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# THE EMPTINESS OF THE CONCEPT OF *JUS COGENS*, AS ILLUSTRATED BY THE WAR IN BOSNIA-HERZEGOVINA

A. Mark Weisburd\*

## INTRODUCTION

In addition to the tremendous human suffering which it has produced, the fighting in Bosnia-Herzegovina since 1992 has had an important impact upon international relations. This article examines one aspect of this impact: the extent to which this war has highlighted the emptiness of the concept of *jus cogens* as applied in public international law.

Since at least some uses of force by international actors and some acts in the course of war-making are said to violate rules of *jus cogens*,<sup>1</sup> one would expect that at least the possibility of the violation of such rules would arise whenever an armed conflict with any sort of international character takes place. In the case of Bosnia-Herzegovina, however, the problem is not simply that such violations have arguably taken place, but that compliance with a rule of international law with considerable claim to *jus cogens* status apparently helped set off the conflict; that the United States individually and the Security Council of the United Nations collectively are actively promoting a formula for settling the conflict that would seem to require acquiescence in acts violative of norms supposed to be of *jus cogens* character; and that the ultimate resolution of the issue may well require what amounts to toleration of violation of still other rules widely believed to be part of *jus cogens*.

The aim of this article is neither to condemn departures from *jus cogens* nor to engage in verbal gymnastics designed to obfuscate the fact that the international community is treating or will treat “peremptory norms” as moralisms irrelevant in practical terms. Rather, this article seeks to show that the problem lies in the concept of *jus cogens* itself. More specifically, the article intends to make the case that the concept is intellectually indefensible — at best useless and at worst harmful in the practical conduct of international relations.

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1. See *infra* discussion at notes 125–59.

The article first provides a brief history of developments in the fighting in Bosnia-Herzegovina. It next addresses the history of the *jus cogens* concept and discusses a few of the types of action constituting violations of rules which have *jus cogens* status, if any do. Finally, the article will both critique the concept of *jus cogens* and show how the fighting in Bosnia-Herzegovina illustrates the problems with that concept.

## I. CHRONICLE OF THE FIGHTING IN BOSNIA-HERZEGOVINA

Disputes between several of the constituent republics of the Socialist Federal Republic of Yugoslavia on the question of reshaping the federation's character led to the adoption, on September 27, 1990, by the parliament of the republic of Slovenia, of a declaration that federal Yugoslav legislation would no longer be applied within Slovenia.<sup>2</sup> The parliament of the republic of Croatia in the following December proclaimed that Croatian legislation would take precedence over federal legislation within Croatia.<sup>3</sup> Serbia, the largest of the republics and dominant in the federation, took part in negotiations between the republics over the following months, but refused to agree to any new constitutional arrangement which would have the effect of weakening its dominance of Yugoslavia.<sup>4</sup> The situation deteriorated to the point that, on June 25, 1991, both Slovenia and Croatia declared their independence from Yugoslavia.<sup>5</sup>

The initial response of the Yugoslav federal military (JNA), beginning on June 27, was to use force against Slovenia.<sup>6</sup> (It is important to note, in this connection, that most of the JNA's officers and men were ethnic Serbs, and that a large proportion of the ethnic Serb senior officers came from regions of Yugoslavia outside Serbia).<sup>7</sup> Combined efforts by the European Community (EC) and the Conference on Security and Cooperation in Europe (CSCE), facilitated by economic sanctions imposed by the EC, led to a cease-fire agreement on July 7; by July 19, JNA forces had been ordered to withdraw from Slovenia.<sup>8</sup> However,

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2. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

3. *Id.* at 569.

4. *Id.* at 569-70.

5. *Id.* at 570.

6. *Id.* at 570.

7. James Gow, *One Year of War in Bosnia and Herzegovina*, RFE/RL RES. REP., June 4, 1993, at 1, 4 [hereinafter *One Year of War*]; James Gow, *The Remains of the Yugoslav People's Army*, 4 JANE'S INTELLIGENCE REV. 359 (Aug. 1992).

8. Weller, *supra* note 2, at 570-74.

over this same period, fighting broke out in Croatia as forces subordinate to the Croatian authorities came into conflict with Serbs living in Croatia and with the JNA.<sup>9</sup>

Over the next several months, as violence in Croatia increased,<sup>10</sup> representatives of the United Nations, the EC and the CSCE sought to bring about a peaceful resolution of the conflict.<sup>11</sup> As a part of this effort, the United Nations Security Council, in its Resolution 713, imposed an arms embargo on all parts of Yugoslavia.<sup>12</sup> The basis for the invocation of the Council's mandatory powers under Chapter VII of the United Nations Charter was the threat to Yugoslavia's neighbors posed by the fighting; the Council did not, that is, purport to treat the conflict as international.<sup>13</sup>

As of December, 1991, however, all efforts to end the fighting had been unsuccessful. At that point, the differences in approach between Germany, on the one hand, and most of the rest of the EC, the United States, and the UN Secretariat, on the other, came to a head. Convinced that Serbia's behavior amounted to unlawful aggression, the German government argued that the best course to pursue to end the fighting in Yugoslavia was to extend formal diplomatic recognition to Croatia and Slovenia. The German government maintained that the political support for Croatia and Slovenia implied by such an act, reinforced by external sanctions, would deter further Serbian actions. Conversely, a refusal to recognize would signal to Serbia that it could continue its activities. Germany's position was not based solely on the foregoing analysis. It also derived from a German conviction that the Croats and Slovenians were entitled to exercise the right to self-determination. Further, German officials apparently believed that recognition, by labeling Croatia and Slovenia as independent states, would make those entities eligible for protection under the Charter of the United Nations; their enjoyment of that status would deter the Serbs from further action, it was thought, since the Serbs would fear exposing themselves to direct action by the United Nations or the EC to aid the defense of sovereign states facing an aggressor.<sup>14</sup> Indeed, one authority has written:

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9. *Id.* at 574.

10. Gow, *One Year of War*, *supra* note 7, at 4-7.

11. Weller, *supra* note 2, at 574-86.

12. *Id.* at 577-80.

13. *Id.*

14. Harald Müller, *Military Intervention for European Security: The German Debate*, in *MILITARY INTERVENTION IN EUROPEAN CONFLICTS* 125, 125-26 (Lawrence Freedman, ed., 1994); Weller, *supra* note 2, at 587; John Eisenhammer, *Germany Flexes Its Muscles on Croatia's Behalf: John Eisenhammer Explains the Eagerness of Bonn to Recognize the*

For Germany, asserting the principles of the Paris Charter — renunciation of the use of force, respect for the inviolability of borders, and respect for human and minority rights — had an importance that extended far beyond the Yugoslav case. This consideration, above all else, explains the determination of the German government to insist on its position despite U.S., UN, and some European opposition.<sup>15</sup>

Those opposing recognition of Croatia and Slovenia feared that, far from helping to end the fighting, recognition in the absence of an overall settlement of the dispute would lead to greatly increased fighting; in particular, there were fears that violence would spread to another of Yugoslavia's constituent republics, Bosnia-Herzegovina, still formally a part of the federation.<sup>16</sup> Nonetheless, Germany was adamant. By mid-December, it had made clear that it would recognize Croatia and Slovenia regardless of the views of others.<sup>17</sup> In the face of Germany's position, the United Nations abandoned its efforts to discourage recognition, while the other members of the EC decided to preserve the unity of their organization and join Germany in recognizing Slovenia and Croatia, managing only to achieve the postponement of the formal opening of diplomatic relations until January 15, 1992.<sup>18</sup>

It is appropriate to note at this point that, in the view of a number of observers, those opposing the German policy on recognition were correct. That is, according to this analysis, the combination of the recognition of Slovene and Croatian independence and of the ethnically diverse character of Bosnia-Herzegovina (its population is about 44%

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*Breakaway Republics Despite EC Reservations*, THE INDEPENDENT (London), Dec. 19, 1991, at 8; Stephen Engelberg, *Yugoslav Ethnic Hatreds Raise Fears of A War Without End*, N.Y. TIMES, Dec. 23, 1991, at A1; Blaine Harden, *Balkans Entangle Big Powers Again: Germany, U.S. Accused of Manipulating Rivalry for Their Own Gain*, WASH. POST, Dec. 24, 1991, at A9; Boris Johnson, *Bonn Flexes Muscles and EC Caves In*, DAILY TELEGRAPH, December 18, 1991, at 1. See generally Harald Müller, *German Foreign Policy After Unification*, in THE NEW GERMANY AND THE NEW EUROPE 126, 153-54 (Paul B. Stares, ed., 1992) (discussing reasons for Germany's recognition decision) [hereinafter *German Foreign Policy*].

15. *German Foreign Policy*, supra note 14, at 153 (footnote omitted).

16. Stephen Engelberg, *Germany Raising Hopes of Croatia*, N.Y. TIMES, Dec. 12, 1991, at A6; Johnson, supra note 14; Patrick Moore, *Diplomatic Recognition of Croatia and Slovenia*, RFE/RL RES. REP., Jan. 24, 1992, at 9, 12; Alan Philips, *Yugoslavian Crisis: EC on Collision Course with US over New Status of Republics*, DAILY TELEGRAPH (London), December 18, 1991, at 8.

17. John Tagliabue, *Moving Defiantly on Yugoslavia, Bonn Threatens Rift with Allies*, N.Y. TIMES, Dec. 15, 1991, at A1.

18. Paul Lewis, *UN Yields to Plans by Germany to Recognize Yugoslav Republics*, N.Y. TIMES, Dec. 16, 1991, at A1; John Tagliabue, *European Ties for Slovenia and Croatia*, N.Y. TIMES, Dec. 17, 1991, at A4.

Muslim Slav, 33% Serb, and 18% Croatian)<sup>19</sup> made fighting in Bosnia-Herzegovina inevitable. On the one hand, the Muslims would be unwilling to remain a part of a Yugoslavia that would, absent Croatia and Slovenia, necessarily be subject to even more Serb domination than had been the case prior to the secession of those two republics. Yet, the Bosnian Serbs would be strongly resistant to any arrangement that eliminated their ties to Serbia and placed them within a state likely to be dominated by a Muslim plurality. They, along with the Bosnian Croats, would strongly prefer an arrangement whereby the areas they inhabited formed part of an ethnic homeland, if federal Yugoslavia were to cease to exist. Further, the governments of both Croatia and Serbia would seek to incorporate within their own territories those portions of Bosnia-Herzegovina inhabited by their co-ethnics.<sup>20</sup>

To return to the narrative, on December 20, 1991, Bosnia-Herzegovina joined Slovenia and Croatia in seeking recognition from the EC states; but its request was denied in view of uncertainty about the views of the ethnic Serbs within its territory. A referendum to determine popular views on the question was accordingly held on March 1, 1992. Although the vote was overwhelmingly in favor of independence, the results did not reflect the views of the Bosnian Serbs, who had boycotted the balloting. Nonetheless, the EC elected to recognize Bosnia-Herzegovina on April 6, 1992.<sup>21</sup> The United States did the same the next day.<sup>22</sup> Bosnia-Herzegovina was admitted to the United Nations, along with Croatia and Slovenia, on May 22, 1992.<sup>23</sup>

While these events were unfolding, violence had begun in Bosnia-Herzegovina amounting to a state of war by March 1992.<sup>24</sup> The fighting pitted Serbs resident in Bosnia-Herzegovina, supported by the JNA, against poorly armed forces of the republic's government.<sup>25</sup> The government of the Federal Republic of Yugoslavia (FRY) — a rump state formed on April 27, 1992, by the two constituent republics of the original Yugoslavia which had not yet seceded<sup>26</sup> — purported, on May

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19. Patrick Moore, *The International Relations of the Yugoslav Area*, REF/RL RES. REP., May 1, 1992, at 33–34.

20. Misha Glenny, *Yugoslavia: The Great Fall*, N.Y. REV. OF BOOKS, Mar. 23, 1995, at 56–57, 61–62; Moore, *supra* note 19, at 34; Warren Zimmermann, *The Last Ambassador: A Memoir of the Collapse of Yugoslavia*, FOREIGN AFF., Mar.-Apr., 1995, at 1, 15–17.

21. Weller, *supra* note 2, at 591–93.

22. 3 U.S. DEP'T ST. DISPATCH, Apr. 27, 1992, at 331.

23. G.A. Res. 46/237, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/237 (1992).

24. *One Year of War*, *supra* note 7, at 7.

25. *Id.* at 7–10.

26. Weller, *supra* note 2, at 595.

5, 1992, to turn over control of JNA units serving in Bosnia-Herzegovina to the Bosnian Serb authorities.<sup>27</sup> However, there was evidence that considerable contact continued to take place between FRY and Bosnian Serb forces, and that units of the JNA continued to fight in Bosnia-Herzegovina after May 1992.<sup>28</sup> Indeed, reports of continuing close ties between FRY forces and the Bosnian Serbs' troops appeared as late as June 1995,<sup>29</sup> even though the government of the FRY claimed to have cut off all political and economic aid to the Bosnian Serbs in August 1994.<sup>30</sup> The Bosnian Serbs, thus supported by the JNA, enjoyed considerable success: as of the end of 1994, they controlled approximately 70% of the territory of Bosnia-Herzegovina.<sup>31</sup>

This situation changed in the summer of 1995. After a three-day offensive in early August, the Croatian Army routed Croatian Serb forces which had been holding the Krajina region of Croatia, adjacent to northwestern Bosnia-Herzegovina.<sup>32</sup> The Croatian forces continued their advance into the territory of Bosnia-Herzegovina, cooperating with the forces of that state in attacking areas held by the Bosnian Serbs; the Croatian/Bosnia-Herzegovinan combined forces made considerable progress, taking from the Bosnian Serbs about 20% of the territory of Bosnia-Herzegovina, thus shifting the balance of territorial control in that state from a 70-30 division favoring the Bosnian Serbs to an approximately equal division between the Bosnian Serbs and the Croatian/Bosnia-Herzegovinan forces.<sup>33</sup>

Bosnia-Herzegovina has thus seen considerable fighting. This fighting, moreover, has been of a very brutal character. While claims by the government of Bosnia-Herzegovina that 200,000 of its citizens have been killed are disputed, even the more recent calculations suggesting that the death toll for all the contending parties is more likely in the

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27. Chuck Sudetic, *Forces in Bosnia Begin to Unravel*, N.Y. TIMES, May 6, 1992, at A16.

