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THE CONCEPT OF JUS COGENS AND THE OBLIGATION UNDER THE U.N. CHARTER

*Kamrul Hossain**

ABSTRACT

By virtue of Article 103 of the Charter of the United Nations, an obligation under the Charter prevails over an obligation arising out of any other international agreement. The decisions in the Security Council that give rise to a compelling obligation upon the member states are taken mostly by means of political consideration. Article 103 obligates all member states to comply with these decisions. Since member states agreed to carry out the decisions of the Security Council in Article 25, this Article 103 obligation operates irrespective of any other obligation arising out of other treaties or agreement, even if it is contrary to those of general U.N. obligations. The question, however, is whether a Charter obligation could override an obligation that represents the norm of *jus cogens*. This article discusses the concept of *jus cogens*, its peremptory nature and how the Charter of the United Nations reflects the norm of *jus cogens* as its fundamental principle. Thus, any decision taken under the Charter should conform to the norm of *jus cogens*.

Jus cogens, the literal meaning of which is “compelling law,” is the technical term given to those norms of general international law that are argued as hierarchically superior.¹ These are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances. The doctrine of international *jus cogens* was developed under a strong influence of natural law concepts, which maintain that states cannot be absolutely free in establishing their contractual relations. States were obliged to respect certain fundamental principles deeply rooted in the international community.² The power of a state to make treaties is subdued when it confronts a super-customary norm of *jus cogens*.³ In other words, *jus cogens* are rules, which correspond to the fundamental norm of international public policy and in which cannot be altered unless a subsequent norm of the same standard is established. This means that the position of the rules of *jus cogens* is hierarchically superior compared to other ordinary rules of international law.

In fact, there are rules, which are preconditions for effective international activity, such as *pacta sunt servanda*. To abrogate such a rule is not possible. A treaty providing that *pacta sunt servanda* is mere reaffirmation. A treaty denying it is an absurdity. The point is that the very activity of treaty-making assumes the general rule which complies with the international public policy and is accepted by the international

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¹ REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 33 (2d ed. 1994).

² See Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT'L L. 42, 44 (1991), available at <http://www.ejil.org/journal/Vol2/No1/art3.html>.

³ DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 26-27 (Nomos ed., 1987).

Under the stewardship of its fourth Rapporteur, Weldock, the International Law Commission [hereinafter ILC] undertook in-depth discussion of *jus cogens*. As reflected in the relevant ILC Yearbooks, that there was agreement in regards to the existence of the rules of *jus cogens* and the peremptory norms were viewed as norms from which states

community at large.⁴ Rules contrary to the notion of *jus cogens* could be regarded as void, since those rules oppose the fundamental norms of international public policy.

As a result, *jus cogens* rules gained the nature of international constitutional rules for two reasons. First, they limit the ability of states to create or change rules of international law. Second, these rules prevent states from violating fundamental rules of international public policy since the resulting rules or violations of rules would be seriously detrimental to the international legal system.⁵ Clearly defined contents of the rules of *jus cogens* are not yet likely to be decided. Existence of such norms is now universally recognized and well established.

Recognition of *Jus Cogens* in International Law

During the early nineteenth century, recognition of *jus cogens* was established. Professor Oppenheim stated that there existed a number of “universally recognized principles” of international law that rendered any conflicting treaty void, and therefore, the peremptory effect of such principles was itself a “unanimously recognized customary rule of International Law.”⁶ For example, he stated that a treaty supporting piracy is void for being contrary to the “universally recognized principles” of international law.⁷ Moreover, the concept of *jus cogens* twice found favor

cannot contract out. See [1963] 2 Y.B. Int'l L. Comm'n 52, U.N. Doc. A/CN.4/Ser.A/1963.

⁴ JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 79-80 (1979).

⁵ See Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 *NORDIC J. INT'L L.* nos. 2-3 211, 219-220 (1997).

⁶ OPPENHEIM ET AL., *OPPENHEIM'S INTERNATIONAL LAW VOL. 1 PEACE*, introduction & part I (1992).

⁷ *Id.* at 528. During the years of 1963 to 1966, several members pointed out in the ILC commentary that the emergence of rules having the character of *jus cogens* was not the product of recent time, rather it has more long-standing character. They further stated that the concept of *jus cogens* had originated in regard to such universal crimes as piracy and the slave-trade as well as such principles as the freedom of high seas and other rules on the law of the sea. For more information, see LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW* 161-62 (1988).

in a judicial context, first, in the decision of the French-Mexican Claims Commission in the 1928 *Pablo Nájera Case*, and later by Judge Schücking of the Permanent Court of International Justice in the 1934 *Oscar Chinn Case* [1934] PCIJ 2 (12 December 1934).⁸ Subsequent to this 1934 case, judges of the International Court of Justice made similar references to *jus cogens* in a number of separate and dissenting opinions.⁹ For example, in a 1993 Bosnian case, Judge Lauterpacht expressed his opinion on the possibility that the Security Council had violated the genocide prohibition and therewith alleged *jus cogens* when imposing an arms embargo on both Serbia and Bosnia. In 1991, Resolution 713 of the Security Council imposed arms embargo. While this resolution disregarded the state's inherent right of self-defense, the Security Council had been unable to take measures necessary to maintain peace and security in Bosnia. The consequences led to ethnic cleansing, genocide and large-scale human sufferings. Therefore, the argument of alleged violation of *jus cogens* has some potential weight.

