

Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?

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A. Introduction

While International Law becomes more and more specialized, a tendency towards Fragmentation becomes visible: more and more sub-regimes of International Law emerge, leading to an increased number of rules. With the creation of more sub-regimes, cases are becoming more likely in which more than one sub-regime is involved and the question arises, which sub-regime's rules take precedence. Recent examples for such collisions of regimes include the relation between Free Trade and the Protection of the Environment in the *Yellowfin-Tuna Case* between the United States and Mexico which was settled only in January 2002, the *Tadic-Nicaragua Debate*¹ and the *Swordfish Case* between the European Community and Chile,² including the need for some form of internal order or hierarchy within International Law.

Twenty Years after Weil's pioneering - yet critical - article,³ based on an earlier French text,⁴ the idea of Relative Normativity in International Law remains a con-

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¹ *cf.* note. 46.

² *cf.* Christian Walter, *Constitutionalizing (Inter)national Governance - Possibilities for and Limits to the Development of an International Constitutional Law*, in: 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 170-90 (2001).

³ Prosper Weil, *Towards Relative Normativity in International Law?*, in 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 413 (1983).

troversial one.⁵ Yet three recent developments indicate that Relative Normativity has found its place in the international legal system. Shelton⁶ identifies the following factors as the main causes for the growing interest in the issue: (1) the reduced importance of state consent for the creation of International Law;⁷ (2) the expansion of International Law as such,⁸ which in turn makes the international legal system more complex⁹ than ever before; and (3) the emergence of International Criminal Law and the subsequent need to define the relationship between rules of International Criminal Law on the one hand and *jus cogens* as well as obligations *erga omnes* on the other hand.¹⁰

In this article we will examine the role of both *jus cogens* and Relative Normativity in contemporary International Law and the potential for a Constitutional Dimension of International Law to give a place to the (few) common values the international community can agree on and finally ask if and how International Constitutional Law can be utilized in order to answer some of today's most pressing questions in International Law.

B. The Role of *jus cogens* in Contemporary International Law

I. The controversy surrounding the *jus cogens* concept

Yet it is the concept, or as it is also referred to, the "theory"¹¹ of *jus cogens* which itself is not as uncontested as it may seem at first sight. To begin with, it remains unclear what the idea of *jus cogens* includes and although Art. 53 of the Vienna Convention on the Law of Treaties (VCLT) refers to the concept of peremptory norms *expressis verbis*,¹² neither the Convention itself nor the *travaux préparatoires* of

⁴ Prosper Weil, *Vers une normativité relative en droit international?*, in 86 *Revue générale de droit international public* 5 (1982).

⁵ *cf.* Dinah Shelton, *International Law and Relative Normativity*, in: MALCOM D. EVANS (ED.), *INTERNATIONAL LAW* 145,46 (2003).

⁶ *Id.* at 148.

⁷ *Id.* at 148

⁸ *Id.* at 148.

⁹ *Id.* at 148.

¹⁰ *Id.* at 149.

¹¹ *Id.* at 150.

¹² Art. 53 of the Vienna Convention on the Law of Treaties, United Nations *Treaty Series*, Vol. 1155, pp. 331 *et seq.*, provides that "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory

the Vienna Convention on the Law of Treaties offer a clear definition of the material content of the rules which are considered to be of a peremptory nature. And although it is recognized that there is a need for fundamental norms in order to ensure that the international legal system itself can operate,¹³ the 1986 Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations failed to come up with a more precise definition of *jus cogens* but recognized that the divergence of views on this issue continued.¹⁴ Furthermore, both states¹⁵ and international courts are reluctant to refer to the peremptory norms of International Law.¹⁶ Yet the concept is being referred to both by domestic courts¹⁷ as well as in dissenting opinions issued by judges of the International Court of Justice.¹⁸ Although the Court recognized the International Law Commission's (ILC) understanding of the prohibition of the use of force as *jus cogens*¹⁹ in the case concerning *Military and Paramilitary Activities in and against Nicaragua*,²⁰ the decision in the *Arrest Warrant Case*²¹ indicates the limits of the concept,

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."

¹³ According to Kelsen, the source of international obligation is not the consent of states to be bound, but must be found in a more fundamental norm which imposes a duty to be bound by obligations freely accepted, cf. Hans Kelsen, *The Pure Theory of Law*, in 51 *Law Quarterly Review* 517 (1935). Then-ILC rapporteur Sir Humphrey Waldock suggested that international treaties ought to be void if they run contrary to fundamental principles of International Law, cf. Shelton, *op. cit.*, at p. 153.

¹⁴ United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February - 21 March 1986, A/Conf.129/16 (Vol. I), 17.

¹⁵ The ICJ noted in *Hungary v. Slovakia, Gabčíkovo-Nagymaros Project*, ICJ Reports 1997, pp. 7 et seq., at para. 112, that both parties had not invoked any *jus cogens* norms relating to International Environmental Law. But see also the Nicaraguan memorial as well as the U.S. Counter-memorial in *Military and Paramilitary Activities in and against Nicaragua*, quoted by the ICJ in its Judgment, ICJ Reports 1986, 14.