28. *One Year of War*, *supra* note 7, at 3-4, 7-10; Jonathan S. Landay, *Yugoslav Army Troops Active Inside Bosnia*, CHRISTIAN SCI. MONITOR, Jan. 28, 1994, at 1.

29. Stephen Engelberg and Eric Schmitt, *Western Officials Say Serbia Helps Bosnian Comrades*, N.Y. TIMES, June 11, 1995, at A1, A14.

30. Chuck Sudetic, *Serbia Isolating Allies in Bosnia*, N.Y. TIMES, Aug. 5, 1994, at A1.

31. James Gow, *To Win on Points—Stalemate in Bosnia*, JANE'S INTELLIGENCE REV. Y.B. 1994, at 54, 54-57.

32. Raymond Bonner, *Croatia Declares Victory in Rebel Area*, N.Y. TIMES, Aug. 7, 1995, at A6.

33. Chris Hedges, *Extent of Croat-Bosnia Advance Threatens U.S.-Brokered Peace*, N.Y. TIMES, Sept. 19, 1995, at A1.

25,000–60,000 range<sup>34</sup> reach a figure representing 0.5%–1.5% of the population of Bosnia-Herzegovina.<sup>35</sup> It must be stressed that many of the dead are non-combatants, and there is also considerable evidence that numerous and massive violations of humanitarian norms have taken place, including arbitrary killings, rape, torture, and — most notoriously — so-called ethnic cleansing, wherein troops of one ethnic group induce members of a rival group to abandon particular territory through the use of arbitrary killing and other forms of terror.<sup>36</sup> Some observers have concluded that the Bosnian Muslims have been victims of genocide, though this conclusion is not universally shared.<sup>37</sup> Further, it appears that by far the majority of these acts are the responsibility of the Serbian side.<sup>38</sup>

The international response to the fighting in Bosnia-Herzegovina has followed three tracks. First, under the auspices of the United Nations, the United Nations Protection Force (UNPROFOR) originally assigned to peace-keeping duty in Croatia, has also taken up responsibilities in Bosnia-Herzegovina. Its mission has been defined as providing protection for deliveries of relief supplies to civilian populations, providing security for so-called “safe areas” established by the Security Council for the protection of non-combatants, and guarding depositories of heavy weapons turned over to UNPROFOR by the combatants.<sup>39</sup> The consensus as of the mid-summer of 1995 was that UNPROFOR’s performance had been mixed. It had had some limited success in delivering relief supplies but had been ineffective in protecting safe areas or in controlling heavy weapons; indeed, it appeared that the vulnerability of the UNPROFOR troops to retaliation at the hands of Bosnian Serbs limited the willingness of third states to adopt a more vigorous policy of protecting safe areas

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34. George Kenney, *The Bosnian Calculation*, N.Y. TIMES, April 23, 1995, §6 (Magazine), at 42.

35. Weller, *supra* note 2, at 569.

36. Kenneth Anderson, *Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 33 VA. J. INT’L L. 385, 391–92 (1993); *One Year of War*, *supra* note 7, at 8; *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. SCOR, 49th Sess., Annex, at 33–37, 70–72, 84 n.87, U.N. Doc. S/1994/674 (1994) [hereinafter *Final Report*].

37. Compare Anderson, *supra* note 36 at 392–94 with *Final Report*, *supra* note 36, at 37–43.

38. Anderson, *supra* note 36, at 391; *Final Report*, *supra* note 36, at 70–72.

39. G.A. Res. 46/242, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/242 (1992); S.C. Res. 824, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/824 (1993); S.C. Res. 816, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/816 (1993); S.C. Res. 770, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/770 (1992); Letter from President William J. Clinton to the Speaker of the House and the President Pro Tempore of the Senate (Aug. 22, 1994), in 5 U.S. DEP’T ST. DISPATCH, Aug. 29, 1994, at 581. See generally S.C. Res. 743, U.N. SCOR, 46th Sess., U.N. Doc. S/RES/743 (1992) (establishing UNPROFOR).



and controlling the combatants' access to heavy weapons. In light of the danger to the peace-keeping forces and UNPROFOR's relatively modest accomplishments, some observers had begun to suggest that the force should be withdrawn.<sup>40</sup>

By late August 1995, the role of third state forces in the fighting in Bosnia-Herzegovina changed profoundly. After a shelling in Sarajevo killed a number of civilians, NATO aircraft began retaliatory airstrikes against Bosnian Serb targets, while French and British artillery units, which formed part of the newly organized United Nations' Rapid Reaction Force, shelled Bosnian Serb positions.<sup>41</sup> After several weeks of NATO/UN bombing and shelling, and in the face of the Croatian/Bosnia-Herzegovinan military advances described above, the Bosnian Serbs agreed in September 1995 to withdraw their heavy weapons from the Sarajevo area and to permit the reopening both of the airport and of land routes into the city.<sup>42</sup> When the contending sides agreed upon a cease-fire in the conflict as discussed below, NATO was expected to provide as many as 70,000 troops, under UN authority, to oversee that cease-fire.<sup>43</sup>

Aside from the dispatch of troops, a second response of the international community has been the establishment by the Security Council of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (Tribunal)<sup>44</sup> and the adoption of a Statute for the governance of that body.<sup>45</sup> The functions of the Tribunal

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40. See Bruce B. Auster, et al., *Lost in the Balkan*, U.S. NEWS & WORLD REP., June 12, 1995, at 34; George J. Church, *The Serbs Respond to NATO Bombings by Chaining Hostages Near Potential Targets, and the Stalemate Resumes*, TIME, June 5, 1995, at 38; Roger Cohen, *As Usual, Serbs Call The Shots*, N.Y. TIMES, July 12, 1995, at A6; Michael R. Gordon, *U.S. and Bosnia: How a Policy Changed*, N.Y. TIMES, Dec. 4, 1994, at A1; Chris Hedges, *Bosnian Serbs Overrun Town Protected by U.N.*, N.Y. TIMES, July 12, 1995, at A1; Bruce W. Nelan, *Despite NATO Bluster, Peacekeeping Reinforcements Won't Change a Thing*, TIME, June 19, 1995, at 29; Eric Schmitt, *U.S. and NATO Face Unhappy Choices for U.N. Force in the Balkans*, N.Y. TIMES, July 12, 1995, at A6; *Unprofitable UNPROFOR*, THE ECONOMIST, June 24, 1995 (U.S. ed.), at 46. See generally Anthony Lewis, *Slaughterhouse: Bosnia and the Failure of the West*, THE NEW REPUBLIC, March 20, 1995, at 29 (book review) (arguing that UNPROFOR lacks effectiveness).

41. Roger Cohen, *Shelling Kills Dozens in Sarajevo: US Urges NATO to Strike Serbs*, N.Y. TIMES, Aug. 29, 1995, at A1; Roger Cohen, *NATO Jets Attack Serbian Positions Around Sarajevo*, N.Y. TIMES, Aug. 30, 1995, at A1.

42. Roger Cohen, *Bosnian Serbs Agree to Pull Back Heavy Artillery From Sarajevo*, N.Y. TIMES, Sept. 15, 1995, at A1.

43. Eric Schmitt, *NATO Force Endorsed*, N.Y. TIMES, Oct. 7, 1995, at A4.

44. S.C. Res. 827, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/827 (1993).

45. The Statute of the Tribunal appears as an annex to *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. SCOR, 47th Sess., U.N. Doc. S/25704 (1993).

are obvious from its title. Its subject matter jurisdiction extends to grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity.<sup>46</sup> The Tribunal is not authorized to take any action solely on the basis of evidence that an act of aggression has been committed. The Tribunal has indicted both the political head and the military commander of the Bosnian Serbs, accusing both of committing extremely serious crimes falling within the Tribunal's subject-matter jurisdiction.<sup>47</sup>

Finally, various international efforts have been undertaken to negotiate an end to the fighting. In 1994, the United States, Russia, the United Kingdom, France, and Germany — the so-called Control Group — proposed a plan according to which 51% of the territory of Bosnia-Herzegovina would fall under the authority of the government of that state, while 49% would be governed by Bosnian Serb authorities. Two years after the plan was implemented, the Serb-administered areas would be permitted to hold a referendum on whether to secede from Bosnia-Herzegovina.<sup>48</sup> This plan was endorsed by the Security Council, which imposed sanctions on the Bosnian Serbs for their refusal to accept the plan.<sup>49</sup> At last, in early September 1995, after the NATO bombing and the Croatian/Bosnia-Herzegovinan military advances described above, and after the Bosnian Serbs had agreed to permit President Milosevic of Serbia to control negotiations on their behalf, the parties accepted a plan proposed by the United States generally in line with the Control Group Plan. Under this approach, Bosnia-Herzegovina would be divided into two entities, one primarily Muslim and Croatian and controlling 51% of the state's territory, the other primarily Serbian and controlling the remaining 49%.<sup>50</sup> Although the plan envisioned preserving the unity of Bosnia-Herzegovina and creating common institutions linking the two entities within it, as of this writing, the nature of such institutions had not been decided and no means of preventing the Bosnian Serb entity from seceding from Bosnia-Herzegovina and uniting with Serbia had been established.<sup>51</sup> Subsequently, in early October, the parties, again at

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46. *Id.* at arts. 2–5.

47. Marlise Simons, *U.N. Tribunal Indicts Bosnian Serb Leader and a Commander*, N.Y. TIMES, July 26, 1995, at A9.

48. Edward Luce, et al., *A Last Effort at Mediation Amid Pessimism and Bluff*, THE GUARDIAN, July 6, 1994, at 12.

49. S.C. Res. 942, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/942 (1994).

50. Roger Cohen, *Serb Shift Opens Chance For Peace, A U.S. Envoy Says*, N.Y. TIMES, Sept. 1, 1995, at A1; Elaine Sciolino, *Enemies in Bosnia Devise Structure For A Government*, N.Y. TIMES, Sept. 27, 1995, at A1.

51. Sciolino, *supra* note 50.

the urging of the United States, agreed to a cease-fire in Bosnia-Herzegovina, during the course of which peace talks were to take place.<sup>52</sup> That cease-fire actually went into effect on October 12.<sup>53</sup>

As of this writing, then, there is some hope of ending the fighting in Bosnia-Herzegovina. The possibility of ending this war has been created in part by the military successes of the Croatian/Bosnia-Herzegovinan forces, in part because of the willingness of NATO governments to finally use significant force against the Bosnian Serbs, and in part because of American diplomatic efforts. It must be stressed, however, that the price of the peace plan being considered would be the effective legitimation of the acquisition by the Bosnian Serbs of nearly half the territory of Bosnia-Herzegovina through the use of force.

## II. THE CONCEPT OF *JUS COGENS* IN INTERNATIONAL LAW

### A. *Development of the Concept*

The term *jus cogens* is applied to "certain overriding principles of international law."<sup>54</sup> According to Brownlie, "[t]he major distinguishing feature of such rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence . . . ."<sup>55</sup> It seems clear that the term "*jus cogens*" was not employed in connection with international law until this century,<sup>56</sup> though Hannikainen has argued that certain rules of international law in fact had come to meet Brownlie's criteria for *jus cogens* in earlier periods.<sup>57</sup> In any case, it appears that the systematic development of the concept began after World War I.

At that time, the idea of an international *jus cogens* began to be advanced by certain publicists of international law.<sup>58</sup> Initially, it was discussed only in connection with the law of treaties. In 1937, Verdross insisted that there were two types of norms having the character of *jus*

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52. Alison Mitchell, *Bosnian Enemies Set A Cease-Fire, Plan Peace Talks*, N.Y. TIMES, Oct. 6, 1995, at A1.

53. Kit R. Roane, *Bosnia Cease-Fire Goes Into Effect As Pact Is Signed*, N.Y. TIMES, Oct. 12, 1995, at A1.

54. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (3d ed., 1979).

55. *Id.*

56. See JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* 12-54 (1974).

57. LAURI HANNIKAINEN, *PEREMPTORY NORMS [JUS COGENS] IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* 14 (1988).

58. See George D. Haimbaugh, Jr., *Jus Cogens: Root & Branch (An Inventory)*, 3 TOURO L. REV. 203, 207-12 (1987).

*cogens* in international law; states were simply not free to conclude treaties violating these norms.<sup>59</sup> The first of these categories included discrete rules that had become compulsory; as an example, Verdross suggested the prohibition on states disturbing other states in the use of the high seas.<sup>60</sup> The second category included rules that were *contra bon mores*.<sup>61</sup> Verdross gave two arguments supporting the existence of this second category of *jus cogens* norms. He noted that such prohibitions on agreements were "common to the juridical orders of all civilized states,"<sup>62</sup> and argued that the principle was therefore part of international law as a general principle of law recognized by civilized states, within the meaning of Article 38 of the Statute of the Permanent Court of International Justice.<sup>63</sup> He acknowledged that such principles were normally considered subsidiary to rules of customary international law and to treaties, but argued that this concept of subsidiarity could not apply to compulsory norms.<sup>64</sup>

Verdross's second argument was that "[n]o juridical order can . . . admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community."<sup>65</sup> He argued that four types of treaties would be immoral and therefore void: treaties which would have the effect of denying a state the ability to protect the lives and property of persons in its territory, as by requiring excessive reductions of its police force; treaties requiring arms reductions to the point that a state was rendered defenseless; treaties requiring a state to expose its population to distress, as by closing hospitals; and treaties forbidding a state to protect its nationals abroad.<sup>66</sup> With respect to examples of his third category of immoral treaties, Verdross observed:

These examples prove in a particularly obvious way the absurd consequences of that pseudo-positivistic doctrine which denies the prohibition of immoral treaties in international law . . . . A truly realistic analysis of the law shows us that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis.<sup>67</sup>

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59. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 572 (1937).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 573. The Statute of the Permanent Court of International Justice is now the Statute of the International Court of Justice.