Furthermore, the Vienna Convention on the Law of Treaties has given the recognition of the norms of *jus cogens* in Article 53, where it states:

A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose 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

⁸ Byers, *supra* note 5, at 213-214 n.8-9.

⁹ *Id.* at 214 n.10. For the opinion of the ICJ, see, for example, Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.) 1958 I.C.J. 55 (Nov. 28) (separate opinion of Judge Quintana); Right of Passage Over Indian Territory (Port. v. India) 1960 I.C.J. 6 (Apr. 12) (separate opinion of Judge *ad hoc* Fernandes); South West Africa Case, Second Phase (Eth. v. S. Afr.; Liber. v. S. Afr.) 1966 I.C.J. 6 (July 18) (separate opinion of Judge Tanaka); North Sea Continental Shelf Cases (F.R.G./Den. v. F.R.G./Neth.) 1969 I.C.J. 3 (Feb. 20) (separate opinion of Judge Nervo).

and which can be modified only by a subsequent norm of general international law having the same character.¹⁰

That means a treaty is no longer an international legal document, if, at the time of its conclusion, it conflicts with the norms of *jus cogens*, which are peremptory in nature. This article sets up the four criteria for a norm to be determined as *jus cogens*, specifically: (1) status as a norm of general international law; (2) acceptance by the international community of states as a whole; (3) immunity from derogation; and (4) modifiable only by a new norm having the same status.

On the other hand, Finnish scholar Lauri Hannikainen demonstrated that if a norm of general international law protects an overriding interest or value of the international community, and if any derogation would seriously jeopardize that interest or value, then the peremptory character of the norm may be presumed if the application of the criteria of peremptory norms produces no noteworthy negative evidence.¹¹

Recognition of the rules of *jus cogens* was again confirmed in 1986 at the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations. The importance of the rules of *jus cogens* was confirmed by the trend to apply it beyond the law of the treaties, in particular, in the law of state responsibility. Specifically, the International Law Commission (ILC) proposed the notion of international crimes resulting from the breach by a state of an international obligation “essential for the protection of fundamental interests of the international community,” which is, in fact,

¹⁰ Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/ 27, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties.htm>.

¹¹ LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 20, 207.

closely linked to the doctrine of international *jus cogens*.¹² In the *Nicaragua Case*, the International Court of Justice clearly affirmed *jus cogens* as an accepted doctrine in international law.¹³ The ICJ relied on the prohibition on the use of force as being “a conspicuous example of a rule of international law having the character of *jus cogens*.”¹⁴

Status of the Norm in International Law

A peremptory norm may, it would appear, be derived from a custom or a treaty, but not, it is submitted, from any other source.¹⁵ This statement is, however, self-contradictory. Indeed, there are serious problems associated with the assertions that a norm of *jus cogens* could be the result of the natural law, or, one or any of the traditional primary sources of international law, namely, treaties, customs or general principles of laws.¹⁶ According to Professor Michale Byers of the Duke University Law School, treaties can, at best, only be contributing factors in the development of *jus cogens* rules for two reasons. First, a treaty cannot bind its parties’ abilities to modify the treaty terms nor to relieve the party’s obligations under it, such as through a subsequent treaty to which all the same parties have consented. Second, all generally accepted *jus cogens* rules apply universally yet none of the treaties, which have codified these rules, have been universally ratified. No treaty, not even the Charter of the Charter of the United Nations, can establish a rule of

¹² See Danilenko, *supra* note 2, at 43; Byers, *supra* note 5, at 214; Draft Articles on State Responsibility, art. 19, available at http://www.javier-leon-diaz.com/humanitarianIssues/State_Resp.pdf.

¹³ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (Jun. 27).

¹⁴ See Danilenko, *supra* note 2, at 42 (discussing *Nicar. V. U.S.*).

¹⁵ WALLACE, *supra* note 1, at 33. In the *Nicaragua Case*, the I.C.J. clearly proceeded on the assumption that the peremptory rule prohibiting the use of force was based not on some exotic source, but on the two most commonly used and established sources of law, namely treaty and custom. See *Military and Paramilitary Activities*, 1986 I.C.J. at 97, 100.

¹⁶ Byers, *supra* note 5, at 220-221 n.34.

general international law. Treaties can only create obligations between their parties.¹⁷

As for the assertion that *jus cogens* rules to be considered as customary international law, more ambiguity exists. Customs are binding only in the case of an established *opinio juris* wherein a state believes to be bound by a said practice due to its creation from customary rule. However, persistent objection of any customary principle creates an exception to have the binding nature of such rules. There are also other ways to supersede customary rules, such as through the development of rules of special customary international law and the conclusion of treaties. On the other hand, in case of the rules of *jus cogens*, these rules are binding regardless of the consent of the parties concerned and regardless of the states' own individual opinion to be bound since these rules are too fundamental for states to escape responsibility. Modification of the rules of *jus cogens* is only possible when a new peremptory norm of equal weight emerges.