¹⁶ In its *North Sea Continental Shelf Judgment*, ICJ Reports 1969, pp. 3 et seq., at para. 72, the ICJ refused to address the issue of *jus cogens*, cf. Shelton, *op. cit.*, at 154, there fn. 29.

¹⁷ cf. Shelton, *op. cit.*, at 154, 56 on the role of *jus cogens* before U.S. Courts.

¹⁸ cf. the dissenting opinion by Judge *ad hoc* Renandès in *Right of Passage over Indian Territory*, ICJ Reports 1960, 6 at 135, 39, 40 and the dissenting opinion of Judge Tanaka in *South West Africa, Second Phase*, ICJ Reports 1966, 6 at 298.

¹⁹ ILC, *Commentary to Article 50 of the ILC Draft Articles on the Law of Treaties*, in ILC Yearbook 1966-II, 247.

²⁰ *Nicaragua v. United States of America, Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, 14.

²¹ *Democratic Republic of Congo v. Belgium, Arrest Warrant of 11 April 2000*, ICJ Reports 2002, 3.

since the Court did not even refer to the issue of *jus cogens*, except for one dissenting opinion.²² On the other hand, Judge Lauterpacht suggested in his separate opinion to the order of 13 September 1993 (Further request for the indication of provisional measures) in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* that even Art. 103 of the Charter of the United Nations,²³ as well as actions taken by the Security Council, are inferior to *jus cogens* rules.²⁴

Furthermore, it appears that Courts specifically dealing with issues more closely related to Human Rights and International Humanitarian Law will refer to *jus cogens* more openly. While the European Court of Human Rights (ECtHR) refused to override state immunity due to a violation of *jus cogens*, it nevertheless accepts the concept,²⁵ as do the Inter-American Commission on Human Rights²⁶ and the International Criminal Tribunal for the Former Yugoslavia²⁷ in a number of decisions. An other boost for the acceptance of *jus cogens* came with the recent completion of the ILC Draft Articles on State Responsibility,²⁸ Article 40 of which acknowledges

²² *Arrest Warrant of 11 April 2000*, ICJ Reports 2002 3, Dissenting opinion by Judge Al-Khasawneh, para. 7.

²³ Art. 103 of the UN Charter of 26 June 1945, Yearbook of the United Nations 1969, 953, reads as follows: "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."

²⁴ Judge Lauterpacht, *Separate Opinion, in APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (BOSNIA AND HERZEGOVINA V. SERBIA AND MONTENEGRO)*, Order of 13 September 1993 - Further request for the indication of provisional measures, ICJ Reports 1993, 325, 408 at 440.

²⁵ ECtHR, *Al-Adsani v. United Kingdom*, Judgment, 21 November 2001, (2002) 34 EHRR 11.

²⁶ OAS, Inter-American Commission on Human Rights, 81st session, Annual Report of the Inter-American Commission on Human Rights, *Victims of the Tugboat '13 de Marzo' v. Cuba*, Rep. No. 47 / 96, OR OEA/Ser.L/V/II.95/Doc.7, rev (1997), at pp. 146 *et seq.*

²⁷ ICTY, *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T, para. 153.

²⁸ The ILC Draft Articles on State Responsibility were included in General Assembly Resolution 56 / 83 (*Responsibility of States for internationally wrongful acts*) of 12 December 2001 as an annex, cf. UN Doc. A/RES/56/83.

the existence of *jus cogens*²⁹ and Article 41 of which states the consequences of a breach thereof.³⁰

Since no international Court will outright deny that *jus cogens* obligations exist, it is most likely that it is not the concept as such but rather the uncertainty of its contents that forms a barrier for a wider acceptance of the idea of peremptory norms by both states and international courts. *Jus cogens* certainly is "a concept in evolution,"³¹ but not necessarily in regard to the concept as such but, as we will see, with regard to its contents. At the time being, it is the Courts and Tribunals dealing with Human Rights and International Humanitarian Law as well as the ILC that are at the cutting edge shaping the content of *jus cogens*.

II. *The need for jus cogens in modern International Law*

Even if massive breaches of the most fundamental rules of International Law, such as the prohibition of the use of force or of genocide, indicate that the global community as a whole is not always willing to accept a set of fundamental and supreme norms, the need for some form of supreme norms aimed at safeguarding the international community as a whole cannot be denied: "The international community cannot afford a consensual regime to address many modern problems. [...]"³² To the contrary, "the modern independence of States demands an international *ordre public* containing rules that require strict compliance."³³ In the words of Dinah Shelton, "The urgent need to act [...] fundamentally challenges the consensual framework of the international system by seeking to impose on dissenting States obliga-

²⁹ Art. 40 (*Application of this chapter*) states: "1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general International Law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation."

³⁰ Art. 41 (*Particular consequences of a serious breach of an obligation under this chapter*) reads as follows: " 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under International Law."

³¹ So the representative of Brazil at the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February - 21 March 1986, A/Conf.129/16 (Vol. I), 188.