64. *Id.*

65. *Id.* at 572.

66. *Id.* at 574-76.

67. *Id.* at 576.

Verdross was somewhat vague on the consequences of the conclusion of an immoral treaty. To be sure, he argued that any tribunal before which such a treaty was considered was obliged to treat it as void, regardless of the arguments of the parties.<sup>68</sup> He also argued that, in the event that a dispute arose between the parties to such a treaty which could not be taken before a tribunal, it could be addressed by the Council of the League of Nations, if both parties were members of the League.<sup>69</sup> Verdross had no suggestions as to methods of dealing with such treaties if neither of those alternatives was available, and made no reference to any rights of states not parties to an immoral treaty to react to it.

After World War II, the concept of *jus cogens* continued to receive attention. Kelsen, for example, addressed the subject, though with considerably less certainty than Verdross. He asserted that, “[n]o clear answer . . . can be found in the traditional theory of international law” to the question whether *jus cogens* norms exist in international law.<sup>70</sup> He stated that it was “probable that a treaty by which two or more states release one another from the obligations imposed upon them by the norm of general international law prohibiting occupation of parts of the open sea” would be declared void by an international tribunal,<sup>71</sup> but rejected the idea that states could not reciprocally renounce their respective rights of extending diplomatic protection to their own citizens.<sup>72</sup> This last, of course, was the fourth of Verdross’s categories of immoral treaties.

In 1953, the issue ceased to be solely a matter of academic discussion. In that year, in his capacity as special rapporteur of the International Law Commission (ILC) on the law of treaties, Lauterpacht submitted to the ILC a partial draft convention on the law of treaties. Its Article 15 provided, “[a] treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.”<sup>73</sup> In his commentary on this article, Lauterpacht observed that “in principle, States are free to modify by treaty, as between themselves, the rules of customary international law.”<sup>74</sup> He went on to give examples of rules he believed states were free to alter as between themselves; included among

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68. *Id.* at 577.

69. *Id.*

70. HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 344 (1952).

71. *Id.*

72. *Id.*

73. Hersch Lauterpacht, *Report on the Law of Treaties*, U.N. Doc. A/CN.4/63 (1953), reprinted in [1953] 2 *Y.B. Int'l L. Comm'n* 90, 93, U.N. Doc. A/CN.4/SER.A/Add.1.

74. *Id.* at 154.

them were rules governing the breadth of their territorial seas, the prohibition upon navies interfering with merchant vessels of states other than their own upon the high seas, and the prohibition upon nationalizing property of foreign nationals without compensation.<sup>75</sup> Lauterpacht then observed:

It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by Article 38(3) of its Statute

.....  
The voidance of contractual agreements whose object is illegal is a general principle of law. As such it must find a place in a codification of the law of treaties.<sup>76</sup>

Although Lauterpacht acknowledged that there were no decisions of international tribunals supporting the voiding of treaties on the basis suggested in his Article 15,<sup>77</sup> he observed that it was "generally — if not universally — admitted by writers."<sup>78</sup> He apparently considered Article 15 *lex lata*, since he made clear that he regarded his draft as generally a statement of existing law. Though he thought it important to indicate clearly when his draft departed from existing law,<sup>79</sup> he gave no such indication in connection with Article 15. Indeed, in a note to his comment, he stressed one difficulty created by what he saw as this existing limitation on states' freedom to agree:

[I]f, as stated in the present article, international courts are to be judges of the validity of treaties in the light of overriding principles of international custom and international public policy as hitherto recognized, a situation may be created in which international society may be deprived of the necessary means of development through processes of international legislation.<sup>80</sup>

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75. *Id.*

76. *Id.* at 155.

77. *Id.*

78. *Id.* at 154.

79. *Id.* at 90.

80. *Id.* at 155.

Lauterpacht made clear that he meant the term "international legislation" to include bilateral *and* multilateral treaties.<sup>81</sup> He went on to suggest that it might be advisable *de lege ferenda* to permit "a multilateral treaty concluded in the general international interest" to depart from "an overriding rule of customary international law."<sup>82</sup> He also indicated that he did not see Article 15 as making "consistency with international morality" *simpliciter* a condition for the validity of a treaty, but only consistency with such considerations of morality as formed "a constituent part of general principles of law and of the requirements of international public policy."<sup>83</sup>

In its stress upon rules of public policy "not necessarily crystallized in a clearly accepted rule of law" and his reliance on "general principles of law" to support his conclusion, Lauterpacht's formulation resembles that of Verdross. Lauterpacht's successors as rapporteurs on the law of treaties relied on similar concepts: Fitzmaurice making reference to "considerations of morals and international good order which are *jus cogens* rules"<sup>84</sup> and Waldock to the idea of "international public order."<sup>85</sup> By 1966, however, the ILC had moved away from this type of thinking on the subject. By this time, the draft language of the renumbered article on *jus cogens* was as follows:

Article 50. Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>86</sup>

In its comment on this article, the ILC explained that "[a]s a modification of a rule of *jus cogens* would to-day most probably be effected through a general multilateral treaty, the Commission thought it desirable

81. *Id.*

82. *Id.*

83. *Id.* at 155-56.

84. Gerald Fitzmaurice, *Third Report on the Law of Treaties*, U.N. Doc. A/CN.4/115 (1958), *reprinted in* [1958] 2 Y.B. Int'l L. Comm'n 20, 27-28, 40-41; U.N. Doc. A/CN.4/SER.A/1958/Add.1.

85. Humphrey Waldock, *Second Report on the Law of Treaties*, U.N. Doc. A/CN.4/156 (1963), *reprinted in* [1963] 2 Y.B. Int'l L. Comm'n 36, 52, U.N. Doc. A/CN.4/SER.A/1963/Add.1.

86. *Report of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, U.N. Doc. A/6309/Rev.1 (1966), *reprinted in* [1966] 2 Y.B. Int'l L. Comm'n 169, 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1 [hereinafter 1966 ILC Report].

to indicate that such a treaty would fall outside the scope of the article."<sup>87</sup> This language clearly assumes that states are free to change *jus cogens*, at least when they use the mechanism of a general multilateral treaty to do so. The assumption that the content of *jus cogens* is under the control of states is likewise implied by the Commission's statement that it planned to leave the full content of *jus cogens* "to be worked out in state practice and in the jurisprudence of international tribunals."<sup>88</sup> This approach to *jus cogens* differs from Lauterpacht's apparent assumption that the content of the body of "international public policy" was something to be applied by tribunals but was essentially unmodifiable by governments.

This more positivistic approach to *jus cogens* was reinforced by the deliberations of state representatives at the Vienna Conference on the Law of Treaties. Greece, joined by Spain and Finland, offered an amendment to Article 50 which proposed inserting the words "recognized by the international community as a norm" after the words "general international law."<sup>89</sup> The incumbent special rapporteur, Sir Humphrey Waldock, took the position that Article 50 as drafted had the same effect as the amendment, since "a general rule of international law necessarily implied general recognition by the international community"; he nonetheless supported consideration of the amendment as making the text of the article clearer.<sup>90</sup> Meeting in the Committee of the Whole, the conference voted to refer the amendment to the Drafting Committee,<sup>91</sup> which "decided the amendment . . . would clarify the text"<sup>92</sup> and incorporated it, slightly modified, into Article 50. As redrafted, Article 50 read:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>93</sup>

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87. *Id.* at 248.

88. *Id.*

89. *Documents of the Conference* 174, Official Records, United Nations Conference on the Law of Treaties, U.N. Doc. A/CONF.39/11/Add.2 (1971).

90. *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* 328, Official Records, 1st Sess., United Nations Conference on the Law of Treaties, U.N. Doc. A/CONF.39/11 (1969).

91. *Id.* at 333.

92. *Id.* at 471.

93. *Id.*



As amended, the Committee of the Whole approved the text of Article 50 by a vote of 72–3–18.<sup>94</sup> The conference gave final approval to the Article by a vote of 87–8–12.<sup>95</sup> The net effect of the consideration of *jus cogens* by the Vienna Conference, then, was to underline the view of the states present that a norm's character as *jus cogens* depended upon its acceptance by states.

Both the ILC and the states represented at the Vienna Conference addressed in addition the issue of the content of *jus cogens*. The ILC, in its commentary to draft Article 50, characterized "the law of the Charter concerning the prohibition of the use of force" as "a conspicuous example of a rule in international law having the character of *jus cogens*,"<sup>96</sup> but ultimately decided not to include examples of *jus cogens* norms in the article in order to avoid both "misunderstanding as to the position concerning other cases not mentioned in the article"<sup>97</sup> and "prolonged study of matters which fall outside the scope of the present articles."<sup>98</sup> The Vienna Conference did not alter the text of Article 50 in this regard, but a number of state delegations also suggested a number of candidates for *jus cogens* status, including not only the prohibition of the use of force but also such rules as the right to self-determination, human rights norms, rules of humanitarian law in warfare, and prohibitions of genocide, racial discrimination, and unequal treaties (different states referred to different norms and no norm was mentioned by all states addressing the issue).<sup>99</sup>

One aspect of the Vienna Convention on the Law of Treaties ("Vienna Convention") requires comment. Draft Article 50, codified in the Vienna Convention as Article 53, falls within a section of the Vienna Convention titled "Invalidity of Treaties."<sup>100</sup> Article 65 of the Vienna Convention — the section on the procedure to be followed for terminating or suspending a treaty — is titled "Procedure to be Followed with Respect to *Invalidity*, Termination, Withdrawal from or Suspension of the Operation of a Treaty."<sup>101</sup> That is, Article 65 is apparently intended to govern when a treaty is challenged as falling under one of the Vienna

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94. *Id.* at 472.

95. *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* 106–07, Official Records, 2d Sess., United Nations Conference on the Law of Treaties, U.N. Doc. A/CONF.39/11/Add.1 (1970).

96. 1966 ILC Report, *supra* note 86, at 247.

97. *Id.* at 248.

98. *Id.*

99. SZTUCKI, *supra* note 56, at 119–20.

100. Vienna Convention on the Law of Treaties, May 23, 1969, pt. V, § 2, art. 53, 1155 U.N.T.S. 311 [hereinafter Vienna Convention].

101. *Id.*, art. 65 (emphasis added).

Convention's grounds of invalidity, which would include Article 53. This is significant because the procedure created under Article 65 is available only to parties to the treaty whose invalidity, termination, etc., is in question. This is apparent from both the language of the article<sup>102</sup> and from the ILC's commentary on it.<sup>103</sup> Writers who have carefully studied the matter have also concluded that the only states entitled under the Vienna Convention to challenge a treaty as violating a *jus cogens* norm are those which are parties to the treaty in question.<sup>104</sup> That is, even though the idea which culminated in Article 53 arose from a concern with treaties violating international public policy or international morality, the Vienna Convention creates no right in states generally to challenge a treaty alleged to violate Article 53. The obligation embodied in Article 53, then, cannot be characterized as *erga omnes*.

The development of the *jus cogens* concept since 1969 has been rather modest. Treaty developments relevant to this subject have included the adherence of seventy-six states to the Vienna Convention,<sup>105</sup> those states presumably accepting that convention's definition of *jus cogens*. The ILC likewise continues to see that definition as authoritative in its dealings with treaties; thus the draft Convention on the Law of Treaties between States and International Organizations or Between International Organizations ("Convention on International Organization Treaties") repeated the language of Article 53 almost verbatim.<sup>106</sup> In particular, the ILC commentary observed, with respect to the continued use of the phrase "recognized and accepted by the international community of states as a whole" that "in the present state of international law, it is states that are called upon to establish or recognize peremptory norms."<sup>107</sup> This language was retained in the final text of the convention.<sup>108</sup>

State practice regarding *jus cogens* has been quite limited. A number of international organizations have condemned as unlawful, apparently because contrary to *jus cogens*, certain agreements and acts by states.

102. "A party which . . . invokes . . . a ground for impeaching the validity of a treaty . . . must notify the other parties of its claim." *Id.*

103. 1966 ILC Report, *supra* note 86, at 262-63.

104. Hannikainen, *supra* note 57, at 294; Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 R.C.A.D.I. 271, 282-83 (1981); CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* 115-19 (1976); SZTUCKI, *supra* note 56, at 125-29.

105. *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1994* 887, U.N. Doc. ST/LEG/SER.E/13 (1995).

106. *Report of the International Law Commission* 117, U.N. GAOR, 37th Sess., Supp. No. 10, U.N. Doc. A/37/10 (1982).

107. *Id.* at 118.

108. See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 21, 1986, arts. 53, 65, U.N. Doc. A/CONF. 129/15, 25 I.L.M. 543, 572, 577 (1986).