As for the binding character of *jus cogens*, acceptance by the large majority of states of such norm would amount to universal legal obligation for the international community as a whole. These are superior rules and bear the common values for the international community as a whole. Michael Byers, however, tends to show that *jus cogens* rules are derived from the "process of customary international law," which is itself a part of international constitutional order.¹⁸ He argues that *opinio juris* (or something resembling *opinio juris*) appears to be at the root of the non-detractable character of *jus cogens* rules, because states simply do not

¹⁷ *Id.* at 221. See also Vienna Convention on the Law of Treaties, *supra* note 10, arts. 34, 39, available at <http://www.un.org/law/ilc/texts/treaties.htm>; Draft Articles on State Responsibility, *supra* note 12, art. 29(1), available at http://www.javier-leon-diaz.com/humanitarianIssues/State_Resp.pdf.

¹⁸ Byers, *supra* note 5, at 222.

believe that it is possible to contract out of *jus cogens* rules or to persistently object to them. States regard these rules as being so important to the international society of states and to how that society defines itself, such that they cannot conceive of an exception.¹⁹ Article 53 of the Vienna Convention, however, contains no reference to any element of practice. One could then hardly conceive *jus cogens* as a strengthened form of custom.²⁰ David Kennedy termed *jus cogens* as super-customary norm.²¹

In fact, two views predominate regarding the foundation of the concept of *jus cogens*, the first, as directly originating from international law, or the second, as being based on the one of the existing sources of international law. However, some argue and accept that *jus cogens* recognizes a wholly new source of law capable of generally binding rules. This idea was developed during the Vienna Conference on the Law of the Treaties at which *jus cogens* was interpreted to indicate that a majority could bring into existence peremptory norms which could bind the international community of states as a whole, regardless of the individual consent of the states. Thus, the result is a new source of law founded on the basis that a community as a whole may create rules that will bind all its members, notwithstanding their possible individual dissent. Others argue that the existing sources have been modified to allow majority rule-making in the context of higher law.²² However, the negotiating history of the Vienna Convention does not support the view that the notion of *jus cogens* emerges as a new source of general international law. Rather, there was a clear tendency to view *jus cogens* as the product of the

¹⁹ *Id.* at 221

²⁰ See generally Danilenko, *supra* note 2, available at <http://www.ejil.org/journal/Vol2/No1/art3.html>.

²¹ See KENNEDY, *supra* note 3, at 26-27.

²² See Danilenko, *supra* note 2, at 42.

existing sources.²³ For example, France argued that if the draft article on *jus cogens* was interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, then the result created an international source of law. France objected to such a possibility on the ground that such a new source of law would be subject to no “control and lacking all responsibility.”²⁴

Moreover, complexity remains in the interpretation of Article 53, regarding the phrase: “acceptance and recognized by the international community of States as a whole.” M.K. Yasseen, the former Chairman of the Drafting Committee of the Vienna Conference on the Law of Treaties, states 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 by the international community as a whole would not be affected.²⁵

Yasseen further stated that no individual state should have the right of veto. Additionally, in the ILC commentary to the Article 19 of the Draft Articles on State Responsibility, it explained the meaning of “as a whole” within the context of requiring international recognition of international crimes:

[T]his 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

²³ *Id.*

²⁴ U.N. Conference on the Law of Treaties I, at 94.

²⁵ *Id.* at 472

states, even if it constitutes a majority, but by all the essential components of the international community.²⁶

This means that “a very large majority” will not necessarily be able to impose its will on “a very small minority” if that “small minority” represents a significant element of the international community. The same view was expressed at the Vienna Conference by the representative of the United States, namely, that the recognition of the peremptory character of a norm “would require, at a minimum, absence of dissent by any important element of the international community.”²⁷ The representative of Australia stressed that “rules could only be regarded as having the status of *jus cogens* if there was the substantial concurrence of states belonging to all principal legal systems.”²⁸

Debate continues, not concerning the existence of the notion of *jus cogens*, but on two other issues. The first one concerns the status of *jus cogens* either as a new source of international law or as part of other existing sources of international law. The second one concerns the process of law-making under the norm of *jus cogens*. While there is realistically no special source for creating constitutional or fundamental principles in the present international legal order, we all know that international law itself is under the constant process of development — “development towards greater coherence.”²⁹

The existence of the concept of *jus cogens* was, nonetheless, not denied by the states at the Vienna Conference on the Law of Treaties. Rather, it was argued that the essence of the concept is that it must affect all states without exception. Indeed, states at the Vienna Convention

²⁶ *Summary Records of the 1374th Meeting*, [1976] 1 Y.B. Int'l L. Comm'n 73, U.N. Doc. A/CN.4/291 and Add.1-2.

²⁷ U.N. Conference on Law of Treaties II, at 102.

²⁸ *Supra* note 24, at 388.