³² Shelton, *op. cit.*, at p. 159.

³³ *Id.*

tions, that the 'international community' deems fundamental. State practice has yet to catch up with this plea of necessity."³⁴

Since there is a need for restructuring International Law, we will now examine the role Relative Normativity plays in International Law today and how the concept of Relative Normativity can be employed to reshape the international legal system in order to give an appropriate place to the fundamental values which aim at promoting the common good of humankind.

C. Relative Normativity in Today's International Legal System

I. Relative Normativity within the International Legal System

The concepts of Relative Normativity and hierarchy therefore have become a fact in present day International Law, both being inherent in any legal system³⁵ and in the case of Public International Law reflected in the general acceptance of the concept of *jus cogens*³⁶ as well as obligations *erga omnes*³⁷ and Art. 103 UN Charter.³⁸ Yet the controversy surrounding *jus cogens*³⁹ already indicates that this "hierarchy" falls well short of the hierarchical structures found in national legal systems. Consequently Weiler and Paulus speak of "super-norms"⁴⁰ rather than of supreme norms.

³⁴ *Id.*

³⁵ cf. Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, in: 8 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1997, 566 at 571.

³⁶ Art. 53 of the Vienna Convention on the Law of Treaties (1969) 1155 United Nations Treaty Series 331 states 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.“ The text of Art. 53 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, (1986) UN Doc. A/Conf. 129/15 (1986) is identical. Later the idea of *jus cogens* was accepted by the ICJ as well: ICJ, *Nicaragua v. United States, Military and Paramilitary activities in and against Nicaragua*, ICJ Reports 1986, pp. 14 *et seq.*, at p. 100. On the acceptance of *jus cogens* in International Law cf. Gennady M. Danilenko, *International Jus Cogens: Issues of Law-making*, in: 2 European Journal of International Law (1991) 42.

³⁷ *Belgium v. Spain, Case concerning the Barcelona Light and Traction Power Company, Limited (Second Phase)*, ICJ Reports 1970, 3 at para. 33.

³⁸ cf. note. 23.

³⁹ Cf. *supra* B. I.

⁴⁰ J. H. H. Weiler / Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law ?*, in 8 European Journal of International Law (1997), 545 at 562.

Yet, as we will see, the case can be made for development towards a more classically hierarchical model in the field of International Law as well. After all, the differences between international and national society are not necessarily so large as to automatically exclude a more hierarchical structure in International Law.⁴¹ Besides, as the international legal system is growing both in terms of issues covered by International Law as well as with regard to the deep impact International Law has on domestic legal systems,⁴² hierarchical aspects can help greatly in structuring an ever more complex⁴³ maze of rules.

II. *Consequences of Relative Normativity in International Law*

What do Relative Normativity and hierarchy mean for the practice of International Law? Are they a nuisance in the event that the rule that would "save" your case happens to be in the "wrong" treaty or are they simply attempts to give values⁴⁴ a place in a legal system traditionally based on the consent of its subjects? It is argued here that Relative Normativity and hierarchy can be much more than that and that they hold a potential for the development of a more *value-based international legal system* that can be more inclusive in so far as the constructs both: (1) recognize the impact of non-state actors on International Law as well as the need for good governance on a global scale through International Law; and (2) while at the same time *reconciling tendencies of Constitutionalization and Fragmentation* and in the long run provide a method with which to find answers to the *hard choices* International Law faces today.

⁴¹ cf. Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, in: 8 *European Journal of International Law* 1997, 583 at 583.

⁴² cf. UN SC Res. 1373 of 28 September 2001, UN Doc. S/RES/1373 (2001).

⁴³ Shelton, *op. cit.*, at p. 171.

⁴⁴ The proliferation of values through International Law still meets resistance: The president of the ICJ, *Shi*, only recently likened any attempt of value-proliferation through International Law to imperialism, cf. the Concluding Speech by the President of the International Court of Justice, *Shi Jiuyong*, at a Joint ASIL / NVIR Conference in The Hague on 5 July 2003, to be published in January 2004 by T.M.C. Asser Press in the conference proceedings entitled „From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System“, cf. also Stefan Kirchner, *Conference Report - "From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System" - 6 th ASIL / NVIR / T.M.C. Asser Institute Joint Conference in The Hague, 3 - 5 July 2003*, 4 *GERMAN LAW JOURNAL* 827, 849 (August 2003). On the problem in general see Serge Sur, *The State between Fragmentation and Globalization*, 8 *European Journal of International Law* 421 at 428 (1997).