However, with the possible exception of the response to Iraq's invasion of Kuwait, there have been no efforts by the international community to reverse the effects of alleged violations of *jus cogens* or to ensure that offending states compensated their victims.<sup>109</sup> Nor — with one exception<sup>110</sup> — have international tribunals squarely relied on *jus cogens* in deciding cases, though they have on occasion phrased opinions in such a way as to hint at their approval of the concept.<sup>111</sup>

One area in which there has been considerable activity with respect to *jus cogens*, however, is that of doctrine. For purposes of this discussion, the most significant aspect of this doctrinal development is the assertion in some quarters that *jus cogens* is relevant to customary international law as well as to the law of treaties. For example, the Restatement (Third) of the Foreign Relations Law of the United States takes the position that rules of *jus cogens* "prevail over and invalidate international agreements and other rules of international law in conflict with them."<sup>112</sup> Further, the ILC drew a connection between the category of *jus cogens* norms and the concept of international crimes embodied in Article 19 of its draft articles on state responsibility — and the concept of international crimes necessarily applies to acts not connected to treaties.<sup>113</sup> A number of writers have also asserted that *jus cogens* has implications for unilateral acts of states as well as for treaties.<sup>114</sup>

It is not easy to determine what it means to say that *jus cogens* applies to rules of customary international law as well as to treaties. As Sztucki points out, if a unilateral act is a violation of a norm of customary international law, it is difficult to see what difference it makes to further characterize the violated norm as "peremptory," since state responsibility exists in any case. If it is argued that the difference lies in the nullity and voidness of the act, he further notes,

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109. Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585, 605–08 (1988); Hannikainen, *supra* note 57, at 185–91, 301–11.

110. Resolution No. 3/87, Case No. 9647 (United States), Inter-Am. C.H.R. 147, OEA/ser. L/VII.69, doc. 17 (1987).

111. Christenson, *supra* note 109, at 605–08; Hannikainen, *supra* note 57, at 192–94; *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 100–01 (June 27).

112. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k (1986) (emphasis added) [hereinafter RESTATEMENT].

113. *Report of the International Law Commission*, U.N. GAOR, 31st Sess., Supp. No. 10, U.N. Doc. A/31/10 (1976), reprinted in [1976] 2 Y.B. Int'l L. Comm'n II 98–116, U.N. Doc. A/CN.4/SER.4/1976/Add.1 (Part 2) [hereinafter 1976 ILC Report].

114. See, e.g., Christenson, *supra* note 109, at 585–86, 611–14; Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. 359, 362 (1988); Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 417–19 (1989); sources collected in Sztucki, *supra* note 56, at 66.

the label applied to the violated norm does not affect the practicality of reversing the challenged act.<sup>115</sup>

Arguably, however, one could imagine one concrete effect of labeling a rule of customary international law as a *jus cogens* norm: such a categorization would mean that practice contrary to the norm in question could not have the effect of changing the norm. It is, of course, a commonplace that practice contrary to a rule of customary international law — which is necessarily a violation of that rule as an initial matter — can ultimately lead to a change in the content of that rule.<sup>116</sup> If, however, a customary rule is one of *jus cogens*, then — to use the language of Article 53 of the Vienna Convention — no derogation from the rule is permitted. Presumably that would mean that acts contrary to the rule are nullities in all respects, and thus cannot affect the content of customary international law, either by undermining an existing rule or by serving as the basis of a new rule. A number of writers have asserted that this is in fact the effect of *jus cogens* concepts on customary law.<sup>117</sup>

Necessarily, this delinking of the content of *jus cogens* and state practice raises questions as to the source of *jus cogens*, and some writers have been willing to take the next logical step and assert that the idea of *jus cogens* makes sense only if that body of norms is seen as a matter of natural law.<sup>118</sup> Indeed, even writers who generally disparage the natural law approach to international legal questions have been willing to rely on natural law arguments as a basis for *jus cogens*.<sup>119</sup>

It should be stressed that this natural law view of *jus cogens* is by no means universal among writers. Rozakis argues that a rule of general customary law, coming into existence through the usual process of development of customary law, can have the effect of changing a customary rule that had the character of *jus cogens*.<sup>120</sup> Similarly, Gaja argues that, “[i]t would be of little use, and theoretically questionable, to assert the existence of a norm of international law which does not effectively regulate the conduct of States.”<sup>121</sup> And Hannikainen considers customary law

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115. SZTUCKI, *supra* note 56, at 68–69.

116. See ANTHONY D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 97–98 (1971); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1, 11–20 (1988).

117. See, e.g., Christenson, *supra* note 109, at 611–14; Parker and Neylon, *supra* note 114, at 418–19.

118. INGRID DETTER, THE INTERNATIONAL LEGAL ORDER 174–76 (1994); Janis, *supra* note 114, at 360–63; Parker and Neylon, *supra* note 114, at 419–22.

119. Compare MYRES S. McDUGAL, HAROLD D. LASSWELL, AND LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 68–71 (1980) with *id.* at 339–42.

120. Rozakis, *supra* note 104, at 89–91.

121. Gaja, *supra* note 104, at 286.

to be the primary source of *jus cogens* norms, though his approach to determining the content of customary law relies heavily on the resolutions of international organizations<sup>122</sup> and thus raises theoretical difficulties.<sup>123</sup>

It is clear, then, that there are fundamental differences among writers regarding the core of the concept of *jus cogens*, echoing the differences between the approach to the subject in the Vienna Convention and that taken in, for example, the Restatement of Foreign Relations Law. As will be discussed in greater detail below,<sup>124</sup> this divergence in view has important implications for the role that the *jus cogens* concept can usefully play in international relations.

122. Hannikainen, *supra* note 57, at 225–47.

123. Hannikainen asserts:

[T]here exists in the Western world a critical doctrine stating that it should be recognized that elements of political expediency are regularly present in the voting of States in international organizations. The tendency of this criticism is to minimize the legal significance of resolutions of international organizations.

In the face of developments of recent decades this critical view is difficult to sustain . . . . Among the resolutions of the GA and SC there can be found elements of expediency and political motivation, but there are also many resolutions which use normative language and indicate the unanimity or general agreement of UN members on a given legal question. If such resolutions are adopted with consistency by a number of international organs or repeatedly by one organ, it is difficult to deny that they are evidence of the practice and the *opinio juris* of those States which vote for those resolutions.

*Id.*, at 233 (footnotes omitted). This proposition does not seem at all difficult to deny. Suppose it can be demonstrated that State practice with respect to a particular subject is quite different from what one would expect if one consulted resolutions adopted by international organizations, which resolutions used normative language, were adopted unanimously, and took a consistent position over time. At least one could make a respectable argument that the resolutions, as they did not reflect State practice, were simply irrelevant to the content of customary international law. See Anthony A. D'Amato, *Trashing Customary Law*, 81 AM. J. INT'L L. 101, 101–05 (1987).

Hannikainen also attempts to analogize the “political” character of resolutions of international organizations to the political character of acts of domestic legislatures. HANNIKAINEN, *supra* note 57, at 233 n.98. But the analogy fails, as it depends on two different senses of the word “political.” As used with respect to international organizations, “political” means that states are acting with reference only to the particular issue before the body, and are not, in fact applying principles that they would either apply in another similar case with different political stakes or adhere to themselves in practice. Since resolutions of international organizations are relevant to customary international law *only* to the extent that they in fact represent the practice of states, to label such a resolution “political” is to indicate that it does not necessarily represent the practice of those voting for it, and thus is irrelevant for purposes of determining the content of customary law. While domestic legislatures may act from all manner of reasons of political expediency, the legal effect of their actions depends simply on the fact of their authority within a given system. That legal effect does not depend on legislative actions somehow evidencing practice outside the legislature. Since a legislature’s authority depends on formal sources, legislative hypocrisy has no legal effect on legislative action. But if states are hypocritical in voting in international organizations, they deprive their votes of legal effect, since such legal effect can exist in any case only to the extent the votes reflect the actual practice of the states whose representatives are doing the voting.

124. See *infra* discussion at notes 168–76.

### B. Content of *Jus Cogens*

The foregoing provides some background as to the evolution of the *jus cogens* concept, but leaves open a question that is central to this discussion: what are the norms falling within the category of *jus cogens* which might be relevant to the subject of this paper?

Addressing this topic requires confronting an aspect of the concept of *jus cogens* which seems somewhat anomalous: as Brownlie has observed, "more authority exists for the category of *jus cogens* than exists for its particular content."<sup>125</sup> Certainly, scholars' concepts of the list of *jus cogens* norms have changed over the decades.

For example, as mentioned above,<sup>126</sup> Verdross included among his list of *jus cogens* norms the freedom of the seas and prohibitions on treaties which obliged a state to forego extending diplomatic protection to its nationals abroad or which rendered a state defenseless. As an example of the last, he apparently had in mind the treaty imposed on Austria after World War I, requiring the disarmament of that state.<sup>127</sup> Kelsen apparently agreed with Verdross regarding freedom of the seas, but not with respect to a prohibition upon waivers of the right to extend diplomatic protection.<sup>128</sup> And Lauterpacht apparently saw both rights as at least partially waivable.<sup>129</sup> Not only have later writers thus questioned Verdross's views regarding the content of *jus cogens*, but those views seem inconsistent with the development of international law. For example, the United Nations Convention on the Law of the Sea has surely qualified many aspects of what Verdross would have called the freedom of the seas.<sup>130</sup> Further, it seems unlikely that requiring a particular state to disarm would be viewed today as unthinkable, given the powers accorded the Security Council eight years after Verdross wrote. But Verdross' 1937 views are hardly the only suggestions for *jus cogens* norms which have been made over the years that would seem suspect in 1995. Professor Schwelb even offered the example of a writer who, prior to World War II, argued that *jus cogens* forbade a state to surrender one of its nationals for war crimes trials, but who wrote after the war that the crimes described in the London Declaration had become a matter of *jus*

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125. Brownlie, *supra* note 54, at 515.

126. See discussion *supra* notes 59-69 and accompanying text.

127. Verdross, *supra* note 59, at 575 n.12.

128. See discussion *supra* notes 70-72 and accompanying text.

129. See discussion *supra* note 75.

130. See, e.g., Convention on the Law of the Sea, Dec. 10, 1982, arts. 55, 57, U.N. Doc. A/CONF/62/122, 21 I.L.M. 1261, 1280 (1982) (regime and breadth of exclusive economic zone).

*cogens*.<sup>131</sup> Sztucki has compiled an extensive catalog of writers' and governments' differing views as to the content of *jus cogens*.<sup>132</sup>

Keeping in mind this tendency for understandings as to the particular content of *jus cogens* to differ and to change over time, it is nonetheless fair to say that contemporary scholars have come to some agreement on the subject. There seems to be little dispute among those supporting the existence of *jus cogens* norms that the rule embodied in Article 2(4) of the United Nations Charter, forbidding the threat or use of force against the territorial integrity or political independence of a member of the United Nations, is a peremptory norm. As noted above,<sup>133</sup> the ILC took this position in its commentary to the draft articles on the law of treaties, as did a number of states at the Vienna Conference. The ILC reiterated this view in its commentary to its draft articles on state responsibility.<sup>134</sup> Writers, including Brownlie,<sup>135</sup> Crawford,<sup>136</sup> Sinclair,<sup>137</sup> and Whiteman,<sup>138</sup> take the same position. Hannikainen concurs, though he acknowledges that states have not in practice consistently refused to recognize either authority over territory seized by force or governments installed in one state through the use of force by another.<sup>139</sup> It should be noted, however, that the dimensions even of this rule are not entirely clear since — though there is much dispute on this point<sup>140</sup> — at least a few writers would read into Article 2(4) an exception for forcible interventions in a state to protect that state's nationals from serious human rights violations perpetrated by the state's government.<sup>141</sup>

A second norm having the character of *jus cogens*, according to a number of authorities, is the prohibition on genocide. The ILC took this position in its comments on Draft Article 50 to the Vienna Convention

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131. Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 967-68 (1967).

132. Sztucki, *supra* note 56, at 76-84, 114-23.

133. See discussion *supra* notes 96-99 and accompanying text.

134. 1976 ILC Report, *supra* note 113, at 102-06.

135. Brownlie, *supra* note 54, at 513, 515.

136. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 106-07 (1979).

137. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 222-23 (2d ed. 1984).

138. Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 625 (1977).

139. HANNIKAINEN, *supra* note 57, at 317-56.

140. *Id.* at 336-37.

141. See, e.g., FERNANDO R. TÉSON, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 127-53 (1988); W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643-45 (1984).

on the Law of Treaties<sup>142</sup> and again in its draft articles on state responsibility.<sup>143</sup> The Restatement of Foreign Relations also takes this position.<sup>144</sup> Although Schwelb expressed some doubt on this question in 1961,<sup>145</sup> writers generally endorsing the *jus cogens* status of the prohibition against genocide include Brownlie,<sup>146</sup> Parker and Neylon,<sup>147</sup> Paust<sup>148</sup> and Whiteman.<sup>149</sup> Hannikainen also agrees, though again noting that states have not in practice acted to prevent or punish acts of genocide.<sup>150</sup>

A third set of norms arguably of *jus cogens* status are those forbidding grave breaches of humanitarian law or crimes against humanity. Brownlie<sup>151</sup> and Whiteman<sup>152</sup> accept this, as does Hannikainen with respect to direct attacks against civilians in internal as well as international armed conflicts.<sup>153</sup>

A fourth norm relevant to the fighting in Bosnia-Herzegovina and possibly of *jus cogens* status is the right to self-determination. However, its character is more controversial than the other three sets of norms discussed in this section. Although the ILC's commentary on the Vienna Convention could be read as implying that interference with self-determination was a violation of a *jus cogens* norm,<sup>154</sup> and its 1976 report on its draft articles on state responsibility labelled interference with the right to self-determination an international crime,<sup>155</sup> some writers are more cautious. Crawford labels the idea that self-determination is a matter of *jus cogens* as "difficult to accept."<sup>156</sup> Hannikainen, after a lengthy analysis, is prepared to acknowledge that self-determination involves a peremptory norm only as applied to "colonial-type domination."<sup>157</sup> Whiteman omits self-determination from her lengthy list of peremptory norms.<sup>158</sup> Brownlie, however, categorizes self-determination as a matter

142. 1966 ILC Report, *supra* note 86, at 248.