²⁹ CRAWFORD, *supra* note 4, at 79.

reached an agreement on a constitutional principle that the peremptory norms bound all members of the international community, notwithstanding their possible dissent.³⁰ It was also argued that the principal criterion of peremptory rules was considered to be the fact that they serve the interest of the international community, not the needs of individual states.³¹ However, some counter with the domestic law analogy — good customs, morals and public policies were applied in specific cases without insoluble difficulties even though these items were not necessarily defined in municipal law.³² Moreover, since the adoption of the Vienna Convention on Law of the Treaties, the norm of *jus cogens* has gained a wide support among the commentators and writers.³³ Therefore, it could be argued that the objecting states are bound by the concept so far as Article 53 of the Vienna Convention is declaratory of an already existing international law concerning *jus cogens*.³⁴ In fact, the principle of consent is a further structural principle of international law, distinct from *jus cogens*.³⁵

³⁰ Danilenko, *supra* note 2, available at <http://www.ejil.org/journal/Vol2/No1/art3.html>.

³¹ This view was address by the representative of Zambia at the Vienna Conference, see U.N. Conference on the Law of Treaties I, at 322.

³² Statement of the representative of Philippines. See U.N. Conference on Law of Treaties II, at 95.

³³ For example, Ch. L. Rozakis writes that once adopted, the peremptory norms bind the entire international community and in consequence 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 function of that rule, or moreover, that it has expressly denied; L.A. Alexidze holds that norms of *jus cogens* are based on the common will of the international community and as absolute norms these norms bind even dissenters; G. Gaja maintained that a peremptory norm necessarily operates with regard to all states; R. St. J. Macdonald addressed that the consent of a very large majority will binding on all states, including those which expressly refused to acknowledge them. See Danilenko, *supra* note 2, at 51.

³⁴ *Id.*

³⁵ CRAWFORD, *supra* note 4 at 80.

Uncertainty on the contents of *Jus Cogens*

Problems remain as to the application of the norm, in terms of which rules must necessarily be covered under the said norms. There was serious doubt concerning the fact that the norm could be misused in interpreting the rules to be covered under *jus cogens*. Over-inclusiveness or under-inclusiveness of the facts might come into being. For example, during the negotiating process of the United Nations Convention on the Law of the Sea (UNCLOS), the common focus of the developing countries was to ensure that they represented the interests of all mankind since they constituted the majority. However, a very small number of Western states opposed the majority's proposals, particularly those regarding the legal status of the seabed. Consequently, developing countries turned to the notion of *jus cogens*. They claimed that the principles of common heritage of mankind, as proclaimed by the 1970 United Nations General Assembly resolution on the seabed, were principles of *jus cogens*. This argument was clearly rejected by the minority of western states.³⁶ Nonetheless, the majority, led by the Group of 77, continued to rely on the notion of *jus cogens* in order to impose specific normative solutions regarding the seabed. The Group of 77 asserted that since the common heritage of mankind is a customary rule which has the force of peremptory norm, then it would follow that the unilateral legislation and limited agreements were illegal and were, therefore, violations of this principle.³⁷

Another example could be found concerning the legal nature of the principle of permanent sovereignty over natural resources proclaimed in a number of the U.N. General Assembly resolutions. This issue was raised at the Vienna Conference on Succession of States in Respect of State

³⁶ See, e.g., Statement of the U.S. Delegation, U.N. Convention on Law of the Sea part XVII at 243; Danilenko. *supra* note 2, at 59.

³⁷ U.N. Conference on Law of the Sea part XIV, at 112, Doc. A/Conf. 621106 (1980).

Property, Archives and Debts. The Draft Convention on Succession of States contained a rule requiring that agreements concluded between a predecessor state and a newly independent state concerning succession to state property of the predecessor state not “infringe the principle of the permanent sovereignty of every people over its wealth and natural resources.”³⁸ In its commentary to a draft article containing this rule, the ILC noted that some of the members of the Commission expressed the view that agreements violating the principle of the permanent sovereignty should be void *ab initio*. Relying on this commentary, the developing states claimed that the principle of permanent sovereignty over wealth and natural resources was a principle of *jus cogens*. The conference was also used to impart the *jus cogens* character to other broad principles, including the right of the peoples to development, to information about their history, and to their cultural heritage.³⁹ The idea of invoking some of the General Assembly Resolutions in terms of the norm of *jus cogens*, with a plea that resolutions achieve support from the large majority of states, was criticized by the Western states that resolutions adopted at the General Assembly are only recommendatory. These do not have any binding force.

Therefore, while a very large majority of states support law-making under the concept of *jus cogens* at the session in General Assembly, it could hardly be possible, unless the other significant elements of international community, namely the western states, agreed to do so. Nonetheless, three categories of *jus cogens* found genuine support, as suggested by the German scholar Ulrich Scheuner:⁴⁰ (1) the rules protecting the foundations of international order, (i.e., the prohibition of

³⁸ Cf. the Draft Convention on Succession of States.

³⁹ See Danilenko, *supra* note 2, available at <http://www.ejil.org/journal/Vol2/No1/art3.html>.

genocide or of the use of force in international relations except in self-defense), (2) the rule concerning peaceful cooperation in the protection of common interests (i.e., freedom of the seas) and the rules protecting the most fundamental and basic human rights, and (3) rules for the protection of the civilians in time of war.

