of individual states, these rules have a relative character, which means they are negotiable and derogable based on state will.<sup>28</sup> As rules with the status of *jus cogens* protect the fundamental interests of the international community, such rules are so compelling that they are accepted by the international community as a legal mechanism to invalidate ordinary rules deriving from treaties or customary international law that conflict with them.<sup>29</sup> In other words, states accept the limitations of their international law-making power, demarcated by the content of *jus cogens* rules. As Paulus explains, the concept of *jus cogens* signifies that ‘the ‘system’ of sovereign States is not an aim in itself, but a means for the safeguard of human values and interests’.<sup>30</sup> Accordingly, the status of *jus cogens* as higher rules exists to relativize state sovereignty; however, such relativization is grounded in acceptance of the existence of fundamental shared values of the international

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essential nature of the norm appeared from the expression "from which no derogation is permitted". See similar opinions of the delegates from Columbia and the Ukrainian Soviet Socialist Republic; however, see also the different opinions of the French and UK delegates, UNCLOT (Second Session), 19<sup>th</sup> Plenary Meeting.

<sup>27</sup> Afler Verdross, ‘Jus Dispositivum and *Jus Cogens* in International Law’ (1966) 60 American Society of International Law Proceedings 55, 58; Gennady M Danilenko, ‘International *Jus Cogens*: Issues of Law-Making’ (1991) 2 EJIL 42, 45 See also the statement by the representative of Zambia, UNCLOT (First Session), p 322.

<sup>28</sup> Verdross (n 27) 58; Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 70–71.

<sup>29</sup> Gordon A Christenson, ‘*Jus Cogens*: Guarding Interests Fundamental to International Society’, Virginia Journal of International Law 28 (1988 1987): 586.

<sup>30</sup> Paulus (n 10) 332.

community. Such fundamental shared values will be defined via the collective decision-making of the international community, by which the limits on the exercising of law-making power by individual states and their liberty to opt out of the most fundamental values of the international community are defined.<sup>31</sup> Thus, as Orakhelashvili puts it, ‘the very rationale of peremptory norms in international law is that the interests of the international community as a whole shall prevail over the conflicting interests of individual States and groups of States’.<sup>32</sup> Accordingly, it should be the conscience or the will of the international community that indicates which international rules are *jus cogens*.

Based on the text of Article 53, it is the international community, whose interests are superior to those of its members, that creates and identifies peremptory rules. A significant legal implication hinges on how the condition of acceptance by the international community as a whole is construed. If acceptance by the international community of states as a whole is simply equivalent to the consent of all the states in the international community, this represents the traditional idea of state consent/wills as a source of validity for international law. However, if this condition is perceived in a fashion that the unanimous acceptance of all states is not required, rather that some sort of majority is adequate, then this will signify not only a new source of validity for international rules, other than state consent, but also the power of law-making by the international community as a distinct entity from that of states.

Addressing this point, M. K. Yasseen, the former Chairman of the Drafting Committee of the Vienna Conference on the Law of Treaties, rejects the requirement for unanimity, articulating that:

[T]here is no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough if a very large majority did so; that would mean that, if one state in isolation refused to accept the peremptory character of a rule, or if that state was supported by a very small number of states, the acceptance and recognition of the peremptory character of the rule

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<sup>31</sup> Ibid.

<sup>32</sup> Alexander Orakhelashvili (n 28) 67.

by the international community as a whole would not be affected.<sup>33</sup>

This approach is also embraced by the ILC, in the context of state responsibility; it defines the term ‘as a whole’ in Article 19 of **the 1976 version** of the Draft Articles on State Responsibility as meaning:

This certainly does not mean the requirement of unanimous recognition by all the members of the community, which would give each state an inconceivable right of veto. What it is intended to ensure is that a given international wrongful act shall be recognized as an “international crime”, not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community.<sup>34</sup>

The condition regarding the essential components of the international community has the consequence that in a case where a small minority can be perceived as representing an essential component of the international community, a very large majority of the international community cannot force its will on a very small dissenting minority based on the universal bindingness of *jus cogens* rules.<sup>35</sup>

It should be noted here that the special attention that is paid to the views of a significant minority is also found in the creation of customary international law in which the uniformity of state practice must include the practices of states whose interests are particularly affected.<sup>36</sup> However, in the case of customary international law, the practice of a particularly affected minority pertains to the process of the creation of a general rule which is the first condition of the rule of recognition of *jus cogens*, whilst the acceptance by a particularly affected minority that certain general rules have a derogable character is relevant to the second condition of the rule of cognition of *jus cogens*. This, however, shows that a minority that will be strongly affected by peremptory norms will have ample opportunity to protect their interests from abuse by the majority in the process of the creation of *jus cogens* rules, even in

<sup>33</sup> UNCLOT (First Session), 80<sup>th</sup> Meeting of the Committee of the Whole, 472.

<sup>34</sup> Report of the International Law Commission on the work of its twenty-eighth/28<sup>th</sup> session 3 May–23 July 1976, UN Doc. A/31/10, 119.

<sup>35</sup> Hossain (n 8) 81.

<sup>36</sup> *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, paras 73–74.

the case that the majority approach is taken.

However, during UNCLOT, the majority approach was heavily rejected by the French delegate who argued that ‘if article 50 [currently Article 53] was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, then the result would be to create an international source of law subject to no control and lacking all responsibility’.<sup>37</sup> Contrariwise, certain delegates were of the belief that the procedures for claiming the invalidity of treaties, including those generated by *jus cogens* and dispute settlement embraced in Articles 62 and 62 bis of the draft article (currently Articles 65 and 66 of the VCLT),<sup>38</sup> function as an essential preventive mechanism against abusive claims for invalidity in light of the non-derogability of *jus cogens*.<sup>39</sup> However, the position that unanimity is not required to create *jus cogens* is defended here. Otherwise, this would grant every single state a right to veto the creation of *jus cogens*, thus pragmatically probably ruling out the possibility of the emergence of *jus cogens* in the international community. The modification to the notion of an international community by ‘of states’ contributes to another issue, whether membership of the international community is exclusive to states or not. However, this issue will be addressed in detail in the section regarding the notion of fundamental shared values of the international community as a source of validity of *jus cogens*.

The second element of this condition of the rule of recognition of *jus cogens* that needs to be explored here is its non-derogable character. Based on Article 53 of the VCLT, it lies within the discretion of the international community as a whole to decide whether certain norms are norms from which no derogation is permitted. However, what remains unanswered is what constitutes the non-derogable character of rules or what makes the international community perceive certain rules to be non-derogable. To explore this non-derogable character further, a proposition made by

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<sup>37</sup> UNCLOT (Second Session), 19<sup>th</sup> Plenary Meeting, 94.

<sup>38</sup> See Articles 65 and 66 of the VCLT.

<sup>39</sup> See the German and Italian Delegates’ statements UNCLOT (Second Session), 19<sup>th</sup> and 20<sup>th</sup> Plenary Meetings, 96 and 104.

academics who, according to Article 38 of the ICJ statute, serve as law-ascertaining officials in the international legal system, as their opinions can be referred to as a subsidiary means for the determination of international law, may help to clarify the element of non-derogability required by the secondary rule of recognition of *jus cogens*.

Simma argues that the peremptory character of *jus cogens* derives from ‘the substantive importance of the interests protected by the rules’.<sup>40</sup> According to Orakhelashvili, there are two questions to be asked: first, ‘whether or not a norm is intended to benefit a given actor in the interest of the community’; secondly, ‘whether a valid derogation would be possible from a given norm’, i.e. ‘whether it could be split into bilateral legal relations’.<sup>41</sup> For instance, in the case of a rule regarding the territorial sea, a state may adopt a limit of twelve nautical miles with one state, six nautical miles with a second state and three nautical miles with a third state. Therefore, the rule regarding the territorial sea is *jus dispositivum* rather than *jus cogens*. The derogable nature of the rule of territorial sea is reflected in the *Anglo-Norwegian Fisheries* case, which indicates that the regime of territorial sea is negotiable and can be regulated differently depending on the specific state involved and relevant situation and contexts.<sup>42</sup> Likewise, international rules regarding the trade and expropriation of property are *jus dispositivum*, as all states’ relationships in this area are negotiable and can be split into bilateral legal relationships. In a case where relevant states agree not to apply certain specific rules to their relationship, that would involve only the interests of states entering into such an agreement, not the interests of the community.<sup>43</sup>

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<sup>40</sup> Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours* 217, 288; See the similar opinion of the Cuban delegate; ‘the essential difference between *jus cogens* rules and other rules of international law lay not in their source but in their content, UNCTAD (First Session), Summary records of plenary meetings and meetings of the Committee of the Whole, 302 and see also the Mexican Delegate’s Statement, 302

<sup>41</sup> Alexander Orakhelashvili (n 28) 47.

<sup>42</sup> *Anglo-Norwegian Fisheries, U.K. v. Norway, Order*, 1951 I.C.J. reports 1951, 142-143 and see *Ibid* 70–71.

<sup>43</sup> *Ibid* 70.



Based on this thinking, what constitutes the non-derogable character of rules that will be recognized as *jus cogens* rules is the belief of the international community in the importance of the interests that the rules protect. In other words, if the international community believes that the interests protected by such rules are very important to the international community, then they cannot be compromised by the interests of certain individual members of the group, thus rendering derogation from the rules protecting such interests invalid.

After discussing the two elements of the second condition of the rule of recognition of *jus cogens*, ‘acceptance by the international community’ and the ‘non-derogable character’, it can be construed that the second condition is fulfilled when the majority of members of the international community, composed of all its essential components, accept that the rules in question protect interests which are so important that derogation from such rules cannot be permitted.

Based on such a proposition, it does not require unanimous acceptance or recognition by the international community that certain rules are law with a peremptory character to elevate such rules to be *jus cogens*. This has two important legal implications. First, the majority, composed of essential components of the international community, can impose the binding effects of certain rules they accept as peremptory norms on those that do not give their consent to be bound by such rules, and this creates the universal character of *jus cogens*. Secondly, such a majority also constitutes the non-derogable character of *jus cogens*. The non-derogability of *jus cogens* constituted by the large majority will apply to those that do not give their consent to be bound by *jus cogens* rules and to those that give consent to be bound by such rules but do not accept them being peremptory norms.<sup>44</sup> It is proposed by Alexidze that the minority are legally bound by *jus cogens* rules to which they dissent because *jus cogens* rules are generated by the common will of the international community as a whole, which bestows on them their absolute

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<sup>44</sup> Neuhold, ‘Völkerrechtlicher Vertrag und “Drittstaaten”’, 28 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1988) 51, 63 as cited in Danilenko (n 27) 51.

character.<sup>45</sup>

It is argued here that the binding effect of the content of *jus cogens* and their non-derogability for dissenting states can be perceived as being based on the nature of the concept of *jus cogens* as peremptory norms which must necessarily apply to all states without exception. Therefore, in the case of customary international law, states which persistently object to the creation of certain customs will be held not to be bound by such customs. However, once such customs earn the status of *jus cogens*, those states cannot rely on the rule of a persistent objector to deny the binding nature of *jus cogens* rule. On this point, Rozakis explains: ‘a state can no longer be dissociated from the binding peremptory character of that rule even if it proves that no evidence exists of its acceptance and recognition of the specific function of that rule, or moreover, that it has expressly denied it’.<sup>46</sup> One example to support this opinion is the situation where the claim of South Africa, based on its former racist policies, that it was a persistent objector to the prohibition of racial discrimination was widely rejected by the international community on the ground that, differing from ordinary customary international law, the persistent objector rule is not accommodated in the context of *jus cogens*.<sup>47</sup>

Given the rationale of *jus cogens* and the potentially paralyzing effects of a unanimity approach, a majority approach serves as a more realistic and logical alternative to interpret the rule of recognition of *jus cogens* in Article 53. However, the universality and non-derogable application of *jus cogens* rules imposed by a large majority of the international community on dissenting states leads to a more

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<sup>45</sup> L.A. Alexidze, Some Theoretical Problems of International Law. Peremptory Norms *Jus Cogens* (1982) 178. (In Russian with English summary) and Alexidze, ‘Legal Nature of *Jus Cogens* in Contemporary International Law’, 172 *Recueil des cours* (1981 III) 219, 246–247, 258 as cited in *ibid* 50–51.

<sup>46</sup> Ch.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (North-Holland Publishing Company 1976) 78 as cited in *Ibid* 50.

<sup>47</sup> Jure Vidmar, ‘Norms Conflict and Hierarchy in International Law: Towards a Vertical International Legal System’ in Erika De Wet and Jure Vidmar, *Hierarchy in International Law: Human Right* (OUP 2012) 26; Byers (n 4) 222; See also UNGA Res 33/183 (24 January 1979) (concerning policies of apartheid of the Government of South Africa).

fundamental theoretical issue of the international legal system, which is dominated by positivist state-consent-based theory. Therefore, the next part will explore what the source of validity of *jus cogens*, if not state consent, is that constitutes the binding force of the norm formulated by the majority and imposed on the rest of the international community.

## ***2.2. Fundamental Shared Values of the International Community as a Source of Validity of Jus Cogens***

In the preceding section, the non-consensual character of the content of the rule of recognition for *jus cogens* was shown. Thus, a very important question to be answered concerns the source of validity of *jus cogens* that imposes non-derogability and universality on the entire international community. The notion of fundamental shared values as a source of validity of *jus cogens* will be proposed here. There are four sub-parts to this task. First, the inability of state wills as a source of validity of international law to accommodate the non-derogable and universal character of *jus cogens* will be addressed. After that, the shortcomings of the notion of natural law as a non-consensual source of validity will be discussed. Then, the concept of fundamental shared values of the international community and how it fits to serve as a source of validity of *jus cogens* rules will be addressed. Finally, the link between *jus cogens* rules and fundamental shared values of the international community will be established.

### ***2.2.1. State Wills as a Source of Validity of Jus Cogens***

Before the discussing the proposition put forward here that fundamental shared values of the international community serve as a source of validity of *jus cogens*, let us explore, in more detail, why state consent or state wills cannot be perceived as a source of validity of *jus cogens*. First of all, based on the majority approach to interpretation of the condition of acceptance by the international community as a whole, the consent-based approach pushed by positivists to explain the validity of *jus*

*cogens* is not persuasive for it cannot give a sound explanation on why a large majority of states of the international community can impose legal obligations on a dissenting minority.<sup>48</sup> Further, Article 53 of the VCLT requires that, first, rules that will become *jus cogens* must exist as part of general international law, deriving either from customary international law or treaties, both of which, as state-will-based sources of international rules cannot accommodate the non-derogability and universality of *jus cogens*. With respect to treaties, in a scenario where treaties are signed by almost every state in the international community, by virtue of the *pacta tertiis* rule, such treaties are not binding on non-signatory states. Even in the case where all states have entered into certain treaties, some state parties states can always derogate from the obligations arising from such treaties by entering into a new agreement.<sup>49</sup> Turning to customary international law, the salient defect of construing customary international law as a source of *jus cogens* is attributable to the principle of the persistent objector, as this principle allows a state to opt out of being bound by customary international law.<sup>50</sup> Further, customary international law can be overridden by other customary international law or by treaties emerging later chronologically or, more specifically, in the light of *lex specialis* or *lex posterior* rules.<sup>51</sup> Thus, customary international law cannot account for the universality and non-derogability of *jus cogens*.

Accordingly, state will cannot properly serve as a source of validity of *jus cogens* rules which are universal and non-derogable in their character. On this issue, Mosler suggests: ‘fundamental rules whose observance is essential for the continuation of society, cannot be derived from the will of States ... but their “source”, their inherent force, must derive from elsewhere’.<sup>52</sup>

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<sup>48</sup> Evan J. Criddle and Even Fox-Decent, ‘A Fiduciary Theory of *Jus Cogens*’ (2009) 34 *Yale Journal of International Law* 331, 332.

<sup>49</sup> Mark Retter, ‘*Jus Cogens*: Towards an International Common Good’ (2011) 2 *Transnational Legal Theory* 537, 543.

<sup>50</sup> Criddle and Fox-Decent (n 48) 340; Retter (n 49) 543.

<sup>51</sup> Criddle and Fox-Decent (n 48) 340; Retter (n 49) 543.

<sup>52</sup> Hermann Mosler, ‘The International Society as a Legal Community’ (1974) 4 *Recueil des Cours* 17, 84.

### 2.2.2. Natural Law as a Source of Validity of *Jus Cogens*

Apart from state consent, there have been attempts to explain *jus cogens* as a remnant of natural-law theory. For example, during UNCLOT, the Italian delegate, Maresca, claimed that rules protecting the human person, ensuring the maintenance of peace and the existence and equality of States have the absolute character of *jus cogens*, explaining that ‘it was an example of *jus naturalis*, that was to say, the law which had its first source in mankind's awareness of the law’.<sup>53</sup> Likewise, Janis argues: ‘*Jus cogens* therefore functions like a natural law that is so fundamental that states, at least for the time being, cannot avoid its force’.<sup>54</sup> Contrariwise, in his proposal for the inclusion of the topic of *jus cogens* in the long-term programme of the work of the ILC, although noting, originally, the non-consensual source of the validity of *jus cogens* was perceived as deriving from natural law,<sup>55</sup> Tladi argues that the *jus cogens* concept has been conceptualized and codified in a written positive law, basing the emergence of *jus cogens* rules on the acceptance of states as members of the international community. This, for him, reflects the deviation of *jus cogens* from its original theoretical basis of natural law.<sup>56</sup>

In this discussion, it will be argued here that resorting to natural law to explain the non-consensual source of validity of *jus cogens* has certain shortcomings. First of all, it is noted by the ILC that, ‘it would clearly be wrong to regard even rules of *jus*

<sup>53</sup> UNCLOT (First Session), 54<sup>th</sup> Meeting of the Committee of the Whole, 311.

<sup>54</sup> Mark W Janis, ‘The Nature of *Jus Cogens*’ (1988) 3 Connecticut Journal of International Law 359, 362; see also John Finis, ‘Natural Law Theories’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2011)

<<http://plato.stanford.edu/archives/fall2011/entries/natural-law-theories/>> accessed 10 July 2015; Mary Ellen O’Connell, ‘Jus Cogens: International Law’s Higher Ethical Norms’ in Donald Earl Childress III (ed), *The Role of Ethics in International Law* (Cambridge University Press 2012).

<sup>55</sup> Dire D Tladi, *The Proposal for the Inclusion of Topic of Jus Cogens in the Long-Term Programme of Work of the ILC*, Annex B to Report of the International Law Commission Sixty-sixth session (5 May–6 June and 7 July–8 August 2014), ILC Report, A/69/10, Annex B para 7.

<sup>56</sup> *Ibid* para 14.

*cogens* as immutable and incapable of modification in the light of future developments'.<sup>57</sup> The possibility of modifications to existing *jus cogens* rules and the emergence of new *jus cogens* are reflected in Articles 53 and 64 of the VCLT. The alterable nature of *jus cogens* clearly contrasts with the concept of natural law as universal unchanging law.<sup>58</sup> As Ford argues, although, at any specific moment, theoretically, *jus cogens* rules serve as the supreme law of international law, their substance alters from time to time corresponding to the shaping of the 'conscience of the international community'. Thus, the proposition to base *jus cogens* on the natural concept must be reconsidered.<sup>59</sup> Secondly, according to Article 64<sup>60</sup> of the VCLT, *jus cogens* rules do not have a retroactive effect,<sup>61</sup> and therefore one may perceive that *jus cogens* are not rooted in natural law theory since, supposedly, the natural-law imperative shall apply timelessly, notwithstanding the point of time they are recognized.<sup>62</sup>

As discussed above, natural-law theory cannot fully accommodate the legal character and effect of *jus cogens* rules; and therefore, logically, it is difficult to uphold that either state consent or natural law can be perceived as a source of validity of *jus cogens*. Alternatively, the notion of fundamental shared values as the source of

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<sup>57</sup> Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, Yearbook of the International Law Commission (1966) vol. II, UN DOC. A/CN.4/SER. A/1966/Add.1, 248.

<sup>58</sup> Christopher A Ford, 'Adjudicating *Jus Cogens*' (1994) 13 Wisconsin International Law Journal 145, 148–149 also see Arthur Mark Weisburd, 'The Emptiness of the Concept of *Jus Cogens* as Illustrated by the War in Bosnia-Herzegovina' Mich JIL 17, no. 1 (1995): 32–33.

<sup>59</sup> Ibid 149.

<sup>60</sup> Article 64 of the VCLT provides that: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

<sup>61</sup> Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, Yearbook of the International Law Commission (1966) vol. II, UN DOC. A/CN.4/SER. A/1966/Add.1, 266-267; See also Rafael Nieto-Navia, 'International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law' Coalition for the International Criminal Court Paper 19 <<http://www.iccnw.org/documents/WritingColombiaEng.pdf>> accessed 10 July 2015.

<sup>62</sup> Retter (n 49) 541; however, Retter also makes the observation that this argument does not pay attention to 'the fact that non-retroactivity may be a fundamental principle underlying natural law itself'.

validity of *jus cogens* offers a more convincing approach. Based on this approach, the peremptory character of *jus cogens* is rooted in the fact that they protect the fundamental interests of the international community, which is the same thing that fundamental shared values are believed to foster. To elaborate more, the fact that the international community perceives the interests protected by certain values to be so crucial that the norms aim to promote and preserve such values should be deemed non-derogable generates the binding force of *jus cogens* rules on the dissenting minority.

### 2.2.3. The Concept of Fundamental Shared Values of the International Community

The aim of this section is to explain the concept of fundamental shared values of the international community and to put forward that they are the source of validity of *jus cogen* rules. As discussed, based on the rule of recognition regarding *jus cogens* rules, the basis for the higher and universal status of *jus cogens* rules is the perception of large majority of the members of the international community that certain rules protect something so important that such rules cannot be derogated from by any member. The notion of fundamental shared values of the international community, which pertains to the belief of members of the international community as to what is fundamental to the existence of international community, properly fits into such content of a rule of recognition for *jus cogens*.

The notion of fundamental shared values of the international community contains two closely related concepts, ‘fundamental shared values’ and ‘international community’. To understand how fundamental shared values can serve as a source of validity of higher rules in the international sphere, the two concepts must be disentangled. Added to this, it is worth noting here that the concept of an international community does in itself reflect the social dimension of international constitutionalism. Therefore, an understanding of the interactions between the international community and its fundamental shared values, which can serve as a ground for the creation of international constitutional rules, should shed light on the

interaction between the social dimension and the normative dimension of the international community.

Regarding the concept of ‘values’ Rescher observes: ‘in the English language the word [value] is used in a somewhat loose and fluctuating way’.<sup>63</sup> The term ‘values’ carries different meanings depending on how the term is employed in a specific context and discourse.<sup>64</sup> Generally, the uses of this term can be divided into an economic or monetary sense and a more normative sense.<sup>65</sup> Indeed the use of the term ‘values’ in this context pertains to the latter one.<sup>66</sup> In the Oxford Advanced Learner’s Dictionary, the term ‘values’ is given many different meanings; however, two of the definitions provided, which are relevant to the normativity and the idea of a source of validity of norms, are as follows. First, values are defined as the ‘quality of being useful or important’; and secondly, they are defined as ‘beliefs about what is right and wrong and what is important in life’.<sup>67</sup> Accordingly, values are closely associated with objective assessment regarding the quality of things or their ideality, whether they are useful, important, immoral or right, or not. This leads to criticism of the notion of values as a source of validity regarding their unchangeability, for values are rooted in the existence of objective truth.<sup>68</sup>

With respect to a decision-making process, Rescher explains that ‘man’s values are both clues to guide another’s explanation of his actions and guide to his own deliberation in the endeavour to arrive at decisions’<sup>69</sup>. According to him, ‘the fundamental role of a person’s values is not surprisingly, to underwrite the

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<sup>63</sup> Nicholas Rescher, *Introduction to Value Theory* (Prentice Hall 1969) 1.

<sup>64</sup> Otto Spijkers, *The United Nations, the Evolution of Global Values and International Law* (Intersentia 2011) 13 at footnote 2; See also Nicholas Rescher, ‘An Introduction To Value Theory’ (Prentice Hall 1969).

<sup>65</sup> Spijkers (n 64) 13–14.

<sup>66</sup> *Ibid.*

<sup>67</sup> Albert Sydney Hornby, ‘Oxford Advanced Learner’s Dictionary of Current English’ 1707–1708 (8th edn, OUP 2010)

<sup>68</sup> See e.g. Jean d’Aspremont, ‘Reinforcing the (Neo-) Hobbesian Representations of International Law’ (2007) SSRN paper 10; Jan Klabbers, ‘Constitutionalism Lite’ (2004) 1 *International Organizations Law Review* 31, 51–52.

<sup>69</sup> Rescher (n 63) 29.



evaluation of his action —to support “practical reasoning”, that is, his purposeful thinking about action in their broadest ramifications.’<sup>70</sup> and ‘if something is proper value, the consideration which establish this fact will have to be equally compelling for all’.<sup>71</sup> Accordingly, the values shared by people involved which is shaped through the deliberative participation of each based on human’s rationalization can as serve as a guide of collective decision-making including the articulation of legal rules. At the global level, Spijkes argues that, in a normative dimension, generally, values serve as ‘the core of global morality’ based on ‘a shared vision of an ideal world’.<sup>72</sup> Further, developed from the definition of values by Rokeach – the inventor the ‘Rokeach Value Survey’ – as ‘an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence’,<sup>73</sup> Spijkes proposes his own definition of global value, in a normative sense: ‘A global value is an enduring, globally shared belief that a specific state of the world, which is possible, is socially preferable, from the perspective of all human beings, to the opposite state of the world.’<sup>74</sup>

The term ‘fundamental’ is used here to modify the term ‘values’ to signify that values that can generate the validity for universal and higher rules must be so important that their deterioration endangers the survival of the international community. Also, they must be fundamental to the international community of mankind as a whole, not just any individual domestic society or groups of them holding particular social/ political/ cultural belief(s).<sup>75</sup> That is to say, they must be values whose fundamental nature is based on the ‘overlapping consensus’ of members of the international community from different domestic societies as well as

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<sup>70</sup> Ibid 12.

<sup>71</sup> Ibid 11.

<sup>72</sup> Spijkers (n 64) 14.

<sup>73</sup> Milton Rokeach, *The Nature of Human Values* (Free Place 1973) 5.

<sup>74</sup> Spijkers (n 64) 20.

<sup>75</sup> According to Oxford Advanced Learner’s Dictionary gives the meaning to the word ‘fundamental’ means as ‘serious and very important; affecting the most central and important parts of sth’ in Hornby (n 67).

religious, political, cultural and belief systems.<sup>76</sup> The idea of fundamentality corresponds to the requirement of the rule of recognition for *jus cogens* that certain rules that will have the status of *jus cogens* must be perceived by the large majority of the international community as non-derogable in their character. The fundamentality criterion requires a list of the universal and higher rules that can be enforced against the will of states and that affect the social and cultural ways of life of their peoples as little as possible to minimize their negative effect on the diversity of the world which reflects the level of freedom of people. This can serve as a mechanism to protect the value approach from being abused as a tool to satisfy the disguised hegemonic or imperialist desires of the superpowers, which is a vital criticism of the hierarchization of international law, either a value-based one or in general.<sup>77</sup>

With respect to the international community, it has frequently been referred to as ‘the repository of interests that transcend those of individual states *ut singuli*’.<sup>78</sup> For instance, when discussing the legal development of the personification of the international community, Weil explains that it is the acceptance and recognition by the international community that certain international rules are essential for the protection of the fundamental interests of the international community that transforms ordinary international rules into higher peremptory rules. This, to some extent, signifies that the international community can possess its own fundamental interests.<sup>79</sup> According to Tasioulas, the communitarian approach ‘denies the priority of the state over international society’.<sup>80</sup> Simma and Paulus explain that ‘the element which distinguishes a ‘community’ from its components is a ‘higher unity, as it were, the representation and prioritization of common interests as against the

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<sup>76</sup> See Rawls’ idea of overlapping consensus in John Rawls, *Political Liberalism* (Columbia University Press 2005) 134–172; see also Paulus (n 10) 329.

<sup>77</sup> See e.g. Weil (n 14) 441; Danilenko (n 27) 45–46.

<sup>78</sup> Bruno Simma and Andreas Paulus, ‘The ‘International Community’: Facing the Challenge of Globalization’ (1998) 9 EJIL 266, 268.

<sup>79</sup> Weil (n 14) 426.

<sup>80</sup> John Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’ (1996) 16 OJLS 85, 117.

egoistic interests of individuals.’<sup>81</sup> Accordingly, the first key question to explore may be what grants a community higher unity according to such a notion. The answer may lie in the differentiation of communities from societies.

Simma and Paulus suggest that whilst societies only assume the ‘factual interdependence’ of their members, a community must possess ‘certain interests common to all its members and a certain set of common values, principles and procedures’.<sup>82</sup> For Abi-Saab, a prerequisite for the existence of a society is that:

...it must first attain a certain degree or threshold of intensity and stability (or normality) in relations among its members, enabling them to be identified and distinguished from other subjects found in the same sphere. In other words, it must be possible to trace the boundary between the group and its environment. Only if this society is welded together by a sense of community, even to very different degrees, over a broad range of matters (that is to say of interests and values), can it be aggregately designated a 'community'.<sup>83</sup>

Likewise, Fassbender argues that what unites a community is ‘a set of shared values’, and what reflects its higher level of unity is the personification of the international community, resulting in the international community’s ‘distinct legal personality’.<sup>84</sup> For Mosler, a psychological condition as ‘a general conviction that all these units [independent societies] are partners, mutually bound by reciprocal, generally applicable, rules granting rights, imposing obligations and distributing competences’ is one of the essential elements of a community.<sup>85</sup> Thus, based on such opinions, what essentially distinguishes societies from communities is the higher level of the unity of the members within the society and what results from such unity is the existence of common values, interests and rules commonly held by the members.

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<sup>81</sup> Simma and Paulus (n 78) 268.

<sup>82</sup> Ibid.

<sup>83</sup> Georges Abi-Saab, ‘Whither the International Community?’ (1998) 9 EJIL 248, 249.

<sup>84</sup> Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (MNP 2009) 71.

<sup>85</sup> Mosler (n 52) 18.

After dealing with the general concept of the international community, the question regarding membership of the international community is equally important in terms of generating an understanding of fundamental shared values as a source of higher rules and criteria to solve normative conflicts. The term ‘the international community of states’ in Article 53 generates another interpretive issue, i.e. whether it is only the beliefs of states that count towards the identification of fundamental values or if the beliefs of individuals also count, i.e. is membership of the international community exclusive to states?

Although one might argue that, given the explicit phrase ‘of States’ in Article 53 of the VCLT, it is only states whose views should be considered when determining *jus cogens* rules, it is proposed here that what is articulated in Article 53 is a codification of the unwritten secondary rule,<sup>86</sup> to which modification is possible, provided, based on Hart’s theory of secondary rules, that it is accepted by officials of the international legal system. One of the major developments of contemporary international law is the expansion of the international community to cover not only states but also non-state entities, as discussed earlier in Chapter III. The inclusion of other subjects of international law into the international community should mean that, in the context of *jus cogens*, apart from those of states, the views of other subjects of international law should count when considering what are the rules that the international community as a whole accepts as non-derogable rules. For example, De Wet opines that although, at present, the international community is still highly dominated by states due to their chief role in the international law-making mechanism, their prominence should not be taken as being equivalent to exclusivity as the international community includes subjects apart from states, notably

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<sup>86</sup> See e.g. the opinions of the Ecuadorian delegate, the US Delegate and the Iraqi Delegate to UNCLOT that rules regarding *jus cogens* were *lex lata* before they were codified in the VCLT, UNCLOT (Second Session), 19th and 20<sup>th</sup> Plenary Meetings, 96, 102 and 103. See also, Macdonald who argues that the concept codified in Article 53 has ‘a history almost as old as international law itself’ and ‘Article 53 is declaratory of international law except that it adds a certain organizational superstructure’, R St J MacDonald, ‘Fundamental Norms in Contemporary International Law’ (1987) 25 Canadian Yearbook of International Law 115, 132.

international and regional organizations.<sup>87</sup> Further, individuals have also been accepted as members of the international community as they possess an international legal personality,<sup>88</sup> for they are regarded as subjects of international law, both as right-holders in the light of international human rights and humanitarian law as well as duty-bearers in the regime of international criminal law.<sup>89</sup>

Appertaining to the membership of individuals of the international community, Bryde put forward the idea that humanity has already become a new source of validity of international rules, arguing: ‘The central role of human rights in this legal system, as well as the recognition of an ever expanding concept of the “Heritage of Mankind” point to the nature of international law’s new source of legitimacy: not the ensemble of states but mankind. International law has to derive from the people.’<sup>90</sup>

Trindade proposes that *jus cogens* rules that stand above the will of states and other subjects of international law derive from ‘human conscience’, for they can fill the gaps in ‘State voluntarism and unilateralism’ in the international legal system. According to him, *jus cogens* rules reflect the idea of an ‘objective justice’, fundamentally rooted in the municipal or international legal system, which entails fundamental values by which the aspirations of humankind as a whole can be achieved.<sup>91</sup>

Given the reality which repeats in the history of mankind, the decisions of states do not always conform with the interests of their peoples. Thus, *jus cogens* rules may perform their duty more aptly if their content is not limited to the perceptions of

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<sup>87</sup> Malcolm N. Shaw, *International Law* (6th edn, CUP 2008) 1298, and see *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949.