143. 1976 ILC Report, *supra* note 113, at 102-04.

144. RESTATEMENT, *supra* note 112, §702(a) and cmt. n.

145. Schwelb, *supra* note 131, at 953-56.

146. Brownlie, *supra* note 54, at 513.

147. Parker and Neylon, *supra* note 114, at 430-31.

148. Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 S. ILL. U. L. J. 131, 139 (1994).

149. Whiteman, *supra* note 138, at 625.

150. HANNIKAINEN, *supra* note 57, at 456-66.

151. Brownlie, *supra* note 54, at 513.

152. Whiteman, *supra* note 138, at 626.

153. HANNIKAINEN, *supra* note 57, at 685.

154. 1966 ILC Report, *supra* note 86, at 248.

155. 1976 ILC Report, *supra* note 113, at 102-06.

156. CRAWFORD, *supra* note 136, at 81.

157. HANNIKAINEN, *supra* note 57, at 424. See generally *id.* at 357-424.

158. Whiteman, *supra* note 138, at 625-26.



of *jus cogens*.<sup>159</sup> In short, there is authority both for and against the proposition that the list of *jus cogens* norms includes the right of self-determination.

To conclude this section, it can be said that both the concept and the content of *jus cogens* have long enjoyed the attention of international lawyers. The next stage of the analysis is to critically examine *jus cogens* concepts, both generally and as they relate to the fighting in Bosnia-Herzegovina.

### III. CRITIQUE OF *JUS COGENS*

This portion of the discussion will seek to demonstrate that the concept of *jus cogens* is both intellectually incoherent and of doubtful utility in international relations. It will first consider certain general problems with the idea of *jus cogens* and then examine more particular difficulties illustrated by the consequences of taking the concept seriously in connection with the conflict in Bosnia-Herzegovina.

#### A. *General Critique of Jus Cogens*

As should be clear by this point in this article, any consideration of the concept of *jus cogens* is necessarily rather complex. To ease understanding of this portion of the discussion, it will be divided into three parts. The first part will briefly demonstrate that the analogy between the domestic law concept of public policy and the corresponding concept of *jus cogens* in international law, upon which the original arguments in favor of an international *jus cogens* were based, is fundamentally flawed. The second section will consider the implications of the difficulty in specifying the content of *jus cogens*, arguing that this problem reveals fundamental theoretical and practical problems with the concept. The last portion of the discussion will attempt to show that considering the concept of an international *jus cogens* in light of reasonable criteria of legitimacy exposes both theoretical problems and practical difficulties. Taken together, it is hoped that the parts of this analysis will show that the concept of *jus cogens* can neither make any sense nor serve any useful purpose in the international legal system, though it offers the potential for doing considerable harm.

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159. Brownlie, *supra* note 54, at 513.

### 1. *Jus Cogens* and Public Policy

As noted above, the concept of public policy in domestic law apparently played a role in suggesting to Verdross<sup>160</sup> and to the special rapporteurs on the law of treaties from Lauterpacht through Waldock<sup>161</sup> that a similar concept must necessarily exist in public international law. Since the domestic law idea apparently contributed to the formulation of the international law concept, it seems important to consider the solidity of the connection between the two.

In fact, there are significant problems with seeking to transfer the idea of public policy as used in domestic legal systems to the international arena. At the outset, it is crucial to make clear that what is meant by public policy in this context is a body of law *not* susceptible to modification by the subjects of the legal system in question. The parallel in the international system would be a set of rules which states could not alter even by general multilateral treaty, rules intended to limit the freedom of states in exactly the same way that public policy notions limit the freedom of individuals in domestic legal systems. In other words, this is the concept of public policy which Lauterpacht sought to apply to the law of treaties.<sup>162</sup> It thus must be distinguished from the concept of *jus cogens* finally adopted in the Vienna Convention on the Law of Treaties, which, as noted above<sup>163</sup> and as Sztucki has stressed,<sup>164</sup> was crafted to depend entirely on acceptance by states.

This notion of a *jus cogens* not dependent upon the will of states has drawn telling scholarly criticism. Schwarzenberger argued as early as 1965 that the international legal system was simply too underdeveloped to support any non-consensual *jus cogens* concept.<sup>165</sup> Sztucki also pointed out, over twenty years ago, problems in applying any analogue to the idea of domestic public policy in international law. For one thing, he noted, in a domestic legal system the courts can provide a single authoritative view of the public policy of the system; in the international system, in contrast, the degree of centralization is less than in any developed domestic legal system, with no single institution's view of public policy being determinative. Sztucki also stressed the importance, for the establishment of any *jus cogens* regime, of the existence of an

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160. See *supra* notes 59–69 and accompanying text.

161. See *supra* notes 73–85 and accompanying text.

162. See *supra* notes 73–83 and accompanying text.

163. See *supra* notes 86–95 and accompanying text.

164. SZTUCKI, *supra* note 56, at 97–98.

165. Georg Schwarzenberger, *International Jus Cogens?*, 43 TEX. L. REV. 455, 476 (1965).

institution capable of enforcing, as well as announcing, *jus cogens* norms, and the non-existence of any such institution in the international system. Further, he noted, jurisdiction in domestic legal systems is non-consensual, such that individuals are bound to accept a court's view of public policy regardless of their own preferences; the same situation, obviously, does not obtain internationally. In the international system, indeed, the usual mode of resolving a dispute will be negotiation between the parties, in light of the uncertain availability of a tribunal.<sup>166</sup> Christenson adds to Sztucki's points an additional important observation: that in domestic systems, an individual who wishes to enforce his rights has no alternative but to turn to the courts, and thus to accept their views of public policy. In the international system, in contrast, states have available a broad array of self-help remedies, and thus do not require the aid of a tribunal in order to defend their rights; correspondingly, they can be less concerned as to a tribunal's views of public policy.<sup>167</sup>

One other key difference between the international legal system and domestic legal systems also renders suspect any international analogue to domestic systems' broad public policy concepts. The domestic system addresses individuals. The fact that particular rules of public policy may work difficulties for particular individuals will not necessarily create corresponding difficulties for society, since hardship to some individuals would presumably be outweighed by the gains to others brought about through enforcing whatever policy would be in question. Even with respect to the harshest instrument of public policy, the criminal law, the cost to society of treating criminals as violators of public policy is relatively modest. It is certainly feasible to employ police forces, establish criminal justice systems, and build prisons. Nor is the social cost of plucking criminals out of society and confining them in prison typically very great. While there may be hardship to criminals' families, criminals can usually be replaced in their other social roles by other people.

The international legal system, however, deals primarily with states. To the extent that enforcing a *jus cogens* rule against a particular state does significant harm to that state, the calculus of costs to international society is different from the corresponding domestic situation. If a state is weakened by application of a *jus cogens* rule, the consequences may spill over and affect other states. States, unlike individuals, cannot easily

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166. SZTUCKI, *supra* note 56, at 8 n.24, 8-9, 162, 190-91. While it is of course true that many domestic disputes with public policy overtones are in fact resolved by negotiation between the parties, Sztucki's observation remains valid, since such bargaining in domestic systems must necessarily take into account the likely outcome of a judicial resolution of the dispute, given the reality of the courts' compulsory jurisdiction. It would be surprising if the views of international courts, with their consensual jurisdiction, had a similar influence upon international negotiation.

167. Christenson, *supra* note 109, at 600.

be replaced in the roles they play in international society. Thus, to the extent that the concept of an unwaivable public policy would require in a given case some action harmful to a particular state, the costs to international society might well be considerably greater than would the corresponding costs of applying a rule of public policy domestically.

It is clear, then, that the genesis of the *jus cogens* concept rests on what must be considered fundamental intellectual confusion. It is derived from rules limiting the freedom of subjects of law in legal systems in which the authority to determine such rules is undisputed; the subjects of law cannot escape the courts' control; these subjects have in any case considerable incentive to submit themselves to the rules applied by the courts; and the negative social consequences of compelling any single subject of the law to conform to public policy rules will almost always be modest. The concept is to be applied, however, in an international system in which none of those circumstances are present. Given these crucial differences, there is considerable reason to question the possibility of the international legal system applying this concept as its analogue is applied in domestic law. The next portions of this discussion will address particular aspects of the problems raised by this attempt at intellectual borrowing.

## 2. The Content of *Jus Cogens*

Considering the issue of the content of *jus cogens* illustrates both the theoretical chaos of that doctrine and its capacity for practical harm.

As pointed out in Section II.B, ideas as to the content of *jus cogens* have changed over time. Some of those put forward by Verdross would probably not be seen as enjoying *jus cogens* status today. Even with respect to the small number of putative *jus cogens* norms discussed in Section II.B as potentially relevant to this article, there has been change in a relatively brief period. Thus, Hannikainen's exhaustive study of the actual status of particular *jus cogens* norms leads him to conclude that the right of self-determination can be seen as a matter of *jus cogens* only in a severely qualified way, and other writers have expressed doubt as to self-determination's *jus cogens* status in any sense.<sup>168</sup> Yet self-determination figured in the ILC's commentary on draft Article 50<sup>169</sup> and was mentioned as an example of a *jus cogens* norm by a significant number of delegations to the Vienna Conference.<sup>170</sup> Further, some writers are offering qualifications to the reach of Article 2(4) of the U.N. Charter not

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168. See *supra* notes 156–58 and accompanying text.

169. 1966 ILC Report, *supra* note 86, at 248.

170. SZTUCKI, *supra* note 56, at 119.

mentioned when that article was treated by the ILC and the Vienna Conference as the most prominent example of a *jus cogens* norm.<sup>171</sup>

But more significant than this disagreement over the precise standing of particular norms; is the more fundamental disagreement discussed above,<sup>172</sup> regarding the source of those norms. When scholars cannot agree as to whether *jus cogens* norms are to be derived from positive law or are, instead, emanations of natural law, there is reason to question whether there is even a core understanding of the concept. Indeed, it would seem fair to conclude that there is no such understanding, since, as will be demonstrated below, there are in fact two incompatible versions of *jus cogens* current in international law, their incompatibility apparently not being clear to many writers in the field.<sup>173</sup> It is difficult to accept the proposition that a concept can be seen as a legal rule when its content is so vague as to permit so great a degree of confusion.

This conclusion is reinforced when it is realized that individual scholars apparently cannot apply their individual approaches to the subject consistently. For example, Hannikainen describes the process of formation of rules of customary international law, including customary rules with the character of *jus cogens*, as requiring state practice consistent with the norm in question; he is prepared to reduce the degree of state practice required with respect to rules also embodied in resolutions of international organizations, but he insists that the practice requirement cannot be eliminated.<sup>174</sup> However, he appears to abandon his own insistence on state practice when he examines the *jus cogens* status of particular norms. Thus, with respect to genocide, he notes that there has been strikingly little state practice involving actions by states either to prevent particular acts of genocide, or to punish the perpetrators of genocide after the fact, or even to condemn individual cases of genocide.<sup>175</sup> Yet he asserts:

However, it is evident that the international community of States has so unequivocally prescribed the absolute obligation of States not to resort to genocide under any circumstances whatsoever that the deficiencies in reaction in actual cases do not deprive the prohibition of genocide of its peremptory character.<sup>176</sup>

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171. See *supra* note 141 and accompanying text.

172. See *supra* notes 112–23 and accompanying text.

173. See *supra* notes 186–206 and accompanying text.

174. HANNIKAINEN, *supra* note 57, at 236–37.

175. *Id.* at 464.

176. *Id.*

Further, he concludes:

It can be *concluded* that the international community of States has been inactive in determining, whether acts of genocide have taken place, and in condemning acts of genocide . . . However, there is no evidence that the UN would have accepted the lawfulness of genocide itself in any specific circumstance. The prohibition of genocide is *peremptory* in principle but the functioning of that prohibition in the practice of the UN is at present limited.<sup>177</sup>

Hannikainen's conclusion is very hard to understand, given his own stated insistence on state practice as a basis for customary law *jus cogens* rules. Aside from his questionable reliance on the practice of the United Nations, in violation of his own insistence on a focus upon the practice of states, he seems to be saying that a rule is of *jus cogens* status even though states have in practice shown themselves unwilling to enforce it. His statement that "[t]here is no evidence that the UN would have accepted the lawfulness of genocide itself . . ." is hardly relevant, since the issue is whether the international community has demonstrated in practice that genocide is not to be permitted, not whether that community has indicated affirmative approval of genocide. And it is not clear what is meant by characterizing a rule as "peremptory in principle" but functioning at only a limited level in practice. Law is applied in individual cases; if in fact a rule is seldom or never applied in a concrete case, what can it mean to say that it is "in principle" obligatory in every case?

Of course, Hannikainen is only one writer, but the difficulties in following his arguments reinforce the impression that the whole subject of the theory of determining the content of *jus cogens* is hopelessly confused. Writers do not merely disagree with one another over the most fundamental aspects of the question; they even disagree with themselves.

In addition to this problem, however, there is another, going not so much to the intellectual confusion surrounding the *jus cogens* concept as to its utility. That problem is that none of the methods urged as a means of establishing a norm's *jus cogens* character is a very good way of deciding that a particular norm should be non-derogable, that is, that it *must* be applied in *all* cases in which it is implicated.

One would hope that the determination that a particular rule should be applied as rigidly as the *jus cogens* concept requires would pass through a number of stages. First, it would be necessary to attempt to foresee as broad a range as possible of the circumstances in which the proposed rule could apply. It would next be necessary to gather a wealth of information about each of those sets of circumstances, in order to

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177. *Id.* at 466.

identify and evaluate the costs and benefits of applying the rule in particular contexts. No decision as to the status of the rule would take place until after this evaluation had been completed. In particular, it would be crucial to keep in mind that each state fills many roles in the international system, and that the consequence of applying a rule rigidly to a state in one situation may affect its willingness and ability to act in other situations, possibly to the detriment of the system generally.