Obligation Under the U.N. Charter

When the Vienna Convention on the Law of the Treaties is itself a treaty at issue, the Security Council, through its decision under Chapter VII, may override the treaty obligation by virtue of Article 103. There remains a question of whether the Security Council is permitted to act in contrary to the norms of *jus cogens*, given the constitutional nature of the United Nation Charter. It remains unclear as to how the international community, lacking any central legislative authority, can accommodate the idea of overriding principles binding all of its members.⁴¹ There is a growing danger that in the absence of clearly defined procedures for the creation of peremptory norms, their emergence and subsequent identification may become a matter of conflicting assertions reflecting political preference of different groups of states.⁴² While some of the relevant procedural issues have been clarified, a coherent elaboration of *jus cogens* still remains a predominant challenge for the international community.⁴³ However, we may construct the argument that the Charter had embodied the norms of fundamental importance, which correspond to the *jus cogens* rules. To many, the Charter constitutes the constitution of international law, so the binding character of those norms could thus easily be realized.

⁴⁰ CRAWFORD, *supra* note 4, at 81.

⁴¹ Danilenko, *supra* note 2, available at <http://www.ejil.org/journal/Vol2/No1/art3.html>.

⁴² *Id.*

⁴³ *Id.*

Is The U.N. Charter Compatible to *Jus Cogens*?

Three things are to be considered concerning whether the United Nations Charter is compatible to *jus cogens*. First, the Charter was entered into force before the Vienna Convention was even drafted. Second, the Vienna Convention is not retroactive by its terms. Third, the Vienna Convention has not seen universal ratification.

Article 4 of the Vienna Convention provides:

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.⁴⁴

That means the Vienna Convention limits its application only to those treaties which have been concluded after the Convention's entry into force. Therefore, there is a question of how the rules of *jus cogens*, the recognition of which is embodied in the article 53 of the Vienna Convention, affect the U.N. Charter provisions.

Debate at the Vienna Conference reflected concern that the Convention provisions should preserve the operation of rules of customary international law as well as take into account general principles of law, which are a separate source of international law. Article 4 of the Vienna Convention was inserted to preserve the application of treaties of any pre-existent rules of customary international law and general principles of law. Therefore, the issue of determining whether *jus cogens* has application to the Charter upon an international law basis other than the Convention

⁴⁴ Vienna Convention on the Law of Treaties, *supra* note 10 art. 4, available at <http://www.un.org/law/ilc/texts/treaties.htm>.

regime suggests analysis on whether *jus cogens* constitutes a codification of customary international law or a progressive development.⁴⁵

Article 15 of the Statute of International Law Commission shows the difference between progressive development versus codification of international law. The Statute provides that the progressive development of international law means “the preparation of Draft Convention on subjects which have not yet been regulated by international law or in regard to which law has not yet been sufficiently developed in the practice of states.”⁴⁶ On the other hand, codification of international law is defined to contemplate “the more precise formulation and systematization of rules of international law in the fields where there already has been extensive state practice, precedent, and doctrine.”⁴⁷

While submitting the final set of rules regarding the law of the treaties, the ILC did not specifically categorize whether its work was on the progressive development or on codification. In fact, in its cover letter, the Commission stated that its work on the law of the treaties constitutes both codification and progressive development of international law to the extent these concepts were defined in Article 15 of the Commission’s Statute. It is not practicable to determine into which category each provision falls.⁴⁸

Consequently, a similar effect is to be given towards the peremptory norm, in the sense that it is partly a codification and partly a

⁴⁵ See IAN McTAGGERT SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF THE TREATIES* 104-06 (1984); Carin Kahgan, *Jus Cogens and inherent right to Self-defence*, available at <http://www.nsulaw.nova.edu/student/organizations/ILSAJournal/3-3/Kahgan%203-3.htm> (last visited Sep. 17, 2001) (on file with author).

⁴⁶ Statute of International Law Commission art 15, available at <http://www.un.org/law/ilc/texts/statufra.htm>.

⁴⁷ SINCLAIR, *supra* note 45, at 11.

⁴⁸ Y.B. Int’l L. Comm’n (1966) at 177; SINCLAIR, *supra* note 45, at 12; Khagan, *supra* note 44.

progressive development of international law.⁴⁹ It is partly a codification because the ILC acknowledged that the peremptory norm exists in international law, which permits no derogation and sets down a general definition of *jus cogens*. Furthermore, it is partly progressive development in relation to the specifics (i.e., which norms were to be accorded *jus cogens* status). The ILC left this latter part to be worked out by state practice and the jurisprudence on international tribunals.⁵⁰

Article 2(4) of the Charter, which prohibits unilateral use of force and threat of armed force, corresponds to the pre-existent norms of international law. Therefore, the notion that the regime is applicable to the Charter independently of the Vienna Convention was supported by the fact that the Charter's prohibition on the use of force was a norm *jus cogens* and declarative of a pre-existent normative regime. Furthermore, the ICJ in the *Nicaragua* case confirmed that the restriction on use of force was a recognized normative regime in customary international law before the Charter.⁵¹ Consequently, even where the Vienna Convention is not applicable, the principles of Articles 53 and 64 would be effective as customary law. Article 53 notes that a treaty that is contrary to an existing rule of *jus cogens* is void *ab initio*.⁵² Additionally, Article 64 of the Vienna Convention provided that if a new peremptory norm of general international law emerges, any existing treaty in conflict with that norm becomes void and terminable. By virtue of Article 64, an existing treaty that conflicts with an emergent rule of *jus cogens* terminates from the date of the emergence of the rule. It is not void *ab initio*. Nor by Article 71 is any right, obligation or legal situation created by the treaty prior to its

⁴⁹ HANNIKAINEN, *supra* note 11, at 162.