III. Approaches to Relative Normativity

Two main approaches to Relative Normativity in Public International Law seem to emerge: An interpretative⁴⁵ or *conflict-of-laws*-approach, which will lead to the necessity of choosing the rules applicable to the case in question,⁴⁶ and a public law approach,⁴⁷ attempting to translate public law ideas known from national legal systems to the arena of public International Law.⁴⁸ While the Vienna Convention on the Law of Treaties in essence follows the first approach,⁴⁹ it is the aim of the public law-approach to bring more *coherence* into the process of Constitutionalization⁵⁰ in order to create an international legal order based on the rule of law⁵¹ and common values.⁵² In this article the latter approach will be explored and we will examine where Relative Normativity has its sources in today's public International Law and how the situation *de lege lata* can be developed with the aim of reconciling the contradictory tendencies of Fragmentation and Constitutionalization. Continuing from there, we will have a look at how a potential future system of International Law aimed at reconciling these tendencies through an *overall public law approach* can provide answers to the hard choices put before International Lawyers today as well as in the future. Recent examples of such hard choices, to name only a few, have been

⁴⁵ cf. Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 *British Yearbook of International Law* 273 (1975).

⁴⁶ The question for example comes up in the Tadic/Nicaragua - debate, in which a general court, the ICJ, and a court attached to a self-contained regime, the ICTY came to different conclusions on the question of third party involvement, specifically third party control of paramilitary forces, in armed conflicts, cf. *Nicaragua v. United States of America, Military and Paramilitary activities in and against Nicaragua*, ICJ Reports 1986, 14. and ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1.

⁴⁷ On the need to strengthen the Public Law Approach in International Law cf. Jochen Abraham Frowein, *Konstitutionalisierung des Völkerrechts*, in JOST DELBRÜCK ET AL. (EDS.), *VÖLKERRECHT UND INTERNATIONALES PRIVATRECHT IN EINEM SICH GLOBALISIERENDEN INTERNATIONALEM SYSTEM* 427 at. 427 (2000).

⁴⁸ A good overview (in English) on the interaction between national and international/european constitutional conceptions is given by Thomas Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozess: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verpflichtung*, in: 157 *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* 1445 at 1447 (2003).

⁴⁹ cf. Shelton, *op. cit.*, at 163.

⁵⁰ On the lack of coherence cf. Andrea Bianchi, *Ad-hocism and the Rule of Law*, 13 *European Journal of International Law* 263 at 269 (2002).

⁵¹ Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, in: 55 *Stanford Law Review* 1999 at 2021 (2003).

⁵² Bianchi, *op. cit.*, at 272.

between International Peace and Security on the one hand⁵³ and Human Rights on the other, or more precisely between Art. 2 (4) UN Charter⁵⁴ and International Human Rights norms⁵⁵ or between free trade and the protection of wildlife.⁵⁶ Especially the Human Rights v. International Peace and Security debate, which at times seems to have left the "radar screens" of International Lawyers after the September 11, 2001, terrorist attacks,⁵⁷ continues to be of great importance since one of the reasons brought forward by the U.S. and the U.K. in the 2003 war against Iraq were the massive Human Rights violations perpetrated by the regime of Saddam Hussein.⁵⁸ Moreover, the Kosovo Cases⁵⁹ are still pending before the ICJ, which appears likely to rule against the NATO member states that took action against Serbia, since Art. 103 UN Charter "protects" Art. 2 (4) UN Charter in so far as it would take an *obligation* of a *jus cogens* nature to fight genocide to overrule the concomitant *jus cogens* obligation of Art. 2 (4) UN Charter. Despite there being a *jus cogens* prohibition of genocide, the *jus cogens* nature of the prohibition of the use of force makes it

⁵³ The literature on the debate ensuing in the wake of the 1999 Kosovo War is extensive, see for example Dino Kritsiotis, *The Kosovo Crisis and NATO's Application of Armed Force against the Federal Republic of Yugoslavia*, 49 *International and Comparative Law Quarterly* 330 (2000); Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 *American Journal of International Law* 847 (1999); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *European Journal of International Law* 1 (1999); and Antonio Cassese, *Ex inuiriā ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community? - Comment on Bruno Simma, NATO, the UN and the Use of Force: Legal Aspects*, 10 *European Journal of International Law* 23 (1999).

⁵⁴ Art. 2 (4) UN Charter requires that "All Members [...] 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."

⁵⁵ In this case, Art. 103 UN Charter provides a rather clear, yet at times unsatisfactory solution in favor of Art. 2 (4) UN Charter, cf. fn. 23.

⁵⁶ After three decades, the Yellowfin Tuna dispute between the U.S. and Mexico was solved only in early 2003. See also the WTO Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, in: 37 *ILM* (1998), pp. 832 *et seq.* and WTO Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW Doc. 01-5166, 22 October 2001, also available online at http://www.wto.org/english/news_e/news01_e/dsb_21nov01_e.htm.

⁵⁷ On Humanitarian Intervention after 9/11 see Tom J. Farer, *Humanitarian Intervention before and after 9/11: legality and legitimacy*, in: J. L. Holzgrefe / Robert Keohane (eds.), *Humanitarian Intervention* (2003), pp. 53 *et seq.*

⁵⁸ Speech by Prime Minister Tony Blair on 18 March 2003, available online at <http://politics.guardian.co.uk/iraq/story/0,12956,916790,00.html>; Speech by U.S. President George W. Bush at the General Assembly of the United Nations on 12 September 2002, available online at <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

⁵⁹ On the cases cf. Christine Gray, *Legality of the Use of Force*, 49 *International and Comparative Law Quarterly* 730 (2000).

unlikely that the case can successfully be made for humanitarian intervention *de lege lata*.⁶⁰

IV. Values turning into Rules?

At the time being, only a few values can be considered to be truly shared by the international community as a whole or at least its overwhelming majority. The long Universalism-Relativism-Debate on Human Rights and the debate on the legality of the use of force outside the limitations of the United Nations Charter on the occasion of the 2003 Iraq War, the War against Terrorism and the 1999 NATO war against Serbia give a glimpse on the fundamental differences which exist already on core issues of International Law.