Instead of a process like that described, however, international law offers two others as means of determining the content of *jus cogens*. They are, as suggested above, either a focus upon positive acts of states, or reliance upon natural law. While they differ fundamentally from each other, neither would permit the sort of careful weighing of alternatives that would seem necessary when what is being considered is making a particular rule unwaivable.

The problem with reliance on positive acts of states is that this inquiry must necessarily depend on state practice, since practice not only determines the content of customary international law but, as a practical matter, controls the meaning and application of treaties as well. And reliance on state practice to determine rules of *jus cogens* is necessarily undesirable. Even if practice were unambiguous, which would be uncommon, prominent instances of practice may be inapposite. For example, Crawford argues that the Allies' reestablishment after World War II of states annexed by Germany and Italy prior to September, 1939, supports the proposition that an illegal annexation cannot extinguish a state's existence.<sup>178</sup> Yet one may question whether the treatment accorded the subjugated Axis powers would provide very good guidance in evaluating the status of an arguably illegal annexation carried out by a state which had not been completely defeated in war.

Reliance on natural law-derived *jus cogens* raises a different set of problems. For one thing, such an approach, exemplified by Verdross' reliance on "the ethics of a particular community" as a source of *jus cogens* rules,<sup>179</sup> risks falling into the error of assuming that, if it would be a good thing for subjects of a legal system to refrain from particular behavior, it must make sense to render the behavior illegal. This does not, however, follow. If the behavior is rendered illegal, it will become necessary to determine how to deal with subjects of the legal system who engage in the behavior anyway. And it could easily happen that, for a variety of reasons, treating those engaging in the behavior as lawbreakers would be so costly as to outweigh any benefits realized by adoption of

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178. CRAWFORD, *supra* note 136, at 418-19.

179. Verdross, *supra* note 59, at 576.

the legal rule. One example that comes to mind is the decidedly mixed experience of Prohibition in the United States in the 1920's.<sup>180</sup>

A second problem with a natural law approach to *jus cogens*-making from the perspective of the quality of the resulting rules is that, as a practical matter, such an approach could turn out in practice to be court-centered. Consideration of the moral criteria appropriate to a natural law analysis is closer to the function of courts than to that of any other international institution. Courts, however, are not equipped to make the policy judgments described above. Indeed, any institution capable of carrying out the sort of policy-making described above is not a court at all, but a particularly skillful legislature.

Thus, whether one considers an approach centered in the practice of states or one grounded in natural law, the conclusion is the same. It seems most unlikely that either process would permit the sort of systematic analysis of the actual operation of a proposed rule that would seem essential if the community is to have confidence that permitting *no* derogation from a particular rule would, overall, do more good than harm.

It thus appears that there is reason to doubt the existence of theoretical criteria sufficiently precise to identify *jus cogens* norms. Nor is there any reason to believe that any of the suggested means of determining the content of *jus cogens* would necessarily produce norms whose application would in practice produce benefits that would outweigh the costs which inhere in applying any legal rule to those who choose to disobey it. And of course, other problems follow from these. For example, suppose that it were somehow possible to settle upon an agreed means of identifying *jus cogens* norms, and it was determined that particular rules enjoyed that status. It is certainly possible that various of these norms could point to opposite conclusions in a particular question of international relations.<sup>181</sup> Yet the difficulties described above would not only make the initial identification of the content of *jus cogens* problematic. It would also preclude, as a practical matter, establishing a hierarchy of *jus cogens* norms, indicating which of two or more competing norms should, in a particular case, give way. Absent such a hierarchy, however, the *jus cogens* character of the competing norms would exacerbate the confusion by arguably rendering any possible resolution illegal.

It can be said, then, that considering the aspects of the difficulties in fixing the content of *jus cogens* provides evidence of the theoretical incoherence of the doctrine, as well as of its limited practical utility. In

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180. See DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 20-35, 199-202 (1979).

181. See, e.g., Christenson, *supra* note 109, at 616-19 (demonstrating that norms are often used to support different substantive propositions).



the next portion of the discussion, consideration of the legitimacy of the *jus cogens* concept indicates further theoretical and practical concerns.

### 3. The Legitimacy of *Jus Cogens*

Professor Franck has offered a two-part definition of “legitimacy” as: “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively”<sup>182</sup> and also “the perception of those addressed by a rule or a rule-making institution that that rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>183</sup> Necessarily the two parts of the definition are related, since if a rule is not perceived as satisfying the second part, the likelihood that it will satisfy the first part is reduced.<sup>184</sup> In light of this consideration, it is a telling weakness of the concept of *jus cogens* that the theoretical basis for the claim that the concept is a legitimate part of the international legal system is fundamentally confused. Further, as will be demonstrated below,<sup>185</sup> the mechanism most often suggested for identifying the content of the concept likewise seems to be of doubtful legitimacy in this context.

Considering the theoretical issue first, the problem is simply that the term “*jus cogens*” is applied in international law to two quite different, indeed contradictory concepts, one having much firmer legal standing than the other. Yet arguments depending on employment of *jus cogens* treat the two as either identical or, at least, complementary, and seek to transfer the claim to authority of the more firmly based concept to its much more shakily-grounded competitor.

To understand the foregoing assertions, it is helpful to recall that the formulation of the *jus cogens* concept adopted in the Vienna Convention on the Law of Treaties was a departure from the approach to the issue previously taken by the ILC’s special rapporteurs.<sup>186</sup> As both Rozakis and Sztucki have pointed out,<sup>187</sup> the concept of peremptory norms developed prior to the Vienna Conference — which will be labelled for convenience “Verdrossian *jus cogens*” — did not make a given norm’s status as *jus cogens* dependent on the views of states. Rather, the status of a norm was a function of its object, and states could not alter *jus cogens* norms. Lauterpacht’s comments on his draft Article 15 make this explicit. Indeed, he apparently took for granted the inability of states to alter

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182. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 16 (1990).

183. *Id.* at 19.

184. *Id.* at 15–19.

185. See *infra* notes 207–25 and accompanying text.

186. See *supra* notes 84–95 and accompanying text.

187. SZTUCKI, *supra* note 56, at 97–98, 103–05; ROZAKIS, *supra* note 104, at 52–53.

peremptory norms, even those which had become outmoded, and saw that situation as a problem requiring attention.<sup>188</sup>

The language of Article 53 of the Vienna Convention, on the other hand, is unequivocal: a norm's *jus cogens* character depends on acceptance by states.<sup>189</sup> Further, in its commentary to its draft Article 50, the ILC observed that changes in *jus cogens* rules would "most probably be effected through a general multilateral treaty."<sup>190</sup> This phrasing is significant in two respects. First, it may be that Sztucki went too far in characterizing the concept of *jus cogens* as "virtually meaningless"<sup>191</sup> if it could be "validly modified by [general multilateral] treaties, instead of establishing limits for their validity"<sup>192</sup> since this concept could still operate with respect to treaties with small numbers of parties. Yet, he is certainly correct to assert that, if a rule can be modified by general multilateral treaty, its capacity to limit the freedom of states is not very great. This conclusion is reinforced if one considers the emphasized language in the quotation above. It implies that conclusion of a general multilateral treaty would not necessarily be the only means of altering *jus cogens* rules, suggesting that such rules could perhaps be altered by changes in customary international law as well. This appears to be Rozakis' view when he argues that if a rule ceases to satisfy Article 53's criteria, it ceases to be a *jus cogens* norm.<sup>193</sup> He holds to this view even with respect to a new legal situation not embodied in a new *jus cogens* norm, despite the language of Article 53 permitting modification of a *jus cogens* norm "only by a subsequent norm of general international law having the same character."

Article 53 *jus cogens* also differs from its Verdrossian counterpart in another important respect: the scope of standing to apply the doctrine. Verdross' references to the "ethics of the international community,"<sup>194</sup> his reference in later writing to "the higher interest of the whole international community"<sup>195</sup> and Lauterpacht's use of the term "international public policy"<sup>196</sup> at least imply that the interests embodied in *jus cogens* rules are those of the international community, not simply those of individual states. Modern writers certainly argue that proper application of the *jus*

188. See *supra* notes 80–82 and accompanying text.

189. Vienna Convention, *supra* note 100, art. 53.

190. 1966 ILC Report, *supra* note 86, at 248 (emphasis added).

191. SZTUCKI, *supra* note 56, at 111.

192. *Id.*

193. ROZAKIS, *supra* note 104, at 88–93.

194. Verdross, *supra* note 59, at 572.

195. Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 58 (1966).

196. Lauterpacht, *supra* note 73, at 155.

*cogens* concept requires that all states be able to invoke it, not simply those directly affected by the breach of a *jus cogens* obligation.<sup>197</sup> Yet, as noted above,<sup>198</sup> the Vienna Convention limits the right to assert a treaty's violation of a *jus cogens* norm to states themselves parties to the treaty. It applies the label *jus cogens*, that is, to a right available only to states particularly affected by some act contrary to some *jus cogens* rule, not to states generally.

Thus, there are two concepts, each called "*jus cogens*." One embodies a content not dependent on the will of states and presumably can be invoked by any state. The content of the other depends entirely on state acceptance; it can, moreover, be invoked only by states particularly affected by the breach of some element of its content. Clearly, the reach of these two doctrines would be vastly different. Indeed, it seems that the two concepts can hardly co-exist. States are either controlled by rules they cannot change, or they are not. This point — that the two concepts are incompatible — is of fundamental importance, since they are by no means equally authoritative in international law.

As Hannikainen has pointed out, it is the Article 53 version that has been put forward as the proper characterization of *jus cogens* in international legal doctrine.<sup>199</sup> As noted above, the definition has been accepted by a significant number of states which adhered to the Vienna Convention and the ILC which relied upon it in drafting the Convention on International Organization Treaties; the definition was in fact adopted in that relatively recent Convention.<sup>200</sup> The Restatement of Foreign Relations Law also treats Article 53 as authoritative.<sup>201</sup> It seems impossible, therefore, to challenge the argument that the Article 53 definition has achieved firm international acceptance and, correspondingly, has a solid claim to doctrinal legitimacy.

If, however, *jus cogens* in international legal doctrine means Article 53 *jus cogens*, and if Article 53 *jus cogens* is incompatible with Verdrossian *jus cogens*, it is very hard to understand any claim that Verdrossian *jus cogens* is also part of international legal doctrine. If it were, it would effectively nullify Article 53 *jus cogens*, the standing of which seems indisputable. Certainly, nothing comparable to the clear indications of acceptance of Article 53 *jus cogens* can be offered to fortify the status of Verdrossian *jus cogens*.

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197. HANNIKAINEN, *supra* note 57, at 269–77; Rozakis, *supra* note 104 at 191–92.

198. See *supra* notes 102–04 and accompanying text.

199. HANNIKAINEN, *supra* note 57, at 3.

200. See *supra* notes 105–08 and accompanying text.

201. RESTATEMENT, *supra* note 112, § 331 cmt. e.

As important as this point is, however, it is apparently not well understood, and has produced considerable confusion. Indeed, even writers whose arguments depend on Verdrossian *jus cogens* place great weight on international acceptance of Article 53 *jus cogens* to justify their positions, apparently unaware of the incompatibility of the two doctrines.<sup>202</sup> Others, while making no reference to Article 53, refer to *jus cogens* rules as those able to constrain the most powerful states, yet define those rules by reference to their actual implementation.<sup>203</sup> Yet, to focus on implementation is to focus on the actual behavior of states, which is relevant under Article 53, but not if one applies a Verdrossian concept. Similarly, the Restatement of Foreign Relations Law and some writers have taken the position that *jus cogens* can control the content of customary international law.<sup>204</sup> Such an assertion would make sense if what was at issue was Verdrossian *jus cogens*, as carried forward in Lauterpacht's original formulation and in the writings of those scholars who look to natural law as the source of *jus cogens*.<sup>205</sup> This follows because the content of Verdrossian *jus cogens* is independent of the consent, and therefore, presumably, of the practice of states. The version of *jus cogens* embodied in Article 53, however, makes state acceptance the only test of *jus cogens*. If this view is correct, there is no higher authority in international law than the consensus of states. Under this latter view of *jus cogens*, it is a contradiction in terms to refer to *jus cogens* as controlling customary international law. This follows, since to assert that *jus cogens* controls customary international law is to assert that changes in the general practice of states cannot affect the legal status of those rules of customary international law of *jus cogens* status. But such a development is logically impossible with respect to Article 53 *jus cogens*, since it would require that a rule which *ex hypothesi* did not represent the general practice of states was nonetheless "accepted and recognized by the international community of states as a whole."

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202. See Christopher A. Ford, *Adjudicating Jus Cogens*, 13 WIS. INT'L L.J. 145, 146-49 (1994); Craig Scott et al., *A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina*, 16 MICH. J. INT'L L. 1, 22-24 (1994).

203. Compare Christenson, *supra* note 109, at 608 (characterizing "an effective *jus cogens* decision" as one in which the decision-maker "must decide effectively . . . that sovereign nation-states, no matter how powerful, may not agree to defect from a peremptory norm") with *id.* at 645-46 (asserting that the content of *jus cogens* would depend on the identity of the decision-makers who acquired power sufficient to impose their view of *jus cogens* on the world).

204. See *supra* notes 112-17 and accompanying text.

205. See *supra* notes 112-19 and accompanying text.

Again, some writers have argued that *jus cogens* provides a basis for judicial review of the Security Council.<sup>206</sup> This argument also must depend on Verdrossian *jus cogens*, rather than on the Article 53 version. After all, the fact that the Council takes an action necessarily signifies that the states making up the Council do not believe that action violates a rule “from which no derogation is permitted.” And if the members of the Security Council do not so characterize the action, it can hardly be said that “the international community as a whole” sees the matter differently — to argue otherwise is to suggest that one can exclude the Security Council’s membership from the international community as a whole.