⁵⁰ *Id.*; Kahgan, *supra* note 45.

⁵¹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), *supra* note 13, at 126-34 ¶¶ 175-94.

⁵² See 2 Y.B. Int'l L. Comm'n 52, at 91-92, UN Doc. A/CN.4/Ser.A/1963.

termination affected so long as its maintenance is not in itself contrary to the new peremptory norm.⁵³ The inclusion of the norm as enshrined in Article 2(4) of the Charter enhances its non-detractable nature since any action in contravention thereof is a breach of a state's obligation under the Charter. However, as *jus cogens* status is not created by the Charter, the argument really rests on the notion that what is incorporated in the Charter is the pre-existent norm, the universality and acceptance of which is evidenced by inclusion in the Charter.⁵⁴ To the extent that these norms were pre-existent and merely codified in the Charter, the Charter becomes subject to the operation of *jus cogens* even though it came into force before the promulgation of the Vienna Convention.⁵⁵

***Jus Cogens* Test of Article 2(4)**

As discussed, the principle of prohibiting use of force is a pre-existent, customary norm in international law. This norm has been reflected in Article 2(4) of the U.N. Charter, which reads as follows: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁵⁶

Territorial integrity or political independence of a state corresponds to the term "sovereignty," which is the basic fundamental issue of international law. Use of force (or threat of use of force) against the territorial integrity or political independence of a state clearly demonstrates the violation of sovereign right. The U.N. Charter upholds this position in Article 2(4) that such violation is not justified under present international law. The Charter holds this position as a reflection of

⁵³ SHAW, INTERNATIONAL LAW 100 (1991).

⁵⁴ See generally Kahgan, *supra* note 45.

⁵⁵ SINCLAIR, *supra* note 45, at 12.

the customary norm⁵⁷ and thereby prohibits all use (or threat of use) of force or action with respect to the state in any other manner inconsistent with the purposes of the United Nations.⁵⁸ The remedy for the violation of this principle invokes the “inherent right of individual or collective self-defense,” as stated in article 51 of the Charter. It clearly indicates that this right is to be applied when an armed attack has occurred.

However, another option is available in this regard. Under Article 39, the Security Council could determine whether a real threat exists for the maintenance of international peace and security. If the Security Council finds in the positive, then further action can be taken, either through military or through non-military measures, in order to restore the peace and security. The inherent right of self-defense in the case of an armed attack is only permissible up to the point that the necessary measures are taken by the Security Council. Therefore, the absolute remedy for the violation of Article 2(4) sits in Chapter VII of the Charter with the authority of the Security Council. Article 51, which prohibits reprisals but permits a balanced and proportionate defensive action against an armed attack, is nonetheless regarded as an “inherent” right representing the pre-existing norm of international law.⁵⁹

The development of the notion enshrined in Article 2(4) involves the long, historical progress of the prohibition of war in the relations among states. The cause of war has been restructured throughout the ages.

⁵⁶ U.N. CHARTER art. 2, para. 4.

⁵⁷ U.N. CHARTER art. 2, para. 1: “The organization is based on the principle of the sovereign equality of all its Members.”

⁵⁸ U.N. CHARTER arts. 1-2 (stating the purposes and principles of the United Nations).

⁵⁹ Under customary international law reprisals were, however, lawful if certain criteria were met, the criteria as attributed to the *Naulilaa Arbitration* that there must have been a prior deliberate violation of international law; that an unsuccessful attempt must have been made at redress; and action taken in reprisal is proportionate to the injury suffered. See ROSALYN HIGGINS, *PROBLEM AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 240 (1994).

The Geneva Convention of 1864 and the Declaration of St. Petersburg of 1868 led to the Hague Conventions, which sought to codify customary principles to make warfare more humane through the development of the terms *jus ad bellum* and *jus in bello*. The former determines whether the *cause* of war is a just one, while the latter determines whether the *mode* of fighting is just.⁶⁰

At the end of World War I, the League of Nations was formed in order to give peace an institutional framework and to prohibit future war. The Covenant of the League, however, proved to be “an imperfect prohibition of war because of textual limitations, lack of will on the part of the members, and the absence of the USSR and the United States at the inception of what was to have been a new global system.”⁶¹ Article 10 of the Covenant, which is regarded as the teeth of the Covenant, declared a commitment to not only respect but also preserve the territorial integrity and political independence of all members. This created a binding obligation upon all states to act individually and collectively through the Council of the League to defend other individual states against wars of aggression. In one sense this provided a guarantee of sovereignty of an individual state, and on the other, this limited the right to go to war. It did this by means of threatening collective action against those who initiated war without *just cause* – a notion defined as premature recourse to hostilities before the exhaustion of available means for peaceful conflict resolution.