Yet regarding the, albeit small, common ground between states, at least an international legal system in which the values the international community wants to promote are given a constitutional, hence supreme, status and in which the relation between such values is clearly defined offers the possibility give answers to such questions in the future. The inclusion of non-state actors in the decision-making process of the international community, while viewed by some as a danger to national sovereignty,⁶¹ reflects the changing role of the state in modern International Law: states will no doubt continue to play a key role on the international stage in the future,⁶² yet they will no longer, and already do no longer, act alone. International Law, in other words, is no longer the states' family business which it used to be and most approaches to the constitutional dimension of International Law are based on this assumption.⁶³

V. A Constitutional Dimension rather than a Constitution

Although assuming that the notions of *jus cogens* and obligations *erga omnes* are insufficient to assume the existence of a hierarchy in International Law,⁶⁴ Walter rightly argues that the decline of the role of the state as well as the "decentraliza-

⁶⁰ cf. Stefan Kirchner, *The Human Rights Dimensions of International Peace and Security and Humanitarian Intervention after 9/11* (2003), available online at <http://ssrn.com/abstract=445124>.

⁶¹ cf. John R. Bolton, *Should we Take Global Governance Seriously?*, in: 1 Chicago Journal of International Law 205 at 221 (2000).

⁶² cf. Walter, *op. cit.*, at 171.

⁶³ *Id.* at 172.

⁶⁴ *Id.* at 201.

tion" of International Law⁶⁵ require that the idea of "a constitution" is abandoned⁶⁶ since the idea of a single constitutional document is based on the assumption that it applies to a limited territory and - in principle - "unlimited subjects of regulation"⁶⁷ This in turn requires us to perceive International Constitutional Law - which in function is not all too different from domestic law - as a body of law which requires coherence without constituting a single document. Rather than that we can speak of a Constitutional Dimension of International Law: there are constitutional norms, many of which are codified, yet there is not, and is not likely to be in the foreseeable future, any single document one could refer to as a "World Constitution". In the case of International Constitutional Law, it is all about function, not about form. The limitations of International Constitutional Law arise not out of a lack of hierarchy within International Law, but rather from the complexity of the international community as the *pouvoir constituant* and in the case of values from a continuing reluctance on the part of states to give values a place in International Law. Yet it is argued here, that a constitutional dimension of International Law has the capability of giving values a certain place in the international legal order:

D. From Relative Normativity to a Constitutional Dimension of International Law

I. The material content of International Constitutional Law today

Nevertheless there needs to be more in such a system of *International Constitutional Law than values*.⁶⁸ Specifically, values need to be accompanied by organizational rules, and *vice versa*.⁶⁹ Such organizational rules, which are already linked to values by, e.g., the principle of sovereign equality of states⁷⁰ (which could be considered a *hybrid* between a value and an organizational aspect), have to deal with the sources of International Law and the actors in the field of International Law, lawmaking,⁷¹

⁶⁵ *Id.* at 188.

⁶⁶ *Id.* at 173 (emphasis as in the original text).

⁶⁷ *Id.* at 191.

⁶⁸ cf. above E. IV.

⁶⁹ Therefore it would go too far to consider the UN Charter to be a constitution of humankind, since the UN Charter only includes a general reference to Human Rights, without defining them explicitly.

⁷⁰ Art. 2 (1) UN Charter: "The Organization is based on the principle of the sovereign equality of all its Members."

⁷¹ Currently these issues are covered mainly by Art. 38 ICJ Statute and the Vienna Convention on the Law of Treaties, yet, apart from the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations neither is so far taking into account the role of non-state actors.

dispute settlement,⁷² state responsibility, law relating to treaties, law enforcement, etc. But which values can be said to be of a constitutional quality or importance? While the case can be made rather easily for the *jus cogens* prohibitions of war, slavery and genocide, things become more difficult when it comes to values related to good governance, such as democracy and Human Rights. While the Haiti intervention generally is not considered to have created a precedence for a duty of states to be organized in a democratic manner, the above mentioned *jus cogens* obligations indicate a role for Human Rights as values in a constitutional aspect of Public International Law.⁷³ While the European Court of Human Rights, but also the European Court of Justice, have played a vital role in making Europe the forerunner in the process of international Human Rights protection, no similar option is available on the global level⁷⁴ due to the lack of a single global Human Rights Court or a global equivalent to the ECtHR. This in turn is due to disagreement on the universality of Human Rights but also due to the manifold Human Rights instruments and a corresponding *Fragmentation through Proliferation*. What is desirable in the long run is a unifying and streamlining of the international systems of Human Rights protection.⁷⁵ Until then the current general consensus of the international community on inviolable Human Rights will have to suffice. At this time, an optimistically wide view in this respect appears to be somewhat unrealistic, and also the Universal Declaration of Human Rights cannot be said to take precedence over other rules of International Law. Although Human Rights are mentioned in the UN Charter's preamble⁷⁶ as well as in Art. 1 (3)⁷⁷ thereof, the obligations of UN member

⁷² cf. Art. 33 UN Charter, which provides "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means."