<sup>88</sup> See e.g. Crawford (n 16) 121.

<sup>89</sup> R.A. Mullerson, *Ordering Anarchy: International Law in International Society* (MNP 2000) 93.

<sup>90</sup> Bryde (n 1) 109–110.

<sup>91</sup> A.A. Cançado Trindade, ‘*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law’ [2008] XXXV *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* – OAS 3, 28–29.

states, especially in scenarios where there is no established legitimacy between the representative of states in the international forum and the people in such states. Equally importantly, stateless people would have no representative in the international forum and that would devalue the quality of international law as a constitutionalized legal system. Indeed, taking into consideration the opinions of other members of the international community would result in a stronger link between humanity as a constituent holder and *jus cogens* rules as constitutional primary rules of the international legal system.

Supporting evidence for expansion of the scope of membership of the international community can be found in the Articles on State Responsibility of 2001, In the Draft Articles, linkage of the international community to states is deliberately omitted by the ILC, notwithstanding the fact that such a linkage to states in the definition of peremptory norms in Article 53 of the VCLT has been raised by certain states. Such a proposal, as in the phrase ‘international community of states as a whole’, was refused by the ILC, explaining that

As a matter of terminology, it is sufficient to use the phrase “international community as a whole” rather than “international community of States as a whole”, which is used in the specific context of article 53 of the 1969 Vienna Convention. The insertion of the words “of States” in article 53 of the Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character.<sup>92</sup>

Weiss comments that this decision, as taken, reflects the deliberate intention of the ILC to opt for a broader articulation of the term, as employed in the *Barcelona Traction* case and subsequent international agreements. He opines that this rejection of including the phrase ‘of States’ supports the view that the international community is now composed of both state and non-state actors.<sup>93</sup> The use of the term ‘international community’ without the qualifying clause ‘of states’ also occurs in

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<sup>92</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 25, para. 18.

<sup>93</sup> Edith Brown Weiss, ‘Invoking State Responsibility in the Twenty First Century’ (2002) 96 AJIL 798, 804. See also *Barcelona Traction* Case, para. 33.

other recent legal instruments, such as in the Preamble to Article 5 of The Rome Statute of the International Criminal Court of 1998 and in the Preamble to the International Convention for the Suppression of the Financing of Terrorism of 1999.<sup>94</sup> In its Declaration on the Occasion of the Fiftieth Anniversary of the UN, the GA refers to ‘non-governmental organizations, multilateral financial institutions, regional organizations and all actors of civil society’ as concerned actors of the international community.<sup>95</sup> Therefore, as Fassbender proposes, ‘in contrast to the old society of states, the new international community includes all subjects of international law, and ultimately all human beings’.<sup>96</sup>

Obviously, however, this proposition leads to another problem of how the views of all members of the international community can be obtained. On this point, arguably, states, especially those in the democratic system, shall be presumed to represent the beliefs of their people. Added to this, in fact, the idea of resorting to the conscience of the community to determine overriding rules also occurs in the context of notions of public morality and public policy in domestic legal systems. Patently municipal systems encounter the same problem of how to identify the content of public morality or public policy. Nevertheless, the notion of public policy or public morality does seemingly perform its duty properly in a municipal legal system. This position was shared by the delegate from the Philippines to UNCLOT, who argued that although the rules of *jus cogens* are not clearly elaborated, in domestic law, terms such as ‘good customs’, ‘morals’ and ‘public policy’ are not given a precise scope and meaning either. However, the application of those terms in specific situations has never led to insurmountable difficulties.<sup>97</sup> Similarly, the Cypriot delegate held that the difficulty residing in the application is not unmanageable, given the fact that ‘the concept of public policy was not clearly defined and had been described as an

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<sup>94</sup> In the Preamble to the International Convention for the Suppression of the Financing of Terrorism of 1999, it states that the party states to this convention consider ‘the financing of terrorism is a matter of grave concern to the international community as a whole’.

<sup>95</sup> A/RES/50/6, 40th plenary meeting, 24 October 1995, para. 17.

<sup>96</sup> Fassbender (n 84) 71.

<sup>97</sup> UNCLOT (Second Session), 19<sup>th</sup> Plenary Meeting, 95.

‘unruly horse’ but ways and means had been found to tame it.’<sup>98</sup> By analogy with the application of the public-order concept in the domestic legal system it is, consequently, suggested that the only method for extracting the content of *jus cogens* is via judicial determination, and therefore it is left to the courts to identify the *jus cogens* rules dwelling within the international legal system by transforming fundamental social values into legal imperatives.<sup>99</sup> Therefore, pragmatically, it is to be accepted that it is courts that implicitly determine the perceptions of the international community via the means available to them. In the domestic context, Friedman proposes that, in identifying the fundamental rules of the community, judges should consider ‘the general state of contemporary legislative policy’ to be the first place to seek information to identify such rules; however, he also argues also that judges should search beyond the legal dimension and delve into the social aspects of society, such as ‘the state of the organization’, ‘the groupings and pulls of major social forces’, ‘society’s pluralistic aspects’ and ‘the state of modern science’.<sup>100</sup> Likewise, on the international plane, in searching for universal rules based on fundamental shared values of the international community, international tribunals shall consider the general state of international rules and other social aspects of the international community. International tribunals can search through the expression of either states or non-state members of the international community, whether individuals, international organizations or NGOs. Gathering the perceptions of both state and non-state entities on what the shared values of the international community are would enable international tribunals to identify more accurately the intentions of the international community. If courts are restrained to take into consideration only state wills, especially when disputes involve stateless persons whose interests are not genuinely represented by any state. This change in the use of the term ‘international community’ by officials of the international legal system without referring to the phrase ‘of states’ can be taken as an unwritten modification to the secondary rule regarding the international community, and this will empower

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<sup>98</sup> UNCLOT (Second Session), 19<sup>th</sup> Plenary Meeting, 103.

<sup>99</sup> Carnegie Endowment for International Peace as cited in O’Connell (n 54) 82.

<sup>100</sup> Wolfgang Friedmann, ‘Legal Philosophy and Judicial Lawmaking’ (1961) 61 Columbia Law Review 821, 843–845.



law-applying officials to seek individuals or other entities in the international community when determining the content of *jus cogens* rules. Further, at this point the broader meaning of official in the international legal system in which the law-ascertaining role of international legal scholars has been recognized, comes in handy. The work of international legal scholars in their non-state capacity which is normally independent from states can help to identify the fundamental shared values of the international community which more genuinely reflects the view of international community of humankind. Moreover, the information regarding what constitutes fundamental shared values and the content of *jus cogens* rules generated by international legal scholars from different social and cultural backgrounds is assimilated and discussed and this will help to clarify the fundamental shared values of the international community in a broadly representative and less state-dominated fashion, which the courts can consult when decide the case regarding *jus cogens*.<sup>101</sup> Currently the ILC has included the topic of *jus cogens* in its long-term programme of work.<sup>102</sup> The work of ILC could help to clarify the substantive content of *jus cogens* rules based on the fundamental shared values of the international community, which is not articulated limitedly based on the states' or state officials' beliefs, and international courts are officially empowered to refer to the work of the ILC as a tool to ascertain the content of *jus cogens* based on the secondary rules of the international legal system as codified in Article 38 (1)(d), as discussed earlier.

Bring together the idea of values and a communitarian approach at this stage. Based on the definition of values given before, it can be construed that when actors in the international society share a common belief or perception about what is useful or important to their life, or what is right or wrong, which would serve the common interest of everyone in society, such common values or common rules built on those

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<sup>101</sup> Schachter argues that the community of international lawyers plays an important role in ascertaining the rules based on natural justice and injecting them into the work of legal officials such as judgments and international agreements, Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217, 225–226.

<sup>102</sup> Report of the ILC Sixty-sixth session,(5 May–6 June and 7 July–8 August 2014), ILC Report A/69/10, para. 268

values will unite international society into a community. That is to say, fundamental shared values are an indicator of what are the fundamental interests of the international community via informal collective decision-making and the articulation of shared enduring beliefs regarding certain objective truth. Elaboration of the interplay between common interests, shared values and universal basic rules is helpful in creating an understanding of how shared values could serve as a source of validity of constitutional rules in the international legal system. The importance of fundamental shared values lies in the fact that the members of the community commonly believe that holding such values will protect the fundamental interests of the community, which is essential to the survival of a community and its members. With such importance, shared value-based rules will apply universally to all components of the community, with no exceptions. On the point of the universal application of basic norms, Tasioulas has observed that subjection to the basic norms is a compulsory matter, not depending on state will; moreover, as such, the basic rules entail ‘the fundamental aspects of the antecedent commitment to a world public order’ which countenances the notion of an international community.<sup>103</sup> This elaboration does not only help to create an understanding of how values can generate the supreme and universal character of rules, but also shows the interconnection of the social dimension of the constitutionalization of international society – the creation of an international community – and the normative dimension – the creation of international constitutional rules –.

One might observe that, essentially and simply, the importance of shared values derives from the fact that they exist supposedly to protect common interests which are superior to individuals’ interests. Thus, the common-interest approach is also proposed as another way to explain the higher status of *jus cogens*, and one of the key arguments that supporters of common-interest theory employ to attack the value approach is based on its objective character. Denying the role of values as a

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<sup>103</sup> Tasioulas (n 80) 117.

foundation of international law and resorting to common interest as an alternative,<sup>104</sup> d'Aspremont perceives global values as absolute and immutable, whilst he regards global interests as 'fundamentally relative, context-dependent and ever-evolving'.<sup>105</sup> Based on the objectivity of truth that values rely on, he refuses the explanation of the binding force of international law based on global values, as he insists that the binding force of international law and the foundations of the international legal system are 'not immutable and are subject to constant and contingent changes'.<sup>106</sup>

However, the values that are proposed as a source of validity of international constitutional rules here are not immutable and absolute. Differing from the natural-law notion, values are beliefs regarding objective truth, not as an objective truth themselves. Accordingly, although objective truth, if it exists, must be immutable and absolute, beliefs in it do not necessarily share the same character and such beliefs can change. However, because it is a belief based on an objective assessment of what is right or wrong, moral or immoral, important or not, such belief can generate the validity or legal force of law. This understanding of values is sustained by Spijkers, who defines a global value as an enduring belief regarding the socially preferable conditions of a world shared by all human beings.<sup>107</sup> He explains that by referring to values as 'enduring' beliefs, this implies both the enduring quality of values and their evolving characteristics. He proposes that the list of global values is ever-changing, since it is not the case that a particular list of values has directed a course for the world since the beginning of time and will keep on doing so until the end of time, for some behaviours that are now generally deemed to be immoral were once very commonly morally acceptable in earlier days.<sup>108</sup> The obvious examples

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<sup>104</sup> D' Aspremont (n 68); Jean d' Aspremont, 'The Foundations of the International Legal Order' (2007) SSRN paper <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1265525](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265525)> accessed 10 July 2015.

<sup>105</sup> D' Aspremont (n 68) 10.

<sup>106</sup> Ibid; d' Aspremont (n 104) 7.

<sup>107</sup> Spijkers (n 64) 20.

<sup>108</sup> Ibid 50.

supporting this argument are human histories regarding slavery and colonialism.<sup>109</sup> The values perceived as good from the viewpoint of one generation are not necessarily good in the eyes of other generations, as values might simply be just an indication of the widespread adherence to certain influencing ideologies at a particular point in history.<sup>110</sup> Nevertheless, what has changed is not objective truth itself but rather the belief in it. The enduring character of values matches the character of the indelibility of constitutional rules; values as a source of validity of constitutional rules should not be prone to change as they establish the structure of society; however, they should not construct an eternal prison for future generations.

If the value approach is dropped here and a common-interest approach is adopted instead, a resort to common interest alone might not suffice to explain the binding force of international constitutional rules to those who dissent from being bound by them. For example, the idea of a common interest might face difficulties in explaining why a dissenting minority, that has never consented to be bound by or disagrees with the non-derogable character of certain rules that earn the status of *jus cogens* on the ground that they are not in their interest which would be subjective in its nature, should respect such rules. However, as illustrated before, the belief that certain norms are fundamental to the survival of the international community generates a force of law from which members of the community cannot dissent, if it does not affect the fundamental interests of the dissenting minority. Although one might argue that the common-interest approach can explain the binding force of constitutional rules on a minority by simply arguing that the common interest is more important than the individual state's or a group of states' interests, this would also resort to an objective assessment of the importance of things as a driving force to make a minority abide by such rules, which is that the interest of the majority is more important than that of a minority. Added to this, in a scenario where international constitutional rules exist in the form of unwritten rules, like *jus cogens*, then, in some

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<sup>109</sup> Ann Florini, 'The Evolution of International Norms' (1996) 40 *International Studies Quarterly* 363, 363.

<sup>110</sup> Christine E.J. Schwöbel, *Global Constitutionalism in International Legal Perspective* (MNP 2011) 121.

situations, it is virtually impossible for an adjudicator to survey the opinions of all states to determine whether the norms in questions are in the common interest of every state or a majority of them. Hence, what courts actually do is to resort to values and where possible refer to the express wishes of states that are available to support the importance of such rules and to confirm that they serve the common interest. For example, in the *Reservations to the Genocide Convention Case*, the ICJ stated its opinion thus:

[I]ts object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of **those high purposes** which are the *raison d'être* of the convention.<sup>111</sup>

Likewise, in the *South-West Africa Case*, the Court expressed the view that: 'Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out.'<sup>112</sup>

Accordingly, it will be argued here that the notion of values and the concept of common interest complement each other and explain the ground for the higher status of constitutional norms. Allot offers a very helpful illustration of the interactions among law, values and common interest. Allot regards values as an idea that can serve as a ground for choosing between possibilities; and accordingly, values help to 'enable consciousness to move from desire and obligation to will and action in conformity with the rest of consciousness'.<sup>113</sup> Moreover, he explains the three functions of law, including international law, which show the interaction of law with values and common interest as follows: '(1) Law carries a structure and system of society through time. (2) Law inserts the common interest into the behaviour of

<sup>111</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951), 23 (emphasis added).

<sup>112</sup> *South-West Africa, Second Phase, Judgment*, I.C.J. Reports 1966, para. 50.

<sup>113</sup> Philip Allott, *Eunomia: New Order for a New World* (OUP 1990) 48.

society-members. (3) Law establishes possible futures for society, in accordance with society's theories values and purposes.'<sup>114</sup> Further, for him, 'Law requires that society have theories which explain and justify law within social consciousness (the public mind) and within individual consciousness ... Such theories reflect and condition society's values and purposes'.<sup>115</sup>

Based on this caveat, values function as guidelines offering direction, whereby the law demands that the behaviours of its subjects conform, and it is these shared values that will shed light on what should be deemed to be the fundamental interest, which will be merged with the behaviours and consciousness of members of society. Accordingly, the notion of fundamental shared values of the international community can logically explain the higher and universal character of higher rules in the international legal system.

#### 2.2.4. Link between Jus Cogens and Fundamental Shared Values

Fundamental shared values of the international community have been referred to in order to explain the limitations of state sovereignty without their consent, including *jus cogens*. To begin with, long ago, Verdross proposed the existence of shared values and their importance to the international community arguing that 'every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis'.<sup>116</sup> He explains:

...the law of civilized states starts with the idea which demands the establishment of a juridical order guaranteeing the rational and moral coexistence of the members. It follows that all those norms of treaties which are incompatible with this goal of all positive law – a goal which is implicitly presupposed – must be regarded as void<sup>117</sup>

<sup>114</sup> Philip Allot, 'The Concept of International Law' (1999) 10 EJIL 31, 31.

<sup>115</sup> Ibid 32.

<sup>116</sup> Alfred von Verdross, 'Forbidden Treaties in International Law: Comments on Professor Garner's Report on "The Law of Treaties"' (1937) 31 American Society of International Law Proceedings 571, 576.

<sup>117</sup> Ibid 574.

In light of the underlying reason for the existence of the international community, Retter proposes that it should be taken into consideration that states cannot simply exist as autonomous units as they are necessarily and inextricably dependent on each other. Accordingly, the international community is created by shared objectives requiring co-operation for the implementation of their common aims, which serves as a fundamental reason for the existence of the international community.<sup>118</sup>

Regarding the universal application and non-derogability of *jus cogens*, Hossain expounds that such a binding force derives from ‘the acceptance by the large majority of states’ of such a norm and this contributes to a universal legal duty on every member of the international community because *jus cogens* rules ‘are superior rules and bear the common values for the international community’.<sup>119</sup> On this point, Conklin suggests argues that ‘without the peremptory norm, there would not be a (domestic or international) legal order of which the states are legal entities’<sup>120</sup>; thus, he emphasizes that the derogation of *jus cogens* is equivalent to the deterioration of the very survival of states.<sup>121</sup> This train of thought explains the legitimacy of how a large majority of states in the international community might impose the binding nature of certain rules and their non-derogability on a minority. *Jus cogens* is a peremptory norm on condition that the majority of the international community believe that such rules serve its fundamental shared values and that such rules are fundamental to its survival, which equates to the survival of each and every state in it. Therefore, minority members of the international community are bound by the norms that the majority, composed of essential components of it and reflecting its conscience, deem to be fundamental to it, and such a minority cannot derogate from such rules that are so fundamental.

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<sup>118</sup> Retter (n 49) 562.

<sup>119</sup> Hossain (n 8) 78.

<sup>120</sup> William E. Conklin, ‘The Peremptory Norms of the International Community’ (2012) 23 EJIL 837, 857.

<sup>121</sup> Ibid 856–857.

The link between *jus cogens* and fundamental values has been employed in judicial reasoning as a ground for the higher status of *jus cogen* rules at both international level and domestic levels. With respect to international jurisprudence, in *Prosecutor v. Anto Furundžija*, ICTY explains the higher status of *jus cogens* rules by referring to the importance of the values that such rules nurture: ‘[b]ecause of the importance of the values it [the prohibition of torture] protects, this principle has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules.’<sup>122</sup> At the domestic level, The U.S. 9th Circuit in the *Siderman de Blake v. Argentina* case, explicitly referring to fundamental values as a source of validity of *jus cogens* and arguing for the superiority of *jus cogens* rules over state-will based rules, ruled:

In contrast, *jus cogens* "embraces customary laws considered binding on all nations", and "**is derived from values taken to be fundamental by the international community**, rather than from the fortuitous or self-interested choices of nations,". Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent.<sup>123</sup>

The proposition of fundamental shared values of the international community as a source of validity of *jus cogens* can avoid the shortcomings that arise in consent theory and natural theory. First, unlike consent theory, the shared-value model is more flexible in terms of state consent, as a large majority of states may be sufficient to satisfy the condition for the creation of *jus cogens*. Secondly, the shared-value model can accommodate modifications to *jus cogens* and its non-retroactive effect, which contradicts natural-law theory.

Based on the notion of fundamental shared values as the source of the universal and

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<sup>122</sup> *Prosecutor v. Anto Furundžija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, para 153.

<sup>123</sup> *Siderman De Blake V. Republic of Argentina*, U.S. 9th Circuit Court of Appeals 965 F.2d 699 (9th Cir. 1992) 965 F.2d, 715 (emphasis added). The quoted part in the Court’s ruling is from Klein, ‘A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts’(1988) 13 Yale Journal of International Law 332, 350–351 and 351.



non-derogable character of *jus cogens*, when the condition of their acceptance as law with a peremptory character by the international community has been fulfilled, general international law with the character of *jus dispositivum*, the validity of which derives from state wills, will be transferred into universal international law with the character of *jus cogens*, the validity of which derives from the fundamental shared values of *jus cogens*. For instance, the belief in the essentiality of the peaceful coexistence of states to the survival of the international community generates the validity of the *jus cogens* status of the rule prohibiting the use of force and humanitarian rules. Likewise, the importance of the protection of fundamental human rights accounts for the validity of the *jus cogens* status of rules pertaining to the right to life, the right to self-determination, the prohibition of torture and the prohibition of genocide.

Given the notion proposed here, that *jus cogens* rules earn their validity from the shared values of the international community, if the fundamental shared values that are a source of validity of *jus cogens* can be identified, this might shed some light on the substance of *jus cogens*, or at least their categories. Equally importantly, it will shed light on the contribution of *jus cogens* rules to the constitutionalization of international law. When speaking of universal international law grounded in the existence of the international community, Lauterpacht explains this as ‘the reason of the thing’ expressive of the necessity of securing the co-existence and peaceful intercourse of States and of safeguarding, as yet to an imperfect degree, the fundamental rights of the individual who is the ultimate subject of all law’.<sup>124</sup> Based on this explanation, the peaceful co-existence of states and the protection of fundamental human rights are values that constitute international universal law, i.e. *jus cogens*. A number of scholars including, to name but a few, Retter, Criddle, Fox-Decent, McDougal, Lasswell and Reisman, also share the legal opinion that peaceful coexistence and the protection of human rights are among such shared values or

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<sup>124</sup> Hersch Lauterpacht, *International Law Being the Collected Papers of Hersch Lauterpacht Volume: 1 The General Works* (E. Lauterpacht ed., CUP 1970) 114.

objectives that demand coordination for their fulfilment.<sup>125</sup> Thus, at the very least, the peaceful co-existence of states and the protection of fundamental human rights serve as fundamental shared values, as a source of the validity of *jus cogens*. Hence, two categories of *jus cogens* may be articulated: *jus cogens* rules that aim for the peaceful co-existence of states and those aiming for the protection of fundamental human rights.

#### A. *Jus Cogens* Rules Aiming for the Sustaining Peaceful Co-Existence of States

In this category, the prohibition on the use of force is a conspicuous example of international norms having the character of *jus cogens*, as referred to by the ICJ.<sup>126</sup> In his separate opinion in the *Palestinian Wall* case, Judge Elaraby indicates that:

The prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter, is no doubt the most important principle that emerged in the twentieth century. It is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted.<sup>127</sup>

Further, Orakhelashvili considers that the right to self-defence of a state, which is part of the prohibition on the use of force as its exception, is perceived as *jus cogens*, basing his argument on the ICJ's *Nuclear Weapons Case*<sup>128</sup> where the court ruled that the right to resort to self-defence is the fundamental right of every state to survival, and the Court, according to Orakhelashvili, 'hesitated to qualify the right even by reference to non-use of nuclear weapons'.<sup>129</sup> In addition, with respect to humanitarian law which can be categorized as rules protecting the peaceful co-existence of states, in the *Kupreškić* case, the ICTY affirmed that the obligations

<sup>125</sup> See Retter (n 49); Criddle and Fox-Decent (n 48); Myres S McDougal, Harold D Lasswell and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980).

<sup>126</sup> Danilenko (n 27) 42.

<sup>127</sup> The Separate Opinion of Judge Elaraby, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, 246.

<sup>128</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 263.

<sup>129</sup> Alexander Orakhelashvili (n 28) 50–51.

arising from international humanitarian law are absolute and non-derogable.<sup>130</sup>

Apart from the rules relevant to the use of force and armed conflict, certain rules dealing with the idea of the common property or common heritage of the international community can be regarded as falling into this category, as they prevent the emergence of grave economic conflicts which often serve as the main reason behind the use of force or armed conflict. Added to this, in his 1967 Article, Scheuner also suggested a rule whereby outer space shall be devoted for peaceful purposes beneficial to all humans should be incorporated into *jus cogens* in the future.<sup>131</sup> The legal regime of the common heritage of mankind can be perceived to fall into this category as well. Regarding the legal regime of the seabed, developing countries claim that the principle of the common heritage of mankind has the status of *jus cogens*.<sup>132</sup> Take for instance, the letter sent from the Group of 77 to the President of the Third United Nations Conference on the Law of the Sea, protesting against relevant unilateral legislation and limited agreements among developed states claiming the right of unilateral exploitation of the seabed. It is stated that: ‘Given that the principle of the common heritage of mankind is a customary rule which has the force of peremptory norm, the unilateral legislation and limited agreements are illegal, and are violations of this principle.’<sup>133</sup> Nonetheless, there was a clear objection regarding this proposal from a very few Western countries.<sup>134</sup> Another debate regarding the peremptory character of the common heritage of mankind regime focuses on Article 311 (6) of the 1982 United Nations Convention on the

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<sup>130</sup> Prosecutor v. Zoran Kupreškić & et al., Case No. IT-95-16, Trial Chamber II, 14 January 2000, para. 511.

<sup>131</sup> Ulrich Scheuner, ‘Conflict of Treaty Provisions with a Peremptory Norm of General International Law, Comments on Arts. 50, 61 and 67 of the ILC’s 1966 Draft Articles on the Law of Treaties’ [1967] ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 520, 526.

<sup>132</sup> Danilenko (n 27) 58.

<sup>133</sup> UN Doc. A/Conf. 62/106 (1980), XIV UNCLOS, 112 (Letter from the Chairman of the Group of 77 to the President of the Third United Nations Conference on the Law of the Sea).

<sup>134</sup> Danilenko (n 27) 58; See e.g. the statement of the US delegation: ‘The concept of the common heritage of mankind in the Convention adopted by the Conference is not *jus cogens*. The Convention text and the negotiating record of the Conference demonstrate that a proposal by some delegations to include a provision on *jus cogens* was rejected.’ XVII UNCLOS, A/CONF.62/WS/37 and ADD.1-2, 243.

Law of the Sea which provides that ‘States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.’ Such a limitation on amendments to the rule regarding the status of the Area as the common heritage of mankind can of course be used to support the non-derogable character of such a rule. The status of the principle of a common heritage of mankind as a *jus cogens* rule is compatible with the idea behind the Declaration of the Preparatory Commission for the Seabed Authority which insists on the illegality of exploitation of the seabed conflicting with rules stipulated in the United Nations Convention on the Law of the Sea.<sup>135</sup>

Nevertheless, one argument against this notion is based on the fact that during the negotiation process the reference to the term ‘*jus cogens*’ was taken away from the wording of Article 311.<sup>136</sup> Therefore, as Harrison argues, the intention of state parties to attribute a peremptory status to the relevant rules cannot simply be extracted on a textual basis.<sup>137</sup> Added to this, according to the ILC, it is incorrect to say that ‘a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void.’<sup>138</sup> Thus the peremptory character of this rule is still debatable and what should be the determining question is whether or not the peremptory character of the principle of a common heritage of mankind has been accepted by a large majority of the international community, which represents its essential components.

#### B. Rules Aiming for the Protection of Fundamental Human Rights

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<sup>135</sup> UN Doc. LOS/PCN72, at 2, (1985) as cited in Danilenko (n 27) 60.

<sup>136</sup> M Nordquist, *United Nations Convention on the Law of the Sea, 1982 : A Commentary* (Martinus Nijhoff, 1989), 241 as cited in James Harrison, *Making the Law of the Sea : A Study in the Development of International Law* (CUP 2011) 133.

<sup>137</sup> Ibid.

<sup>138</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 50, para. 1.

Despite the fact that detailed contours of *jus cogens* are difficult to map out, it is hard to reject the part of human rights within it due to ‘an almost intrinsic relationship between *jus cogens* and human rights’.<sup>139</sup> The perception of human rights as intrinsic to *jus cogens* rules can be traced back to even prior to the adoption of the VCLT.<sup>140</sup> This perception can be seen in Judge Tanaka’s dissenting opinion, where he articulates:

If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, ... surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.<sup>141</sup>

Arguably, not every right in the Universal Declaration on Human Rights and Fundamental Freedoms, or other important human rights instruments such as the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, has the status of *jus cogens*.<sup>142</sup> Regarding this point, Scheuner explains that although certain human rights provisions place obligations on states, not all of them have the same level of importance. However, those protecting ‘human dignity, personal and racial equality, life and personal freedom’ certainly belong to a peremptory category.<sup>143</sup> Higgins is of the opinion that ‘there certainly exists a consensus that certain rights – the right to life, to freedom from slavery or torture – are so fundamental that no derogation may be made’.<sup>144</sup> Prohibitions on genocide, slavery and piracy were listed as examples of *jus cogens* in Draft Articles on the Law of Treaties with commentaries in 1966.<sup>145</sup> With respect to piracy, Scharf opines that

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<sup>139</sup> Andrea Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’ (2008) 19 EJIL 491, 491.

<sup>140</sup> Ibid 492.

<sup>141</sup> Dissenting Opinion of Judge Tanaka, *South-West Africa, Second Phase*, Judgment, I.C.J. Reports 1966, 298.

<sup>142</sup> See Scheuner (n 131) 526–527; Alexander Orakhelashvili (n 28) 56.

<sup>143</sup> Scheuner (n 131) 526–527.

<sup>144</sup> Rosalyn Higgins, ‘Derogations Under Human Rights Treaties’ (1976) 48 BYBIL 281, 282.

<sup>145</sup> ILC, Draft Articles on the Law of Treaties with commentaries 1966, 248.

‘[p]iracy often consists of heinous acts of violence and depredation’<sup>146</sup> and in *U.S. vs. Smith* case, the US Supreme Court justified the universal jurisdiction over crimes of piracy based on piracy being *hostis humani generis* [enemies of all humankind].<sup>147</sup>

In the *Questions Relating to the Obligation to Prosecute or Extradite* case, the ICJ explicitly confirmed that ‘the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)’,<sup>148</sup> whilst in the Kupreškić case, the International Criminal Tribunal for the former Yugoslavia<sup>149</sup> expressly stated that the prohibition of genocide is a peremptory norm of international law.<sup>150</sup> With regard to crimes against humanity, the Inter-American Court of Human Rights confirmed its status of *jus cogens*.<sup>151</sup>

Discussing the right of people to self-determination seems to secure its part in *jus cogens*; in its Resolution 35/118, the GA reaffirmed the non-alienability of the rights of peoples to self-determination and independence in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>152</sup> Further, the *jus cogens* status of the right against discrimination has been confirmed by the Inter-American Court of Human Rights in *Juridical Condition and Rights of the Undocumented Migrants* case, ruling that:

[T]he principle of equality before the law, equal protection before the law and

<sup>146</sup> Michael P. Scharf, *Customary International Law in Times of Fundamental Change Recognizing Grotian Moments* (CUP 2013) 92.

<sup>147</sup> *United States v. Smith*, United States Supreme Court, 18 U.S. 5 Wheat. 153 (1820), 156.

<sup>148</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, I.C.J. Reports 2012, para. 99.

<sup>149</sup> Hereinafter, ‘ICTY’.

<sup>150</sup> *Kupreškić Case*, para. 520, see also *Prosecutor v. Kayishema and Ruzindana*, the International Criminal Tribunal for Rwanda, Case No. ICTR-95-1-T (Trial Chamber), May 21, 1999, para. 88: [T]he crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*.

<sup>151</sup> *Almonacid-Arellano et al. v. Chile*, Judgment of September 26, 2006 (Preliminary Objections, Merits, Reparations and Costs) Inter-Am. Ct. H.R. (Series C ) No. 154 (2006), para. 99. See also *Sarei v. Rio Tinto*, PLC, 487 F.3d 1193, 1202 (9th Cir. 2003) where the US court of appeals affirms the status of *jus cogens* of crimes against humanity.

<sup>152</sup> Plan of Action for Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/35/118 of 11 December 1980.

non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.<sup>153</sup>

After discussing the content of current rules that qualify as *jus cogens* rules, one important point that needs to be made here is that those rules are primary rules that create an obligation, and none of them are secondary rules. Simma argues that because the rules of peremptory norms derive their special character from the ‘substantive’ importance of the interests protected by the rule; therefore, ‘not all rules which are important or even indispensable, for the existence and working of international law belong to that category [*jus cogens*]’.<sup>154</sup> For example, when discussing this issue, Czapliński and Danilenko argue that the *pacta sunt servanda* rule, despite being of fundamental importance to the law of treaties and international law as a whole, does not constitute such a peremptory rule. Their reason is that if it were *jus cogens*, every agreement infringing the *pacta sunt servanda* rule would be void or nullified in light of Article 53; however, Article 30 of the Vienna Convention of 1969 stipulates its legal effect in the case of successive treaties, i.e. *lex posterior* prevails over earlier one(s). Hence, it can be inferred that *pacta sunt servanda* does not belong to *jus cogens*.<sup>155</sup>

### ***2.3. Rule of the Non-derogability of Jus Cogens and the Hierarchical Structure of the International Legal System***

In the preceding section, the link between fundamental shared values of the international community and *jus cogens* was established to provide a theoretical explanation for the non-derogable character of *jus cogens* rules. This section will discuss a secondary rule of the non-derogability of *jus cogens* to shed light on the details of the hierarchical structure constructed by it. It will begin with acceptance of

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<sup>153</sup> *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Series A) No. 18 (2003), para. 101.