It is not, however, until 1928, after the conclusion of the General Treaty for the Renunciation of War (mostly known as Kellogg-Briand Pact) that war was declared prohibited. Article 2 of the Pact states “that

⁶⁰ See THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 245 (1995).

⁶¹ *Id.* at 255.

the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among [the Parties], shall never be sought except by pacific means.”⁶² The preamble of the Pact proclaims “a frank renunciation of war as an instrument of policy.”⁶³ According to Professor Ian Brownlie, the Kellogg-Briand norm prohibiting war-making had by 1939 become so well established as “to justify the assertion that a customary rule had developed.”⁶⁴ After the end of Second World War, the continued, normative pull of Kellogg-Briand was evidenced by the framing of charges against the defendants at the war crimes trials of the Nuremberg Tribunal. Kellogg-Briand appeared to be the blueprint for the new United Nations Charter system.⁶⁵ Therefore, the idea enshrined in Article 2(4) of the Charter was nothing new. It developed through the customary process of law-making and was codified in the Charter only as a pre-existent norm.

The Charter is an instrument where almost the whole community of states is the party, rather than a large majority of states.⁶⁶ These parties agree with the norm, as reflected in the Article 2(4) of the Charter. The norm is so important that it gains the status of general international law and is accepted and recognized by the international community of states as a whole, including all the significant components of the international

⁶² Kellogg-Briand Pact art. 2, available at <http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>.

⁶³ See *id.*; see also FRANCK, *supra* note 60, at 258.

⁶⁴ IAN BROWNLIE, INTERNATIONAL LAW AND USE OF FORCE BY STATES 108, 110 (1963).

⁶⁵ FRANCK, *supra* note 60, at 259.

⁶⁶ Until the year of 2000, 189 states were parties to the United Nations, see www.un.org. States outside the U.N. consist of the permanently neutral Switzerland, a few divided states, and a number of small states with limited international capacity which participate only to a limited extent in international activities. See HANNIKAINEN, *supra* note 11, at 220.

community from all major legal systems.⁶⁷ Moreover, non-members of the U.N. recognize the basic principles of the Charter. Therefore, the Article 2(4) principle has achieved such importance that all states, including non-members of the UN, agree on its non-derogable character. Any derogation, therefore, gives rise to action by the Security Council: firstly, by means of individual or collective self-defense without Security Council involvement,⁶⁸ and secondly, by means of enforcement measures taken by the Security Council under Chapter VII of the Charter, or alternatively, by the Regional Arrangement or Agencies which hold authorization from the Security Council.⁶⁹

Regarding the obligation to the non-parties to the UN, Article 2(6) of the Charter states that non-members of the United Nations shall act in accordance with the principles so far as may be necessary for the maintenance of international peace and security. Although the Charter is a treaty instrument that holds a superior position among the treaties, it is capable of binding non-parties at least so far as the rules of general international law are concerned. For example, Switzerland has made it known that it does not consider itself bound by decisions and resolutions of the U.N., even though it has not in practice challenged U.N. interpretations of its basic principles.⁷⁰

Debate at the 1945 San Francisco Conference clearly indicated that the delegates were unanimously committed to the creation of an organization with the authority to uphold international peace, wherever it

⁶⁷ See John F. Murphy, *Force and Arms*, in UNITED NATIONS LEGAL ORDER 255 (Oscar Schachter & Christopher C. Joyner eds., 1995) (arguing many states, including the United States, take the legal position that article 2(4) is a peremptory norm (*jus cogens*)).

⁶⁸ U.N. CHARTER art. 51.

⁶⁹ U.N. CHARTER art. 53, para. 1.

⁷⁰ See HANNIKAINEN, *supra* note 11, at 223-224.

is threatened. Such authority is not compatible with the full autonomy of non-members.⁷¹

According to Brownlie, Article 2(4) constitutes an exception to the rule that a treaty binds only the parties to it. The exception is based on the specific character of the U.N. as an organization concerned primarily with international peace and security. On the basis of that provision, certain obligations on the part of non-members may arise under general international law.⁷²

It is quite clear from the Preamble of the Charter⁷³ as well as from the basic principles thereof that: (1) the included provisions are for the general interest of the entire international community, (2) they constitute the supreme rule that states are based on sovereign equality, and (3) territorial integrity and political independence of the states are inviolable. These concepts are to be protected in order to maintain international peace and security at large. No state, regardless of its U.N. membership, can thus violate such basic norms. To compromise with the non-members with respect to those norms means to compromise with the maintenance of international legal order designed for international peace and security.

States' sovereign rights incur responsibilities, such as responsibilities not to resort to threat of force or use of force against the territorial integrity or political independence of any state. The state cannot rule out such basic principles even if it is not a party to the treaty embodying such principles. A treaty attempting to impose duties on third-

⁷¹ Richard A. Falk, *The Authority of the United Nations Over Non-Members*, in HANNIKAINEN, *supra* note 11, at 220.

⁷² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 691 (1979).