It thus seems clear that, as a theoretical matter, the only version of *jus cogens* with a plausible claim to legitimacy within the international community is a very limited one. The version of *jus cogens* which supports the broadest claims for the effect of that doctrine not only contradicts the version whose legitimacy is established, but it also can point to no comparable basis for its own legitimacy. The lack of understanding of this point reinforces the incoherence of international *jus cogens* created by the falseness of the domestic law analogy which gave birth to the intellectual concept. This is especially true in light of writers’ continued reliance on Verdrossian *jus cogens*, for example, with respect to arguments asserting that *jus cogens* can prevent change in customary international law or place limits on the authority of the Security Council.

The legitimacy problems of *jus cogens* are not limited to the theoretical level, however. One must also consider the legitimacy of the claim of any institution which asserts the authority to determine the content of *jus cogens*. First, it must be stressed that this issue of institutional legitimacy cannot be avoided, since institutions must necessarily be involved in determining the content of *jus cogens*. That is, one cannot hope to avoid reliance on institutional creation of *jus cogens* norms by, for example, reference to natural law concepts, perhaps characterized as “necessary” elements of the international legal system. This follows because, as Professor Rubin has observed, natural law concepts can make themselves felt only if relied upon by particular human decision makers in concrete cases — yet if so relied upon, those concepts control any subsequent decisions because of the choice of the decision maker to rely upon them. Even if the decision maker characterizes the decision she reaches as compelled by natural law, the decision has consequences because she is in a position to make decisions which cannot be ignored,

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206. Paust, *supra* note 148, at 138–40; Scott et al., *supra* note 202, at 85–90; Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT’L L.J. 1 (1993).

not because natural law somehow automatically binds the decision-maker.<sup>207</sup> And one can hardly treat reliance on the "necessity" of some element to a particular legal system as dictating particular non-derogable rules of that system unless there is widespread agreement on a carefully defined hierarchy of systemic goals<sup>208</sup> — again, a situation which can hardly be self-creating.

We are thrown back, then, on institutions to determine the content of non-consensual rules of international *jus cogens*. But there are none. To be sure, the Security Council of the United Nations is empowered to make decisions binding, as a practical matter, on all states respecting certain aspects of international relations,<sup>209</sup> but it is a political rather than a legislative body, organized to deal with particular crises rather than to formulate general policies. Further, since its competence to issue binding decisions is limited to matters which arguably threaten international peace and security,<sup>210</sup> there are broad areas of international relations as to which it is not authorized to act.

In any case, the Security Council is not commonly recommended as the arbiter of *jus cogens*. Rather, that position is granted to international tribunals, in particular the International Court of Justice (ICJ). It will be recalled that Lauterpacht's original draft article on illegal treaties made the voidness of such treaties dependent on a declaration to that effect by the ICJ.<sup>211</sup> Further, the method finally chosen by the Vienna Conference on the Law of Treaties to resolve disputes between states over *jus cogens* was that of compulsory jurisdiction in the ICJ.<sup>212</sup> Indeed, as noted above, some writers have gone so far as to suggest that the ICJ has the authority to enforce *jus cogens* rules even against the Security Council.<sup>213</sup>

One must question, however, the legitimacy of any claim that the ICJ or other international tribunals may properly define the content of *jus cogens*. The legitimacy problem in this context can, again in Professor Franck's terminology, be characterized as lack of "pedigree," that is, the lack of "authenticated status."<sup>214</sup> In other words, states do not perceive international tribunals as generally authorized by their status to compel them to act in ways they do not wish to act.

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207. Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 HARV. J. INT'L L. 149, 149-50 (1993).

208. Christenson, *supra* note 109, at 587 n.8.

209. U.N. CHARTER, ch. VII.

210. *Id.*

211. *See supra* note 73 and accompanying text.

212. Vienna Convention, *supra* note 100, art. 66.

213. *See supra* note 206 and accompanying text.

214. *Id.* at 94.

To take the ICJ as the prime example, this lack of status is manifested in two distinct ways. The first is the extremely limited character of the ICJ's authority as defined by its Statute. Only states may be parties to cases in which it renders binding decisions.<sup>215</sup> Its jurisdiction over states is purely consensual; even its so-called compulsory jurisdiction depends on a state's (revocable) acceptance of that jurisdiction.<sup>216</sup> Its decisions are binding only with respect to the case before it; they do not establish rules of law through *stare decisis*.<sup>217</sup> The ICJ is empowered only to apply, not to make, law.<sup>218</sup> This last point is particularly significant if what is to be considered is Verdrossian *jus cogens*, so that a court announcing the existence of such a rule would not simply be relying on the general acceptance of the rule by states, but rather on its own views of the needs of the international system. Finally, the ICJ's judgments are enforceable only by and at the discretion of the Security Council.<sup>219</sup>

The drafters of the ICJ's Statute have thus created a "court" which can neither claim jurisdiction over states against their wills nor enforce its judgments against states who have submitted to its jurisdiction. The ICJ, therefore, is not trusted by the states which established it to exercise any significant degree of power. This effective refusal to permit the ICJ to act against non-consenting states simply cannot be squared with an effort to portray the ICJ as authorized to establish non-derogable rules of international law. (Of course, the ICJ's authority to hear cases arising under Article 66 of the Vienna Convention is not here in question,<sup>220</sup> firmly based as it is on state consent. But since only 76 states are parties to the Vienna Convention — at a time when the membership of the United Nations exceeds 180<sup>221</sup> — Article 66 provides only limited justification for any claim of general authority in the ICJ to determine the content of *jus cogens*).

Aside from formal indications that the ICJ's legitimate authority is perceived by states as extremely limited, there are practical reasons to doubt the legitimacy of any effort by the ICJ to claim authority to determine the content of *jus cogens*. One is that states do not use the ICJ

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215. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 36, ¶ 2.

216. *Id.*, art. 34.

217. *Id.*, art. 59.

218. *Id.*, art. 38.

219. U.N. CHARTER, art. 96, ¶ 2. Given all these factors, one must seriously consider Sztucki's suggestion that Article 66 of the Vienna Convention on the Law of Treaties, by essentially asking the ICJ to make general declarations as to the content of *jus cogens*, calls on the court to exceed its jurisdiction, Sztucki, *supra* note 56, at 141–42.

220. Vienna Convention, *supra* note 100, art. 66.

221. *Membership of Principal United Nations Organizations in 1995*, 32 U.N. MONTHLY CHRON., Mar. 1995, at inside back cover.

much. It may be that this fact reflects both the availability of diplomatic channels for the resolution of particular disputes and the limited availability of international tribunals, as Sztucki has suggested.<sup>222</sup> In any case, Professors Carter and Trimble were able to record only 69 contentious cases and 21 advisory cases brought before the ICJ over the period 1945–mid-1993.<sup>223</sup> Such a lack of usage certainly raises doubts as to the degree of respect felt for the ICJ by states.

Furthermore, states ignore the judgments of the ICJ relatively frequently. This phenomenon is common enough that an American federal court of appeals took note of it, rejecting the argument that an obligation to obey decisions of the ICJ in the exercise of its compulsory jurisdiction was “accepted and recognized by the community of states as a whole.”<sup>224</sup>

All of these observations raise serious questions as to the theoretical and practical legitimacy of any attempt by the ICJ, and by extension, less prestigious tribunals, to determine the content of *jus cogens*. In light of this conclusion, it is puzzling that writers addressing the subject of *jus cogens* pay as much attention to the opinions of international tribunals as they do. There would seem to be no justification for reliance on judicial formulations of *jus cogens* without some indication that the formulation has had some impact on international relations. For example, Christenson, in his provocative article on *jus cogens*, places some weight on two decisions by the ICJ and one by the Inter-American Commission on Human Rights, all of which hinted at relying or squarely relied upon *jus cogens* concepts in reaching their results.<sup>225</sup> Yet the losing state ignored the adverse judgments in all three cases, raising doubts as to the significance of the tribunals’ efforts to fortify their conclusions by reference to *jus cogens*.

In summary, then, consideration of the legitimacy of international *jus cogens* reinforces the impression of intellectual incoherence and practical irrelevance. The only version of that doctrine with a plausible claim to legitimate status has a relatively limited reach — yet claims are made for a much broader reach of the doctrine. Further, the legitimate authority of the institution most frequently mentioned as the identifier of *jus cogens* norms is itself limited. Its status would not appear to be up to setting limits on the freedom of states. In light of states’ limited willingness to resort to the ICJ or to abide by its judgments, any court-centered concept

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222. SZTUCKI, *supra* note 56, at 190–91.

223. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS AND NEW DEVELOPMENTS* 44–47 (1994).

224. *Committee of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940–41 (D.C. Cir. 1988) (quoting Vienna Convention, *supra* note 100, art. 53).

225. Christenson, *supra* note 109, at 607–08, 620–23.



of non-consensual international *jus cogens* can have little practical effect. Considerations of legitimacy, then, support the conclusion that the *jus cogens* concept is weakly justified theoretically and practically irrelevant.

The foregoing sections have offered a general exposition of the theoretical and practical weaknesses of the concept of *jus cogens* with respect to its origins, its content, and the legitimacy of its application. The next portion of the discussion offers a concrete example of the practical problems the doctrine can cause.

## B. Jus Cogens and Bosnia-Herzegovina

### 1. Introduction

Preliminarily, it is necessary to make explicit precisely how the concept of *jus cogens* affects and is affected by the situation in Bosnia-Herzegovina. Those interconnections take several forms.

First, *jus cogens* impacts on the Bosnia-Herzegovina conflict to the extent that self-determination is a *jus cogens* norm, which, it will be recalled, is controversial.<sup>226</sup> Self-determination is relevant in two ways. First, as previously discussed, one of Germany's justifications for recognizing Slovenia and Croatia in 1991 was derived from the right of self-determination, and that act of recognition apparently contributed to the commencement of hostilities in Bosnia-Herzegovina.<sup>227</sup> That is, there is some reason to believe that adherence to a norm arguably of *jus cogens* character helped start a brutal war. Recognition took place, moreover, in a context in which no clear gain from that step could be assumed.

The right to self-determination is also relevant to this conflict because it arguably provides a basis for the territorial claims of the Bosnian Serbs.<sup>228</sup> To be sure, the Arbitration Commission of the EC's Conference on Yugoslavia rejected those claims,<sup>229</sup> but the Commission's opinion leaves many questions unanswered and fails to address specifically the question of whether the right to self-determination is of *jus cogens* status and, if so, what the consequences of that status are.<sup>230</sup>

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226. See *supra* notes 154–159 and accompanying text.

227. See *supra* notes 14–20 and accompanying text.

228. See Opinion No. 2, Conference on Yugoslavia Arbitration Commission, Jan. 11, 1992, 31 I.L.M. 1497, 1498 (1992) [hereinafter Opinion No. 2]; compare Anderson, *supra* note 36, at 390–91.

229. Opinion No. 2, *supra* note 228, at 1498.

230. The relevant paragraph from the Arbitration Commission's opinion reads as follows:

The Commission considers that international law as it currently stands does not spell out all the implications of the right to self-determination. However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise.

Leaving aside self-determination questions, it seems clear that Bosnia-Herzegovina is a victim of use of force by a state (the FRY) in violation of Article 2(4) of the Charter of the United Nations. Since Bosnia-Herzegovina is a member of the United Nations,<sup>231</sup> it necessarily falls into the class of entities entitled to the protection of Article 2(4). Since its territorial integrity is threatened by a use of force, given that armed groups hostile to it control 50% of its land area, and since that use of force has apparently involved FRY troops and arguably has been at times controlled by the FRY,<sup>232</sup> it is at least maintainable that Bosnia-Herzegovina has been the victim of a violation of Article 2(4). This violation implicates *jus cogens* since Article 2(4) is generally understood, at least in this context, to be a rule of *jus cogens*, assuming there are any such rules.<sup>233</sup>

Finally, *jus cogens* is arguably implicated in the context of the fighting in Bosnia-Herzegovina with respect to violations of humanitarian law. There is clearly evidence that this conflict has been the occasion for the commission of both genocide and/or grave breaches of humanitarian law not amounting to genocide, generally by the Serbs;<sup>234</sup> indeed, the Tribunal has indicted the Bosnian Serbs' leaders

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*Id.* at 1498. The Commission went on to suggest that application of the self-determination principle could require that the Serb populations in Bosnia and Croatia be permitted to choose their nationalities for themselves.

There are several problems with this opinion. First, as noted in the text of this article, it does not address the question whether the right of self-determination enjoys the status of *jus cogens*. Second, it is surprising to see a tribunal deal with a legal principle of uncertain content by simply noting the fact of uncertainty; presumably, if the principle in fact is a rule of law, it is the tribunal's responsibility to flesh it out. Third, the Commission's determination that *uti possidetis juris* always trumps self-determination does not appear to be well-established. In the ICJ decision most closely on point, the Court characterized *uti possidetis* as "a principle of a general kind" in connection with decolonization; it did not refer to any other circumstance in which entities may attain the status of independent states. Case Concerning the Frontier Dispute (Burkina Faso v. Republic of Mali), 1986 I.C.J. 554, 565-66 (Dec. 22). Further, in holding that *uti possidetis* took precedence over self-determination in that case, the Court expressly relied on a particular regional practice in Africa, according to which respect for boundaries existing at independence was seen as a necessity for realizing the practical benefits of self-determination; the Court did not suggest that this resolution of the conflict between the two principles would necessarily apply in any other region. *Id.* at 566-67. Finally, it is by no means clear what the Commission meant by referring to a right of the Bosnian and Croatian Serbs to elect their own nationalities. If such a right were recognized, that would mean either that Bosnia and Croatia would be forced to permit persons of Serbian nationality to remain within their borders, with all the possible problems such an arrangement could create, or else that these nationals of Serbia, in order to fully enjoy that status, would have to abandon their homes in areas that remained parts of Croatia and Bosnia and emigrate to Serbia. The potential difficulties either resolution could pose are obvious.