<sup>154</sup> Simma (n 40) 288.

<sup>155</sup> W. Czapliński and G. Danilenko, ‘Conflicts of Norms in International Law’ (1990) 21 *Netherlands Yearbook of International Law* 3, 10.

the rule of non-derogability of *jus cogens* by officials of the international legal system, to confirm the hierarchical structure, and then move on to consider its effect and scope to provide details of the hierarchical structure.

2.3.1. Acceptance of the Secondary Rule of the Non-derogability of Jus Cogens by Officials as a Secondary Rule of the International Legal System

In this section, acceptance of the secondary rules of *jus cogens* by officials of the international legal system will be elaborated to confirm their status as a secondary rule of the international legal system. This is vital for the establishment of a constitutionalized international legal system since the acceptance of the secondary rule of the non-derogability of *jus cogens* would confirm the hierarchical legal structure of the international legal system.

First of all, based on the notion that *jus cogens* came into being before UNCLOT,<sup>156</sup> the codifying of the rule of the non-derogability of *jus cogens* in the 1969 VCLT itself, as well as the 1982 Vienna Convention on Treaties Between States and International Organizations or Between International Organizations, reflects, of course, acceptance of the rule of the non-derogability of *jus cogens* by states as officials in the international legal system. The growing acceptance of the notion of *jus cogens* is also reflected in the fact that states, which are both subjects and officials of the international legal system, increasingly rely on the concept of *jus cogens* in their official legal arguments; and on a law-making point, states attempt to achieve fundamental and radical alternation to the existing international law via their *jus cogens*-related claims.<sup>157</sup>

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<sup>156</sup> For example, Mr. Yasseen, the Iraqi delegate to UNCLOT, commented that ‘the international legal order already recognized a hierarchy of international rules. Those were rules which took priority over others, so that it could be said that the system provided for in article 50 (Currently 53) was already a part of positive international law’, UNCLOT (Second Session), 20<sup>th</sup> Plenary Meeting, 103 (see also the similar opinions of the delegates from the US and Ecuador).

<sup>157</sup> Danilenko (n 27) 43.



With respect to international tribunals, there is an array of cases in which the notion of *jus cogens* has been referred to or applied by different tribunals. By way of illustration, in *the Nicaragua* case, the court affirmed *jus cogens* as an accepted rule in international law, relying on the status of the prohibition on the use of force as *jus cogens* when deciding the case.<sup>158</sup> Whilst in the *Questions Relating to the Obligation to Prosecute or Extradite* case, the ICJ explicitly affirmed that the prohibition of torture is part of customary international law and has become *jus cogens*,<sup>159</sup> in *Legality of the Threat or Use of Nuclear Weapons*, the court confirmed the status of humanitarian law as *jus cogens*.<sup>160</sup> Likewise, in the *Kupreškić* case, the ICTY affirmed that the obligations found within international humanitarian law have an absolute and non-derogable character,<sup>161</sup> and in the *Furundžija* case, ICTY affirmed the *jus cogens* character of the rules on the prohibition of torture.<sup>162</sup> However, despite a number of cases where international tribunals apply or refer to the concept of *jus cogens*, it is very difficult to find ones where the court renders norms invalid on the ground of violation of the rule of the non-derogability of *jus cogens*. This might be because it is very unlikely that states will enter into treaties that conflict with *jus cogens*.<sup>163</sup> However, in his dissenting opinion in the Wimbledon case, Judge M. Schücking construed that by permitting the passage of a ship carrying contraband, Germany would have violated the duties of a neutral state, which constitutes an offence under international law, and Article 380 of the Peace Treaty of Versailles, obliging Germany to permit such passage, was not enforceable, explaining:

It cannot have been the intention of the victorious States to bind the Reich, by means of the Versailles Treaty, to commit such offences as against third States. It would, moreover, have been impossible to give effect to such an intention, because a legally binding contractual obligation cannot be undertaken to perform acts which would violate the rights of third parties. For this reason it

<sup>158</sup> *Military and Paramilitary Activities in and against Nicaragua, (Merits) Case*, para. 190.

<sup>159</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, para. 99.

<sup>160</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, para. 83.

<sup>161</sup> *Kupreškić* case, para. 511.

<sup>162</sup> *Furundžija* case, paras 137–139, 144, 151, 153–154 and 160.

<sup>163</sup> Markus Petsche, 'Jus Cogens as a Vision of the International Legal Order' (2010) 29 Penn State International Law Review 233, 249.

seems difficult to admit a right, as between neutral States, enforceable at law to trade in and to transport contraband, whereas the same interests are unprotected as against a belligerent.<sup>164</sup>

As the duty of a neutral state to forbid the movement of troops or convoys of either munitions of war or supplies across the territory of a neutral state can be perceived as a rule with *jus cogens* character,<sup>165</sup> this can be seen as an example of officials applying the rule of the non-derogability of *jus cogens* to invalidate a conflicting norm.

Added to this, the concept of a peremptory norm of general international law has also been referred to in Articles 26, 40 and 50<sup>166</sup> of the 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, demonstrating that the concept of *jus cogens* is accepted as the basis for further development of international law.

As illustrated before, there exists evidence for the official acceptance of the secondary rule of *jus cogens*, and this would confirm the status of the secondary rule of non-derogability of *jus cogens* as a secondary rule of the international legal system.

### 2.3.2. Scope of the Application and Legal Consequences of the Rule of the Non-derogability of Jus Cogens

To start with the scope of application of the rule of the non-derogability of *jus cogens*, as only the case of treaties conflicting with *jus cogens* has been expressly codified in the VCLT, one might question whether or not non-derogability also

<sup>164</sup> Dissenting Opinion by M. Schücking, *S.S. Wimbledon (U.K. v. Japan)*, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17), paras 86–93

<sup>165</sup> Markus Petsche (n 163) 248; See Egon Schwelb, ‘Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission’ (1967) 61 *American Society of International Law* 946, 950.

<sup>166</sup> See Articles 26, 40, and 50 of the 2001 Draft articles on the Responsibility of States for Internationally Wrongful Acts.

applies to scenarios where other types of norms conflict with *jus cogens*. Appertaining to customary international law and unilateral acts conflicting with *jus cogens*, although not expressly governed by written treaties, there exists a widely agreed legal opinion that secondary rules for the non-derogability of *jus cogens* should be able to nullify not only conflicting treaties but also international customary law and unilateral acts.<sup>167</sup> One convincing reason offered by Zemanek is that ‘[t]he concept of peremptory norms would not make sense if such norms affected only one source of legal rights and obligations, and not the other’.<sup>168</sup> Also, Art. 41(2) of the ILC’s Draft Articles on the Responsibility of States provides: ‘no State shall recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law’.<sup>169</sup>

With respect to the consequences of violation of the rule of non-derogation, the VCLT deals with two different scenarios in which a treaty conflicts with *jus cogens*. First, if new treaties conflict with existing *jus cogens* the conflicting treaty will become void, and by virtue of Article 44(5) the rule of the separability of provisions does not apply. Secondly, Article 63 construes that any existing treaty conflicting with a new peremptory norm becomes void and terminates. Nonetheless, as the rule of separability is not expressly prohibited by the VCLT from applying to this case, there is room for the possibility that the rule of separability may apply to it. Crawford argues that even in the case of supervening *jus cogens*, where only one single provision of a treaty conflicts with newly emerging peremptory norms, the whole treaty is void or nullified. His reason is that Article 64 clearly stipulates that an

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<sup>167</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 325, Separate Opinion of Judge ad hoc Lauterpacht, para. 100 and also Paulus (n 10) 310–311 and 317; Simma (n 40) 288.

<sup>168</sup> Karl Zemanek, “The Metamorphosis of *Jus Cogens*: From an Institution of Treaty Law to the Bedrock of the International Legal Order?”, in *The Law of Treaties Beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford, New York: OUP, 2011), 394.

<sup>169</sup> Article 41(2) of the ILC’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts.

‘existing treaty’ in conflict with *jus cogens* becomes void and terminates.<sup>170</sup> However, a different opinion can be found in the ILC’s commentary on Article 63 (now Article 64),<sup>171</sup> which states that in the case of certain provisions of a treaty conflict with emerging *jus cogens*: ‘If those provisions can properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid.’<sup>172</sup> Likewise, Pauwelyn propounds that application of the rule of separability to a treaty conflicting with supervening *jus cogens* does not undermine the importance and primacy of *jus cogens* because, if it did, Article 44 of the VCLT would expressly state the non-applicability of the rule of separability in this case.<sup>173</sup> In addition, he also contends that in the case where a treaty exists as a framework agreement composed of myriad agreements, such as the WTO, the proposition that where only one provision conflicts with supervening *jus cogens* the whole set of agreements shall be invalidated might be disproportionate.<sup>174</sup> The position taken here is that the rule of separability shall apply to treaties conflicting with supervening *jus cogens*. The reason is that as international law-making power is allocated to states due to the respect for their peoples and international law should not intervene in matters not involving the serious interests of the international community; applying the rule of separability would not jeopardize the purpose of the rule of non-derogability of *jus cogens*. Further, this would prevent the absurdity of a situation where newly emerging *jus cogens* rules have a retrospective effect to cancel whole international agreements in parts that do not conflict with such *jus cogens* rules. For other types of norms, apart from treaties, their conflict with *jus cogens* shall result in the invalidity of such norms. Hannikainen, for instance, suggests that unilateral acts of states conflicting with *jus*

<sup>170</sup> James Crawford, Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum 2, A/CN.4/498/Add. 2, para. 306 and footnote 593.

<sup>171</sup> Pauwelyn (n 13) 281.

<sup>172</sup> ILC, Draft Articles on the Law of Treaties with commentaries 1966, 261.

<sup>173</sup> However, theoretically, Pauwelyn argues that the rule of separability should be applied to both cases of conflicts of norms with existing *jus cogens* and emerging *jus cogens*, as it is more suitable to the exceptional nature of the invalidity of norms that derives from the conflict with another norm Pauwelyn (n 13) 282.

<sup>174</sup> Ibid.

*cogens* shall also be deemed void.<sup>175</sup> With respect to the retroactive effect of the rule of the non-derogability of *jus cogens*, on examining article 64, which deals with conflicts of treaties with supervening *jus cogens*, the words ‘becomes void and terminates’ send an unambiguous message that the drafters considered that the emergence of a new rule of *jus cogens* is not to apply retroactively to the validity of a conflicting treaty and that invalidity is to operate subsequent to the emergence of newly-established *jus cogens*.<sup>176</sup>

2.3.3. The Supremacy of the International Primary Rules Protecting Peace and Fundamental Human Rights Created by the Secondary Rule of Non-derogability of Jus Cogens.

Given the effect of the rule of the non-derogability of *jus cogens* that invalidates state-based primary rules that conflict with shared-value-based primary rules, the rule of the non-derogability of *jus cogens* functions as a secondary rule that resolves normative conflicts. In case of conflicts, it gives superiority to community-value-based primary rules in light of the essentiality of the community’s interests and the survival of the international community, which shared-value-based primary rules protect. The rule of the non-derogability of *jus cogens* also functions as part of a unifying rule of recognition for the international legal system, as it arranges the order of sources of validity for primary rules by giving superiority to fundamental shared values over state wills, and this creates a hierarchy of international law between laws with different sources of validity.

From the constitutionalization of international law aspect, the conflict-solving effect of the rule of the non-derogability of *jus cogens* plays its part in constitutionalizing international law. This secondary rule attributes *jus cogens* rules the status of higher

<sup>175</sup> Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Helsinki Finnish Lawyers’ Publishing Co., 1998), 6 as cited in Simma (n 40) 288.

<sup>176</sup> Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, in ILC, Yearbook of the International Law Commission (1966) vol. II, 248–249.

law in the international legal system and this has led to the *jus cogens* rules having the status of a constitutional rule in the sense that based on the importance of the values they protect, in cases where ordinary general international rules conflict with *jus cogens* rules, this results in the invalidity of ordinary international rules as a lower norm of the international legal system. Mani claims that the concept of *jus cogens* is an ‘important normative development that would contribute to universal constitutionalism in the realm of the evolution of a truly global legal framework’ and argues that despite a number of questions remaining unanswered, *jus cogens* can be regarded as ‘the first stepping-stone towards the eventual build-up of international constitutionalism’.<sup>177</sup> Similarly, Byers is of the view that *jus cogens* is the most obvious example of constitutional rules in international law. He explains that, unlike other international rules, *jus cogens* rules have a legal effect that restricts the international law-making power of states and prevents them from engaging in acts not in conformity with the peremptory rules of the international community.<sup>178</sup> As Bryde has observed, the existence of *jus cogens* shows that ‘the “higher law” concept of constitutionalism has been transferred to international law’.<sup>179</sup> Thus, now it would be incorrect to perceive the notion of the constitutionalization of international law as just an ambiguous idea or dreamy thoughts of legal academics, for it has been accepted and codified as a positive international legal rule.<sup>180</sup>

However, based on the cosmopolitan paradigm, international constitutionalism has an underlying purpose to establish international self-governance with a mandate for international peace and the protection of fundamental human rights. Given the state-centred character of international law, in which state will is one source of validity of primary rules, this will never be achieved if the primary rules that generate the obligation for the protection of international peace and fundamental human rights are not elevated to a higher law which is not subject to the will of states to alter or

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<sup>177</sup> V.S. Mani, ‘Centrifugal and Centripetal Tendencies in the International System: Some Reflections’ in Ronald St John Macdonald and Douglas M Johnston (eds), *Towards World Constitutionalism* (MNP 2005) 253.

<sup>178</sup> Byers (n 4) 219–220.

<sup>179</sup> Bryde (n 1) 108.

<sup>180</sup> *Ibid.*

derogate from them as they wish. The exploration of current primary rules that have the status of *jus cogens* has shown that they can be divided into two categories: those seeking the peaceful co-existence of states and those aiming for the protection of fundamental human rights. The *jus cogens* rules on prohibition of the use of force, humanitarian law and the common heritage of mankind fall into the first category, whilst peremptory rules on the prohibition of slavery, torture, piracy and crimes against humanity, and those protecting specific fundamental human rights, such as the right to life, the right to self-determination and rights against discrimination, fall into the second category. Thus, *jus cogens* rules and the relevant secondary rules have created a hierarchical structure of rules in the international legal system that put international peace and the protection of fundamental human rights at the heart of the system.

### **III. The Secondary Rule of the Primacy of the UN Charter**

Apart from the secondary rule of the non-derogability of *jus cogens*, the rule of primacy of the UN Charter is another candidate for conflict of norm rules that have established the hierarchy of international primary rules. Therefore, the subject of study in this section is the UN Charter. It begins with a discussion of the link between the UN Charter and fundamental shared values of the international community, which are a higher source of validity of rules in the international legal system, to determine the status of the UN Charter as constitutional rules of the international legal system. Then, the scope and consequences of the secondary rule of the primacy of the UN Charter will be discussed in order to determine the contribution of the UN Charter and relevant secondary rules to the hierarchization of the international legal system.

#### ***3.1. Article 103 of the UN Charter and the Primacy of the UN Charter***

Before discussing the link between the UN Charter and fundamental shared values, a discussion of Article 103 will be the best place to start to consider the constitutional

character of the primary rules within the UN Charter as it is a written provision expressly claiming priority of the UN Charter over other international agreements.

Article 103 of the UN Charter provides that: ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’

In the words of Kolb, ‘this provision is replete with a plethora of uncertainties, ranging from the root of its meaning, to points on interpretation’.<sup>181</sup> As Liivoja observes it, Article 103 can be read in many ways: some simply regard it as an ordinary conflict clause in a treaty without ‘any conceptually ground-breaking qualities’; some think of it as ‘legal prose’; those with more ambitious perspectives take this article as a ‘supremacy clause’ reflecting the status of the UN Charter as, effectively, the constitution of the international community.<sup>182</sup> In the context of conflicts of norms, Pauwelyn treats Article 103 as a conflict clause with special qualifications.<sup>183</sup> Pertaining to the special qualifications of the UN Charter, he explains that, generally, the conflict clause claiming priority over subsequent treaties cannot restrain states from exercising their freedom of contract. This allows states as masters of their will to alter their minds in the future, subject to the condition provided in the rule of the non-derogability of *jus cogens* and Articles 41/58 of the VCLT.<sup>184</sup> In other words, a conflict clause claiming priority over subsequent treaties has to be subject to the *lex posterior* rule.<sup>185</sup> Nevertheless, denying the higher hierarchy of the UN Charter,<sup>186</sup> the mere ground that Pauwelyn offers to distinguish

<sup>181</sup> Robert Kolb, ‘Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?’, *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* 1, no. 64 (2004): 21.

<sup>182</sup> Rain Liivoja, ‘The Scope of The Supremacy Clause of The United Nations Charter’, *ICLQ* 57 (July 2008): 584.

<sup>183</sup> Pauwelyn (n 13) 335–343.

<sup>184</sup> *Ibid* 335.

<sup>185</sup> *Ibid*.

<sup>186</sup> He argues unless this article was to be perceived as *jus cogens* rule, the UN members can exercise their freedom of contact to amend Article 103 and therefore the UN Charter does



the special character of Article 103 from other conflict clauses is the fact that Article 30(1)<sup>187</sup> of the VCLT explicitly construes that Article 103 of the UN Charter is an exception to *lex posterior*.<sup>188</sup> Pauwelyn does not offer any further clarification of why Article 30(1) treats Article 103 as an exception, and differently from other conflict clauses. Conforti argues that the explanation for the special treatment of Article 103 is that although, from ‘a strictly formal point of view’, the Charter is a treaty, ‘the principle contained in Article 103 is considered by the whole international community to be a principle going beyond the law of treaties, and it has come to be regarded as a customary rule’.<sup>189</sup> However, he does not elaborate further on the special legal effect of a rule contained in the principle of Article 103 going beyond the law of treaties; merely the fact that the rule in Article 103 has become a customary rule does not explain its special character as an exception to the *lex posterior rule*. Thus, the reasoning behind the position of Article 103 as an exception to *lex posterior* holds the mystical key to understanding the reasons behind the special character of Article 103 and the Charter itself and needs to be discussed here.

Scrutinizing the draft history of Article 30(1) of the VCLT does not give a clear answer to the question of special treatment of Article 103 of the UN Charter, as the ILC just refers to the importance of the Charter, explaining that:

[T]he position of the Charter of the United Nations in modern international law is of such importance, and the States Members of the United Nations constitute so large a part of the international community, that it appeared to the Commission to be essential to give Article 103 of the Charter special mention and a special place in the present article.<sup>190</sup>

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not represent an ‘inherently higher law’ as the priority of the UN Charter is based on the agreement of the UN members; Pauwelyn (n 13), p 337

<sup>187</sup> Article 30(1) of the VCLT provides that: ‘Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.’

<sup>188</sup> Pauwelyn (n 13) 337.

<sup>189</sup> Benedetto Conforti, ‘Consistency among Treaty Obligations’ in Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 189.

<sup>190</sup> ILC, Draft Articles on the Law of Treaties with Commentaries 1966, *Yearbook of the International Law Commission, 1966*, vol. II. 214.

Considering the historical articulation of Article 103 of the UN Charter, originally there was no primacy clause in the Dumbarton Oaks Proposals.<sup>191</sup> Later, in the United Nations Conference on International Organization (UNCIO)<sup>192</sup>, certain states proposed to include such a clause in their discussions.<sup>193</sup> During UNCIO, there was general agreement that members should not in future undertake obligations inconsistent with the Charter.<sup>194</sup> The delegate from the USSR expressed the view that it was questionable whether a provision regarding obligations inconsistent with the Charter, calling into question the validity of all past as well as future treaties, should be incorporated in the Charter. The delegate views that if such a provision was included, it might be difficult for certain states when deciding whether to ratify the Charter. Further, given the probability that an obligation inserted in the Charter would be binding on members in terms of observing its provisions generally, the incorporation of a special provision relating to treaties seemed unnecessary.<sup>195</sup> As the discussion developed, certain delegates rejected the insertion of such a clause; however, others agreed to the insertion, although they could not agree on the content. Therefore, these issues were referred to the relevant Subcommittee.<sup>196</sup> After considering the issue, the Subcommittee unanimously agreed that a provision governing conflicts or inconsistencies between the obligations of members and the Charter itself is necessary, because ‘omission of such a provision could give rise to inaccurate interpretations’. Moreover, it would be ‘inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof’.<sup>197</sup> The draft history of Article 30 of the VCLT and Article 103 of the UN Charter does not seem to shed much light on the rationality behind Article 103 being

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<sup>191</sup> Spijkers (n 64) 75.

<sup>192</sup> Hereinafter, ‘UNCIO’.

<sup>193</sup> See e.g. Belgian Amendments, Norwegian Amendments, Egyptian Amendments, Philippines Amendments, Australian Amendments, and Ethiopian Amendments in United Nations, *Documents of the United Nations Conference on International Organization* (22 volumes), vol. III, 343-344, 371, 463, 540, 553 and 561 (The collection will be referred hereinafter as UNCIO vol. (n))

<sup>194</sup> UNCIO vol. XIII, 592.

<sup>195</sup> Ibid 598.

<sup>196</sup> Ibid, 602–603.

<sup>197</sup> Ibid, 806.

an exception to the *lex specialis* rule, apart from highlighting the importance of the Charter.

The study of Article 103 and its drafting history does not help us to understand the primacy of the UN Charter, especially because its international-agreement origin contradicts the idea of the supremacy of the Charter over states from which the validity of international agreement derives. However, based on the ‘importance’ clue, one logical way to explain the primacy of the Charter is that such importance might be generated from the status of the UN Charter as a constitution of the international community.<sup>198</sup> This approach is used by Bernhardt, who claims that to understand the scope of application of Article 103, the character of the Charter as the constitutional document of the international community must be taken into account.<sup>199</sup> Thus, the status of the UN Charter as a constitution of the international community will be examined in the hope of figuring out what accounts for the special position of Article 103 and the UN Charter.

### ***3.2. The UN Charter and the Fundamental Shared Values of the International Community***

As shown in the *jus cogens* section, based on the unifying rule of recognition of the international legal system, the source of validity of higher international rules is fundamental shared values of the international community, i.e. constitutional law derives from the belief of the international community as an origin of international constituent power. Thus, to attribute a constitutional character to the UN Charter, a link between the UN Charter and the higher source of validity of international rules – fundamental shared values of the international community – must be established.

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<sup>198</sup> E.g. Michael W Doyle, ‘A Global Constitution? The Struggle over the UN Charter’ (2010); Pierre-Marie Dupuy, ‘The Constitutional Dimension of the Charter of the United Nations Revisited’ (1997) 1 Max Planck UNYB 1; Blaine Sloan, ‘The United Nations Charter as a Constitution’ (1989) 1 Pace International Law Review 61; MacDonald (n 86).

<sup>199</sup> Rudolf Bernhardt, ‘Article 103’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (OUP 2002) 1299.

The word ‘value’ is not explicitly used anywhere in the text of the Charter; however, the UN Charter is patently articulated based on certain principles and for specific purposes.<sup>200</sup> The purposes stipulated in the Charter are ‘aims of action’ that obligate the UN and its members to perform actions in an attempt to actualize certain purposes which can be seen as ‘expressions of the world’s most fundamental values.’<sup>201</sup> The UN Charter was intended to be a document that constitutes a global world order<sup>202</sup> and a set of guidelines for future global decisions and further development of the international community.<sup>203</sup> The first General Counsel and Director of the Legal Department of the UN, A. H. Feller, called the Charter ‘the constitutional instrument which governs the organizational structure of a world community’, explaining that:

[T]he Charter is not just a legal text intended to describe with precision the rights and duties of parties like a conveyance or a contract of sale; it is a political document designed to embody statements of ideals, of principles, and of moral sentiment ... [S]uch is the nature of constitutions, at least of those constitutions which live in the minds of people and are adaptable to growth along with the societies they are intended to govern.<sup>204</sup>

From a historical perspective, the negotiation and drafting history of the Charter may be defined as a world dialogue regarding global values.<sup>205</sup> According to Spijkers, the communication that occurred was not only concerned with particular states which sent their representatives to attend, but rather the future of the international community as a whole. The collective scourge of the Second World War, which states had just experienced, generated a shared will to prevent the recurrence of such events, based on ‘a sense of urgency, a shared awareness that there was a need to define global values and global obligations to act on them’.<sup>206</sup> This sentiment was

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<sup>200</sup> Spijkers (n 64) 68.

<sup>201</sup> Ibid 72.

<sup>202</sup> MacDonald (n 86) 120; Spijkers (n 64) 72–73.

<sup>203</sup> MacDonald (n 86) 120; Spijkers (n 64) 79.

<sup>204</sup> H. Feller, Book Review (of Hans Kelsen, *The Law of the United Nations*) (1951) 51 *Columbia Law Review* 537, 538 as cited in Fassbender (n 84) 3.

<sup>205</sup> Spijkers (n 64) 81.

<sup>206</sup> Ibid.

also reflected in the opening address of the San Francisco Conference by President Truman: ‘We represent the overwhelming majority of all mankind ... We hold a powerful mandate from our people ... We must prevent, if human mind, heart, and hope can prevent, the repetition of the disasters from which the entire world will suffer for years to come.’<sup>207</sup> It was proposed that the phrase ‘we the peoples’, at the very beginning of the Preamble, would signify that the Charter entails and reflects ‘the ideas of the peoples of the world’, and is conferred the mandate of all peoples.<sup>208</sup>

Considering its origin, the insistence that the Charter was intended to be a document aiming to establish a legal order and global guidance for its members is of course subject to debate, but it does not come up without reasonable ground. Although the representatives attending the drafting process of the UN Charter and joining in the forum came from most regions of the world, certain countries did not have representatives participating in those processes.<sup>209</sup> Thus, at the time of its inception, it would not be entirely accurate to claim that the content of the Charter reflected the opinion of the full international community. Nevertheless, currently, the almost universal membership of the UN Charter<sup>210</sup> gives more weight to the legitimacy of the claim that the UN charter reflects the fundamental shared values of the international community. In Draft Articles on State Responsibility of 2001, ILC make a comment that ‘the special importance of the Charter, as reflected in its Article 103 derives from its express provisions as well as from the virtually universal membership of States in the United Nations’.<sup>211</sup> Accordingly, two factors that generate the special character of the Charter is the substantive importance the Charter

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<sup>207</sup> Verbatim Minutes of the Opening Session, April 25, 1945, UNCIO, vol.I, 113.

<sup>208</sup> Fassbender (n 84) 90–94; MacDonald (n 86) 860; See discussions in Spijkers (n 64) 66.

<sup>209</sup> Spijkers (n 64) 81.

<sup>210</sup> As of 10 July 2015, 193 countries are members of the UN; See <<http://www.worldometers.info/united-nations/>> and <<http://www.un.org/en/members/>> accessed 10 July 2015.

<sup>211</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Article 12, para. 8.

rules entail and its representability of the international community, at least in the sense of international community ‘of states’.

Thus, the intention of member states which can represent the view of the international community to create the Charter not as an ordinary international agreement based on compromise and the exchange of states’ interests but as higher rules that protect fundamental shared values and shape the international legal system. This would logically explain why Article 103 needed to be incorporated into the Charter. It also clarifies the importance that the Charter possesses which made Article 30 of the VCLT expressly stipulate that Article 103 is not subject to the rule of *lex posterior* due to the importance of the Charter. The link between the UN Charter as a constitution of the international community and fundamental community values has been supported by Tomuschat who is of the view that

...the international community can indeed be conceived of as a legal entity, governed by a constitution ... The international community and its constitution were created by States. Over centuries up to the present time, buttressed in particular by the UN Charter, the idea of a legal framework determining certain common values as the guiding principle States are bound to observe and respect...<sup>212</sup>

Accordingly, the historical aspect and textual basis can serve as a ground to read the UN Charter as a document that is intended by its members that it can legitimately claim to represent the international community, to serve as a reflection of what they believe to be fundamental shared values of the international community. Thus, the next issue that should be addressed is what are the fundamental shared values of the international community that are reflected in the Charter. The Charter does not clearly list the fundamental values on which it is based, or which it aims to foster and protect. Nonetheless, such values can be extracted from the purposes and fundamental principles of the Charter. Articles 1, 2, 55 and 56, which entail the purposes and fundamental principles of the Charter, seem to be an ideal place to

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<sup>212</sup> Tomuschat, ‘Obligations Arising for States without or against Their Will’ (1993) 241 *Recueil des Cours* 194, 236.

identify the fundamental shared values that the Charter holds dear.<sup>213</sup> Exploring these relevant articles, one might come to the conclusion that, essentially, the purposes and fundamental principles of the UN Charter hinge on two fundamental shared values, namely, peaceful co-existence between states and respect for fundamental human rights.

The fundamental shared value of the peaceful coexistence of states is reflected in the purposes of the UN Charter to maintain peace and security (Article 1 para. 1), to develop friendly relations among nations based on respect for the principle of equal rights and the self-determination of peoples (Article 1 para. 2) and to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character (Article 1 para. 4). Such purposes are complemented by the principle of sovereign equality (Article 2 para. 1), the principle of duty regarding the peaceful settlement of disputes (Article 2 para. 3) and the prohibition on the use of force (Article 2 para. 4). Further, Articles 55 and 56 oblige the UN and its members to promote the economic welfare of the people, solutions for international issues and respect for human rights in order to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations. The value of the protection of fundamental of human rights is clearly reflected in the purpose of the UN Charter to promote and encourage respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion (Article 2 para. 3).<sup>214</sup> In the Declaration on Principles of International Law, Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations,<sup>215</sup> the General Assembly<sup>216</sup> reaffirms the

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<sup>213</sup> Dupuy is of the opinion that 'the substantial and fundamental principles of the Charter of the United Nations are mainly to be found in Articles 1 and 2', Dupuy (n 198) 5; Spijkers proposes that 'the purposes of the UN Charter can be found in Articles 1 and 55 and that the principles are formulated in Articles 2 and 56'. Further, he argues that 'most of the purposes in Articles 1 and 55 can be qualified as expressions of the world's most fundamental values' Spijkers (n 64) 69 and 72.

<sup>214</sup> See Dupuy (n 198) 6–7 and Spijkers (n 64) 68–72.

<sup>215</sup> Declaration on Principles of International Law, Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations, A/RES/25/2625 of 24 October 1970.

utmost importance of the maintenance of peace and security and reiterates the principles in Articles 1 and 2,<sup>217</sup> and it regards them as one of the fundamental principles of the international legal system.<sup>218</sup> These two values of the peaceful co-existence of states and the protection of fundamental human rights are the same as those values that, as shown in the preceding part, *jus cogens* rules aim to protect.

Further, apart from the fact that the substantive rules in the UN Charter reflect the fundamental shared values of the international community, another linkage between the UN Charter and fundamental shared values of the international community is in that the UN Charter also establishes the UN and its organs. The Charter imposes on them duties relevant to the implementation and protection of fundamental shared values and allocates power to them to achieve assigned tasks, e.g. the GA as a global forum, the SC as an executive body and the ICJ as a judicial guardian to identify, shape, implement and protect the fundamental shared values of the international community. Therefore, the UN Charter has both a substantive link and an institutional link to fundamental shared values; however, such an institutional structure to fulfil fundamental values established by the Charter is very relevant to the institutionalization of international constituted power; therefore, that issue will be discussed in the next chapter. The whole UN Charter can thus be perceived as an attempt by the international community to identify fundamental shared values and to implement such values in the form of written basic legal instrument. This is reflected in the dissenting opinion of Judge Weeramantry in the *Lockerbie* case, in that ‘[t]he entire law of the United Nations has been built up around the notion of peace and the prevention of conflict’.<sup>219</sup>

As shown in the *jus cogens* section, fundamental shared values of the international community are recognized by the unifying rule of recognition of the international

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<sup>216</sup> Hereinafter, the ‘GA’.

<sup>217</sup> Dupuy (n 198) 6.

<sup>218</sup> Hossain (n 8) 95.