⁷³ On the question where to locate Human Rights guarantees appropriately, on a national or on an international level, cf. Spiro, *op. cit.*, at 2001, 2021.

⁷⁴ Albeit decisions by the ECtHR are increasingly cited outside Europe, the most spectacular case, which yet went almost unnoticed in Europe, was the U.S. Supreme Court's recent decision in *Lawrence and Garner v. Texas* of 26 June 2003, Case No. 02-102, (the text of the decision is available online at <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=02-102#opinion1>), in which for the first time ever the U.S. Supreme Court cited the ECtHR in a majority opinion.

⁷⁵ Preferably with a single „all-inclusive“ Human Rights Convention and an ECtHR-style International Human Rights Court.

⁷⁶ The preamble of the Charter of the United Nations reads as follows: "We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from trea-

states are included, *expressis verbis*, only in Art. 2 *et seq.* of the UN Charter, preventing any construction to the effect that Art. 103 UN⁷⁸ Charter requires supremacy of respect for Human Rights over other obligations. But Human Rights treaties already are different from "ordinary treaties" in so far as, e.g., the reservations-regime of the Vienna Convention on the Law of Treaties is inappropriate with respect to them⁷⁹ and succession into Human Rights Treaties is considered to be automatic.⁸⁰ The special nature of Human Rights treaties, which make individuals true holders of rights and not only mere beneficiaries, is also reflected in Art. 60 (5) VCLT.⁸¹ Yet, as of today, only *jus cogens* rules as well as obligations *erga omnes* can be considered to be of a constitutional nature, as well as obligations arising out of the UN Charter⁸² and general principles.⁸³ Human Rights treaties have arguably reached a status which elevates them over other treaties, so that it could be argued that they form a third, middle level of norms, from which they can in the future become constitutional norms. The creation of a "middle level" between constitutional and non-constitutional norms does not serve the idea of legal certainty

ties and other sources of International Law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations."

⁷⁷ According to Art. 1 (3) of the Charter of the United Nations, one of the purposes of the UN is 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 [...]"

⁷⁸ *cf.* fn. 23.

⁷⁹ Human Rights Committee General Comment No. 24 (52), UN Doc. CCPR/C/21/Rev.1/Add.6., para. 17.

⁸⁰ *Bosnia and Herzegovina v. Yugoslavia* (now *Bosnia and Herzegovina v. Serbia and Montenegro*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections), Judgment of 11 July 1996, ICJ Reports 1996, pp. 595 *et seq.*, *sep. op.* Weeramantry, at 645.

⁸¹ According to Art. 60 (5) VCLT "Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

⁸² Art. 103 UN Charter, *cf.* fn. 23.

⁸³ Art. 38 (1) (c) ICJ Statute: "1. The Court, whose function is to decide in accordance with International Law such disputes as are submitted to it, shall apply: [...] c. the general principles of law recognized by civilized nations [...]"

since the question would have to arise which is the relation between ordinary norms⁸⁴ and “middle level” Human Rights norms, which are not supreme since they are not (yet) constitutional norms. Consequently Human Rights norms which have not yet reached constitutional status remain “normal” non-constitutional norms, albeit they are more likely to become constitutional norms in the future and should therefore be taken into account when other non-constitutional norms are being applied, although they of course do not yet enjoy the supremacy which *jus cogens* norms enjoy.⁸⁵ In either case, due to the lack of state interests⁸⁶ in Human Rights treaties, it is the consensus of the world community as a whole⁸⁷ - including also networks⁸⁸ that extend beyond the community of states⁸⁹ - which creates the constitutional rules no less than is done on a national level,⁹⁰ be it that obligations are generally accepted as general principles or as *jus cogens* or exist with respect to everyone (*erga omnes*) or that (almost) all states are members of the UN and hence bound by the Charter.⁹¹ It is therefore the international community⁹² which is the

⁸⁴ E.g. of International Trade Law.

⁸⁵ On the relation between Human Rights treaties and other rules of International Law, albeit focussing on the question of reciprocity cf. Craven, *Legal Differentiation and the concept of the Human Rights Treaty in International Law*, *European Journal of International Law* 2000, 489.

⁸⁶ This lack of state interests (which doesn't mean that the states don't have an interest in compliance with the treaty in question, cf. Craven, *op. cit.*, at p. 510.) is reflected in the lack of reciprocity in most Human Rights treaties, cf. e.g. Inter-American Court of Human Rights, *The Effects of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75)* (Advisory Opinion), Advisory Opinion OC-2/82, 24 September 1982. Instead we can speak of a common interest, cf. ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), ICJ Reports 1951,13.