⁷³ "[T]o save succeeding generation from the scourge of war, . . . to practice tolerance and live together in peace with one another as good neighbors, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institutions of methods, that armed force shall not be used save in the, common interest." U.N. CHARTER preamble.

party states is not void, as is a treaty in violation of a *jus cogens* norm.⁷⁴ Therefore, the principle that a treaty cannot impose obligations upon non-parties becomes unavoidable. Article 2(6) is a mandatory provision and has set a limit, determined by the general interest of the international community, to the application of the main principles of the U.N. Charter.⁷⁵

These basic normative principles of the Charter have been accepted as universally obligatory; non-members have accepted them as basic customary rules.⁷⁶ The universality of these basic principles of the Charter is supported by a number of important declarations of the General Assembly, which speak for the obligations of all states not just of U.N. members. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations was adopted unanimously by the General Assembly in 1970.⁷⁷ This declaration provided the interpretation of seven basic principles of the Charter, speaks consistently of the obligations of “every state,” and characterizes those principles as basic principles of international law. As a result, these main principles gain the status of peremptory norm in nature from which derogation is never permitted unless another peremptory norm of similar standard is developed.

Conclusion

In general, International Law is criticized for the lack of enforcement mechanisms. However, at least in cases within the realm of international peace and security, the Security Council may take necessary

⁷⁴ CRAWFORD, *supra* note 4, at 80.

⁷⁵ See OPPENHEIM & LAUTERPACHT, INTERNATIONAL LAW (1955); HANNIKAINEN, *supra* note 11, at 222-223.

⁷⁶ HANNIKAINEN, *supra* note 11, at 222-223.

⁷⁷ GA Res. 2625, U.N. GAOR, 25th Sess., at 121, U.N. Doc. A/8082 (1970). See also GA Res. 2734, U.N. GAOR, 25th Sess., at 22, U.N. Doc. A/ (1970); GA Res. 33/73, U.N. GAOR, 33rd Sess., at 178, U.N. Doc. A/RES/33/37 (1978); GA Res. 2131, U.N. GAOR, 20th Sess., at 11 (1965); GA Res. 36/103, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/103 (1981); see HANNIKAINEN, *supra* note 11, at 223 n.64.

action in order to repeal any violation of international law that could endanger international peace and security, so long as it falls within the limits of Article 39. Article 2(4) of the Charter, which is merely a reaffirmation of the pre-existent norm in the Charter, is a peremptory norm under international law and the fundamental provision of the Charter.

Yet there remained the question of who would determine the violation of the norm reflected in Article 2(4) in the disorganized international society. The Charter empowers the Security Council, a non-judicial body, to make a formal determination concerning violations of Article 2(4) as well as the violation of other principles of the Charter. For example, the Security Council may identify certain situations as a “threat to the peace” under Article 39 because of a violation of the principles laid down in Article 2(4) of the Charter. The Council may then take further actions for the enforcement of peace. A direct relationship is then found between “threat or use of force” under Article 2(4) and a “threat to the peace”, “breach of peace,” and “act of aggression” under Article 39, which grants the Security Council jurisdiction under Chapter VII.

The power of the Security Council under Article 39 is, *inter alia*, to investigate whether a breach of Article 2(4) is constituted, yet it is apparent that the interpretation of Article 39 goes far beyond that. Article 2(4) did not only prohibit threat or use of force against territorial integrity or political independence. It also stated that threat or use of force is prohibited if it is in any way inconsistent with the purposes of the Charter. This article allows the Security Council to find a broad meaning of “threat to the peace.” According to Professor Hans Kelsen, it is completely within the discretion of the Security Council to decide what constitutes a threat to the peace.⁷⁸ Indeed, the Security Council is not fettered in its

⁷⁸ HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 727 (1950).

powers of determination under Article 39, but the duty of customary law and the general international law incorporated in the Charter limits such discretion to be absolute. As a result, the peremptory norm, such as *jus cogens*, now an established principle in international law and incorporated in the Charter as a pre-existent norm, also limits absolute discretion of the Security Council.

Technically, peace becomes threatened or breached when there is violation of the Charter principles. As established earlier, the basis of the Charter principles was deeply rooted in the supreme interest of the entire international community of states and such principles gained the character of *jus cogens*. Article 39 of the Charter, one may assume, confirms that a violation of the norm of *jus cogens* exists, while a clear violation of article 2(4) and other principles of the Charter is found, which by nature is constitutive of threat to the peace, or a breach of the peace, or an act of aggression.

Therefore, the role of the Security Council is also to safeguard the hierarchical norms of international law. Unless a violation of the principles of the Charter has occurred, peace and security can hardly be endangered. The Security Council is the body responsible for protecting such laws, from which infringement may constitute a threat to the peace, a breach of the peace, or an act of aggression. In this sense, the Security Council itself is also under an obligation to follow such legal principles. For example, a limit of the Security Council under Article 39 is defined by Article 2(4), specifically, “to go beyond that and, say, the determination that a situation was a ‘threat to the peace’ when it was not a ‘threat of force’ would be *ultra virus*.”⁷⁹ However, the changing structure of international order shows that a violation of other Charter principles that

are inconsistent with the purposes of the United Nations could constitute an infringement of the norm of *jus cogens* and thereby could be brought to attention under Article 39 grounds (e.g., gross violation of human rights, genocide, systematic rape, apartheid and so on).

⁷⁹ N. D. WHITE, *KEEPING THE PEACE: THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 35 (1993).