<sup>219</sup> Dissenting Opinion by Judge Weeramantry, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, 1992 I.C.J. reports, p 70.



legal system as a source of validity of the constitutional/ higher rules of the system. The link between fundamental shared values and the Charter can serve as a ground for the status of the Charter as a written constitution of the international community, i.e. the source of the legally binding nature of the UN Charter as a constitution of the international community derives from fundamental shared values. The status of the UN Charter as a constitution of the international community would provide a logical explanation for the supremacy of the Charter as reflected in Article 103, which could not be accommodated if the UN Charter existed as an ordinary treaty. According to Fassbender, in a case where a treaty has earned the status of a constitution, ‘the instrument will subordinate the constituent units to the new creation and will govern each of them irrespective of their continuous individual consents’; therefore, albeit contractually established, the new body is non-consensual or autonomous in character.<sup>220</sup> Such a difference is also supported by Gardbaum, who when discussing the differences between treaty-based regimes and constitution-based regimes proposes that

...treaty-based regimes impose legal obligations on states that are both fixed at the outset and consensual, constitutional entities have the capacity to impose obligations on states that are neither. Such new obligations may be imposed by a governance structure with autonomous lawmaking powers acting by some version of majority vote, and may be enforced by an adjudicatory body with compulsory jurisdiction.<sup>221</sup>

This difference between the nature of a constitutional instrument and an ordinary treaty can explain the special status of Article 103 in Article 30(1) of the VCLT. To elaborate further, the UN Charter were a state-will-based rule and Article 103 were a will-based conflict clause which allows states to set up how conflicts are to be solved when there is a conflict between state-will based rules; then, logically, Article 103 would be subject to the *lex posterior* rule as states are still masters of their own will,

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<sup>220</sup> Fassbender (n 84) 63–64.

<sup>221</sup> Stephen Gardbaum, ‘Human Rights as International Constitutional Rights’ (2008) 19 EJIL 749, 759.

and so they can change their mind in the future.<sup>222</sup> Nonetheless, since the Charter as the constitution of the international community derives its validity from the international community, it is not subject to the individual wills of states or groups of them. Consequently, this turns the UN Charter into a higher rule of the international system. Thus, Article 103 is not a conflict clause that is executed based on the will of relevant states but rather a declaration or codification of the secondary rule of the primacy of the UN Charter. However, the independence of the power constituted by the Charter or even the Charter itself is not absolute, as it must be curtailed by the constituent power holder, aka the international community. Added to this, referring to the case of *jus cogens*, when general international law has earned the status of *jus cogens*, transforming from state-will-based into community-value-based rules, not only does such a norm earn the status of higher law, it also attains a universal character, which means it is binding on states not giving their consent to such norms. Applying such an effect to the UN Charter, then, as a community-value-based rule, it is binding on non-member states as it is a law created by the community's will. To some extent, Article 2(6) of the Charter can be interpreted as generating an obligation for non-member states; therefore, to some extent, it might be seen as supporting evidence for universal application of the UN Charter. However, the legal effect of Article 2(6) will be discussed in detail later, in the section regarding the application of Article 103 to non-UN-member states.

### ***3.3. Secondary Rules of the Primacy of The UN Charter and the Hierarchical Structure of the International Legal System***

This section will discuss the hierarchical structure of the international legal system established by the rule of primacy of the UN Charter, based on the constitutional character of the Charter, to reveal the hierarchical legal structure of international law shaped by the secondary rule of the primacy of the Charter.

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<sup>222</sup> However, states are still subject to other will-based conflict rules, such as Article 59 of the VCLT.

### 3.3.1 Acceptance of the Secondary Rule of Primacy of the UN Charter by Officials as a Secondary Rule of the International Legal System

First of all, it can be confirmed that there is acceptance by the officials of the international legal system that the secondary rule of primacy of the Charter has become part of the international legal system. To start with, Article 103 by itself would, of course, indicate official acceptance of the secondary rule of the primacy of the UN Charter by member states which are both subjects and officials of international law. This is because upon becoming members of the UN, those states express their acceptance of the Charter, including Article 103. Added to this, apparently, official acceptance of the secondary rule of the primacy of the UN Charter can be seen in the way that other treaties govern their relations with the UN Charter, demonstrating their acceptance of the UN Charter as higher law within the international community. For instance, Article 107 of the NATO Treaty 1949 provides that, '[t]he Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations... .' In Article 131 of the Charter of the Organization of American States 1948, it is stated: 'None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations.' Article 1, paragraph C, of the Statute of the Council of Europe stipulates: 'Participation in the Council of Europe shall not affect the collaboration of its members in the work of the United Nations and of other international organisations or unions to which they are parties.' Likewise, this pattern in the relationship between the UN Charter and other treaties is also shared by Article XXI of The General Agreement on Tariffs and Trade (GATT 1947) and Article 5, paragraph 2, of the Rome Statute of the International Criminal Court 1998. Further, in its Friendly Relations Declaration 1970, the GA recognizes the utmost importance of the Charter in the promotion of the rule of law among states, for the maintenance of international peace and security, and for the furtherance of friendly

relations and co-operation among states.<sup>223</sup> Further, the indication of Article 30 (1) of the VCLT and Article 30 (6) of the 1986 Vienna Convention on the Law of Treaties between International Organizations, that Article 103 is an exception to the *lex posterior* rule, is clear acceptance of the secondary rule of the primacy of the Charter.

The ICJ's acceptance of the rule of primacy of the Charter as a secondary rule of the international legal system governing the conflict of norms can be found in the *Lockerbie* case, in which the ICJ accepted the priority of the obligation under the UN Charter over the obligation under a later treaty, the 1971 Montreal Convention, by expounding that: 'in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention'.<sup>224</sup> Thus, this shows that the secondary rule of primacy of the Charter has been accepted as part of the international legal system.

### 3.3.2. Scope of Application of the Secondary Rule of Primacy of the Charter

#### *A. Scope of the term 'Conflict'*

As the wording of Article 103 explicitly deals with conflicts between obligations under the Charter and obligations under other international agreements, but does not refer to rights, this has generated an interpretative issue regarding the scope of conflicts that this Article covers.<sup>225</sup> However, based on the correlativity between obligations or duties and rights in a limited sense as claim rights,<sup>226</sup> the norms

<sup>223</sup> Declaration on Principles of International Law, Friendly Relations and Co-Operation Among States in accordance with the Charter of the United Nations.

<sup>224</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, para. 45.

<sup>225</sup> Pauwelyn (n 13) 340–342.

<sup>226</sup> Hohfeld argues that only rights in a limited sense as claims are correlative to duties, and rights in a limited sense do not include liberties, powers and immunities, Wesley Newcomb

creating claim rights for one party of the jural relation correlatively create duties for another. Thus where a conflict involves obligation, it always involves claim rights. Thus, based on correlativity, the text of Article 103 can, legally, be logically interpreted as including scenarios where claim rights are involved. Further, going beyond the textual interpretation, Paulus and Leiß support a wider definition to cover incompatibilities involving liberties and no rights (both exempting and permissive norms) should be adopted. They argue that this is because the aim of Art. 103 is to ‘ensure the effectiveness of the Charter system as well as to remove obstacles in ‘ordinary’ treaty norms for the implementation of obligations under the Charter’ and ‘to promote the effectiveness of the international system of peace and security’.<sup>227</sup> Moreover, if the strict definition of conflict which only revolves around obligations and claim rights<sup>228</sup> is adhered to, this reduces the benefit of Article 103 as a conflict rule that can be applied to resolve normative conflicts and create legal certainty for the international legal system, simply because certain normative conflicts do not fall within the scope of the definition.<sup>229</sup> Thus, a broad understanding of conflicts which include all the incompatibilities caused by legal normative effects, not limited to incompatibilities revolving around obligations and their correlative claim rights, would be preferable, given the specific purpose of Article 103 and for the sake of certainty in the international legal system in general. Moreover, based on the constitutional status of the Charter defended here, the aim of Article 103 is to reflect the secondary rule of primacy of the UN Charter as constitutional rules. Therefore, it should cover all possible incompatibility scenarios involving norms that create rights and duties and those that create liberties and no rights, power and liability, as well as

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Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed, The Lawbook exchange, LTD 2010) 36; See Ibid 341.

<sup>227</sup> Andreas Paulus and Johann Leiß, ‘Article 103’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary Volume II* (3rd edn, OUP 2012) 2123.

<sup>228</sup> E.g. Jenks proposes: ‘conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties’, C Wilfred Jenks, ‘Conflict of Law-Making Treaties’ (1953) 30 BYIL 401, 426.

<sup>229</sup> Paulus and Leiß (n 227) 2123; Erich Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17 EJIL 395, 403.

immunity and disability.<sup>230</sup> For example, the wider definition of conflict of norms proposed by Pauwelyn where conflict refers to the situation in which '[e]ssentially two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other'<sup>231</sup> can provide a helpful to provide a scope of conflict in the light of this article

In reality, the ambiguity of the term leads to a dispute regarding whether Article 103 may exclusively apply in cases of incompatibilities between obligations or not. In the Lockerbie Case, Libya contended that Article 103 of the Charter, which refers only to obligations, may not apply to rights under international agreements or under general international law.<sup>232</sup> Libya believed that the UN Charter prevails over conflicting obligations, but that is not the case for inconsistent explicit rights.<sup>233</sup> In response to Libya's claim, the UK riposted:

The obligation to comply with Security Council decisions applies fully both to decisions affecting the rights and to those affecting the obligations of States. The relevant provisions of the Charter are phrased broadly and are intended to be broad in effect. They must be in order to assure the effectiveness of the régime of Chapter VII and in interpreting this aspect of the Charter, this Court has not recognized any distinction between "rights" and "obligations" ... Suppose a bilateral treaty gives the nationals of each party the right to invest in the territory of the other. Surely the Charter gives the Security Council the power in a Chapter VII situation to require that one party prohibit investments by its nationals in the territory of the other, notwithstanding these treaty provisions.<sup>234</sup>

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<sup>230</sup> See the definitions and interactions between these eight fundamental legal concepts in Hohfeld (n 226).

<sup>231</sup> Pauwelyn (n 13) 176; Likewise, Kelsen's definition of conflict is '...conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated'. Hans Kelsen, 'Conflicts between Obligations under the Charter of the United Nations and Obligations under Other International Agreements - An Analysis of Article 103 of the Charter' (1948) 10 *University of Pittsburgh Law Review* 284.

<sup>232</sup> Mr. Crook, UK Statement, Public sitting held on Wednesday 15 October 1997, at 10 a.m., CR 1997/19, para. 3.35.

<sup>233</sup> Pauwelyn (n 13) 340.

<sup>234</sup> Mr. Crook, (n 232) paras. 3.36–3.3.7.

Regrettably, due to the withdrawal of the case by the disputed states, the ICJ did not have a chance to decide on this issue.<sup>235</sup> However, it will be absurd if a claim similar to that of Libya is upheld in any court since that would mean that the effect of Article 103 could be circumvented simply by articulation of the obligation in conflict with the Charter as its correlative right, and this would create a big loophole and virtually disable Article 103.

### *B. Obligations under the Present Charter*

The phrase ‘obligations under the present Charter’ has been interpreted as including two kinds of obligations: first, obligations that are generated directly from the text of the Charter, such as the duty to settle international disputes by peaceful means (Article 2(3)) and the duty to restrain from the use of force (Article 2(4)); secondly, obligations deriving from the binding decisions of UN organs.<sup>236</sup> At the San Francisco Conference, it was explained that conflicts within the meaning of Article 103 may be based on obligations directly created by the Charter or obligations to comply with a decision of UN Charter organs:

It is immaterial whether the conflict arise because of intrinsic inconsistency between the two categories of obligations or as a result of the application of the provisions of the Charter under given circumstances: e.g. in the case where economic sanctions were applied against a state which derives benefits or advantages from previous agreements contrary to said sanctions.<sup>237</sup>

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<sup>235</sup> See ICJ Press Release 2003/29 <http://www.icj-cij.org/docket/index.php?pr=168&code=lus&p1=3&p2=3&p3=6&case=89&k=82>.

<sup>236</sup> Liivoja (n 182) 585–587 and 591; Paulus and Leiß (n 227) 2124–2125. However, for a contrary view, see Separate Opinion of Judge Rezek, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Preliminary Objections*, 152.

<sup>237</sup> UNCIO vol. XIII, 686; see further discussions in Liivoja (n 182) 593.

The obligation to comply with a decision of the SC by virtue of Article 25 of the Charter is construed as an obligation in the second category.<sup>238</sup> The application of Article 103 of the Charter to SC resolution has been confirmed in *the Lockerbie case*, in which the ICJ ruled:

Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court ... in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention...<sup>239</sup>

Nevertheless, as Bowett suggests, a binding decision of the SC is not per se an obligation under the Charter. It is a duty to comply with such a decision which is an obligation under the Charter.<sup>240</sup> Accordingly, the obligations created by binding decisions of the organs are not per se obligations under the Charter, but the duty to comply with such a decision is an obligation under the Charter. This means that Article 103 may apply to obligations arising from binding decisions of UN organs only when such decisions do not conflict with the Charter.<sup>241</sup> For example, the decisions of UN organs which are ultra vires are not protected by Article 103.

Based on the wider interpretation of the scope of conflict under this Article, the decisions of UN organs protected under this Article should not be limited to decisions that create an obligation, but also those that create authorization/permission, as a conflict can be created by a conflict between the authorization of UN organs for certain actions and the prohibition of such actions by other

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<sup>238</sup> Article 25 of the Charter provides that: ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’

<sup>239</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, para. 45.

<sup>240</sup> Derek Bowett, ‘The Impact of Security Council Decisions on Dispute Settlement Procedures’ (1994) 5 EJIL 89, 92.

<sup>241</sup> Liivoja (n 182) 586; Bowett (n 240) 92–93.



international rules.<sup>242</sup> This wider interpretation is reflected in the *Al Jeda* Case, in which the UK House of Lords ruled that interpretation of Article 103 also covers authorization for the sake of effectiveness of the UN system.<sup>243</sup> Although, on this matter, the European Court of Human Rights does not explicitly discuss the scope of Article 103 over an authorization, arguably, the court impliedly admits this notion, as it expressly stated that SC Resolution 1546 authorised the United Kingdom to take measures to contribute to the maintenance of security and stability in Iraq. However, it did not rule that Article 103 was not applicable to the case but went on to determine whether a conflict existed or not, and ruled that in the absence of a binding obligation to use internment, there was no conflict between the United Kingdom's obligations under the Charter of the United Nations and its obligations under Article 5 (1) of the European Convention on Human Rights.<sup>244</sup> Given the fact that when applying Article 24 of the Charter the SC tends to authorize state members to use force rather than obliging them to do so, if Article 103 is not to apply to such authorization, this might undermine the effectiveness of the collective security system.<sup>245</sup>

During consideration of the report of the Special Committee on Decolonization on the situation concerning Territories under Portuguese administration, the Fourth Committee decided that the term obligation should be construed as going beyond the text of the Charter and the binding resolutions or decisions of UN bodies,<sup>246</sup> including an obligation arising from the headquarters agreement.<sup>247</sup> Thus, it might be inferred that apart from the text of the Charter and the binding resolutions or decisions of UN bodies, obligations generated by the agreement entered into by the

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<sup>242</sup> Paulus and Leiß (n 227) 2122 and 2125–2127.

<sup>243</sup> *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, (2007) UKHL 58, paras 32–39 (Lord Bingham), paras 115–117 (Lord Rodger), para. 135 (Lord Carswell) and para. 152 (Lord Brown).

<sup>244</sup> *Case of Al-Jedda V. The United Kingdom* (Application no. 27021/08 (ETCHR, 7 July 2011), para 109. See the discussion in Paulus and Leiß (n 227) 2125–2126.

<sup>245</sup> *Ibid* 2122–2123; see further discussions in Robert Kolb (n 181).

<sup>246</sup> Liivoja (n 182) 587.

<sup>247</sup> *Repertory of Practice of United Nations Organs*, Supplement No 3 (1959 – 1966), volume 4, 209.

UN fall within the scope of the term ‘obligations under the present Charter’<sup>248</sup> since, as Bernhardt suggests, such agreements were established to enable the UN to achieve its aims effectively.<sup>249</sup>

However, in the Nuclear Test case, a legal question of whether or not obligations arising from an optional clause to submit a dispute to the ICJ are under the protection of Article 103 and trump conflicting obligations created by the General Act of Pacific Settlement of International Disputes of 1928 was raised.<sup>250</sup> Despite the fact that the Court ruled that there was no objection to the jurisdiction without addressing this issue, in a Joint Dissenting Opinion, four judges addressed this matter and rejected the application of Article 103, explaining:

The Charter itself places no obligation on member States to submit their disputes to judicial settlement, and any such obligation assumed by a Member under the optional clause of the Statute is therefore undertaken as a voluntary and additional obligation which does not fall within the purview of Article 103.<sup>251</sup>

Nevertheless, the reasoning discussed in this joint dissenting opinion is not against the notion that obligations under the Charter should be given a relatively wide meaning, taking into account the established practices and aims of the UN.<sup>252</sup>

### *C. Article 103 and International Rules Deriving from other Sources of International Law Apart from Treaties*

Article 103 explicitly refers to situations where the rules of the UN Charter conflict with international rules deriving from international agreements, which is interpreted

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<sup>248</sup> Paulus and Leiß (n 227) 2125; Liivoja (n 182) 587.

<sup>249</sup> Bernhardt (n 199) 1296.

<sup>250</sup> *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, 253.

<sup>251</sup> *Nuclear Tests (Australia v. France)* [1974] I.C.J. Reports 1974, 253, Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, para. 78.

<sup>252</sup> Liivoja (n 182) 589.

to cover not only all kinds of international agreements under international law<sup>253</sup> but also contracts, licences and permits between states under domestic law.<sup>254</sup> The ILC noted that ‘there is nothing troubling in viewing agreements between States subjected to municipal law as international agreements for present purposes’.<sup>255</sup> However, as the text does not address conflicts between the Charter and international rules deriving from other sources of international law, this leads to debates about the relationship between the Charter and other sources of norms apart from treaties.

There exists a legal opinion that denies the primacy of the Charter over norms which are not international agreements. Based on the text of Article 103, Bowett and Orakhelashvili comment that Article 103 by itself cannot accommodate the superiority of the Charter over norms which are not treaties.<sup>256</sup> Strictly relying on the text of Article 103 alone, such a comment is correct. However, this does not prevent one from arguing that the unwritten secondary rule regarding the primacy of the Charter that is reflected in Article 103 may go beyond the wording of Article 103 and account for the primacy of the Charter over norms which are not treaties. Further, MacDonald argues that for protection of the non-derogability of *jus cogens* rules, states shall not be capable of agreeing a clause in a treaty in order to derogate or violate *jus coegens* rules, which exist as part of customary international law. Therefore, Article 103 does not apply to conflicts between the Charter and international customary law.<sup>257</sup> Rather, such arguments focus on the special character of *jus cogens*. Thus, as for the relationship between the Charter and *jus*

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<sup>253</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) Jurisdiction and Admissibility*, Judgment (1984) ICJ Reports, para. 107; see also Separate Opinion of Judge Jessup in *South West Africa (Ethiopia v. South Africa, Liberia v. South Africa) (Preliminary Objections)* I.C.J. Reports, 1962, 319.

<sup>254</sup> See e.g. SC Resolutions 1160 (1998), 1127 (1997), 1173 (1998), 1267 (1999) and 1298 (2000).

<sup>255</sup> ILC Report on Fragmentation of International Law, para. 332.

<sup>256</sup> Bowett (n 240) 92; Alexander Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’ (2005) 16 EJIL 59, 69.

<sup>257</sup> Ronald St John Macdonald, ‘The International Community as a Legal Community’ in Ronald St John Macdonald and Douglas M. Johnston (eds), *Towards World Constitutionalism* (Martinus Nijhoff 2005) 862.

*cogens*, both of which, arguably, have a status of higher law in international law, this should be seen as being distinguished from that between the UN Charter and ordinary customary international law.

On the other side, some scholars favour the effect of the primacy of the chapter to cover norms deriving from other sources of law. Basing their arguments on the constitutional status of the Charter, Dupuy is of the opinion that its omission as to the relationship between the Charter and customary international law does not necessarily undermine the interpretation of Article 103 in light of the constitutional character of the Charter.<sup>258</sup> Likewise, Bernhardt claims that Article 103 must be interpreted by taking Article 25 and the character of the Charter as a constitution of the international community into consideration, and this means that the underlying purpose Article 103 shall extend to cases of conflict between the Charter and international rules, other than those stemming from treaties.<sup>259</sup> Similarly, the ILC argues that: ‘...given the character of some Charter provisions, the constitutional character of the Charter and the established practice of States and United Nations organs, Charter obligations may also prevail over inconsistent customary international law’.<sup>260</sup> The acceptance of the superiority of the Charter over norms rather than treaties is reflected in SC Resolution 1343 (2001). In this resolution, the SC called on all States and relevant international organizations to comply with the resolution, ‘**notwithstanding the existence of any rights or obligations entered into**, or any licence or permit granted prior to the date of adoption of this resolution’.<sup>261</sup> This resolution differs from the preceding practice of UN organs in the context of the primacy of the UN Charter, since the words ‘conferred or imposed

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<sup>258</sup> Dupuy (n 198) 13–14.

<sup>259</sup> Bernhardt (n 199) 1299.

<sup>260</sup> ILC, “Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law” (A/CN.4/L.702), Yearbook of the International Law Commission, 2006 2, Part Two para. 35.

<sup>261</sup> SC Resolution 1343 (2001) para. 22 (emphasis added).

by any international agreement or any contract' are omitted.<sup>262</sup>

The effect of becoming a constitution of the international community can go beyond the text of Article 103, as the rule of primacy of the Charter represents a hierarchy of the international community not just an ordinary conflict clause. The will of the international community to protect the shared values of the international community will never be fulfilled unless the secondary rule of the primacy of the Charter applies to every will-based rule, no matter whether it is a treaty or a custom. Explained in light of the value-based constitutionalization of international law, community-value-based rules can be perceived as constitutional rules of the international community. Thus, the obligation of the UN Charter as a written constitutional rule shall prevail over other obligations deriving from non-constitutional rules generated by any state-will-based sources of norms. Therefore, the secondary rule of primacy of the Charter shall be applied to customary international law and unilateral acts.

#### *D. Non-member States*

The application of Article 103 to agreements between UN members is unquestionable.<sup>263</sup> However, a highly problematical situation arises when non-member states are involved in either a case of conflict between the Charter and a treaty concluded by member states and non-member states, or one between the Charter and a treaty concluded only by non-member states. Although the fact that virtually all states in the world have become a member of the United Nations makes this issue of 'little practical value' to discuss<sup>264</sup>, this issue is theoretically fundamental to the status of the UN Charter as a constitution of the international

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<sup>262</sup> Declaration on the Strengthening of International Security, UNGA Res. 2734 (XXV) (16 December 1970) para. 3, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, annexed to UNGA Res 42/22 (18 November 1987) para. 4, UNGA Res 56/152 (13 February 2002), UNGA Res 57/217 (27 February 2003), UNGA Res. 58/188 (22 March 2004) and UNGA Res. 59/204 (23 March 2005). Liivoja (n 182) 607–608, but he construes that this change does not have any important meaning.

<sup>263</sup> Paulus and Leiß (n 227) 2128–2129; Bernhardt (n 199) 1296–1297.

<sup>264</sup> Rain Liivoja, (n 182), 596.

community.

As far as the wording of the article is concerned, to apply Article 103, at least one party to the international agreement in conflict with the Charter is to be a UN member state. Thus, literally, Article 103 might be applicable to treaties between member states and non-member states, but not those between non-member states.<sup>265</sup> During the drafting process of the UN Charter, the relevant committee gave its opinion on this issue:

The Committee is fully aware that as a matter of international law it is not ordinarily possible to provide in any convention for rules binding upon third parties. On the other hand, it is of the highest importance for the Organization that the performance of the members' obligations under the Charter in specific cases should not be hindered by obligations which they may have assumed to non-member States. The Committee has had these considerations in view when drafting the text. The suggested text is accordingly not limited to pre-existing obligations between members.<sup>266</sup>

Thus, the *travaux préparatoires* of the Charter also suggest that Article 103 does not restrictively apply to a scenario involving inter-se agreements between UN members.<sup>267</sup> Nonetheless, considering the *pacta tertiis* rule, non-member states are not bound by Article 103 as they do not give their consent to the Charter.<sup>268</sup> Therefore, based on the law of treaties, Article 103 may apply to neither international agreements between member states nor those between non-member states. Mus, however, argues that the reason for the inclusion of Article 103 into the UN Charter and the reference to it in paragraph 1 of Article 30 of the VCLT is ‘to stress the importance of the UN Charter above other treaties and international instruments in the international community, even for states which are not member states of the UN’.<sup>269</sup> Accordingly, Mus seems to imply that Article 103 also applies to those

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<sup>265</sup> Paulus and Leiß (n 227) 2129.

<sup>266</sup> UNCIO vol. XIII, 686.

<sup>267</sup> Paulus and Leiß (n 227) 2129.

<sup>268</sup> *Ibid.*

<sup>269</sup> Jan B. Mus, ‘Conflicts Between Treaties in International Law’, 1998 45 *Netherlands International Law Review* 208, 216.

treaties concluded by non-member states due to the importance of the Charter.

In the *Reparation for Injuries Case*, the ICJ opined that:

[T]he vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.<sup>270</sup>

According to this advisory opinion, the UN had legal personality not only vis-à-vis Member States, but also in relation to non-Member States. Of course, it should be noted that the composition and the width of the membership of international organizations are not a necessary condition for the creation of an objective personality for an international organization which binds all states, as the legal personality of any international organization does not rely on its factual recognition by states or the international community but rather on the secondary rule of the international legal system that establishes a legal personality for an international organization.<sup>271</sup> However, this message hints that, in the opinion of the court, due to its vast membership, the UN represents the will of the international community and this serves as a ground for the special character of the relationship between the UN and non-member states which are also part of the international community. Seemingly, Mus's notion of the importance of the Charter and the UN's representativeness vis-à-vis the international community in the view of ICJ are compatible with the idea of a taxonomy of state-will-based rules and community-value-based rules based on their source of validity.

As illustrated before, the linking of the Charter to the fundamental shared values of the international community earns the Charter the status of community-value-based rules and, similar to *jus cogens* rules, the UN Charter would not only be a higher but

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<sup>270</sup> *Reparation for injuries suffered in the service of the United Nations* Advisory Opinion, 185.

<sup>271</sup> Dapo Akande, 'International Organizations' in Malcolm D Evans (ed.), *International Law* (4<sup>th</sup> edn, OUP 2014) 254–255.

also a universal law, due to the importance of the values it protects. If the Charter is a universal rule, then its provisions, including article 103, should be applied to all states in the international community. Thus, the next step is to examine the universality of the Charter and its ability to accommodate the universal application of the rule of primacy of the UN Charter, as reflected in Article 103.

The kernel of the discussion about the universality of the Charter hinges on Article 2(6), which states: ‘The Organisation shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.’

However, this proposition that Article 2(6) imposes an obligation on non-state members is quite problematic, as it is not exactly accommodated by the text of the Article itself. Tomuschat argues: ‘Article 2(6) invites the Organization to use its best efforts with a view to inducing non-member States to adapt their conducts to the exigencies of the Charter, but does not directly address these States’.<sup>272</sup> Accordingly, this provision does not endeavour to obligate non-members; rather, it imposes an obligation on the UN.<sup>273</sup> For instance, several times, Switzerland, prior to its membership of the UN, insisted that it took part in the enforcements imposed by the SC at its liberty or executed similar sanctions imposed autonomously.<sup>274</sup> However, after reading such an argument, one might be curious as to whether or not the fact that this article has obligated the UN to ensure that non-member states act in accordance with the Charter might be interpreted as meaning that it also impliedly imposes an obligation on non-state members. Otherwise, liability could accrue to the UN and state members that enforce the UN Charter rules or SC resolutions on non-member states. For example, when the SC authorizes or demands the member states to implement economic or military measures against non-member states which might result in violations of relevant international rules. Therefore, Article 2(6) should be

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<sup>272</sup> Tomuschat (n 212) 252.

<sup>273</sup> Liivoja (n 182) 595.

<sup>274</sup> G.M. Danilenko, *Law-Making in the International Community* (MNP 1993) 61, fn 77, as cited in *ibid* 596.



regarded as not only imposing a duty on the UN, but also as conferring a right on the UN to demand that non-member states comply with relevant rules. An interpretation to the contrary would mean that the Charter to some extent obliged the UN to commit violations of international rules, which would not have been the intention of the drafters. Thus, examining the drafting history of Article 2 (6) of the Charter might shed some light on this issue.

Historically, the idea behind this article can be traced back to the Dumbarton Proposal as an affirmation of the power of the UN to impose obligations on third-party States, insofar as it is necessary for the maintenance of peace.<sup>275</sup> It was explained that: ‘The Charter now being drawn up is not a special covenant but a general one which will, some day, we hope, be universal ... it will stand out as the will of most of the civilized States – some, indeed, will call it the collective conscience of humanity.’<sup>276</sup> The relevant Rapporteur expressed the view that ‘the paragraph was intended to provide a justification for extending the power of the Organization to apply to the actions of non-members’.<sup>277</sup> The delegate from Belgium stated that for him this was a most important provision, explaining:

...for the Organization should not be paralyzed by having a state invoke provisions such as the Hague Agreements, neutrality agreements etc. ... the Organization could ignore the claim made by non-members because it would be the authorized expression of the international legal community.<sup>278</sup>

In the same vein, the Australian delegate posited that despite the difficulty regarding its enforcement, this article is essential and ‘[t]he Organization would have to see that everything possible would be done to suppress an aggressor’.<sup>279</sup> During the drafting process, the word ‘should’ was replaced by the word ‘shall’, which

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<sup>275</sup> UNCIO vol. III, 337.

<sup>276</sup> Ibid.

<sup>277</sup> UNCIO vol. VI, 348.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

emphasizes the obligation imposed on the UN by this Article.<sup>280</sup> It is also noted by the relevant Subcommittee that:

[T]he vote [which adopts Article 2(6)] was taken on the understanding that the association of the United Nations, representing the major expression of the international legal community, **is entitled** to act in a manner which will insure the effective cooperation of non-member states with it, so far as that is necessary for the maintenance of international peace and security.<sup>281</sup>

This reflects that the intention of the drafters not only to impose the obligation on the UN but also to confer on the UN the right to demand the non-member states. This right of the UN to demand non-member states to comply with relevant rules and sanctions is correlative to the duty of non-member states to comply with the UN's demand. Further, this also hints the thought that the universality of the UN Charter comes from the fact that it represents the will of the international community. However, the phrase 'so far as may be necessary for the maintenance of international peace and security' was intended to limit the relevant obligations and rights generated by Article 2(6) to issues falling within the scope of the maintenance of international peace and security.<sup>282</sup> Of course, while having some persuasive authority in interpreting the relevant text, the drafting history does not serve as a decisive determining factor.

The practice of the SC may be a reflection of the acceptance by officials of the universality of the Charter. Arguably, the SC seemingly believes that its resolutions can have a legally binding effect, not only on member states but also on non-member states.<sup>283</sup> In resolution 101, the SC reminded the Governments of Israel and Jordan, which were not yet members of the UN, of their obligations under its resolution.<sup>284</sup>

<sup>280</sup> See UNCIO vol. VI, 83, UNCIO vol. XVII, 147 and UNCIO vol. XVIII, 375.

<sup>281</sup> UNCIO vol. VI, 722 (emphasis added)

<sup>282</sup> UNCIO vol. XVII, 147. See also Stefan Talmon, 'Article 2(6)' in Nikolai Wessendorf with Bruno Simma, Daniel-Eramus Khan and George Nolte, Andreas Paulus (eds), *The Charter of the United Nations: A Commentary Volume I* (3rd edn, OUP 2012) 264; Mosler (n 52) 206–207.

<sup>283</sup> Talmon (n 282) 266–267.

<sup>284</sup> SC resolution 101 (1953).