⁸⁷ Frowein, *op. cit.*, at p. 443; Spiro, *op. cit.*, at p. 2024, speaks of a „new global human rights community“. On the impact of the world community's opinion on judicial decisions cf. *Atkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002), a ruling preventing the execution of a mentally retarded offender.

⁸⁸ Spiro, *op. cit.*, at p. 2024; cf. also Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in MICHAEL BYERS (ED.), *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 177 (2000).

⁸⁹ Spiro, *op. cit.*, at p. 2024; PHILIP ALLOTT, *EUNOMIA* 254 (1990, reprinted with new a foreword in 2003); Brun-Otto Bryde, *Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts*, 42 *Der Staat* 61 at 64 (2003).

⁹⁰ Bryde, *op. cit.*, at 61.

⁹¹ Although states are no longer the only actor in the field of International Law, only states can become members of the UN, cf. Art. 4 (1) UN Charter: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations."

⁹² On the creation of legal regimes independent of states cf. Craven, *op. cit.*, at 519.

pouvoir constituant, or constitution-making power, in the field of International Law. In an increasingly Post-Westphalian International Legal System, non-state actors have become part of this growing international community and consequently are involved in the decision-making process, although often in more informal ways. Supra- and International Organisations, NGOs, Networks and other non-state actors enrich today's decision-making processes and already have a significant impact on the material content of International Law.⁹³

II. Characteristics of the Constitutional Dimension of International Law

Being the closest yet to a collection⁹⁴ of quasi-constitutional norms, the UN Charter with Art. 103 UN Charter⁹⁵ provides a precedence for a supremacy clause in International Law. Yet *supremacy* is inherent in every legal order, as is indicated, by the existence of *jus cogens*, which was not foreseen by the UN Charter. While constitutional rules are supreme with regard to "ordinary rules," or International "Administrative" and International Criminal Law,⁹⁶ the latter necessarily have to be *lex specialis* and therefore enjoy *priority of application*, albeit of course not supremacy over more general rules of a constitutional nature.⁹⁷

III. The Limits of International Constitutional Law: Drawing the line between constitutional and non-constitutional rules

While the *lex lata* is clear (albeit unsatisfactorily so), on the question which (few) rules can be considered to be of a constitutional nature, the question will become more difficult - not only in the field of Human Rights - when the international community will have to decide which other values are important enough amount to rules of a constitutional nature: It has been suggested that free trade be considered such a constitutional principle.⁹⁸ Yet merely accepting the constitutional or *jus*

⁹³ One of the most impressive examples of recent years certainly being the Campaign for a ban on Landmines.

⁹⁴ Albeit an incomplete and outdated one, since neither Human Rights nor lawmaking are included sufficiently, and outdated, since it only recognizes states as full subjects of International Law.

⁹⁵ *cf.* fn. 23.

⁹⁶ Criminal Law is here understood as a part of public law in a wider sense and consequently international criminal law generally is considered part of public International Law.

⁹⁷ *cf.* in this context also Koskeniemi, *op. cit.*, at 577.

⁹⁸ Daniel-Erasmus Khan / Andreas L. Paulus, *Gemeinsame Werte in der Völkerrechtsgemeinschaft*, in: I. Erberich / A. Hörster et al. (eds.), *Frieden und Recht*, 38. Assistententagung Öffentliches Recht, Münster, 1998, 217 at 253, 56.

cogens nature of a rule is not enough: the hierarchical order of rules⁹⁹ has to remain strict and it has to be made clear that the protection of international peace and security is paramount to state sovereignty, that Human Rights and the prohibition of the use of force take precedence over free trade etc. Otherwise states could *e.g.* attempt to balance the right to free trade against the prohibition of the use of force and use force to gain access to markets.¹⁰⁰ Maintaining an inherent order of International Law will help to achieve a higher degree of legal certainty and in the long run maintain law and order on a global scale.

E. Utilizing a Constitutional Dimension of International Law

I. *Hard choices and the role for International Constitutional Law*

Developing the idea of an International Constitutional Law further, especially if the hierarchy inherent to it is based on the importance the international community attaches to certain values rather than on the question asked by Art. 103 of the UN Charter¹⁰¹ whether an obligation stems from the UN Charter or from another treaty, would allow the international community to make *value-based decisions* when it comes to the *hard choices* to be made by current International Law, such as between peace and Human Rights, free trade and the protection of the environment, etc. Only a minimum consensus on values¹⁰² will be possible in the foreseeable future, but it would provide a great deal of legal certainty if actions by actors in the field of International Law are being measured against certain generally accepted constitutional rules. The same is true for organizational questions, for example regarding the not uncontroversial lawmaking by the UN Security Council, most recently with Resolution 1373¹⁰³ which arguably has the greatest impact on a global scale of all resolutions adopted by the Council under Art. 41 UN Charter.¹⁰⁴ Constitutional standards could lead to a degree of control that could come at least somewhat closer to the scrutiny under which national governments and lawmakers are or

⁹⁹ cf. C. III. (at the end).