This SC dropped its early distinctive approach when it made demands on member states regarding its binding decisions in operative paragraphs and when it urged non-state members or called upon non-members. The Resolution 418<sup>285</sup> was the first time the SC addressed a binding resolution affecting all states, including non-member states, and at that moment, more than ten states did not have UN membership.<sup>286</sup> Since then, in adopting Chapter VII-based resolutions, the SC constantly addresses relevant resolutions to all states, rather than only to UN state members.<sup>287</sup> Further, not only has the SC requested that non-member states implement sanctions on other states, but it has also enacted enforcement measures against them, for example against Rhodesia<sup>288</sup> and against the Federal Republic of Yugoslavia (Serbia and Montenegro).<sup>289</sup> Nonetheless, none of them denied the legality of such sanctions based on the fact that they were not members of the UN.<sup>290</sup>

However, Tomuschat argues that as the relevant Charter principles exist as part of currently existing customary international rules, the UN, of course, has legitimacy to warn non-member states regarding their customary obligations.<sup>291</sup> Likewise, Liivoja maintains: ‘...there would be nothing to prevent the UN, and its Members for that matter, from using all legally available avenues for securing the cooperation of non-Members’.<sup>292</sup> However, can the practice of the UN be comfortably seen as an act reminding non-members of their obligations or securing their co-operation? The practice of the SC since 1977 has been that, in adopting Chapter VII-based resolutions, it regularly addresses relevant resolutions to all states, rather than only to

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<sup>285</sup> SC resolution 418 (1977). See Talmon (n 282) 267.

<sup>286</sup> Ibid 268.

<sup>287</sup> Ibid; Tomuschat (n 212) 254; The last time SC referred to the term ‘State not members of the United Nations’ or ‘States non-members of the United Nations’ was in its Resolution 1054 (26 April 1996) Talmon (n 282) 268.

<sup>288</sup> See e.g. SC resolutions 232 (1966), 253 (1968), 277 (1970) and 388 (1976).

<sup>289</sup> See e.g. SC resolutions 757 (1992) and 820 (1993),

<sup>290</sup> Benedetto Conforti and Carlo Focarelli, *The Law and Practice of the United Nations* (4th edn, MNP 2010) 151–152 as cited in Talmon (n 282) 270.

<sup>291</sup> Tomuschat (n 212) 252.

<sup>292</sup> Liivoja (n 182) 595.

UN state members,<sup>293</sup> which seems to suggest a negative answer to this question. Nonetheless, in contrast, Liivoja offers an explanation opposing the binding character of SC resolutions on non-member states, in that, despite the non-binding nature of the Charter and SC resolutions on non-member states, the UN may call upon such states to make efforts for the fulfilment of its resolutions.<sup>294</sup> However, Liivoja does not offer any reason why such a practice should be interpreted in that fashion. One observation that needs to be made here is that if the addressing to and imposing of sanctions on non-member states by the SC, via its binding resolutions, are interpreted as, at best, a call by the SC for co-operation, why then, so far, have there been no states, especially those with sanctions imposed on them, claiming non-membership as a ground for refusing to comply with such decisions? Further, arguably, the fact that there have been no objections made by non-member states regarding the bindingness of SC resolutions addressing or sanctioning on them on the ground of non-membership can also be taken as the acquiescence of such states to the universal application of the Charter to all states.<sup>295</sup> In other words, this illustrates the acceptance by the international community of the universality of the Charter as an effect of the UN Charter being a value-based norm that protects the fundamental values of the international community and that it is to be regarded as a higher law and a universal law in order to fulfil its aims. This also reflects the status of the Charter as the written constitution of the international community. The phrase ‘so far as may be necessary for the maintenance of international peace and security’ not only puts a limitation on this Article but also signifies that the power of the UN Charter to create an obligation on the part of non-member states is generated by the importance of the shared values that the Charter protects, which is the maintenance of peace and security. In certain situations, the maintenance of peace and security can be interpreted as including the protection of fundamental human rights, which is essential for the creation of peace. Accordingly, shared fundamental values of peace

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<sup>293</sup> Tomuschat (n 212) 254; see e.g. SC Resolutions 418 (1977), 661 (1990), 670 (1990) 713 (25 September 1991), 757 (1992) and 788 (1992).

<sup>294</sup> Liivoja (n 182) 596.

<sup>295</sup> Baxter supports this view, Richard R Baxter, ‘Treaties and Custom’ (1971) 129 (1970/I) *Recueil des Cours* 71 as cited in Talmon (n 282) 267 at footnote 103.

and fundamental human rights are a source of, and at the same time a limitation on, the bindingness of the UN Charter vis-à-vis non-member states. The universality of the UN Charter makes Article 103 applicable to non-member states. Through the lens of the constitutionalist, Article 103 shall function as a rule in relation to the hierarchy of the international legal system and be applicable to all members of the international community.

### 3.3.3. Legal Consequences of the Secondary Rule of the Primacy of The UN Charter

In the case of a conflict falling within the scope of application of Article 103, the legal consequence designated is that ‘obligations under the present Charter shall prevail’. Although the term ‘prevail’ has a clear meaning, that obligations arising from the Charter shall be enforced,<sup>296</sup> this does however leave some uncertainty over what happens to superseded obligations, whether they are ‘void, voidable, suspendable or unenforceable’.<sup>297</sup> In other words, is Article 103 a secondary rule of priority or of validity?<sup>298</sup> Also there is the question of to ‘what extent other arrangements should be superseded or nullified’.<sup>299</sup>

ILC suggests that ‘the word “prevail” does not grammatically imply that the lower-ranking provision would become automatically null and void, or even suspended’.<sup>300</sup> It is argued that the use of the word ‘prevail’, instead of the stronger term ‘abrogate’, as employed in the Covenant of the League of Nations, signifies that a normative conflict falling under this article shall have less serious legal consequences, other than abrogation.<sup>301</sup> Kelsen, however, proposes that the word ‘prevail’ instead of ‘abrogate’ was preferred because ‘[t]he term "abrogate" usually refers only to the

<sup>296</sup> Liivoja (n 182) 596.

<sup>297</sup> Bernhardt (n 199) 1295.

<sup>298</sup> ILC Report on Fragmentation of International Law, para 334.

<sup>299</sup> Paulus and Leiß (n 227) 2135.

<sup>300</sup> ILC Report on Fragmentation of International Law, 334.

<sup>301</sup> E. Sciso, ‘On Article 103 of the Charter of the United Nations in the Light of the Vienna Convention on the Law of Treaties’ (1987) 38 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 161–79, 168–171 as cited in Paulus and Leiß (n 227) 2135.

subsequent norm'. Hence, 'It may be that the term "prevail" instead of "abrogate" has been chosen to cover the invalidation by the Charter of inconsistent, preceding as well as subsequent, treaty obligations'.<sup>302</sup> Therefore, interpretation of the term 'prevail' does not give a clear-cut answer to the question.

Three alternatives for the consequences of the application of Article 103 are suggested by academics. The first proposition is that the result of this Article is the invalidity of a conflicting norm.<sup>303</sup> Fassbender, in particular, argues that the UN Charter is a constitutional rule and therefore the effect of Article 103 leads to the same legal consequence as the rule of the non-derogability of *jus cogens* rules, which is the invalidation of conflicting rules.<sup>304</sup> The second alternative is that Article 103 does not invalidate or nullify the conflicting rule but gives priority to the Charter and temporarily suspends the conflicting rule until the conflict disappears.<sup>305</sup> The third alternative, proposed by Bernhardt, articulates that the consequences of violation of Article 103 can be divided into two scenarios, namely, conflicts of norms with the provisions of the Charter and conflicts of norms with the binding decisions of UN organs. In the first scenario, where a normative conflict involves an obligation generated directly by the provisions of the Charter, the violating norm shall be unenforceable and void. However, in the second scenario, which is not per se in conflict with Charter rules but in conflict with the chapter VII-based SC resolution, the superseded norm shall be temporarily suspended as long as the resolution is still in force.<sup>306</sup>

In cases of conflict of other international rules with a binding decision of the SC Chapter VII resolutions, the interpretation of Article 103 as a rule of priority is patently more preferable. As Klabbers observes, such conflicts tend to happen in 'a

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<sup>302</sup> Kelsen (n 231) 289.

<sup>303</sup> See e.g. Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press 1961) 217.

<sup>304</sup> Bardo Fassbender, 'The United Nations Charter as Constitution of The International Community' (1998) 36 *Columbia Journal of Transnational Law* 529, 590.

<sup>305</sup> Liivoja (n 182) 597; Spijkers (n 64) 77–78; Paulus and Leiß (n 227) 2135–2136.

<sup>306</sup> Bernhardt (n 199) 1297–1298.

short-term scenario' since SC sanctions are likely 'to be temporary in design'.<sup>307</sup> Therefore, it might lead to an absurd consequence if a conflict with only temporary and specific decisions of the SC were to nullify a whole conflicting treaty which, at the abstract level, does not conflict with UN Charter rules. Take for example the *Lockerbie* case, in which there existed a conflict between an SC resolution and the Montreal convention. The SC resolution in dispute could be implemented given just a temporary suspension of a conflicting provision of the Montreal Convention, showing that this provision conflicted with the Charter in a concrete or ad hoc manner but not at an abstract level.<sup>308</sup> Thus, the option to nullify either only the conflicting provision(s) or the whole Montreal Convention rather than temporary suspension would have been illogical. Accordingly, the first alternative that renders the conflicting norm invalid in both cases of conflict with the Charter rule and the decisions of UN organs is not to be taken as a proper choice. The problem with the second alternative would be that, given the constitutional character of the Charter, the conflict with constitutional law should be interpreted as resulting in the invalidity of the conflicting norm for it conflicts with the supreme law of the system. For the third alternative it can be argued that there exists no textual basis for a distinction between the results of cases of conflict with Charter rules and the decisions of UN organs. However, there exists a substantive difference between cases of direct conflict with the substance of the UN Charter and conflicts with obligations created by the SC resolution. The former directly conflict with the UN Charter and are not temporal in nature whilst the latter occur at a specific level and are not per se in conflict with the substance of the Charter but are in conflict with the chapter VII-based SC resolution and temporal in their nature. This distinction could provide a reasonable ground for the Court to interpret the consequences of such cases differently, and although there is no solid textual basis for this distinction, the unclear content of such an article does indeed leave some room for interpretation by

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<sup>307</sup> Jan Klabbers, 'Straddling Law and Politics: Judicial Review in International Law' in R St J MacDonald and DM Johnston (eds), *Towards World Constitutionalism* (MNP 2005) 834.

<sup>308</sup> ILC Report on Fragmentation of International Law, para 335; Paulus and Leiß (n 227) 2136.

the Courts to develop secondary rules regarding this matter.

With regard to the extent to which a colliding agreement should be declared void or suspended, the proposition taken here is that in the case of a conflict of norms with a direct obligation directly arising from Charter law, resulting in the invalidity of violating norms, due to its proximity to the protection of the shared values of the international community, it can be modelled on Articles 53 and 64 of the VCLT in the case of norms conflicting with *jus cogens*. Accordingly, the rule of separability should apply to violating norms precedent to the Charter, but not to those subsequent to the Charter. However, in the case of norms conflicting with an obligation not directly arising from the Charter, the rule of primacy of the Charter should suspend only a specific provision that conflicts with the decision of the UN organ,<sup>309</sup> i.e. the rule of separability shall apply, no matter whether the conflicting norm is precedent or subsequent to the relevant UN organ's decision. Otherwise, it will result in an absurd situation where the conflict of only one provision of a certain treaty which does not conflict with Charter rules but only with a decision of a UN organ unnecessarily leads to suspension of the whole treaty.

#### 3.3.4. Supremacy of International Primary Rules Protecting Peace and Fundamental Human Rights Established by the Secondary Rule of Primacy of the UN Charter

It has been shown that the secondary rule of the primacy of the UN Charter reflects the elevation of substantive rules of the Charter into higher primary rules of the international legal system and reflects the status of the UN Charter as a written constitution of the international community. Apart from those with the status of *jus cogens*, if other international rules, in whatever form of international law they exist, conflict with the provision of the UN Charter, this will result in their invalidity, whilst if they do not conflict with the provisions of the UN Charter but rather with the binding decisions of UN organs, their application will be temporarily suspended

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<sup>309</sup> Paulus and Leiß (n 227) 2136; ILC Report on Fragmentation of International Law, para. 335.



until the conflict disappears. The status of the UN Charter as the constitution of the international community is, theoretically, based on its link to the fundamental shared values of the international community, and the acceptance of the rule of primacy of the UN Charter, reflected in Article 103 of the Charter, has created a hierarchical structure of the primary rules in the international system. Exploring the underlying purpose of the Charter, the Charter rules serve the international community's fundamental shared values, which are the protection of international peace and fundamental human rights. Similar to the non-derogability of *jus cogens*, the primacy of the UN Charter elevates international primary rules that protect those two values into higher rules of the international system and similarly provide a limitation on the law-making power of states, since if states enter into agreements that conflict with the UN Charter, such agreements are not enforceable. This has again confirmed, via the most important written legal instrument of the international community, that the protection of peace and fundamental human rights are values fundamental to the survival of the international community and these need to be protected by the higher and universal rules of the international legal system. The secondary rule of the primacy of the UN Charter also plays a role in limiting the law-making power of states with respect to peace and fundamental human rights. Thus, together with the secondary rule of the non-derogability of *jus cogens*, the secondary rule of the primacy of the UN Charter has contributed to the establishment of a hierarchical structure of the international legal system that confers higher status on international primary rules protecting peace and fundamental human rights, which is one of the necessary conditions for turning international law into a constitutionalized legal system. However, as the substantive rules of the Charter and the *jus cogens* rules are not the same set of rules, and each has its own process of creation and change, there exists the possibility that rules from these two sets of higher rules will conflict with each other, and so this is an issue that will be dealt with in the next section.

#### **IV. Conflicts between *Jus Cogens* and the UN Charter**

As it is proposed here that both *jus cogens* rules and the substantive rules of the UN Charter exist as constitutional primary rules of the international legal system, this leads to one of the most complicated issues regarding conflicts between them.

Based on the unifying rule of recognition of the international community, the validity of primary rules derives from fundamental shared values of the international community and the rules of *jus cogens* and the Charter exists as a higher law, as they are rules perceived by the international community as protecting the fundamental shared values of the international community. At a particular moment, the international community holds only one set of content of fundamental shared values. Therefore, *jus cogens* and the Charter rules must earn their validity from the same content of values, and this leads to the notion that if these two set of norms are to have a higher status at the same moment, the contents of the two norms should be in harmony. Indeed, fundamental shared values of the international community can conflict with each other. However, such conflicts of fundamental values shall be resolved by a collective decision of the international community and the content of community-value-based rules will reflect such compromises between fundamental values in term of general rules and exceptions. Thus, rules which can be deemed as accurately reflecting the content of fundamental shared values must also reflect any compromise between fundamental values which exist in the form of general rules and exceptions. Accordingly, *jus cogens* and the Charter will be in harmony if they reflect such content. In other words, where overlaps between the contents of the UN Charter and *jus cogens* rules occur, and both accurately reflect the beliefs of the international community regarding fundamental shared values, the written rules of the Charter must be an expression of the content of *jus cogens*. However, this does not necessarily mean that every unwritten *jus cogens* rule will have a counterpart written rule in the UN Charter.<sup>310</sup> For example, a rule for the common heritage of mankind does not appear in the Charter.

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<sup>310</sup> See the discussion in Dupuy (n 198) 4–5.

A number of scholars agree with the academic opinion that sustains that, at least currently, the Charter is the expression or confirmation of pre-existing unwritten fundamental rules of the international community, i.e. *jus cogens* rules.<sup>311</sup> Exploring the current content of the UN Charter, conflicts between two sets of norms cannot be identified, while conflicts that have materialized and been brought before the court, such as in the *Yussuf* case and *Kadi* case are between *jus cogens* rules and SC resolutions, rather than involving the Charter.

However, this does not rule out the possibility of conflicts because they are two separate sets of rules and can change according to relevant secondary rules of change. To elaborate more, based on Article 53 of the VCLT, the contents of *jus cogens* can be modified and, likewise, based on Articles 108–109 of the UN Charter, the Charter can be amended. In possible conflict scenarios due to the change in their contents, certain scholars are of the view that *jus cogens* rules will prevail over the Charter.<sup>312</sup> The ILC is also in favour of *jus cogens*, articulating:

[I]f United Nations Member States are unable to draw up valid agreements in dissonance with *jus cogens*, they must also be unable to vest an international organization with the power to go against peremptory norms. Indeed both doctrine and practice unequivocally confirm that conflicts between the United Nations Charter and norms of *jus cogens* result not in the Charter obligations' pre-eminence, but their invalidity. In this sense, the United Nations Charter is an international agreement as any other treaty.<sup>313</sup>

Nevertheless, in contrast, Fassbender disagrees with the higher position of *jus cogens*, arguing that 'those peremptory norms, all of which are based on the rules and values of the Charter, could not exist independently of the Charter'<sup>314</sup> and that

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<sup>311</sup> MacDonald (n 86) 145; Fassbender (n 84) 164; Spijkers (n 64) 72–73; Dupuy (n 198) 13–14; Hossain (n 8) 85.

<sup>312</sup> Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 LJIL 579, 598; Orakhelashvili (n 256).

<sup>313</sup> ILC Report on Fragmentation of International Law, para. 346.

<sup>314</sup> Fassbender (n 84) 164.

*jus cogens* rules are ‘a logical prolongation of the Law of the Charter’.<sup>315</sup> However, these arguments seem to possess certain shortcomings. Indeed, as illustrated before, despite, in the context of *jus cogens*, the lack of development of institutional rules to implement and enforce *jus cogens* rules, the non-derogability of *jus cogens* can still be enforced outside the UN system. Thus, the claim that *jus cogens* rules are independent of the UN Charter is not sustainable. Even if it were true, the more developed structure of the UN system could not be a compelling reason to grant the UN Charter superior status, since what gives both norms a special status pertains to a substantive point and the link to fundamental values of the international community. Moreover, there are certain *jus cogens* rules which are not codified in the UN Charter and new *jus cogens* might develop outside the UN system. Thus the claim that *jus cogens* is a logical prolongation of the UN Charter does not reflect such a fact or possibility. On the contrary, the UN Charter shall be deemed as an attempt to provide an institutional structure to implement *jus cogens* rules

It will be argued here that *jus cogens* is superior in a case of conflict with the Charter. The reason is that, as proposed here, what constitutes the special character of *jus cogens* and the UN Charter is the importance of the values they protect. Given the rule of change of *jus cogens*, according to Article 53, *jus cogens* rules can be modified only by a subsequent norm of general international law having the same character of *jus cogens*. According to the rule of recognition of *jus cogens*, subsequent norms can have *jus cogens* character only when the international community accepts them as being non-derogable, i.e. they protect fundamental shared values of the international community. Thus, *jus cogens* rules which can exist as unwritten rules will always correspond to the content of the fundamental shared values of the international community. Hence, changes to *jus cogens* are always based on a change to the content of fundamental shared values. Differently, changes to the UN Charter do not always reflect the content of fundamental shared values since, according to Articles 108 and 109 of the Charter, the process of modification only requires a two-thirds vote of members of the UN, including all permanent

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<sup>315</sup> Ibid.

members of the SC.<sup>316</sup> Thus, such procedures are based primarily on the community of states' view and this does not necessarily represent the view of the essential components of the international community of humankind. This is where, based on the insistence that the current content of *jus cogens* and the Charter are in harmony, future conflicts of these two sets of norms would fit into two scenarios. First, there are changes in *jus cogens* that conflict with the current Charter. This happens when new *jus cogens* rules emerge and modify the current *jus cogens* rules and emerging *jus cogens* rules conflict with the current content of the UN Charter. In this case, *jus cogens* shall prevail as the new emerging *jus cogens* rules reflect changes to the content of fundamental shared values. This is because the current content of the Charter does not correspond to changes in the content of fundamental shared values, thus depriving the constitutional status of the UN Charter. The second scenario is when the Charter is modified and such modification does not represent changes to the content of fundamental shared values of the international community. Consequently, the new content of the Charter can conflict with *jus cogens* rules which are based on the unaltered content of fundamental shared values. In a case where new content of the Charter conflicts with *jus cogens*, this would mean that it departs from the current content of fundamental shared values and cannot retain its constitutional character. However, when applying Article 53 of the VCLT, this should be interpreted as a conflict between an amendment to the Charter and *jus cogens* rules, and so making such an amendment or alteration should be deemed void and the content of the Charter left unmodified. Thus, it can be said that an amendment to or alteration of the Charter is subject to *jus cogens* rules, unless it reflects the view of the international community and establishes a new *jus cogens* rule. This is comparable to a situation in the domestic system where modification to a written constitution cannot be made in contravention of basic unwritten constitutional rules or written provisions expressing such unwritten rules.<sup>317</sup> For

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<sup>316</sup> See Articles 108 and 109 of the UN Charter.

<sup>317</sup> See the case-law of constitutional courts accepting the existence of implicit substantive limits on the constitutional amendment in Kemal Gözler, *Judicial Review of Constitutional Amendments A Comparative Study* (Ekin Press 2008) 84–97; see also the hierarchy among norms from the same source in Mosler (n 52) 101.

example, The Turkish Constitutional Court, in its decision of 26 September 1965, No. 1965/40, 144, affirmed that ‘the constitutional amendments which ... destroy the basic rights and freedoms, rule of law principle, in one word, demolish the essence of the 1961 Constitution ... cannot be made in application of the Article 155’.<sup>318</sup> The superiority of *jus cogens* rules over the Charter can also be seen as a limitation on the power of an ensemble of states as a representative of the international community to design, change or modify the written constitution of the international community. The majority will of the community of states might not always represent the view of the international community of humankind composed of all essential components, especially given the protection of the benefits of stateless persons who are a minority without a genuine representative in inter-state forums as well as the minority groups that can be under-represented by state agents.

With respect to the legal consequences of a conflict between the UN Charter and *jus cogens*, it is suggested that the rule codified in Articles 53 and 64 of the VCLT may apply to such a conflict, as the UN Charter can still be seen as a treaty,<sup>319</sup> especially when it departs from the shared values of the international community that created its special status. However, one might argue that Articles 53 and 64 of the VCLT cannot be applied to the relation between *jus cogens* and the Charter, which entered into force before the VCLT, in light of the rule of non-retroactivity in Article 4<sup>320</sup> of the VCLT.<sup>321</sup> Nonetheless, Hossain's view is that, despite the fact that the VCLT entered into force after the Charter, the rules embraced in Articles 53 and 64 of the VCLT can be applied as customary rules and the rule of the non-derogability of *jus cogens* rules as an unwritten rule was accepted as a rule of the international legal system

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<sup>318</sup> 4 AMKD 290 (1965), as cited in Gözler (n 317) 96.

<sup>319</sup> Vidmar (n 47) 22.

<sup>320</sup> Article 4 of the VCLT provides that, ‘Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.’

<sup>321</sup> Vidmar (n 47) 22.

before the creation of the Charter.<sup>322</sup> Therefore, by virtue of the unwritten secondary rule codified in Article 53 of the VCLT, Charter rules will become void if they conflict with *jus cogens* rules. Added to this, based on an unwritten secondary rule codified in Article 64 of the VCLT which will apply in a case where the UN Charter conflicts with *jus cogens* rules, which have been altered, based on a change in the content of the shared values of the international community, the rule of separability shall apply and only a specific provision in the conflict will become void.

Further, as the rule of primacy of the UN Charter also elevates the SC's Chapter VII-based resolution, conflicts between SC resolutions and *jus cogens* rules is the next issue to be discussed. The decisions of the SC are protected by Article 103 of the Charter and because the obligation of member states to comply with SC decisions according to Article 25 falls within the scope of Chapter VII, such an obligation falls within the scope of Article 103, as discussed before. Normally, if an SC resolution conflicts with *jus cogens* rules, it is very likely to conflict with the UN Charter. In such a case, the bindingness of SC resolutions can be rejected on both the ground of violation of the Charter, which is the basis of the power of the SC, and on the ground of violation of the rule of the non-derogability of *jus cogens*. However, there can be a situation where SC resolutions do not conflict with the Charter but are incompatible with *jus cogens*, since the provisions of the Charter are quite general in character and the Charter empowers the SC with some discretion to design measures under Chapter VII. In such a case, if the UN Charter is inferior to *jus cogens* in a case of conflict, this is also the case for SC decisions which are only an extension of the Charter. However, conflict avoidance should be resorted to first before applying conflict rules. For example, Rodley suggests that based on the wording of Article 1(3)<sup>323</sup> of the Charter, an SC resolution should be interpreted on the presumption that, 'the Security Council did not intend that actions taken pursuant to its resolutions should

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<sup>322</sup> Hossain (n 8) 88.

<sup>323</sup> Article 1(3) of the UN Charter provides: 'To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...'

violate human rights’, and ‘in any event, there was no intention that a peremptory norm of international (human rights) law (*jus cogens*) should be violated’.<sup>324</sup>

The subjection of SC resolutions to *jus cogens* rules was explained in Judge Lauterpacht’s separate opinion in the *Bosnia Genocide* case, in that:

The concept of *jus cogens* operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent.<sup>325</sup>

The Court of First Instance of the EC took this approach in the *Yusuf* case, as the Court ruled that: ‘...there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*’.<sup>326</sup> A similar approach was taken in the *Kadi* case in the ruling of the CFI.<sup>327</sup> However, the ECJ turned around the decision of the CFI on the issue of the power to review the validity of SC solutions, ruling that it has no jurisdiction to review the lawfulness of a resolution adopted by an international body. However, the ECJ ruling on that issue is based on ‘the separateness’ of the EU from the international legal system<sup>328</sup> in light of its sui

<sup>324</sup> Nabil Sayadi and Patricia Vinck v. Belgium, Communication No. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006 (2008). CCPR/C/89/D/1472/2006, Individual opinion of Committee member Sir Nigel Rodley (concurring), 36–37.

<sup>325</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 325, Separate Opinion of Judge ad hoc Lauterpacht, para. 100.

<sup>326</sup> Judgment of the Court of First Instance of 21 September 2005 in Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, paras 280–281.

<sup>327</sup> Judgment of The Court of First Instance (Second Chamber, Extended Composition) of 21 September 2005 in Case T-315/01, *Kadi v. Council And Commission*, paras 229–230.

<sup>328</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, paras 286-288, 316 and 326-327; See Andreas Paulus, ‘The



generis character in the sense that the EU is beyond being an international organization and on its way to developing into a state system. Accordingly, it should not serve as a precedent for international adjudicators.

Regarding the legal consequence, SC resolutions which are in conflict with *jus cogens* rules will be void.<sup>329</sup> Further, Orakhelashvili suggests that, arguably, the non-severability effect on legal acts conflicting with *jus cogens* rules has not yet been accepted as part of customary international law. As a result, the rule of separation may apply to SC resolutions in conflict and protect the validity of other clauses which are in conformity with *jus cogens* rules.<sup>330</sup> However, it is argued here that based on analogical reasons to the case of treaties in conflict with *jus cogens*, only SC resolutions that conflict with newly emerging *jus cogens* rules enjoy the benefit of the rule of separation, not those in conflict with pre-existing *jus cogens* rules.

Thus, to conclude, since *jus cogens* rules need to be neither codified nor changed by a written instrument, they more promptly correspond to the content of fundamental shared values of the international community than the UN Charter that needs to be modified via a designated process. In possible future conflicts between *jus cogens* rules and the UN Charter, *jus cogens* will prevail. With regard to clashes between *jus cogens* and SC resolutions, normally, if an SC resolution conflicts with *jus cogens* rules, it is very likely to conflict with the UN Charter, and the bindingness of SC resolutions can be rejected on both the ground of violation of the Charter, which is the basis of the power of the SC, and on the ground of violation of the rule of the non-derogability of *jus cogens*. However, there can be situations where SC resolutions do not conflict with the Charter but are incompatible with *jus cogens*, since the provisions of the Charter are quite general in character and the Charter empowers the SC with some discretion to design measures under Chapter VII.

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International Legal System as a Constitution' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 105.

<sup>329</sup> See the discussion about the legal consequences of a breach of *jus cogens* by SC resolutions in Orakhelashvili (n 256) 78–84.

<sup>330</sup> Ibid 84.

**V. Conclusion: The Existence of The Hierarchical Structure with the Supremacy of International Primary Rules Protecting Peace and Fundamental Human Rights in International Law**

A hierarchical structure that provides supremacy for international primary rules protecting peace and fundamental human rights, i.e. as constitutional primary rules, is essential to fulfilment of the constitutionalized international legal system's limited mandate for peace and the protection of fundamental human rights. The international legal system recognizes the power of states to make international law due to, from the cosmopolitan paradigm, the respect for the constituent power-holders of the state, aka the people, as reflected in the principle of state equality. This is to create international peace and prevent states from being forced, against their will, to enter into a legal relationship. Nonetheless, the unlimited international law-making power of states will pose a threat to peace and the protection of fundamental of human rights, since states will be able to opt out from international law creating an obligation to protect peace and fundamental human rights or even enter into an agreement whose purpose opposes peace and the protection of fundamental human rights. Primary constitutional rules will impose, apart from substantive coherence, limitations on the law-making power of states regarding peace and fundamental human right issues. This will contribute to more legitimacy for states to exercise their international law-making power. Based on the content of the unifying rule of recognition of the international legal system that accepts fundamental shared values as a source of validity of higher rules of the system, two sets of primary rules are elevated into constitutional primary rules of the international legal system – *jus cogens* rules and the UN Charter by the secondary rule of the non-derogability of *jus cogens* and the secondary rule of primacy of the Charter, because of their links to fundamental shared values. However, *jus cogens* rules and the substantive rules of the UN Charter exist as separate sets of rules in the same legal system and a change to one set of rules does not always result in a change in another. Therefore, conflicts between them are possible. When such conflicts occur, it is *jus cogens* rules that

prevail since *jus cogens* are more closely linked to fundamental shared values of the international community which are a source of validity of both sets of rules' constitutional status.

As illustrated in this chapter, the fundamental values that are protected by those two sets of constitutional primary rules are peace and fundamental human rights. That is to say, it is the belief of the international community in the utmost importance of these two values to its survival that generates the universal and higher character of *jus cogens* rules and the Charter and elevates them into constitutional primary rules of the international legal system. Therefore, this reflects the international community having recognized the importance of these two values and the necessity of attributing constitutional status to the primary rules that protect peace and fundamental human rights in order to limit the legal power of states to opt out or derogate from them. Thus this belief of the international community is the driving force for and the rationale underlying the hierarchical structure of primary rules for the supremacy of the international primary rules protecting peace and fundamental human rights which have been already established in the international legal system.

In this chapter, it has been shown that the hierarchical structure of international law conferring constitutional status on the international primary rules that protect peace and fundamental human rights exists in international law. However, although the hierarchical structure of international law as well as the systematic element of international law sustained in the preceding chapter has been affirmed, it does not suffice to confirm the quality of international law as a constitutionalized legal system with an aim of the establishment of international self-governance with a limited mandate over peace and fundamental human rights. Without the institutionalization of international constituted power which can be exercised against state wills to protect the hierarchical structure of the international legal system established to enforce the constitutional obligation to protect peace and fundamental human rights, the aim of international constitutionalism cannot be fulfilled. Thus, in the next chapter, the existence of a legal structure that serves as a mechanism for the

institutionalization of international constituted power with regard to the matter of peace and fundamental human rights will be examined.



## Chapter V: Institutionalization of International Constituted Power in International Law

### I. Introduction

In Chapters III and IV, two out of three necessary conditions for a constitutionalized international legal system — the systematic quality and hierarchical structure of international primary rules with the supremacy for rules protecting peace and fundamental human rights were affirmed. In this chapter, the final necessary condition for the emergence of constitutionalized international legal system, which is the institutionalization of international constituted power, will be discussed.

In his famous political writing ‘What is the third estate’, Sieyès writes: ‘[i]n each of its part, a constitution is not the work of a constituted power but as a constituent power.’<sup>1</sup> Loughlin argues that the concept of constituent power ‘helps us locate the source of modern political authority, and therefore identify the base upon which the structure of legal authority rests’.<sup>2</sup> According to Negri, constituent power is ‘the source of production of constitutional norms’, aka ‘the power to make a constitution’, and therefore it is ‘the power to dictate the fundamental norms that organize powers of the States’ (or within communities), and it can also be explained as ‘the power to establish a new juridical arrangement, to regulate the juridical relationships within a new community’.<sup>3</sup> Thus, the constituent power is ‘absolutely free in scope’ whilst constituted power is ‘limited by the terms of constitution’.<sup>4</sup> In other words, constituted power can be explained as ‘the legal basis on which

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<sup>1</sup> Emmanuel Sieyès, ‘What Is the Third Estate?’ in Michael Sonenscher (tr), *Sieyès: Political Writings: Including the Debate Between Sieyès and Tom Paine in 1791* (Hackett Publishing 2004) 136.

<sup>2</sup> Martin Loughlin, *The Idea of Public Law* (OUP 2003) 100.

<sup>3</sup> Antonio Negri, *Insurgencies: Constituent Power and the Modern State (Theory Out of Bounds)* (Maurizia Boscagli tr, University of Minnesota Press 2009) 2.

<sup>4</sup> Paolo Carrozza, ‘Constitutionalism’ Post-Modern Opening’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 174.

authority is exercised within a legal framework’, whilst constituent power is ‘the exercise of political power and the ultimate source of legitimate authority’.<sup>5</sup> Applying the idea of a nexus between constituted power and constituent power to the international sphere, Donoghue explains that:

Within international law, constituent power is identified with those who grant to political actors the legitimacy and authority to create customary international law, treaty law, binding decisions and resolutions, and other characteristics of the exercise of constituted power. Constituted power, on the other hand, is held by those within the system that exercise and are constrained by the authority granted to them.<sup>6</sup>

Thus, the best place to look for international constituent power holder and constituted power holder would be the unifying rule of recognition of the international legal system as it is a rule that governs the source of validity of international rules including international constitutional rules. The identification of source of validity of international rules will help us reveal the entities holding either international constituent power that can be used to make international constitutional rules or international constituted power that can be used to make ordinary international rules.

As illustrated in Chapter III, the unifying rule of recognition of the international legal system embraces state wills and fundamental shared values of the international community as a source of international rules. As fundamental shared values of the international community are a source of validity of international constitutional rules, this suggests that the international community is the origin of international constituent power and individuals as part of humanity are a collective international constituent power-holder. State wills are regarded as a source of validity of ordinary international rule. The international secondary constitutional rule such as the rule of *pacta sunt servanda*, the rule of recognition of customary international law and the rule of recognition of general principles recognize state wills as a source of validity;

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<sup>5</sup> Aoife O’Donoghue, *Constitutionalism in Global Constitutionalisation* (CUP 2014) 9.

<sup>6</sup> *Ibid* 237.

in other words, the constitutional secondary rules also allocate international law-making power to states. Thus, states are bestowed international constituted power. However, the source of such power comes from within states, either its people or other forms of sovereignty as the case may be and the power of states pre-existed both the international community and the international constitutional system, the existence of which is sought to be affirmed in this thesis. Hence, such power is not originally constituted by the international constitution, thus not deriving originally from international constituent power-holder. However, when the international community and its legal system emerge, the international legal system respects and accepts the power of states. Based on the cosmopolitan paradigm, the international legal system must respect the domestic constituent power-holders of democratic states and must not intervene the development of domestic constitutionalism through internal enlightenment unless peace and fundamental human rights are at risk. Accordingly, the international legal system allocates international law-making power and allows states to create international rules based on their consensual will as long as it does not violate the community-value-based rules which are created by the constituent power-holder of the international legal system. Nevertheless, in light of mutually complementing relationship between the international legal system and domestic legal systems, the international legal system does not exist as a legal system which is hierarchically superior to domestic legal systems; rather, international law is a legal system which holds those systems together. Hence, the international legal system can intervene in the power of domestic legal systems only over matters of peace and fundamental human rights because it is only within domestic legal systems that a genuine link between governments and people can be robustly established; therefore, other matters at both international and domestic levels should be left for relevant states to decide.

However, international constituted power, the allocation and limitation of which this chapter seeks to affirm is international constituted power which can be exercised against state wills which is necessary to the enforcement of primary constitutional rules and the protection of the hierarchy of international primary rules guarding the



supremacy of peace and fundamental human rights. Thus, the scope of the institutionalization of constituted power discussed here is limited to international constituted power, which can force against state wills. In other words, the aim of this chapter is to determine whether or not international constituted power superior to state wills has been allocated to any actor in the international legal system and if so, whether or not it is limited by the nexus to the international community of humankind to affirm the existence of the international self-governance with mandate for peace and fundamental human rights.

In search for international constituted power which can be exercised against state wills, the verticalization of international law by the secondary rules of the non-derogability of *jus cogens* signifies the existence of such international constituted power that is superior to the power of states. The identifying of a hierarchical structure of international primary rules done in the last chapter not only reveals the existence of constitutional primary rules in the international legal system but also identifies a pattern for the allocation of powers to international actors that hold international constituted power that can be used against the will of states. Such verticalization of power signifies a shifting of power away from state-centred international law.<sup>7</sup> This will help us to trace the source of such power, aka constituent power, since, as Donoghue suggests, the indication of constitutional rules is vital to the task of revealing who possesses constituted power and constituent power.<sup>8</sup>

Accordingly, the task of this chapter is to identify, within the regimes of *jus cogens* and the UN Charter, the actors to which international constituted power that can be used to enforce constitutional primary rules and protect the international hierarchical structure has been allocated. Once the allocation of international constituted power in each regime identified, it is time to see whether the exercising of such power is limited based on the nexus to the international community of humans as the

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<sup>7</sup> Ibid 50–51.

<sup>8</sup> Ibid 237.

international constituent power-holder. It should be noted here that, as discussed in the last chapter, in case of conflict of *jus cogens* rules with substantive UN Charter Rules or SC Chapter VII resolutions, *jus cogens* rules will prevail. Therefore, *jus cogens* rules can serve as a limitation on the exercising of the international constituted power allocated by the UN Charter and thus it will be discussed first.

## **II. Jus Cogens and the Institutionalization of International Constituted Power**

The unifying rule of recognition of the international legal system embraces both state will as a source of state-will-based primary rules and the shared values of the international community as a source of validity of community-value-based primary rules, including *jus cogens*. However, fundamental shared values are recognized as a superior source of rule validity. This means that the unifying rule of recognition of the international legal system reveals that there exists an international constituted power superior to the will of states and this international constituted power derives from the international community of human kind which can be seen as the origin of international constituent power.

Nevertheless, constituted power must be institutionalized; in other words, it must be allocated to actors in the legal system and limited by a link to constituent power in order to create international self-governance via the secondary rules of the system. On exploring the *jus cogens* context, there seems to be a lack of development in the institutionalization of international constituted power. Although Articles 44, 53, 64, 66 and 71 of the 1969 VCLT and their counterparts in the Vienna Convention on the Law of Treaties between States and International Organizations, or between International Organizations 1986, entail a rule of recognition, a rule of change and a rule of adjudication for *jus cogens*, and a rule of the non-derogability of *jus cogens*, none of them create or empower international actors to exercise international constituted power to enforce and protect *jus cogens* rules. The only international actors that seem able to exercise such international constituted power are international adjudicating bodies. However, there exist no special adjudication rules

that empower any court to have compulsory jurisdiction over a dispute regarding *jus cogens* rules. This lack of compulsory jurisdiction of the ICJ, even in the case of *jus cogens* rules, is clearly expressed in the *Armed Activities* case. In referring to the distinction between obligation *erga omnes* and the rule of consensual jurisdiction in its past jurisprudence,<sup>9</sup> the court ruled:

The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties.<sup>10</sup>

In the context of international criminal law, the International Criminal Court has criminal jurisdiction over *jus cogens* rules concerning crimes of genocide, war crimes, crimes against humanity and crimes of aggression. However, the only situation in which the court has jurisdiction over non-party states' nationals for a crime committed in a non-party's territory is when crimes are referred to the Prosecutor by the SC according to Article 13 (b) of the Rome Statute of the International Criminal Court.<sup>11</sup> This scenario is more relevant to the power of the SC based on the UN Charter, which is another higher rule in the international legal system, and this will be dealt with later. Accordingly, as far as *jus cogens* rules and relevant secondary rules are concerned, the constituted power deriving from the international community is insufficiently institutionalized. Thus, as far as *jus cogens*-related legal mechanisms are concerned, the fulfilment of the underlying purpose of an international constitutional legal system to create international peace and protect fundamental of human rights may only scarcely be achieved.

<sup>9</sup> *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, para. 29

<sup>10</sup> *Armed Activities on the Territory of The Congo (New Application: 2002) (Democratic Republic of The Congo v. Rwanda) Jurisdiction of The Court and Admissibility of the Application*, I.C.J. Reports 2006, para. 64.

<sup>11</sup> See e.g. Dapo Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' 1 *Journal of International Criminal Justice* 618.

Although the *jus cogens* regime does not contribute much to the development of the institutionalization of international constituted power, as it does not specifically allocate international constituted power to enforce *jus cogens* rules, it provides a clear illustration of how international constitutional rules derive from the constituent power held by all individuals in the international community as the international. This discussion will be very helpful when *jus cogens* rules play the role of a legal mechanism that limits the international constituted power allocated by the UN Charter to its organs. With respect to international constituent power, the unifying rule of recognition of the international legal system embraces fundamental shared values as a source of validity of higher rules of the system. This signifies that international constituent power is held by the international community, i.e. members of the international community whose beliefs count towards the articulation of fundamental shared values are the holders of constituent power. Through a cosmopolitan lens, an international constitutional legal system exists, inter alia, to create cosmopolitan rights, aka human rights, for every individual dwelling on this earth, and these shall be enforced irrespective of territorial issues. This is how an international constitutional system will fix the inherent defects of the domestic constitutional system which cannot include all possible individuals that might be affected by constitutional rules and other rules of the system as its constituent power-holders. Accordingly, the current international legal system cannot qualify as a constitutionalized international legal system unless every human being is a constituent power-holder, i.e. every human being is a member of the international community. The cosmopolitan idea has its roots in stoicism,<sup>12</sup> one of the important philosophical contributions of which is the idea of the community of humankind. For instance, Seneca wrote that '[t]he first thing philosophy promises us is the feeling of

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<sup>12</sup> Derek Heater, 'Does Cosmopolitan Thinking Have a Future?' (2000) 26 *Review of International Studies* 179; Tony Burns, 'Aristotle, Stoicism and Cosmopolitan Political Thought' (2007), A Paper Presented to a Conference on the Theme of Cosmopolitanism: Past and Present, University of Dundee, 6th-9th June 2007.

fellowship, of belonging to mankind and being members of a community'.<sup>13</sup> Seneca also argued that:

We must grasp that there are two public realms, two commonwealths. One is great and truly common to all, where gods as well as men are included, *where we look not to this corner* or that, but measure its bounds with the sun. The other is that in which we are enrolled by an accident of birth – I mean Athens or Carthage or some other city that belongs not to all men, but only to a limited number.<sup>14</sup>

Based on Seneca's thoughts, Donoghue proposes that, according to stoic philosophy, there are two communities, 'one assigned at birth' which is 'their home state', and 'another that embraces all men' which is "[the] kingdom of reason", a much broader supposition with almost universal membership'.<sup>15</sup> When discussing the idea of community, it is explained that, to have a community, there must exist a commonality that unites the members of the community. For the international community of humankind, what should serve that function is the rationality of each individual, as Aurelius explains:

If to understand and to be reasonable be common unto all men, then is that reason, for which we are termed reasonable, common unto all. If reason is general, then is that reason also, which prescribed what is to be done and what not, common unto all. If that, then law. If law, then are we fellow-citizens. If so, then are we partners in some one commonweal. If so, then the world is as it were a city.<sup>16</sup>

To interpret the international community as a community of mankind based on a common rational character should alleviate the excluding effect of the binary

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<sup>13</sup> Seneca's 'Fifth Letter to Lucilius as cited in Amélie Oksenberg Rorty (ed.), *The Many Faces of Philosophy Reflections from Plato to Arendt* (OUP 2003) 8–9.

<sup>14</sup> Lucius Annaeus Seneca, *Seneca: Moral and Political Essays* (J.F. Procope ed., John M. Cooper tr., CUP 1995) 175.

<sup>15</sup> O'Donoghue (n 5) 202.

<sup>16</sup> Marcus Aurelius, *The Meditations of Marcus Aurelius Antoninus*, Volume IV (Meric Casaubon tr, 30 <<http://www.philaletheians.co.uk/>> accessed 10 July 2015.

dimension of the international community<sup>17</sup> that can exclude certain individuals from being a constituent power-holder of the international constitutionalized system.

As Franck argues, '[t]his emergent sense of global community is often, but should not be, seen as alternative to, or competing with, the basic community which is the state. *Communitas* can be concentric and overlapping',<sup>18</sup> the international community can coexist with state communities and does not necessarily terminate state communities, reflecting a 'stoic multidimensional' understanding of community.<sup>19</sup> The duality of the international community on the one hand and state community on the other reflects the idea of a world with multilevel governance. The co-existence of international community and state communities can serve as the social dimension of the complementarity between an international constitutional system and domestic constitutionalism connecting together by the individuals being members of both the international community and the state community. When every individual human is taken to be a member of the international community that holds the constituent power curtailing the exercising of the constituted power in the constitutionalized international legal system, Kant's idea cosmopolitan rights can be effectively achieved. Based on the textual basis of Article 53, the term "international community" is modified by the phrase "of States". However, on such a textual basis, to fit the idea of humanity as a source of international constituent power, the international officials that have the rule-ascertaining power have to treat the state as representative of and constituted by its people; and beliefs that contribute to the determination of the content of fundamental shared values are those of the peoples of states. Nevertheless, even if states in this context are interpreted as a vehicle for the people's will, there is still a shortcoming regarding stateless persons for whom there are no representatives so that a state can protect their interests and express their beliefs at the international level. Also, it is very likely that the minority in certain states will be underrepresented in via state agents. Thus, interpreting the international

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<sup>17</sup> See the discussion of binary and commonality element of the community concept in O'Donoghue (n 5) 59–77.

<sup>18</sup> Thomas Franck, *Fairness in International Law and Institutions* (OUP 1998) 13.

<sup>19</sup> O'Donoghue (n 5) 215.

community, which is a locus of international constituent power as an ensemble of states – as either the ultimate member or representative of its peoples – cannot meet the aim of international self-governance of humankind. Thus, the more recent use of the term ‘international community’, without the modifier ‘of states’, has the potential to accommodate the idea of humanity as a source of constituent power of the constitutionalized international legal system. This would allow international courts to seek the opinions of non-state actors in order to determine the content of the fundamental shared values of the international community, which is facilitated by the role of legal scholars and domestic courts as law-ascertaining officials.

Move to the legal mechanism that limits the exercising of the international constituted power by the nexus over humanity as the source of international constituent power-holder. As the international constituted power with regard to *jus cogens* has not been insufficiently allocated to relevant actors, which makes resorting to the secondary rule of the non-derogability of *jus cogens* very limited, a limitation on such power is also rarely seen in the current international legal system. However, based on current secondary rules relevant to *jus cogens*, the nexus of the international constituted power and the international constituent power seems to be in the hands of international adjudicators. Despite lacking compulsory jurisdiction, international adjudicators will have the power to create a link between the content of *jus cogens* rules and the beliefs of humanity. International tribunals can search for opinions outside the statist international forum which represents the essential components of humankind, especially specially affected minorities and stateless persons. However, this again opens up the usual debate over what happens if courts are the ones that abuse their power. However, given the very passive role at the international level and the lack of its own legal mechanism to enforce its decisions, this problem of international law is less severe compared to those in domestic regimes.

### **III. The UN Charter and the Institutionalization of International Constituted Power**

In the last section, the hierarchy of international primary rules created by the secondary rule of non-derogability of *jus cogens* showed the existence of international constituted power above state will; however, it also revealed that the institutionalization of such power is not sufficiently developed in the regime of *jus cogens*. Nevertheless, unlike *jus cogens*, the UN Charter establishes the UN and its organs and allocates power to those entities in order to achieve the task assigned to them. Accordingly, not only does the UN Charter play a substantial critical role in the international value system, it also serves as a crucial document in constructing a system that fosters and protects the fundamental shared values of the international community as it creates a ‘structural linkage of the different communities through universal State membership’.<sup>20</sup> The structural contribution of the Charter to a value-based international legal system can be seen through the role of the organs established by it, which have institutionalized and implemented the world’s desire to promote and protect fundamental values. Thus, a study of the role and power of the UN organs allocated by the Charter in order to implement and protect the fundamental values held dear by the Charter will help to reveal the allocation of international constituted power within the UN system. When the allocation of international constituted power can be identified, the task to identify the limitation of such power based on the nexus to the international constituent power will be pursued. However, it would be unrealistic to address all the functions and powers of all UN organs in this piece of work. Thus, this section will selectively discuss the main functions and power of the General Assembly, the Security Council, the Economic and Social Council<sup>21</sup> and the ICJ which is closely linked to the articulation, protection and implementation of the fundamental shared values of the international community, which are peace and fundamental human rights and which would be a good trail to follow for the international constituted power allocated by the Charter.

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<sup>20</sup> Erika De Wet, ‘The International Constitutional Order’ (2006) 55 *International and Comparative Law Quarterly* 51, 57.

<sup>21</sup> Hereinafter, ‘ECOSOC’.



### ***3.1. The Role and Power of the UN Organs in a Value-based International Legal System***

#### ***3.1.1. The General Assembly***

Regarding its institutional function in the value-based international legal system, the GA can be seen as a global forum where shared values of the international community are identified and shaped. As Spijkers argues, since values exist as a form of belief, not as facts, fundamental shared values cannot be scientifically identified but need a discussion, which is as inclusive as possible, in the sense that the entire international community can participate.<sup>22</sup> The GA is a ‘standing international conference in which any UN member State can raise any international issue it regards as deserving global attention’.<sup>23</sup> It serves as ‘the unique forum of choice’ for articulating global values and norms and the arena where contested norms can be ‘debated and reconciled’.<sup>24</sup> However, it should be borne in mind that although the GA represents the entire United Nations membership and operates on the basis of one state, one vote, the GA represents governments and not peoples, and certain governments are not elected to represent their people. Even in the case of those democratically elected, governments have ‘their own logic’.<sup>25</sup> Thus, the GA might be able to represent the views of states, but it cannot be said that it always represents the views of the international community of humankind.<sup>26</sup> Nonetheless, an effort to establish consultative NGOs might mitigate this defect in the genuineness of the GA as an agent of the international community.<sup>27</sup> Regarding the NGO’s participation in the GA, unlike NGOs’ participation in ECOSOC based on Article 71 of the UN

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<sup>22</sup> Otto Spijkers, *The United Nations, the Evolution of Global Values and International Law* (Intersentia 2011) 42.

<sup>23</sup> MJ Peterson, ‘General Assembly’ in Thomas G Weiss, Sam Daws (eds), *The Oxford Handbook on the United Nations* (OUP 2007) 98.

<sup>24</sup> Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (CUP 2006) 62.

<sup>25</sup> Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours* 217, 262–263.

<sup>26</sup> O’Donoghue (n 5) 179.

<sup>27</sup> Simma (n 25) 263.

Charter, the GA has no legal framework for NGO participation. However, the GA has made its forum accessible to NGOs on many occasions, e.g. the +5 Special Sessions and the informal Civil Society Hearings in the run-up to the 2005 World Summit.<sup>28</sup>

Therefore, to some extent, it can be perceived that shared values of the international community are identified, shaped, articulated or clarified in the GA. The abstract substance of such shared values is made tangible in GA resolutions, especially in its declarations which ‘contain general norms and principles’ ‘elaborat[ing] the general purposes and principles of the Charter’.<sup>29</sup> One specific example of where the GA expressly states that it attempts to identify or clarify the shared values of the international community is its Global Agenda for Dialogue among Civilizations.<sup>30</sup> The aim of the Global Agenda is ‘to learn, uncover and examine assumptions, unfold shared meaning and core values and integrate multiple perspectives through dialogue’ among civilizations.<sup>31</sup>

Although not establishing a legal binding obligation in itself, Judge Lauterpacht regards the GA’s resolution as ‘one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations’.<sup>32</sup> Either via the GA or by convoking international conferences, the UN helps to shape the values of the international community and to translate ‘the concept of the ‘international community’ from an abstract notion into something approaching institutional reality’.<sup>33</sup> Although, the GA resolutions are not binding in

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<sup>28</sup> Jens Martens, ‘The Future of NGO Participation at the United Nations after the 2005 World Summit’ (Friedrich-Ebert-Stiftung 2006) Dialogue on Globalization Briefing Paper 2.

<sup>29</sup> Spijkers (n 22) 82.

<sup>30</sup> Global Agenda for Dialogue among Civilizations, General Assembly resolution A/RES/56/6 of 9 November 2001.

<sup>31</sup> See Article 1 of the Global Agenda for Dialogue among Civilizations.

<sup>32</sup> Separate Opinion of Judge Lauterpacht, 122, *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion of 7 June 1955, I.C.J. reports, 67.

<sup>33</sup> Bruno Simma and Andreas Paulus, ‘The “International Community”’: Facing the Challenge of Globalization’ (1998) 9 EJIL 266, 274.

themselves, they might serve as evidence of *opinio juris* on the creation of customary international law. On this point, the ICJ in the *Nuclear Weapon* Advisory Opinion explains that

‘General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. ... it is necessary to look at its content and the conditions of its adoption’.<sup>34</sup>

Also, the discussions in the GA can serve as a valuable source of information when international adjudicators have to identify acceptance by the international community of the non-derogable character of certain rules according to Article 53, bearing in mind that the GA can only represent the views of states.

With respect to the international constituted power allocated to the GA, as illustrated before, the GA functions as an international forum where the will of the international community regarding shared values forms and is expressed; furthermore, in its composition and role, the GA can be compared to a ‘world parliament’.<sup>35</sup> This logically leads to the question of whether the GA has global legislative power. As beyond the “‘house-keeping’ domain”<sup>36</sup> – budgetary and procedural – GA resolutions have no legally binding effects, the GA does not possess global legislative power.<sup>37</sup> Thus, the GA is not allocated international constituted power in the sense of a world parliament. However, albeit non-binding, GA resolutions can serve as a valuable source of information when international adjudicators have to identify acceptance by the international community of the non-derogable character of certain rules according to Article 53, bearing in mind that the GA can only represent the views of states.

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<sup>34</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), para 70.

<sup>35</sup> Simma (n 25) 262–263.

<sup>36</sup> *Ibid* 263.

<sup>37</sup> Gaetano Arangio-Ruiz, ‘The Normative Role of the General Assembly’ (1972) 137 *Recueil des Cours* 419, 444–452; Spijkers (n 22) 100.

Apart from the legislative power, another type of international constituted power that might potentially be allocated to the GA is the power to interpret the UN Charter, which can be perceived as the power to interpret constitutional rules. In UNCIO, the relevant special committee was asked the question: ‘How and by what organ or organs of the Organization should the Charter be interpreted?’<sup>38</sup> The Special Committee replied:

In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body, which operates under an instrument defining its functions and powers. ... Accordingly, it is not necessary to include in the Charter a provision either authorizing or approving the normal operation of this principle<sup>39</sup>

This seems to suggest that the Charter does not allocate international constituted power to interpret the Charter authoritatively to any specific organ. However, The Special Committee believed that certain GA resolutions can serve as the authoritative interpretation of the Charter, explaining that:

...resolutions of the General Assembly could possess legal force, depending, however, on the intention and the numbers of States voting in favour. Since the Charter of the United Nations was a treaty binding on all Member States, it followed that a General Assembly resolution interpreting Charter principles, such as resolution 2131 (XX) [Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty] could be binding on Member States as an authentic interpretation...<sup>40</sup>

According to Schacht, GA resolution 2625 (XXV) (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in

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<sup>38</sup> UNCIO vol. XIII, 668.

<sup>39</sup> Ibid.

<sup>40</sup> Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, 3rd Report, Annex to the Official Record of 22<sup>nd</sup> Session of General Assembly (1967), A/6799, para. 324.

accordance with the Charter of the United Nations)<sup>41</sup> is ‘the international lawyer’s favorite example of an authoritative UN resolution’.<sup>42</sup> The declaration addresses seven essential principles of the UN Charter, namely, the prohibition on the use of force, the principle that states should settle their disputes peacefully, the non-intervention principle, the principle of sovereign equality of states, the duty to cooperate, the principle of good faith and the principle of the self-determination of peoples. The drafting time consumed almost ten years, as the ‘drafters wanted a consensus on every single paragraph in the declaration’.<sup>43</sup> The delegate of Venezuela to the Special Committee viewed this resolution as ‘the most up-to-date expression of the scope and interpretation of the Charter of the United Nations, the basis of international law as it was understood and practised by the civilized nations of the world today’.<sup>44</sup> In his article, Rosenstock, US delegates argues:

The generality of the language used in the Declaration does not deprive this instrument of its significance the most important single statement representing what the Members of the United Nations agree to be the law of the Charter on the seven principles.<sup>45</sup>

Nevertheless, not every GA resolution will serve as an authoritative interpretation of the Charter. To determine the quality of GA resolutions as an authoritative interpretation of the Charter, Sahović, Yugoslavian delegate to the Special Committee, proposes that, inter alia, the historical and procedural points should be taken into consideration.<sup>46</sup> The historical point focuses on the political importance which results in the creation of the resolution as well as the significance of the

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<sup>41</sup> General Assembly resolution 2625 (XXV), adopted 24 October 1970.

<sup>42</sup> Oscar Schachter, ‘United Nations Law’ (1994) 88 AJIL 1, 3.

<sup>43</sup> Spijkers (n 22) 117.

<sup>44</sup> Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, 6th Report, Supplement No 18 to Official Record of the 25<sup>th</sup> Session of General Assembly (1970) (A/8018), para. 109.

<sup>45</sup> Robert Rosenstock, ‘The Declaration of Principles of International Law Concerning Friendly Relations: A Survey’ (1971) 65 American Society of International Law 713, 714.

<sup>46</sup> Milan Sahovic, ‘Codification des principes du droit international des relations amicales et de la coopération entre les Etats’ (1974), 250 as cited in Spijkers (n 22) 120.

resolution in question itself.<sup>47</sup> The procedural issue examines the intention of the drafters, whether or not the resolutions are intended to be an interpretation of the Charter.<sup>48</sup> Spijkers also suggests that the consensus element attained by the relevant resolution can also serve as a determining factor of its quality as an authoritative interpretation of the Charter. According to him, the consensus element shows the universal participation and serious commitment of the international community of states.<sup>49</sup> Hence, based on the historical, procedural and consensus aspects, it seems to suggest that the perception of the international community that accepts certain GA resolutions as an authoritative interpretation of the Charter is an underlying determining factor in considering whether or not certain GA resolutions serve as authoritative interpretations of the Charter. Accordingly, it is difficult to say that the GA is allocated international constituted power that can be used to interpret the Charter authoritatively; however, as the world forum, it is the place where the will of the international community regarding the elaboration of the Charter can be formed and reflected.

To sum up, the GA does play a very important role in the value-based international legal system as an international forum where shared values are shaped and articulated; however, it is not attributed international constituted power, at least not in the sense that there is a clear procedure to trigger the exercise of such power. Nonetheless, although lacking legislative power and authoritative interpretative power, the GA as the international forum has in its hands methods to condemn publicly, ‘naming and shaming’<sup>50</sup> those responsible for non-compliance with its resolutions. The public condemnation tools are perceived by Judge Alvarez that in

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<sup>47</sup> Milan Sahovic, ‘Codification des principes du droit international des relations amicales et de la coopération entre les Etats’ (1974), 255–284 as cited in Spijkers (n 22) 120.

<sup>48</sup> Milan Sahovic, ‘Codification des principes du droit international des relations amicales et de la coopération entre les Etats’ (1974), 285–299 as cited in Spijkers (n 22) 120.

<sup>49</sup> Spijkers (n 22) 121–123.

<sup>50</sup> Ibid 140.

case that it earns public support, it can generate ‘more force than if it had been a mere breach of a convention of minor importance’.<sup>51</sup>

### 3.1.2 The United Nations Economic and Social Council

ECOSOC focuses on progress in international economic, social, cultural, educational, health and related matters and respect for fundamental human rights and freedoms,<sup>52</sup> leading to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.<sup>53</sup> With respect to the shared values of the international community, based on Article 62 of the Charter, ECOSOC has four functions and powers, which are:

- (I) To initiate studies and reports with respect to international economic, social, cultural, educational, health and related matters,
- (II) To make recommendations related to matters mentioned in (I) and promoting respect for, and observance of, human rights and fundamental freedoms for all,
- (III) To prepare draft conventions for submission to the General Assembly and
- (IV) To call for international conferences on matters falling within its competence.

Thus, ECOSOC is assigned functions that are both directly relevant to peace and fundamental human rights and relevant to other shared values which will facilitate the creation and protection of peace and fundamental human rights. However, one of its masterpieces is the translation of fundamental values into very important documents in international law. Boyle and Chinkin opine: ‘one of ECOSOC’s most prominent responsibilities for international law-making has been the elaboration of international human rights law through subsidiary commissions’<sup>54</sup>. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural

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<sup>51</sup> Alvarez, Separate Opinion in the ICJ’s Reservations to the Genocide Convention Advisory Opinion, 28 May 1951, 52.

<sup>52</sup> Article 62 of the UN Charter.

<sup>53</sup> Article 55 of the UN Charter.

<sup>54</sup> Alan E Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 120.

Rights (ICESCR) were drafted by the Commission on Human Rights, one of the ECOSOC's subsidiary commissions.

Although, unlike the GA, its membership is limited to fifty-four UN members elected by the GA, the advantage of the ECOSOC mechanism is that it systematically provides a stage for non-state actors to participate in its mechanisms. By virtue of Article 71 of the Charter, ECOSOC is entitled to make an arrangement to establish the consultative status of NGOs. The aim of creating a consultative relationship with NGOs is to provide help for ECOSOC as well as its subsidiary committees in fulfilling their functions.<sup>55</sup> In the current international society, in light of their expertise, NGOs greatly facilitate the negotiation and a making of international agreements.<sup>56</sup> They have acted as 'important pressure groups as they can usually operate with greater flexibility and less bureaucracy'<sup>57</sup> and as a 'representative of civil society', to protect those interests which might be ignored by states.<sup>58</sup> Hobe argues that Article 71 is 'a good example of how important the involvement of civil society in international affairs has become in the era of globalization and how dispensable NGOs in consultative status are in the UN system'. Added to this, ECOSOC, by virtue of Article 68 of the Charter, has set up expert bodies whose members serve in a personal capacity, namely the Committee for Development Policy, the Committee of Experts on Public Administration, the Committee of Experts on International Cooperation in Tax Matters, the Committee on Economic, Social and Cultural Rights and a Permanent Forum on Indigenous Issues. Accordingly, ECOSOC provides a channel for non-state actors, either NGOs or individuals, to play a role in the UN system. The participation of those non-state actors via such channels will allow the product of the UN system to reflect a collective will which is not exclusively based on states' view. However, although ECOSOC provides a channel for non-state actors to play some role in the articulation

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<sup>55</sup> Stephen Hobe, 'Article 71' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary Volume II* (3rd edn, OUP 2012) 1801.

<sup>56</sup> Ibid 1814.

<sup>57</sup> Ibid 1814–1815.

<sup>58</sup> Ibid 1815.



of shared values, this organ of the UN does not have any power potentially to be regarded as an international constituted power superior to state wills.

### 3.1.3. The Security Council

With respect to the role of the SC in the UN international value system, the Charter confers on the SC the primary responsibility for the maintenance of international peace and security,<sup>59</sup> and in discharging these duties the SC shall act in accordance with the purposes and principles of the United Nations.<sup>60</sup> To fulfil such a responsibility, and according to Article 39, the SC shall determine the existence of any threat to the peace, any breach of the peace or any act of aggression and shall make recommendations, or decide to take economic or military measures, in accordance with Articles 41 and 42 in order to maintain or restore international peace and security. Such measures have legal binding force on state members in light of Article 25. Together with the principle of the non-use of force in state relations, the power of the SC to issue a resolution obliging UN member states to cope with a threat to the peace, a breach of the peace or an act of aggression establishes the international community's collective security.<sup>61</sup> The decision to trigger the UN Charter's security arrangements is entrusted to the discretion of the SC, which must determine the existence of any threat to the peace, breach of the peace or act of aggression.<sup>62</sup> In this sense, based on the mandate conferred on it by the Charter, the SC acts as an executive body representing the international community to protect the value of the peaceful coexistence of states via its power to execute collective security.

However, in many cases, the SC does not strictly attach the term 'threat to peace' to scenarios carrying the risk of international armed conflict as it also considers internal

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<sup>59</sup> Article 24 (1) of the UN Charter.

<sup>60</sup> Article 24 (2) of the UN Charter.

<sup>61</sup> See discussions in e.g. Martti Koskenniemi, 'The Place of Law in Collective Security' (1996) 17 *Mich JIL* 455, 456–460.

<sup>62</sup> *Ibid* 457.

armed conflicts and other situations of violence arising within the territory of member states as a threat to peace.<sup>63</sup> Responding to the situation of South Africa's apartheid policy, the SC reaffirmed that 'a policy of apartheid is a crime against the conscience and dignity of mankind and seriously disturbs international peace and security'.<sup>64</sup> On many occasions, the SC has called for humanitarian intervention in internal armed conflict scenarios,<sup>65</sup> such as in the cases of Iraqi/ Kurdistan,<sup>66</sup> Somalia,<sup>67</sup> Rwanda<sup>68</sup> and Haiti<sup>69</sup>. Again, it is breaches of fundamental human rights that are employed as a ground for the SC to assert the existence of a threat to peace where the scenarios in question do not involve international armed conflict.<sup>70</sup> In its Resolution 794, the SC validated the UN's humanitarian intervention in Somalia by determining that, 'the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security',<sup>71</sup> Also, in Resolution 940, the SC explains that the situation in Haiti which entailed 'the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission'.<sup>72</sup> Thus, it decides that such a situation constituted a threat to peace and security in the region.<sup>73</sup> With such an extended interpretation of the term 'threat to peace', it is perceived that the SC is willing to deal not only with scenarios involving international armed conflict but also

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<sup>63</sup> Simma (n 25) 266.