¹⁰⁰ Robert Uerpmann, *Internationales Verfassungsrecht*, 56 *Juristen Zeitung* 565 at 571 (2001).

¹⁰¹ cf. fn. 23.

¹⁰² If such a consensus is possible at all, cf. fn. 44.

¹⁰³ UN Security Council Res. 1373 of 28 September 2001, UN Doc. S/RES/1373 (2001).

¹⁰⁴ Art. 41 UN Charter reads as follows: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

should be. In either case, a choice has to be made as to which rules, besides those already enjoying the status of *jus cogens* or included in the UN Charter and hence “protected” by Art. 103 UN Charter,¹⁰⁵ should be given supremacy over other rules, based on the common values of the international community.

II. Safeguarding Legal Certainty

Legal certainty can be achieved with regard to the relation between general rules and rules included in self-contained legal regimes. While a public law approach allows for a further development on the level of international “administrative” (e.g. international environmental or trade law) and criminal law,¹⁰⁶ rules of a constitutional nature can ensure legal certainty in cases like the *Tadic-Nicaragua-debate*.¹⁰⁷ In this sense, a further Fragmentation of International Law does not necessarily need to be a matter of concern.¹⁰⁸ To the contrary, Constitutionalization and Fragmentation, seen together and guided by public law notions can actually help to provide answers to some of today’s pressing issues as well as legal certainty. Starting points for this development can already be recognized in today’s International Law, especially in *jus cogens* norms and Art. 103 UN Charter.¹⁰⁹ It can be said that some norms¹¹⁰ are already “more equal”, *i.e.* take precedence over, others in the same way national constitutional law is superior to other national legal rules. International Constitutional Law and therefore Relative Normativity are already facts of modern International Law.

F. Conclusion

The question therefore is not whether there is indeed Relative Normativity in International Law, but rather how existing hierarchies can be used for the common good

¹⁰⁵ cf. fn. 23.

¹⁰⁶ While the inclusion of criminal law aspects in public International Law has made a great step forward during the 1990s, it remains to be seen whether indeed private International Law is going to be absorbed by public International Law as well, as is argued by Joel R. Paul, *The Isolation of Private International Law*, in: 7 *Wisconsin International Law Journal* 149 at 152 (1988) and by Joel P. Trachtman, *The International Economic Law Revolution*, in: 17 *University of Pennsylvania Journal of International Economic Law* 33 at 37 (1996).

¹⁰⁷ cf. fn. 46.

¹⁰⁸ As an example for early concerns see the discussion on the name of the ILC Working Group designated to deal with the matter in *Report of the International Law Commission on the work of its fifty-fourth session*, 29 April - 7 June and 22 July - 16 August 2002, UN Doc. A/57/10, para. 500.

¹⁰⁹ cf. fn. 23.

¹¹⁰ Not necessarily treaties, albeit many have been codified by now.

as well as for reconciling tendencies of Constitutionalization and Fragmentation.¹¹¹ Guiding this development towards the practical and sustainable solution of a constitutional part of international legal norms, resembling the situation in national legal systems, requires that Public International Law is no longer understood exclusively as being, in its essence, of a contractual nature involving public entities, but rather as a system of public law on an international level which also accepts non-public actors. The necessary supremacy of International Law can become normatively sustainable as the global community develops a common set of values¹¹² - even if, for the time being, based only on a minimum consensus. For this end, concepts of public, especially constitutional law, can to be employed on a global scale.¹¹³

Although "state practice has yet to catch up with this plea of necessity",¹¹⁴ the process of Constitutionalization of the international legal order offers an opportunity to give values a certain place in the international legal order. Which values beyond those already recognized as *jus cogens* or fundamental principles of International Law can be understood as playing a *constitutional* role in the international legal order is for the international community to decide. At the time being the Constitutional Dimension of International Law is still far from being either as effective or as wide in terms of regulation as are Constitutions on a national level.¹¹⁵ Yet as this community moves more and more beyond the Westphalian System of International Law and is opening up for non-state actors, the chances are increasing that - although all too often fundamental differences remain between states - in time more emphasis can be given on those fundamental values which transcend state interests.

¹¹¹ In so far, the assertion by Ulrich Fastenrath, *Relative Normativity in International Law*, in: 4 European Journal of International Law (1993), pp. 305 *et seq.*, at p. 323, that the problem of hierarchy of norms is of little practical importance is less true today than it was in 1993. Yet he assumed correctly that the increasing complexity of the international legal system would make the formulation of common values necessary, which in turn leads to a higher degree of Relative Normativity, *id.* at 339.

¹¹² cf. Spiro, *op. cit.*, at 2027.

¹¹³ cf. Bryde, *op. cit.*, at p. 62 as well as Walter, *op. cit.*, at 173.

¹¹⁴ Shelton, *op. cit.*, at 159.

¹¹⁵ cf. Walter, *op. cit.*, at 194.