<sup>64</sup> SC Resolution 392 (1976) and see also Resolution 418 (1977).

<sup>65</sup> Pierre-Marie Dupuy, 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck UNYB 1, 24.

<sup>66</sup> SC Resolution 688 (1991).

<sup>67</sup> SC Resolution 794 (1992).

<sup>68</sup> SC Resolution 929 (1994).

<sup>69</sup> SC Resolution 940 (1994).

<sup>70</sup> See Richard B Lillich, 'The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World' 3 Tulane Journal of International and Comparative Law 1.

<sup>71</sup> SC Resolution 794 (1992).

<sup>72</sup> SC Resolution 940 (1994).

<sup>73</sup> Ibid

those posing a threat to other fundamental interests of the international community, particularly breaches of fundamental human rights.<sup>74</sup> However, if the SC asserts that there exists a threat to peace in a case where there is no threat of force, arguably it will lead to the problem of an *ultra vires* act.<sup>75</sup>

Given its extended interpretation of a threat to peace, the SC functions as an executive of the international community and executes its collective security system to protect the value of the peaceful co-existence of states, and in the case that a link to a threat to peace can be established, the protection of fundamental human rights. In terms of international constituted power, based on its power granted by Chapter VII of the Charter, the SC has international constituted power which can be exercised to issue measures necessary for enforcing the constitutional primary rules protecting peace and fundamental human rights. The decision to issue a Chapter VII measures requires ‘an affirmative vote of nine members including the concurring votes of the permanent members’.<sup>76</sup> However, all members are obligated to implement such decisions of the SC, despite its limited membership, in light of Article 25. Also, it was argued in the last chapter that due to Articles 2(6) and 103 of the Charter, which reflect the constitutional status of the UN Charter, Chapter VII SC measures are binding on non-member states as well. Added to this, member states and non-member states cannot opt out of an obligation created by SC resolutions due to the effect of the secondary rule of primacy of the Charter as codified in Article 103. Thus, the Charter as a constitution of the international community allocates international constituted power to the SC to enforce international constitutional primary rules and protect fundamental shared values of the international community.

Although the executive power of the SC based on Chapter VII is widely accepted, the scope of SC power granted by Chapter VII is equivocal, due to the fact that the SC issues certain resolutions which have a general effect rather than specific

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<sup>74</sup> Dupuy (n 65) 22–24.

<sup>75</sup> ND White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (2nd edn, Manchester University Press 1997) 34.

<sup>76</sup> Article 27(2) of the UN Charter.

situation-based measures, leading to an issue regarding the legislative power of the SC. A prime example which is used to argue for the legislative power of the SC is when the SC adopted Resolution 1373 (2001). This resolution characterizes terrorism as a threat to international peace and security and obliges member states to adopt far-reaching measures to prevent future terrorist acts, including a requirement to ‘ensure that terrorist acts are established as serious criminal offences in domestic laws’.<sup>77</sup> Likewise, SC Resolution 1540 (2004) determines Weapons of Mass Destruction to be a threat to international peace and security and obliges member states to take action against their proliferation, including the adoption and enforcement of appropriate effective laws which prohibit relevant acts.<sup>78</sup> Nonetheless, the power of the SC to act as a global legislator is very debatable. With respect to a legal text as a basis for the legislative power of the SC, there exist divergent opinions. On the one hand, some scholars perceive that Article 41 of the UN Charter is ‘broad enough to cover any type of action not involving the use of force, which is addressed in Article 42’.<sup>79</sup> This view seems to be supported by the ruling of the Appeals Chamber of the ICTY in the *Tadic* case, stating that: ‘It is evident that the measures set out in Article 41 are merely illustrative examples which obviously do not exclude other measures. All the Article requires is that they do not involve "the use of force." It is a negative definition.’<sup>80</sup> Thus, in cases where the SC determines that there exists a particular situation threatening international peace and security, it has not only been entitled to exercise broad discretion to opt for the proper measures, including enacting general abstract norms, but also obliged to do so according to its primary responsibility to maintain international peace and security.<sup>81</sup> On the other hand, although the SC has been endowed by Article 24 of the UN Charter with the duty to sustain international peace and security, no provisions specifically allocate power to the Council to enact

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<sup>77</sup> SC Resolution 1373 (2001).

<sup>78</sup> SC Resolution 1540 (2004).

<sup>79</sup> Eric Rosand, ‘The Security Council As “Global Legislator”: Ultra Vires or Ultra Innovative?’ (2004) 28 *Fordham International Law Journal* 542, 555; see also Schachter (n 42) 12.

<sup>80</sup> *Prosecutor v. Dusko Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, Decision of 2 October 1995, para. 35.

<sup>81</sup> Rosand (n 79) 551–560.

general legislation or to adopt a decision which has a general law-making effect.<sup>82</sup> Added to this, Marschik is of the opinion that Article 2(7) of the UN Charter can be argued as implicitly excluding law-making powers for the SC as it ‘prohibits the UN from intervening in matters essentially within the domestic jurisdiction of any State, except for “enforcement measures under Chapter VII”’.<sup>83</sup> Arguably, the enactment of generally binding norms by the SC does not fall under the term ‘enforcement’ and is therefore prohibited. However, Marschik notes that ‘the term ‘enforcement’ is not defined in the Charter and the practice of the Council would rather imply that any act legally adopted under Chapter VII can pierce the *domaine réservé* of the States irrespective of its nature’.<sup>84</sup> Nevertheless, he proposes that even though the UN Charter might not accommodate legislative powers for the SC and such an act might be deemed *ultra vires*, the defect could be fixed if the Council has been conferred such a power in light of ‘the concept of subsequent practice’. Such subsequent practices can appear in a form of ‘formal statements’, ‘cooperation between States’ and ‘the domestic implementation of resolution’.<sup>85</sup> The support for the measures and procedures of Resolution no. 1373 could be considered as evidence of acceptance of the competence to enact general, abstract and binding rules, at least in the area of terrorism.<sup>86</sup> The idea of the UN Charter as a ‘living tree’ or ‘living document’ has also been applied to legitimize the legislative power of the SC. According to such a notion, Resolution nos. 1373 and 1540 reflect the evolution of the Charter, allowing the Council to function as a global legislator which, under certain circumstances, may adopt resolutions which respond to new global threats by establishing legal norms, thus imposing obligations designed to cope with those new threats,<sup>87</sup> similar to the case of the SC's authorization of peacekeeping operations.<sup>88</sup>

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<sup>82</sup> Alex Marschik, ‘The Security Council as World Legislator?: Theory, Practice and Consequences of an Expanding World Power’ (2005) *International Law and Justice Working Papers* 2005/18 6 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=871758](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=871758)> accessed 10 July 2015.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* 15.

<sup>86</sup> *Ibid.* 14–15.

<sup>87</sup> Rosand (n 79) 569–573.

<sup>88</sup> *Ibid.* 580.

Such a position seems to offer greater efficiency to the international legal system to deal with matters of international security. Further, one might argue that the five most powerful nations in terms of military capacity should have a privileged role in the maintenance of international peace based on the political reality in exchange for such efficiency, and for that the five superpowers will play their games on the stage of the UN.<sup>89</sup> Nevertheless, as Ulfstein observes, the acceptance of the allocation of a special law-making power to ‘an organ with limited membership, and where three out of five permanent members are Western states’ is problematic.<sup>90</sup>

It is argued here that the legislative power of the SC could raise a more serious issue regarding its legitimacy, which is already highly criticized due to its composition and veto system. This would be against the idea of the horizontal separation of powers in terms of function. Added to this, later in this chapter, it will be illustrated that SC resolutions are also under the protection of Article 103. Hence, if the SC does have legislative power, then a small group of countries, which have already been invested with the power to call for the use of force, also have the power to enact a rule which overcomes the wills of other states. Thus, this would lead to a very unhealthy interpretation of the Charter and a very despotic scenario. Therefore, an interpretation of the Charter as accommodating the legislative power of the SC would be against the idea of international constitutionalism. However, the issue of the legislative power of the SC is left unsettled but the exercising of Chapter VII power by the SC in a legislative fashion can be challenged under the limitation on the international constituted power of the SC, which will be discussed in the next section.

#### 3.1.4. The International Court of Justice

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<sup>89</sup> Geir Ulfstein, ‘Institutions and Competences’ in Jan Klabber, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009) 57.

<sup>90</sup> Ibid.

In the section, regarding the institutionalization of international constituted power in the context of *jus cogens*, it is argued that no secondary rules in the *jus cogens* regime allocate international constituted power which can be used against state wills to any international court, including the ICJ, to summon states compulsorily to settle their disputes regarding *jus cogens* before the Court without the prior consent of disputed states. In this section, it is now pertinent to explore the role of the ICJ in the UN system and to see whether the ICJ has been allocated any international constituted power.

Essentially, the ICJ provides a peaceful dispute settlement forum with a general jurisdiction and an enforcement mechanism,<sup>91</sup> helping to foster the peaceful coexistence of states. As the jurisdiction of ICJ is not limited to specific international rules and is open to all states in the international community, notwithstanding their membership of the UN, the ICJ is regarded as ‘a general court of the international community’.<sup>92</sup> Accordingly, with this role for the ICJ, one cannot help but wonder whether or not the ICJ possesses international constituted judicial power. Based on the Charter, the ICJ possesses two types of jurisdiction – contentious jurisdiction and advisory jurisdiction. The contentious jurisdiction of the ICJ covers inter-state disputes but it is not open for international organizations.<sup>93</sup> According to Article 94 (1) of the Charter, a member of the UN shall comply with a decision of the ICJ in any case to which it is a party, and in case of non-compliance, the ICJ can make a recommendation to the SC. Then, In case where the SC deems it necessary, it may issue recommendations or measures to enforce relevant judgments. Likewise, Article 59 of the ICJ statute stipulates that a decision of the Court “has no binding force except between the parties and in respect of that particular case”, indicating the rule

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<sup>91</sup> Article 94(2) of the UN Charter provides that, ‘If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment’.

<sup>92</sup> Karin Oellers-Frahm, ‘Article 92’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary Volume II* (3rd edn, OUP 2012) 1912.

<sup>93</sup> Merrills, J. G., *International Dispute Settlement* (5th edn, CUP 2011) 116.

of *res judicata* and that ICJ decisions are final and binding relevant states parties.<sup>94</sup> The second category of jurisdiction of the ICJ is its advisory jurisdiction. In the case of advisory opinions of the ICJ, the GA and the SC, as well as other organs of the UN and specialized agencies with the authorization of the GA, can request an advisory opinion from the ICJ according to Article 96 of the Charter. However, advisory opinions are not binding in their nature.<sup>95</sup>

With respect to the allocation of international constituted power to the ICJ, although the decisions of ICJ are binding on states which are a party to a case, and even if the outcome of a case is not satisfactory for them, disputed states in the case need to comply with it. However, this is not because the ICJ possesses international constituted power which can compel states to act against their will. The binding nature of ICJ decisions vis-à-vis states is generated by the consent of such states, which can be given to the ICJ through many channels, including the compromissory clause and optional clause under Article 36 (2) of the ICJ, by which states can give their consent in advance as well as through a special agreement which is reached after disputes arise.<sup>96</sup> The jurisdiction of the ICJ to which consent is given in advance is sometimes mistakenly termed compulsory jurisdiction. For example, in *Military and Paramilitary Activities in and against Nicaragua*, whilst using the term ‘compulsory jurisdiction’, the ICJ accepted the non-compulsory character of its jurisdiction in the case of an optional clause, explicating that:

Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so

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<sup>94</sup> Karin Oellers-Frahm, ‘Article 94’ in Bruno Simma, Andreas Paulus and Nikolai Wessendorf (eds), *The Charter of the United Nations: A Commentary Volume II* (3rd edn, OUP 2012) 1959–1960.

<sup>95</sup> E.g. in *Interpretation of Peace Treaties*, the Court ruled “*The Court's reply is only of an advisory character: as such, it has no binding force*”; *Interpretation of Peace Treaties*, Advisory Opinion: I.C.J. Reports 1950, 71.

<sup>96</sup> See Merrills, J. G. (n 93) 116–118.



unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations.<sup>97</sup>

Lowe with Collier comment that using the term ‘compulsory jurisdiction’ in this context is ‘misleading’ as ‘[i]t is optional for States to make such jurisdiction compulsory’.<sup>98</sup> In *Nottebohm* case, although also misleadingly using the term ‘compulsory jurisdiction’ for its compromissory-clause-based jurisdiction, the ICJ correctly explains ‘[t]he characteristic of this compulsory jurisdiction is that it results from a previous agreement which makes it possible to seize the Court of a dispute without a Special Agreement’.<sup>99</sup> Alexandrov has expounded that the ICJ’s compulsory jurisdiction is compulsory only ‘in the sense that consent to jurisdiction is granted by the States in advance, with respect to all or certain categories of disputes, and once a dispute arises, the State then does have a binding obligation and must submit to the Court’s jurisdiction’.<sup>100</sup>

Thus, the ICJ does not possess international constituted power to initiate a binding judicial procedure without the consent of relevant states. However, the Court can play a key role in limiting the international constituted power given to the SC, which is another face of the institutionalization of international constituted power.

To conclude this section, although many of the UN organs have been assigned a function to operate the UN system to protect and implement the values that the UN charter holds dear, only the SC has been empowered with international constituted power which can be exercised against the wills of states. However, although the GA and ECOSOC have not been given international constituted power, they can serve as a channel in which states and non-state actors can participate and express their will.

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<sup>97</sup> *Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)* case, para. 59.

<sup>98</sup> John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (OUP 2000) 140.

<sup>99</sup> See *Nottebohm case (Preliminary Objection)* Judgment of November 18th, 1953: I.C.J. Reports 1953, p 122

<sup>100</sup> Stanimir A Alexandrov, ‘The Compulsory Jurisdiction of the International Court of Justice: How Compulsory Is It?’ (2006) 5 Chinese Journal of International Law 29, 35.

Their forums serve as a space where the collective will of the international community and its fundamental shared values are formed and shaped. In contrast, albeit while not possessing international constituted judicial power in the sense of global compulsory jurisdiction, the ICJ will play a vital role in limiting the international constituted power allocated to the SC.

### ***3.2. Limitations on the International Constituted Power allocated by the UN Charter.***

Based on what has been discussed in the preceding section, currently the SC is the only organ which is equipped with international constituted power to be used against the will of states. Thus, this section focuses on the limitations on international constituted power possessed by the SC based on the nexus to humanity as the international constituent power-holder. This section is divided into two parts. The first will discuss the limitations of international constituted power allocated through the rule of law, separation of powers, democratic legitimacy and the protection of fundamental constituent power-holders, which is modelled on statist constitutionalism. Then, the second part will discuss the mechanism of vertical checks and balances between international constituted power and states which is based on the multi-level and pluralist structure of international governance.

#### 3.2.1. Limitations of International Constituted Power Through the Rule of Law, Separation of Powers, Democratic Legitimacy and the Protection of Fundamental Rights of Constituent Power-Holders.

With its international constituted power, the SC's composition of five permanent members vested with a veto right and ten non-permanent members<sup>101</sup> generates the perception that it represents a powerful minority rather than the international community as a whole.<sup>102</sup> This leads to much criticism regarding its legitimacy. At

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<sup>101</sup> Articles 23 and 27 of the UN Charter.

<sup>102</sup> See Legitimacy of the SC as World Executive in Dupuy (n 65) 28–30.

the San Francisco Conference, the veto right was one of the most controversial issues.<sup>103</sup> The long list of 23 questions regarding the exercise of veto rights was submitted by representatives of delegations other than those of the sponsoring governments to the relevant subcommittee.<sup>104</sup> The Netherlands delegate pointed out that in a case where one of the permanent members is involved in a conflict, the measure under Chapter VII cannot be triggered because one of the permanent members exercises its veto right. As a result, this might be seen as ‘the death knell of the organisation and unescapably lead to its complete break-down’ and leave the world “open once more to power politics in their purest and most ruthless form”.<sup>105</sup> The four sponsoring states, namely the US, the UK, Russia and China, responded in a joint statement that:

In view of the primary responsibilities of the permanent member they could not be expected ... to assume the obligation to act in so serious a matter as the maintenance of international peace and security in consequence of a decision in which they had not concurred. Therefore, if a majority voting in the Security Council is to be made possible, the only practicable method is to provide, in respect of non-procedural decisions, for unanimity of the permanent members plus the concurring votes of at least two of the non-permanent members.<sup>106</sup>

Evatt, an Australian delegate, argued in favour of a veto, realizing this put extra responsibility on the permanent members: ‘We don’t mind a veto on a shooting-match, because the big powers have to carry the burden of shooting. What we object to is a veto on a talking match.’<sup>107</sup>

In his book written in 1945, Davies comments that a veto system ‘became suggestive of tyranny, of dark shadows and clouds of disaster, of an eternal curse thrust upon all

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<sup>103</sup> Philippa Webb, ‘Human Rights and the Immunities of State Officials’ in Erika De Wet and Jure Vidmar, *Hierarchy in International Law: The Place of Human Rights* (OUP 2012) 473.

<sup>104</sup> UNCIO vol. XI, pp 699-709.

<sup>105</sup> *Ibid* 329.

<sup>106</sup> *Ibid* 713.

<sup>107</sup> San Francisco Chronicle 31 May as cited in Kylie Tennant, *Evatt: Politics and Justice* (Angus & Robertson 1970) 171.

that it concerned'.<sup>108</sup> Then, in 1994, Simma observed that the right to veto is rarely exercised and it was used in 'a more even distributed way'; however, albeit rarely utilized, the veto system 'will have an influence on the process of arriving at a decision'.<sup>109</sup> Eventually, the privileges of the superpowers were sustained, but in exchange they must bear special responsibility,<sup>110</sup> and this results in the current situation. Nevertheless, the composition of the permanent members of the SC is argued by Lang as being a 'kind of institutional balance' within the SC. He argues that this structure 'prevents any one of them from dominating the decision making of the Council as a whole',<sup>111</sup> and 'provide[s] a check and balance that is associative in that they must come to agreement through diplomatic dialogue'.<sup>112</sup> Of course, this does not solve the legitimate issue of the composition and veto privileges of the permanent members, and it would not be much of help were permanent members of the SC to share the same interests. However, given the realpolitik of international society, this has created checks and balances between the superpowers with a clear procedure and made the power game open to public scrutiny.

Accordingly, although the power of the SC offers greater efficiency for the international legal system to limit the exercise of the power of states in the international sphere, it has, in turn, established a new Leviathan to be tamed.<sup>113</sup> Thus, if the UN system is to provide a constitutionalized international legal system that can establish international self-governance with a mandate for peace and fundamental human rights, a limitation on SC power based on the nexus to international constituent power must be established.

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<sup>108</sup> Betty Jane Davis, *Charter for Tomorrow: the San Francisco Conference*. Bulletin No. 6 of the Bureau of International Relations, (University of Washington 1946), 5 as cited in Spijkers (n 22) 161.

<sup>109</sup> San Francisco Chronicle 31 May 1945 as cited in Tennant (n 107) 171.

<sup>110</sup> Spijkers (n 22) 161.

<sup>111</sup> Anthony F Lang, 'Constitutionalism and the Law Evaluating the Security Council' in Vesselin Popovski and Trudy Fraser (eds), *The Security Council as Global Legislator* (Routledge 2014) 27–28.

<sup>112</sup> Ibid 27.

<sup>113</sup> See e.g. Martti Koskenniemi, 'The Police in the Temple: Order, Justice and the UN: A Dialectical View' (1995) 6 EJIL 325.

The ICTY once clearly stated that ‘[i]n any case, neither the text nor the spirit of the Charter conceives of the SC as *legibus solutus* (unbound by law)’.<sup>114</sup> Indeed, the limitation on the power of the SC comes first from the Charter itself since, as secondary rules that allocate power to the SC, the Charter rules simultaneously set a limit on such power via the textual basis of Chapter VII of the Charter.<sup>115</sup> Nevertheless, despite its universal state membership, the text of the UN Charter represents only the will of the state community, rather than the will of the community of humankind. Although it might be argued that the will of a state can represent the will of its people, this logic cannot apply to undemocratic countries. This results in a shortcoming in the nexus of international constituent and international constituted power. However, based on the cosmopolitan paradigm, a world state is too despotic a choice, and so this shortcoming has to be addressed by the development of domestic constitutionalism in those states. What can be done by an international constitutional legal system is to provide a peaceful environment for domestic constitutionalism to develop and set minimum standards for human rights. Thus, we can see that, with such intertwinement, the more that domestic constitutionalism develops, the more that international constitutionalism will progress, and vice versa. Nevertheless, the subjection of SC resolutions to *jus cogens* would also serve as a remedy to this shortcoming to some extent. As argued in the preceding chapter, the ascertainment of *jus cogens* based on the development of a secondary rule regarding the international community which is not limited to states allows international courts more flexibility to search for more genuine opinions of the international community of humankind through the expression of other entities, rather than states. Thus, both *jus cogens* and the UN Charter set out a legal limitation which the SC cannot violate, and this provides the basis for a rule-of-law element to limit the exercising of power of the SC. It should be noted also that the subjection of the exercise of the power to amend the UN Charter, which requires a two-third vote of UN members including all of the SC permanent members, to *jus cogens* can be

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<sup>114</sup> *The Prosecutor v. Dusko Tadic*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1, A. Ch. 2, October 1995, para. 28

<sup>115</sup> See e.g., Simma (n 25) 268–274.

seen as a limitation on ‘international derived constituent power’ to amend the written constitutional rule of the Charter <sup>116</sup>, conferred on the SC together with the GA based on the rule of law.<sup>117</sup>

However, the heart of the rule of law lies in judicial reviews by the courts. Two channels that might facilitate judicial reviews of SC resolutions are the advisory jurisdiction of the ICJ and the contentious jurisdiction of international courts in general.<sup>118</sup> In the case of advisory opinions of the ICJ, the GA as well as other organs of the UN and specialized agencies with the authorization of the GA can request an advisory opinion from the ICJ, potentially serving as a channel to review the exercising of the power of the SC by the ICJ. However, states which are affected by SC resolutions cannot access this channel.<sup>119</sup> More importantly, advisory opinions are not binding in their nature, and arguably this shortcoming shows a fundamental defect in advisory opinions as a channel for judicial review of SC resolutions.<sup>120</sup> Nevertheless, advisory opinions can ‘put political pressure on states to comply’<sup>121</sup> and would provide a very legitimate ground for states not to comply with SC resolutions.

The second channel is the contentious jurisdiction of international courts in general. In *Tadić*, the ICTY confirmed its incidental power to examine the validity of an SC resolution, explaining that:

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<sup>116</sup> See the explanation of the constitutional amendment power as a *sui generis* (not either as constituted power or original constituent power) as derived constituent power in Yaniv Roznai, ‘Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers’ (PhD Thesis, The London School of Economics and Political Science 2014); and also Denis Baranger, ‘The Language of Eternity: Constitutional Review of the Amending Power in France (or the Absence Thereof)’ (2010) 5 *Jus Politicum* available at < <http://ssrn.com/abstract=2039346> > accessed 10 July 2015.

<sup>117</sup> See the discussion on a conflict between an amendment to the Charter and *jus cogens* rules in Section IV: Conflicts between *Jus Cogens* and the UN Charter in Chapter IV, 217–218.

<sup>118</sup> Simma (n 25) 280–281.

<sup>119</sup> *Ibid* 280.

<sup>120</sup> Antonios Tzanakopoulos, *Disobeying the Security Council Countermeasures against Wrongful Sanctions* (OUP 2011) 103–104.

<sup>121</sup> Ulfstein (n 89) 66.

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.<sup>122</sup>

This channel would provide a chance for the Courts, as officials of the international legal system, to use their power to review the validity of SC resolutions, putting limitations on the exercise of the international constituted power of the SC. However, the problem with this channel is that no international courts have compulsory jurisdiction; therefore, the review the validity of an SC resolution by the ICJ via this channel can only be used when disputed states consent to the court's jurisdiction. Franck explains that, in essence, judicial review is 'a weapon of deterrence, the effectiveness of which is best demonstrated by the absence of occasions for its use'.<sup>123</sup> Basing his proposition on Franck seeing judicial review as a weapon of deterrence, Tzanakopoulos argues that only when the 'regular availability' of judicial review exists can it effectively function as a deterrent.<sup>124</sup> For him, even though the ICJ has incidental power to review SC resolutions, it can deny the binding force of unlawful SC resolutions only in a specific case that is incidentally presented to the court, and therefore, 'any such 'review' by ICJ cannot be – at present at least – systematic'. Accordingly, he argues that compulsory jurisdiction is indispensable for systematic judicial review.<sup>125</sup> Henceforth, although they provide a possible mechanism for reviewing the legality of SC resolutions, the non-compulsory jurisdiction of international courts and the non-binding character of advisory

<sup>122</sup> *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, A.Ch, 2 October 1995, paras 21–22.

<sup>123</sup> Thomas M Franck, 'Franck the Political and the Judicial' in Najeeb M Al-Nauimi and Richard Meese (eds), *International Legal Issues Arising Under the United Nations Decade of International Law* (MNP 1995) 631.

<sup>124</sup> Tzanakopoulos (n 120) 107.

<sup>125</sup> *Ibid* 107–108.

opinions of the ICJ undermine the judicial review mechanism to control the exercise of power by the SC.

Pertaining to separation-of-power mechanisms, as found in Charter rules and the ICJ Statute, the GA, the SC and the ICJ provide a structure similar to the separation of powers between parliament, government and courts in the domestic system.<sup>126</sup> However, unlike domestic parliaments, the GA cannot enact binding resolutions although GA resolutions can serve as evidence of *opinio juris* on the creation of customary international law and the view of the international community on the non-derogable character of certain rules which will develop into *jus cogens*. With respect to the checks and balances among them, at the San Francisco Conference, small countries attempted to empower the GA when the SC cannot function properly. For example, Venezuela commented: ‘it [the power of the SC] appears practically unacceptable ... nevertheless ... such a delegation of powers can be admitted if there are attributed to the central organization, that is, the General Assembly, the necessary powers of control’. There were a number of amendments proposed by small countries with regard to this issue, e.g. the insertion of a new clause by Chile which reads:

Decisions of the Council tending to impose, with respect to determined cases, specific obligations upon members of the Organization, or upon certain, of them, likewise require the approval of the majority in which, in addition to the votes of States that are members of the Council...<sup>127</sup>

Their attempts, however, did not pay off.<sup>128</sup> Nevertheless, the GA adopted the resolution on Uniting Peace which set up a procedure for the GA to recommend collective measures in cases where the SC, ‘because of lack of unanimity of the

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<sup>126</sup> Andreas Paulus, ‘The International Legal System as a Constitution’ in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 77–78.

<sup>127</sup> UNCIO vol. III, 287; see also e.g., the amendments of Mexico, 134–135 and 160, Guatemala, 256 and 258 and Cost Rica, 275 and 278–279.

<sup>128</sup> Spijkers (n 22) 158–160.



permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security'.<sup>129</sup> Accordingly, this suggests that the struggle for the creation of checks and balances continues by giving the GA a complementary role<sup>130</sup> to that of the SC regarding peace and international security. However, the GA cannot force the SC or a UN member to comply with its decisions, as unlike the SC, the GA can only make non-binding recommendations regarding peace and security maintenance. Another checks-and-balances mechanism between the three main UN organs can be seen in a scenario where the GA can ask the ICJ to provide an advisory opinion on the validity of an SC decision under the Charter and *jus cogens*, thus allowing the ICJ to check the constitutionality of SC measures.<sup>131</sup> However, as discussed before, advisory opinions have no legally binding effect although they produce political pressure and persuasive authority. Added to this, an interpretation of the power of the SC as not including legislative power would be preferable in terms of the separation of powers as it would prevent the SC from gaining despotic power. Should any of the three main UN organs be granted global legal legislative power, the GA, which in terms of composition has far greater representativeness vis-à-vis the international community, should be the one.

With respect to democratic legitimacy, direct democracy is virtually impossible at the international level and genuine representative democracy cannot be found in the UN Charter since, as explained before, not all members of the UN are democratic countries. Further, even in a democratic country, the officials of such a country are more likely to pursue the interests of its own people than those of humankind,<sup>132</sup> which is the source of international constituent power. The room for the participation of individuals to build a discursive or deliberative democratic legitimacy is very limited. The composition of the permanent members is very undemocratic and creates privileges for a handful of powerful minorities, although this situation reflects

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<sup>129</sup> UNGA Res 377 A (3 November 1950).

<sup>130</sup> See the role of GA regarding peace and security in *Certain expenses of the United Nations (Article 17, para. 2, of the Charter)*, Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, 163.

<sup>131</sup> Paulus (n 126) 77–78.

<sup>132</sup> O'Donoghue (n 5) 227.

realpolitik in the international sphere. Amendments to and alternations of such a structure are possible; however, the acceptance of all permanent members of the SC is required, thus making changes to the structure of the SC to deprive the permanent members of their special status seems impractical.

The shortcoming of democratic legitimacy is deeply rooted in the cosmopolitan international constitutional structure, as it does not opt for creation of a world state in which global democracy can be fully constructed. Instead, it aims for world governance without world government, leaving room for states to determine their own rules.<sup>133</sup> Brown explains that cosmopolitan democracy denies ‘the idea of coercive global institutions’ but countenances ‘a system of democratic institutions based on consent and a dedication to self-regulating normative principles’. According to him, this requires states to engage in ‘additional democratic principles in order to create global institutions’ and ‘additional procedures of global interdependence’, as well as ‘the final outcomes of a mutually agreed governance process’.<sup>134</sup>

The protection of the fundamental rights of the constituent power-holder as another legal mechanism to limit international constituted power is quite patent, as fundamental human rights are protected by both the Charter and *jus cogens*, which are two sets of norms that set the scope of the power of the SC. However, the non-bindingness of ICJ advisory opinions and the lack of compulsory jurisdiction of international courts in general undermine the protection of such rights. However, the courts, international, regional and domestic, to the extent possible, should exercise their power to review the validity of SC resolutions wherever possible, and this seems to be a scenario where limitations on SC power can be curtailed by the international constituent power. Nonetheless, the role of domestic courts will be discussed later in the vertical checks and balances between states and the SC.

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<sup>133</sup> See general discussions e.g. in Garrett Wallace Brown, *Grounding Cosmopolitanism from Kant to the Idea of a Cosmopolitan Constitution* (Edinburgh University Press 2009) 110–116.

<sup>134</sup> *Ibid* 116.

### 3.2.2. Vertical Checks and Balances in Multi-level Pluralist International Governance

After examining the limitations on the SC's international constituted power by considering the elements of rule of law, separation of powers, democratic legitimacy and the protection of the basic rights of the constituent power-holder, there exist certain mechanisms that might be used to limit the exercise of international constituted power. However, their systematic quality and effectiveness are highly questionable mainly due to the lack of any compulsory and binding judicial review of SC resolutions. Nevertheless, it should be noted here that although the SC has the power to authorize the use of force, the SC needs to rely on the authorization of the use of force by states or international organizations but cannot direct the use of force by itself due to the lack of military force stipulated in Article 43 of the Charter.<sup>135</sup> Thus, tangible actions depend on the decisions by state members as to whether or not to implement measures stipulated by the SC<sup>136</sup> which, according to Paulus, 'can only withhold legality but cannot use military force by itself'.<sup>137</sup> Hence, although the UN Charter as a constitution allocates international constituted power to the SC, it does not possess as centralized power as that of governments in the domestic sphere. Accordingly, this shows a weak form of the vertical checks and balances via which states might refuse to offer the SC their military forces to implement its missions. Further, this also suggests that in the pluralist structure of the international legal system, at present, the limitation on the international constituted power granted to the SC might be effectively delivered by states in case of need.

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<sup>135</sup> Niels Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"' (2000) 11 *EJIL* 541, 567.

<sup>136</sup> Paulus (n 125) 80.

<sup>137</sup> *Ibid.*

As Romana and Chinkin express metaphorically: ‘any international organization needs a "life supporting" system which resides in the national administrations’.<sup>138</sup> This is particularly true in the case of the SC implementing Chapter VII measures. Therefore, as judicial review of SC resolutions is ‘limited at best, and for the time being rather hypothetical’,<sup>139</sup> it is argued that disobedience or non-compliance by states with SC resolutions, which is illegal according to the UN Charter and *jus cogens* rules, might serve as ‘the last resort, *the ultimum refugium* of States’.<sup>140</sup> Indeed with limited access to judicial reviews of SC resolutions, states will rely on auto-determination to determine whether SC resolutions are lawful or not.<sup>141</sup> The SC is not attributed with the power to authoritatively interpret the Charter; therefore, the interpretation of the Charter by the SC is still ‘susceptible of constituting a breach of the Organization’s obligations under that law’.<sup>142</sup> However, in *Certain Expenses*, whilst admitting that the powers of the SC are not unlimited,<sup>143</sup> the court countenances the presumption of *intra vires* for UN acts, ruling that ‘it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization’.<sup>144</sup> Similarly, in *Namibia*, the court also asserts the presumption of the validity of UN acts, in that: ‘[a] resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted.’<sup>145</sup> Based on presumption, a member of the UN can challenge the lawfulness of an SC resolution

<sup>138</sup> Sadurska Romana and CM Chinkin, ‘The Collapse of the International Tin Council: A Case of State Responsibility’ (1990) 30 *Virginia Journal of International Law* 845, 888.

<sup>139</sup> Tzanakopoulos (n 120) 157.

<sup>140</sup> *Ibid*; See general discussions on states’ disobedience to SC resolutions in *Ibid* 157–190.

<sup>141</sup> See discussions over states’ power of auto-determination of legality of SC resolutions in Tzanakopoulos (n 120) 123–136.

<sup>142</sup> *Ibid* 115.

<sup>143</sup> *Certain expenses of the United Nations (Article 17, para. 2, of the Charter)*, Advisory Opinion of 20 July 1962: I.C.J. Reports 1962, 168.

<sup>144</sup> *Ibid*

<sup>145</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, para. 20.

only in the case of it being ‘fragantly or obviously ultra vires’<sup>146</sup> and ‘at its own risk’ of potential responsibility.<sup>147</sup> Non-compliance with SC resolutions has also been used by the OAU to respond to allegedly illegal SC resolutions. In 1998, the Assembly of Heads of State and Government of the Organization of African Unity called upon the SC to suspend the sanctions imposed on Libya under Resolutions 748 (1992) and 883 (1993) until the ICJ delivered its decision on the issue. It also decided not to comply with SC Resolutions 748 (1992) and 883 (1993) on sanctions, unless the proposed condition was met, arguing that the said resolutions violated Article 27 paragraph 3, Article 33 and Article 36 paragraph 3 of the Charter.<sup>148</sup> Added to this, the UN, to which the SC’s and member states’ actions in fulfilling the SC measure can be attributed,<sup>149</sup> can have ‘legal capacity not only to take countermeasures against a State or another IO [International Organization], but also to sustain such countermeasures’.<sup>150</sup> Tzanakopoulos proposes that states may take countermeasures against the UN in the case of illegal acts by the SC, such as refusal to pay an assessed contribution and providing assistance to targeted subject of the SC sanctions.<sup>151</sup>

Apart from non-compliance with SC resolutions and countermeasures, one actor that might offer a promising way to check the exercising of international constituted power by the SC is domestic courts. Although they are regarded as a domestic entity, as discussed in Chapter III<sup>152</sup> domestic courts are also regarded as a law-ascertaining official in the international legal system. This allows domestic courts to strengthen the limitation on the SC’s international constituted power. Indeed, the implementation of SC resolutions relies on domestic measures which might violate the rights of individuals. Individuals, then, are likely to have access to domestic courts and in such cases domestic courts may have opportunities to determine not

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<sup>146</sup> Tzanakopoulos (n 120) 120.

<sup>147</sup> *Ibid* 116.

<sup>148</sup> AHG/Dec.127 (XXXIV)

<sup>149</sup> Tzanakopoulos (n 120) 17–52.

<sup>150</sup> *Ibid* 55–56.

<sup>151</sup> See *Ibid* 191–197.

<sup>152</sup> See Section 4.1 of Chapter on International Officials, 93-94.

only the lawfulness of domestic measures but also that of SC resolutions.<sup>153</sup> In the latter case, the issue of the validity of SC resolutions according to the UN Charter and *jus cogens* rules might arise. In such a case, domestic courts might find that disputed resolutions are unlawful. This approach has been taken in domestic courts. In the *Yossuf* and *Kadi* cases,<sup>154</sup> the CFI ruled that it was empowered to check indirectly the lawfulness of disputed resolutions in light of *jus cogens*.<sup>155</sup> In the same vein, in the *Nada* case, the Swiss Federal Supreme Court also reviewed the compliance of a contested SC resolution with *jus cogens* rules.<sup>156</sup> Of course, this does not mean that domestic courts have the power of judicial review over SC resolutions as their decisions are not binding on the SC and relevant states cannot claim domestic decisions as a ground for refusal to meet obligations imposed by SC resolutions.<sup>157</sup> However, this will, of course, generate political force to put pressure on the SC vertically and might be an effective measure if it occurs collectively in different domestic jurisdictions. Further, this creates the opportunity for domestic courts to play the role of a law-ascertaining official of the international legal system and to clarify the rules within the Charter and also *jus cogens* rules. For example, in the *Nada* case, the court decided that:

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<sup>153</sup> See further discussions in Tzanakopoulos (n 120) 131–136; and also Antonios Tzanakopoulos, ‘United Nations Sanctions in Domestic Courts From Interpretation to Defiance in *Abdelrazik v. Canada*’ (2010) 8 *Journal of International Criminal Justice* 249.

<sup>154</sup> As argued earlier, the EU system has a *sui generis* character which it is not proper to take as a sub-system of international law as it has developed into a more comprehensive system, similar to a municipal legal system. Therefore, the EU courts are perceived as domestic courts in this context.

<sup>155</sup> Judgment of the Court of First Instance (Second Chamber, Extended Composition) of 21 September 2005 in Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, para. 337 and Judgment of The Court of First Instance (Second Chamber, Extended Composition) of 21 September 2005 in Case T-315/01, *Kadi v. Council And Commission*, para. 226

<sup>156</sup> *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, the Swiss Federal Supreme Court, (CH 2007) ILDC 461, para. 7.3 available with English translation at <<http://www.oxfordlawreports.com>> accessed 10 July 2015.

<sup>157</sup> Article 3 of Draft Article on State Responsibility provides: ‘The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.’ See e.g. Tzanakopoulos (n 153) 257–260.

But even the procedural guarantees asserted by the petitioner (right a to legal hearing and a fair trial pursuant to Article 6(1) of the ECHR and Article 14(1) of the International Covenant on Economic, Social, and Cultural Rights; right to an effective appeal pursuant to Article 13 of the ECHR and Article 2(3) of the International Covenant on Civil and Political Rights) do not belong to the inalienable core of the international conventions on human rights ... and thus do not belong categorically to *jus cogens*.<sup>158</sup>

This illustrates a situation whereby domestic courts which, despite being a state official, have a tendency to reach their determinations with a lower political motive, and to participate in the ascertainment of *jus cogens* rules. Indeed, international courts are not bound by what has been decided by domestic courts. However, they are both entitled and encouraged to consult domestic decisions when ascertaining the content of international rules according to Article 38 of the Statute of ICJ, which is argued here as reflecting part of the rule of recognition of the international legal system. It should be note that although at the domestic level states are compelled to follow domestic courts not to implement SC resolutions, at international level, states might bear a risk of international responsibility being incumbent upon them since domestic courts do not provide authoritative rulings in the eyes of international courts. However, domestic courts' decisions have a highly persuasive authority that international courts have to take in consideration in deciding relevant issues.

Accordingly, states and their domestic courts have certain measures available to them to respond to the abuse of international constituted power to some extent. Nevertheless, the benefits of these vertical checks and balances do depend on the development of a sense of citizens of the world. Otherwise, this might gravely undermine the international legal system if vertical checks and balances are employed solely for the sake of national interests. Nevertheless, the notion of states 'as an end in itself' results in patriotism, which naturally hinders the development of the sense of citizens of the world to some extent.<sup>159</sup> Brown suggests that the sense of

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<sup>158</sup> *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, the Swiss Federal Supreme Court, (CH 2007) ILDC 461, para. 7.3.

<sup>159</sup> Jurgen Habermas, *The Divided West* (Ciaran Cronin tr, Polity Press 2006) 152.

citizens of the world will be strengthened ‘only through the beliefs of individuals and their non-coerced willingness to broaden their identity formation so as to incorporate humanity itself’.<sup>160</sup> Habermas explains that the experience of the increasing independence in world society results in a change in the “self-image” of states and their citizens as well as in the decision-making of relevant actors to fit with a new structure of the world.<sup>161</sup> He further argues that:

Through participation in controversies over the application of new laws, norms that are merely verbally acknowledged by officials and citizens gradually become internalized. In this way, nation states learn to regard themselves at the same time as members of larger political communities.<sup>162</sup>

Accordingly, the limitations of the international constituted power via vertical checks and balances lie in the realization of people and other relevant actors that they are also part of a larger and perhaps the largest and most inclusive society, which is the international community of humanity.

#### **IV: Conclusion: The Development of the Institutionalization of International Constituted Power in the International legal System**

As shown, the *jus cogens* regime does not contribute greatly to the institutionalization of international constituted power as it does not specifically allocate power that can be exercised against state wills to any international actors. However, *jus cogens* rules play a vital role in the limitation of international constituted power allocated to the SC based on the nexus to the international constituent power-holder. Based on the development of a secondary rule regarding the international community which is not limited to states, views of individuals will count in the forming of the collective will of the international community which determines what the fundamental shared values of the international community are. Of course, a survey of all individuals’ views would be nothing if not impossible.

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<sup>160</sup> Brown (n 133) 71.

<sup>161</sup> Habermas (n 159) 177.

<sup>162</sup> Ibid 176–177.



Nonetheless, this gives the legitimacy for international courts to look for, in non-state avenues, information which can be used in determining and applying *jus cogens* rules, especially in the opinion of academia, regarded as a rule-ascertaining official in the international legal system. As SC resolutions are subject to *jus cogens* rules, this provides a limitation on the exercise of international constituted power by the SC based on rules articulated based on the will of humanity, which is the source of international constituent power-holder. Further, the use of *jus cogens* as a limit on the international constituted power of the SC is accessible to both international and domestic courts.

Within the UN system, the only organ that is empowered with a power superior to state wills is the SC, based on Chapter VII of the Charter. The GA and ECOSOC play a vital role in identifying and shaping fundamental shared values and other shared values. However, they function as more like an avenue where states as the representatives of constituent power-holders and other non-state actors, such as NGOs or relevant experts, participate in the creation of the collective will of the international community, which might lead to the emergence or ascertainment of international constitutional rules. In this sense, the GA and ECOSOC are relevant to the exercise of constituent power or constitution-making power. Likewise, although the ICJ's decisions are binding on state parties to cases, as the jurisdiction of the ICJ depends on the consent of such states, the bindingness of ICJ verdicts derives from state consent rather than the power of the court over state wills. Thus, the allocation of international constituted power in the sense of power superior to state wills is currently only found in the SC. Thus, this power of the SC needs to be limited based on its nexus to the international constituent power so that international self-governance with a mandate for peace and fundamental human rights will emerge.

With respect to legal mechanisms that impose limitations on the international constituted power allocated to the SC, the SC's Chapter VII powers are limited by the text of the Charter as well as by *jus cogens* rules. This basically inserts a rule-of-law mechanism into the international legal system. However, the rule-of-law

mechanism hinges on the independent judicial reviews of international courts. Now, only incidental judicial reviews via non-compulsory contentious jurisdictions and non-binding advisory opinions are available in the international legal system. With respect to the separation of powers, the GA can seek advisory opinions of the ICJ to determine the lawfulness of SC resolutions. Nonetheless, again, advisory opinions are not binding on the SC. Added to this, although when the SC malfunctions the GA can step in to take responsibility for peace and fundamental human rights, the GA cannot issue binding resolutions. As the UN Charter and *jus cogens* rules both entail rules protecting fundamental human rights, there exists a limitation on international constituted power based on protection of the fundamental rights of the constituent power-holder. Nevertheless, the limited capability of international courts to deal with this issue again undermines the effectiveness of this mechanism. Regarding democratic legitimacy, the structure of state-centred international law disables the development of global demos and the creation of a robust democratic link between international constituted power and the international constituent power-holder. However, democratic legitimacy might be further developed by states adopting additional democratic principles on the international stage. Nonetheless, this depends on the development of domestic constitutionalism for which international constitutionalism aims to provide a supporting environment, reflecting the complementing interactions between two levels of governance.

Thus, the mechanisms that are used to limit constituted power in domestic systems are also available in the international legal system. However, largely because of the lack of compulsory jurisdiction of international courts, such mechanisms are lacking in efficiency. Nevertheless, although the lack of compulsory jurisdiction is the negative side of the largely decentralized character of state-centred international law, looking on the bright side, the power of the SC is less centralized and more limited in scope than domestic government. Further, state-centred international law offers vertical checks and balances between states as a representative of the international constituent power-holder and the international constituted power holder. States can opt not to comply with potentially unlawful SC resolutions or even to resort to

countermeasures to create checks and balances between SC and states, especially smaller countries. Domestic courts which are typically less influenced by political motives also have a chance to review the lawfulness of the SC resolutions if cases relevant to the domestic implementations of such resolutions are presented to the court. Although, domestic courts' decisions are not binding on the SC and do not provide legitimacy for non-compliance with SC resolutions, they do generate political pressure and have persuasive authority. In addition, this provides a chance for domestic courts also to play the role of a rule-ascertaining official in the international legal system in terms of clarifying the content of *jus cogens* rules, or even the UN Charter, which international courts are eligible and encouraged to use in their cases.

All in all, there exists an allocation of international constituted power to the SC, though not one as strong as that in domestic system. This reflects the institutionalization of the international constituted power in terms of the allocation of power being less developed compared to domestic constitutional legal systems. However, that is compatible with Kant's idea of a federation of free states which shall have a limited mandate as a loosened, tied and collective entity. The concentrated allocation of constituted power to an international actor would carry the risk of despotism. There are also elements of the limitation of the international constituted power of the SC via the rule of law, the separation of powers and the protection of fundamental human rights. However, the lack of compulsory jurisdiction of international law, which is key to the successful limitation of power, is missing. Although the vertical checks and balances the SC's power by states and their actors might kick in and provide help, this kind of mechanism is largely dependent on the development of a sense of citizens of the world which will drive states as representatives of their peoples and other relevant actors to act for the benefit of humanity as whole.

Accordingly, until the sense of citizens of the world is sufficiently developed through the experience of people of the world regarding the interdependence of the human

race, a change in the composition of the SC and/or its veto rights or the emergence of a compulsory jurisdiction is still needed to provide more legitimacy for the exercise of power by the SC. Hence, certainly, the institutionalization of international constituted power can be affirmed, although it does indeed need a further process of constitutionalization.



## **Chapter VI: Conclusion**

The purpose of this thesis is to determine the constitutional quality of international law. In doing so, two tasks have been undertaken — firstly, an articulation of the conditions which are individually necessary and cumulatively sufficient for the emergence of a constitutionalized international legal system and secondly an assessment of the current structure of international law based on the proposed conditions. It is proposed here that the international constitutional legal system has developed robustly; however, there exist certain shortcomings in the current structure of international law. Thus, the thesis also includes suggestions for how further to constitutionalize international law.

At the heart of this thesis is the mindset that the largely decentralized and state-centred character of international law should never be automatically labelled as an underdeveloped legal structure, just because it is not as centralized as domestic constitutional legal systems. To prevent international constitutionalism being overshadowed by statist constitutionalism, making us blind to the differences between international and domestic society, it is necessary to figure out the underlying rationale of the international, largely decentralized, legal system. Then, if the largely decentralized structure has been constructed based on some underlying rationale rather than just because of the lack of normative development, articulation of the necessary conditions for and a determination of the constitutional quality of international law must be achieved by taking such underlying rationales into consideration. Of course, the thesis does not deny that some form of centralized legal structure is required for the emergence of an international constitutional legal structure. However, the real question concerns the extent to which international law should be centralized. The answer to this question depends on how much centralisation is needed to achieve the creation of self-governance of the free and equal. Again, this should be modelled in light of the pluralist character of state-centred international law the reality of a world with two levels of governance –

international and domestic – which can and should complement each other and compensate for each other's weaknesses.

The main difficulty in completing these two tasks lies in the semantic issue of the contours and content of international constitutionalism, which is a consequence of the transfer of the already-highly contested concept originating in the domestic sphere to the international setting. To tackle this semantic issue, firstly the thesis has discussed three intertwined key terms: 'international constitutionalism', 'the constitutionalization of international society and its law' and 'a constitution of the international community'. The thesis proposes the interrelationship between these three terms – international constitutionalism as an idea, the constitutionalization of international law as a process and a constitution of the international community as a product. Accordingly, no matter how one defines international constitutionalism, one logical way to determine whether international law qualifies as a constitutionalized legal system is to determine whether the international legal structure, which has been structured by constitutional rules as a product of the constitutionalizing process of the idea of constitutionalism, can fulfil the ideas entailed in international constitutionalism.

Based on this interrelationship, it is also proposed here that, in the weakest and most inclusive sense, the constitutionalization of international law can be understood as the systematization of international law. However, people who have specific content of constitutionalism in mind will demand that international law be systematized in a specific direction or possess specific legal mechanisms. Thus, constitutionalization of international law starts from the basic systematization but might need to develop further in order to achieve a particular variation of international constitutionalism chosen to set a goal of the constitutionalization process. Based on such a basic understanding of constitutionalization of international law, three models for an international legal constitutional structure can be found in the current literature on the various propositions for international constitutionalism: secondary-rule constitutional legal structure, hierarchical constitutional legal structure and statist

constitutional legal structure, which are candidates for a model for an international constitutional legal system.

Then, it was proposed here that the keys to the transfer of the concept of constitutionalism into the international sphere are the viability and the capacity to fulfil the underlying aim of international constitutionalism. These criteria serve as a basic for the assessment of these three models in the current literature and the articulation of the conditions necessary and sufficient for an international constitutionalized legal system.

With respect to viability, the cosmopolitan paradigm offers a proper cognitive framework for the current character of international law on which the constitutional model can be grounded. Different from the statist model of international constitutionalism which sees the state-centred character of international law as a lack of development, a cosmopolitan paradigm explains the reasons behind this character. According to the cosmopolitan paradigm, the creation of a legal structure to support a world state is rejected, as the world-state path carries a high risk of despotism. Also, it might be used as a way to legitimize a claim by one state or international organization to use its coercive power to make other states subject to it. The cosmopolitan paradigm insists that states and their constitutions should not be subject to external coercive rights, except for the matters of peace and fundamental human rights. Even states with a despotic constitution cannot be told to change their constitution by external powers as this would undermine the peace-creation condition. Thus, international cosmopolitan constitutionalism rejects the viability of a world state-structure with a single demos, whilst supporting the current pluralist structure of world governance. Pluralist state-centred international law has been developed to serve peace creation and respect for states and their peoples, taking into consideration the potential development of domestic constitutionalism through self-enlightenment within states.



The underlying aim of constitutionalism also depends on how one defines the concept. However, the increase in constitutional discussion at the international level is, to a large extent, due to its potential to address the deficiencies of both domestic and international law. On the one hand, domestic constitutions built on the idea of territoriality lack the capacity to deal with deterritorialized activities and have a problem regarding legitimacy of the scope of constituent power holders with respect to outsiders affected by the constitution and domestic law. The construction of an international legal system can cure the defects of domestic constitutional legal systems as it can subject deterritorialized problems to law and it has no inherent problems regarding the exclusion of outsiders based on territories or nationalities. However, international law has its own problem of a fragmented nature, thus triggering a need for the creation of more unity at the international level; and due to the proliferation of international rules and organizations with political power, international law needs to be legitimized. Thus, the international legal structure built to fight with the new challenges of the world have its own issues that need to be legitimized by via the process of constitutionalization. This reflects the on-going attempt of humanity to further develop the legal structure of human society to cope with the new emerging social phenomena via law as well as with the legitimacy problems generated by the development or modification of the legal structure.

Then, looking at the original context of constitutionalism, the underlying aim of domestic constitutionalism is to create self-governance for the people of a state. If this purpose of the creation of self-governance is also transferred and achieved in the international sphere, then international self-governance can cure the legal defects discussed at both levels. This strongly suggests that the constitutionalization process of the international law and domestic law should be seen as an ongoing human attempt to legitimize the legal structure of human society at both domestic and international levels by the creation of self-governance of human beings. The fundamental connecting point of this process is the primacy of the human beings who are the ultimate stakeholders of any kind of society over any form of entities granted public power by the governance established by human beings. Given that at

the international level, every human being can be included as a constituent power-holder, excluding no one based on nationality, territory or citizenship, taking the constitutionalization of international law as a part of ongoing project of the constitutionalization of human society allows the creation of self-governance to be truly achieved. Thus, it is argued that the creation of self-governance is the underlying aim of the idea of constitutionalism; this aim should not vary, regardless of the type of society in which the idea of constitutionalism is actualized. This aim must not be compromised during the transfer of concept into the international setting, and it should be taken as the underlying aim of international constitutionalism. The shared purpose to create self-governance will serve as an underlying connecting point between domestic constitutionalism and international constitutionalism.

However, this does not mean that a constitutionalized international legal system must achieve this underlying aim on its own. The reality is that there exist two levels of world governance, each of which has its own weaknesses hindering the creation of self-governance in different aspects. As both domestic constitutionalism and international constitutionalism have the same underlying purpose, a constitutional legal system at both levels should be structured from the view that each of them can and should complement and compensate for the other. On this point, the cosmopolitan paradigm proposes three cosmopolitan conditions for the creation of self-governance of the free and equal based on the reality of multilevel governance of the world. First, ‘the civil constitution of every state shall be republican’; secondly, ‘the rights of nations shall be based on a federation of free states’; and thirdly, ‘cosmopolitan rights shall be limited to conditions of universality hospitality’.<sup>1</sup> The first condition is to be fulfilled by domestic constitutionalism, whilst the international right, which is the right of states not to be subjected to external coercive power, and cosmopolitan rights, which take the form of human rights in the contemporary context, are to be fulfilled in the international sphere. Based on the idea of the complementarity of two levels of governance, on the one

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<sup>1</sup> Immanuel Kant, ‘Perpetual Peace’ in HS Reiss and HB Nisbet (eds), *Kant: Political Writings* (2nd edn, CUP 1991) 99–108.

hand, the international constitutional legal system provides a peaceful condition and a minimum standard of human rights that humans will enjoy everywhere. Under such conditions, without the difficulties caused by external intervention, domestic constitutionalism will grow. On the other hand, when states become more democratically legitimate, a federation of free states in which states act as representatives of their people who are part of international constituent power-holders will earn more legitimacy based on a stronger link between international constituted power and international constituent power through states. It is also expected that when domestic constitutionalism grows strong, the representatives of states will support democratic principles at the international level. Accordingly, based on the complementary relationship between an international constitutional legal system and domestic constitutional legal systems, the mandate of international self-governance in the form of a federation of free states should be limited to securing international peace and fundamental human rights. Other matters, apart from peace and fundamental human rights, should be left to the discretion of states, in which democratic legitimacy can be fully developed to design the content of law in the form of a state constitution, domestic law and state-consent-based international law.

Applying the viability and capacity to fulfil the underlying purpose criterion, this thesis rejects each of the three models available in the current literature, as none succeeds in giving a fully plausible account of the necessary and sufficient conditions of an international constitutional structure.

Systematic quality is one of the necessary conditions for the establishment of an international constitutionalized legal system, as it provides basic efficacy of the system. This is a prerequisite for any legal system, not matter whether constitutionalized or not, in order to fulfil its underlying purpose. However, focusing only on the systemic element of international law, the secondary-rule constitutional legal structure does not necessitate pursuit of peace or the protection of fundamental human rights, let alone international self-governance. Nor can a hierarchical legal

structure can serve as a sufficient model for an international constitutionalized legal system since a system with a hierarchical structure of primary rules does not necessarily prioritize peace and fundamental human rights. Further, this model does not require that the higher rules of the hierarchy be constituted by the international constituent power-holders, aka humankind, which is necessary to create international self-governance. However, a hierarchy of primary rules which can provide the supremacy and universality of primary rules, creating an obligation to protect international peace and fundamental human rights, is one of the necessary conditions for the emergence of an international constitutionalized system to fulfil the aims described above.

In contrast, a statist model for an international constitutional legal structure has a condition that is too attached to the particularity of domestic legal structure. The statist legal structure model requires both a comprehensive legal structure that juridifies all the political power within the relevant territoriality, and legal mechanisms that impose a limitation on the exercise of the constituted power based on the nexus between constituted power and constituent power. If a comprehensively centralized legal structure needs to be achieved at the international level, then a world sovereign or world statehood has to be in place. This path is not desirable due to the risk of despotism of a world government. Nevertheless, the purposes of an international constitutional legal system will never be achieved unless centralized power that can be used to enforce constitutional primary rules against state wills, as far as peace and fundamental human rights are concerned emerges within international law. When international constituted power that can force states to act against will has been allocated to certain actors, this in turn necessitates limitations on such power. That is to say, the institutionalization of international constituted power on the matter of peace and fundamental human rights is the final condition for the emergence of a constitutionalized international legal system.

Based on this analysis, this thesis has proposed the following conditions – individually necessary and cumulatively sufficient – for the emergence of an international constitutional legal system:

1. International law must be sufficiently equipped with secondary rules which will provide basic efficacy for international law to exist as a legal system.
2. There must exist a hierarchy of international primary rules providing supremacy for primary rules that protect peace and fundamental human rights.
3. The institutionalization (allocation and limitation) of international constituted power must be achieved in order to establish international self-governance with a mandate for the protection of international peace and fundamental human rights.

Based on these conditions, this thesis argues that a constitutional legal system has emerged at the international level, despite certain shortcomings with respect to the institutionalization of international constituted power that can force states to act against their wills.

With respect to the systematic element, based on Hart's theory of a legal system as a union of primary rules and secondary rules, it is proposed here that international law exists as a legal system. Two Hartian minimum conditions for the existence of a legal system are met by international law. First, the international primary rules of obligation are generally obeyed. Secondly, international law is sufficiently equipped with secondary rules to deal with the problems of legal uncertainty, legal stagnation and legal ineffectiveness. Considering the content of international secondary rules, the rule of recognition of international law recognizes state wills as one of the sources of validity of the primary rules of the system, and other secondary rules also respect the autonomy of states, which are the representatives of their respective peoples. This contributes to the largely decentralized and state-centred international law. However, international law has developed in this direction as it is necessary for

a peace-creating condition for the world. In the case of democratic states, this also allows states as representatives of their constituent power-holders at the international level to exercise the power conferred on them by their peoples to freely designate international law, as long as it does not undermine the protection of peace and fundamental human rights domain. Although the largely decentralized character of international law creates another problem of legal uncertainty caused by normative conflicts, international law is also equipped with adequate conflict rules to deal with this issue.

In light of the hierarchical structure of international primary rules with the supremacy of peace and fundamental human rights, it is argued here that there exists a unifying rule of recognition which embraces both state wills and the fundamental shared values of the international community as a source of validity international primary rules whilst recognizing the latter as a superior source of validity. The hierarchical structure of international primary rules is established by the secondary rules of non-derogability of *jus cogens* and the primacy of the UN Charter, both of which protect the higher status of community-value-based international primary rules. Both *jus cogens* rules and the substantive rules of the UN Charter, as a higher rule of the international legal system, generate obligations protecting of peace and fundamental human rights. Accordingly, the existence of a hierarchical structure of international primary rules providing the supremacy for rules protecting peace and fundamental human rights have been established in the international legal system. The revelation of the content of the unifying rule of recognition that recognizes the fundamental shared values of the international community as a source of validity of international constitutional primary rules simultaneously identifies all human beings in the international community as a constituent power-holders. The recognition of the constitution-making power of the international community of mankind by the unifying rule of recognition of the international legal system can provide the foundation for the creation of international self-governance of the free and equal as it includes every human being as a part of constituent power-holder. However, it is nothing if not impossible to gather all individuals' views regarding fundamental

values or community-value-based rules. Nonetheless, in current international law, international dialogues or forums are still dominated by state actors and the views of state agents at the international stages are readily accessible for international courts as rule-applying officials. Thus, the ascertainment of international constitutional rules is still mainly based on states' views. Hence, certain groups of people such as stateless persons and minorities in states tend to be under-represented. More open international forums for non-state actors such as NGOs and experts are encouraged in order to remedy this deficiency in the current international legal system. Likewise, legal opinions regarding the content of community-value-based rules of academics and domestic courts which serve as rule-ascertaining officials of the international legal system should be given more attentions by international courts. These two actors are typically less politically influenced and both can create an epistemic community of legal experts where information sharing regarding community-value-based rules and discussion of them can be made possible. This would provide a venue where international courts can gather information about the fundamental values of the international community as well as community-value-based rules beyond the opinions of states and their strictly-under-state-control officials.

Pertaining to the third condition — the institutionalization of international constituted power superior to state wills — the UN Charter creates an institutional structure to identify, clarify and protect the fundamental shared values of the international community. Whilst the GA, the SC, the ICJ and ECOSOC have been assigned vital functions in the UN value system and attributed the necessary power to achieve assigned tasks, it is argued that currently only the SC has been empowered with international constituted power which can be exercised against state wills. However, the composition of the UN Charter with five fixed permanent members possessing veto privileges generates a serious legitimacy problem for the exercise of the international constituted power of the SC. Added to this, the limitation of the constituted power allocated to the SC is a weakness of the international legal system, albeit reflecting the *realpolitik* of international society.

Whilst democratic legitimacy is extremely difficult to establish in state-centred pluralist international law due to the lack of a global single demos, the mechanisms of the rule of law, vertical separation of powers and the protection of fundamental rights of constituent power-holders can be found. Nevertheless, the absence of the compulsory jurisdiction with respect to peace and fundamental human rights of international courts is a key reason for relative inefficiency of these mechanisms. However, the constituted power allocated to the SC is not as centralized as in domestic government, as the SC does not have its own military force and other resources necessary for enforcing its sanctions. Added to this, the multilevel governance of the world offers vertical checks and balances on the SC's power by states. Nonetheless, the efficiency of these vertical checks and balances depends on the development of a sense of citizens of the world. Otherwise, this is nothing more than a patriotic tool to protect individual states' interests. Domestically established but recognized as rule-ascertaining officials of the international legal system, domestic courts can, however, play a vital role when deciding issues relevant to the domestic implementation of SC measures. Domestic courts have opportunities to check the lawfulness of SC sanctions in light of the UN Charter and *jus cogens* when domestic implementation of such SC sanctions results in disputes before them. This also provides a chance for domestic courts to ascertain the content of international constitutional rules, drawn from either the Charter or *jus cogens* rules, and to make them more reflective of the shared opinion of humankind rather than merely that of the community of states.

To conclude, international law exists as a legal system with a hierarchical structure protecting peace and fundamental human rights. However, the process of constitutionalization is still incomplete. In order to better achieve the aims of the international constitutionalism, further institutionalization of international constituted power on the matter of peace and fundamental human rights is needed. The allocation of international constituted power superior to states' power can be identified in the case of the SC, albeit not as centralized as in the case of domestic government. However, the limitation of such international constituted power based



on the nexus to the international community of mankind lacks efficiency, mainly due to the lack of compulsory jurisdiction of international courts. This, together with the issues of the representativeness and veto rights of the SC, poses a serious problem regarding the legitimacy of the international constituted power conferred on the SC. The vertical checks and balances on states and the SC can offer some assistance but the results depend on the development of a sense of citizens of the world amongst relevant actors. Accordingly, a robust international constitutional legal system has emerged with some deficiencies that need further constitutionalization processes if they are to be rectified. Reforms of the international legal structure and composition of the SC and veto rights, as well as the establishment of compulsory jurisdiction for international courts on matters of peace and fundamental human rights, are obviously needed. Nevertheless, given the current international political landscape, such a process seems unlikely to occur in the near future. However, hope may lie in strengthening the sense of cosmopolitan citizenship that can inspire people to perceive themselves as part of both their own national states and the larger community of mankind, both of which exist for the benefit of humankind as a whole. When a strong sense of world citizenship is deeply instilled in the minds of people, this should enable reform of the international legal structure to take place. Until then, the role of academics and domestic courts, which are typically less politically influenced and regarded as officials of the international legal system, should be emphasized to make the best out of the currently imperfect, but with potential to develop, constitutionalized international legal system.

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