231. G.A. Res. 46/237, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/237 (1992).

232. See *supra* notes 24-31 and accompanying text.

233. See *supra* notes 133-41 and accompanying text.

234. See *supra* notes 34-38, 47 and accompanying text.

for war crimes.<sup>235</sup> Such acts are at least arguably in violation of *jus cogens* norms, if any exist.<sup>236</sup>

The war in Bosnia-Herzegovina, then, seems to have been caused in part by the application of the concept of self-determination and has seen apparent violations of Article 2(4) of the United Nations Charter and of humanitarian law. Respect for self-determination, Article 2(4) and humanitarian rules are each, arguably, *jus cogens* rules. The interplay between these rules and different aspects of the Bosnia-Herzegovina war illustrates several of the points made in section III.A. For convenience this portion of the discussion will follow the same organization as that of Section III.A. First, it will show how the Bosnia-Herzegovina fighting illustrates problems in applying in international relations a concept analogous to that of "public policy" in domestic legal systems. Next, the discussion will show how the war in Bosnia-Herzegovina illustrates the deficiencies in the methods of determining which rules of international law ought to be non-derogable, in that treatment of the above-mentioned rules in this fashion arguably has done, or would have done, or will do more harm than good. Finally, the discussion will demonstrate the apparent illegitimacy of the idea that particular rules are of a *jus cogens* character — and thus force the conclusion that Verdrossian *jus cogens* plays no role in international relations.

## 2. Bosnia-Herzegovina and International Public Policy

We first consider, then, the differences between applying public-policy-like concepts in the international system and applying such concepts in domestic legal systems. It will be recalled that one problem in analogizing between the two systems is that such an analogy assumes that, just as in domestic systems the harm done to individuals by forcing them to conform to public policy concepts or face the consequences is outweighed by benefits to the community, so similar harm to states violating *jus cogens* is outweighed by the benefits to the international community of enforcing such rules.

The war in Bosnia-Herzegovina, however, provides at least one example of a situation in which this analogy does not appear to hold. As noted above, Bosnia-Herzegovina has arguably been the victim of a violation of Article 2(4) at the hands of the Federal Republic of Yugoslavia (which may be identified with Serbia). If Article 2(4) had been treated by the Security Council as absolutely non-derogable, however, the Council must necessarily have forbidden any peace plan which

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235. Simons, *supra* note 47.

236. See *supra* notes 142–53 and accompanying text.

deprived the Government of Bosnia-Herzegovina of full control of any territory taken in violation of that article. To have followed that course would, as a practical matter, have meant that there could be no resolution of the conflict in Bosnia-Herzegovina until the Bosnian Serbs either were militarily defeated or fundamentally changed their attitude toward the issues that triggered the fighting in the first place. Since the latter development is not foreseen by any observer, the complete military defeat of the Bosnian Serbs would be the only way to end the fighting. However, given the relationship between Serbia and the Bosnian Serbs, at least some of the steps which would have been necessary to inflict such a defeat could have had severe negative effects on Serbia. Some Western states have hoped that Serbia would eventually play a significant constructive role in the Balkans.<sup>237</sup> Indeed, the United States sees Serbia as very important to the achievement of peace in Bosnia-Herzegovina.<sup>238</sup> That is, the actual effect of preventing a development supposedly contrary to "international public policy" would be to harm a member of the international community whose role in international relations could *not* easily be filled by some other entity. The cost to the international community of abiding by this rule is thus not comparable to adherence to a rule of public policy in a domestic legal system, in which harm to an individual through application of a rule of public policy rarely harms, and generally benefits, the community.

### 3. Bosnia-Herzegovina and the Content of *Jus Cogens*.

The second general point in Section III.A was the difficulty of determining the content of *jus cogens*. That is, not only was there disagreement over which rules should be considered of a *jus cogens* character, but international relations seemed to offer no mechanism for deciding objectively what rules *should* be on the list. The war in Bosnia-Herzegovina illustrates both problems.

The Bosnian Serbs' claims to self-determination are an example of the uncertain content of the list of *jus cogens* norms. Thus, twenty-six years after the ILC more or less implied that the right to self-determination was a matter of *jus cogens* and sixteen years after the ILC's draft articles on state responsibility labelled denial of self-determination an international crime, the EC's Arbitration Commission could still assert that international law did not "spell out all the implications of the right

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237. Mark M. Nelson et al., *Vicious Circle: The Saber Rattling Over Bosnia Sounds Like a Bleak Reply*, WALL ST. J., July 28, 1995, at A1, A4.

238. Stephen Engelberg, *Tribunal Asks U.S. for Pledge on War Crimes*, N.Y. TIMES, Nov. 3, 1995, at A1.

to self-determination” and also experienced great difficulty reconciling that principle with the principle of *uti possidetis juris*.<sup>239</sup>

This point is also reflected in at least one reaction to the exclusion from the Tribunal’s jurisdiction of the offense of committing an unlawful use of force. As explained above, it is at least arguable that Bosnia-Herzegovina has suffered just such an unlawful use of force, and, according to doctrine, the *jus cogens* status of the prohibition on aggression is clear. Nonetheless, one commentator has expressed approval of omitting “crimes against peace” from the Tribunal’s Statute, arguing that including jurisdiction over such acts “would almost inevitably require the tribunal to investigate the causes of the conflict itself (and the justifications issued by the combatants), which would involve the tribunal squarely in the political issues surrounding the conflict.”<sup>240</sup> This explanation is puzzling. It is difficult to imagine any situation in which a tribunal was adjudicating a charge of unlawful aggression in which the tribunal would be able to avoid “investigat[ing] the causes of the conflict . . . and the justifications of the combatants.” If this argument against the Tribunal’s jurisdiction over the offense of aggression is meant to suggest that such inquiries are so inevitably political that no legal standard could be applied to them, it amounts to saying that “aggression” is too vague a term ever to be applied by a court. If that is what this statement means, it reinforces the argument that the concept of *jus cogens* is too lacking in content to be a legal category and suggests that the writer does not see violations of Article 2(4) as implicating *jus cogens*. Alternatively, the writer may have meant that the circumstances of this particular case would render such an inquiry “too political.” Again, however, it is difficult to see what differentiates this case from any other in which aggression has arguably been committed but the aggressor has not been subjugated. If the writer means to imply that prosecutions for aggression *should* be limited to those cases in which the aggressor is completely defeated, he obviously narrows the scope of the prohibition considerably. More importantly for purposes of this discussion, he implies that applying Article 2(4) according to its letter would make no sense with respect to acts of aggression which do not culminate in the subjugation of the aggressor. He thus in effect argues that, if the *jus cogens* “process” has conferred non-derogable status on Article 2(4), it represents bad policy. If this is his view, the writer appears to be suggesting that the war in Bosnia-Herzegovina illustrates the second problem with the content of *jus cogens* — the contention that both of the

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239. Opinion no. 2, *supra* note 228, at 1498.

240. James C. O’Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT’L L. 639, 645 (1993).

processes suggested as generators of *jus cogens* are dubious vehicles for formulating non-waivable rules of law whose benefits will in practice outweigh their costs.

Certainly, the Bosnia-Herzegovian war would seem to provide ample illustration of that point. For example, consider the endorsement by the Security Council and later by the United States of a peace plan that would, in effect, recognize Bosnia-Herzegovina's loss of territory due to an arguably unlawful use of force. Quite clearly, the Council thought that rigid application of Article 2(4) of the United Nations Charter on these facts was poor policy. This decision is at least comprehensible. It will be recalled that the Bosnian Serbs formerly controlled approximately 70% of Bosnia-Herzegovina, and that the forces of the government of Bosnia-Herzegovina appeared unlikely to be able to defeat the Serbs militarily.<sup>241</sup> That meant that the Bosnian Serbs could not be compelled to disgorge the territory they had conquered unless third states entered the war. (In fact, of course, it was only the intervention of Croatia in the fighting in Bosnia-Herzegovina that compelled the Bosnian Serbs to yield a large portion of the territory they controlled).<sup>242</sup> Thus, if the Security Council wished to end rather than widen the conflict, thereby avoiding as well the risk of a wider war that was part of the Council's original concern,<sup>243</sup> some sort of negotiation with the Bosnian Serbs would be necessary. And if the Council insisted that the outcome of the negotiations must include the agreement by the Bosnian Serbs to surrender all the land they had conquered, despite their military dominance, then presumably the odds that negotiations could succeed would be quite small. In fact, the plan that is giving some hope of ending the conflict peacefully permits the Bosnian Serbs to retain a considerable portion of their conquests.

In short, mechanical acceptance of the absolutely binding character of Article 2(4) in this situation would necessarily have been perceived at the time of the adoption of Resolution 942 as leading either to a bigger war or to a war that could not be ended. Either development, in turn, could have persisting effects in the Balkans contrary to the interests of the international community generally. Under such circumstances, it was surely not unreasonable for the Security Council to conclude that such an automatic application of Article 2(4) would simply make no sense. Automatic application would, indeed, appear to contradict the basic policy behind that article, which presumably aims at the limitation of the use of force, not at prolonging wars. This is not to say that the policy

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241. See *supra* note 31 and accompanying text.

242. See *supra* notes 32-33 and accompanying text.

243. See *supra* note 13 and accompanying text.

adopted by the Security Council was the only reasonable alternative in this situation. Certainly, a good case could be made that third states should have intervened earlier to aid Bosnia-Herzegovina. The point is not that the Security Council's approach was the *only* possible approach, but rather that it was a reasonable approach that would have been absolutely unavailable if the Council had seen itself bound to apply Article 2(4) to the letter. In other words, the situation in Bosnia-Herzegovina demonstrates that according *jus cogens* status to Article 2(4) would be an exercise in bad law-making, since it would mean that an approach to ending the fighting in that state that permitted taking into account a number of the potential costs and benefits to all those involved would have been unavailable to the international community.

Again, if the *jus cogens* "process" can be seen as having conferred *jus cogens* status on the rule of self-determination, it is clear that this process can lead to the non-derogability of rules that arguably should be derogable. Thus, had Germany been less convinced of the fundamental character of self-determination, it might have withheld recognition of Slovenia and Croatia, and Bosnia-Herzegovina might have been spared the horrors it has suffered.

The problem presented by the idea of immunizing Bosnian Serb leaders from war crimes prosecutions as an element of an eventual peace settlement raises many of these same issues as are presented by the *jus cogens* status of Article 2(4). As Professors D'Amato and Forsythe have observed, it is difficult to imagine the leaders of the Bosnian Serbs agreeing to any settlement of this conflict which did not immunize them from the jurisdiction of the Tribunal.<sup>244</sup> Yet any agreement purporting to grant such immunity would arguably amount to acquiescence in acts in violation of *jus cogens*, and thus itself be void as violative of norms of *jus cogens*. This problem, too, raises the specter of *jus cogens* rules operating to prolong a war. It also illustrates a defect in the *jus cogens* "process" not raised by the Article 2(4) problem: the non-existence of any method of rationally weighing against one another the policies embodied in different *jus cogens* norms. Thus, if the *jus cogens* goal of ending inter-state wars is seen as primary, then a concession to particular leaders necessary to end a war presumably would be consistent with, if not indeed required by, *jus cogens*. Conversely, if respect for humanitarian norms is primary, then *jus cogens* would require that the war continue if it could not be ended except by letting war criminals escape. Yet acting on this conclusion would in effect prolong the very condi-

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244. Anthony A. D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 500-03 (1994); David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. F. 401, 415-16 (1994).

tions which produce the commission of war crimes. This dilemma simply cannot be resolved without determining which of the two *jus cogens* goals has priority. But there is no mechanism in *jus cogens* doctrine for making such a determination. In this connection, it is striking that Professor D'Amato's suggestion that it might be impossible to end the fighting in Bosnia-Herzegovina without providing immunity from the Tribunal's jurisdiction for Bosnian Serb leaders<sup>245</sup> evoked extremely negative responses<sup>246</sup> — but, as D'Amato observed,<sup>247</sup> none of those responses suggested a way of addressing the dilemma D'Amato identified other than what he proposed.

#### 4. Bosnia-Herzegovina and the Legitimacy of *Jus Cogens*.

The last subject addressed in Section III.A was the doubtful legitimacy of at least the Verdrossian version of *jus cogens*. The war in Bosnia-Herzegovina clearly illustrates that point. In excluding crimes against peace from the jurisdiction of the Tribunal,<sup>248</sup> and in endorsing a peace plan calling for the formal limitation of the authority of Bosnia-Herzegovina over a portion of its territory because of a use of force against that territory arguably in violation of Article 2(4),<sup>249</sup> the Security Council appears to be derogating from Article 2(4). The same can be said of the American peace plan.<sup>250</sup> Clearly, neither the Security Council nor the United States individually felt constrained to apply Article 2(4) rigidly in a situation in which they perceived, correctly or not, that the consequences of doing so would undermine the basic objective of that article. They thereby demonstrated that — in Professor Franck's phrase — the “pull towards compliance”<sup>251</sup> of an absolutist understanding of Article 2(4), obligatory without regard to the wills of states, was not great. The actions of the Council and of the United States thus appear to reinforce the impression that the legal standing of this Verdrossian version of *jus cogens* is questionable.

The conflict in Bosnia-Herzegovina has also been the occasion for further demonstration of the intellectual confusion surrounding *jus cogens*. Thus, some writers have claimed to rely on *jus cogens* to attack

245. See *supra* note 241 and accompanying text.

246. See Payam Akhavan, *Letter to the Editors in Chief*, 89 AM. J. INT'L L. 92 (1995); Jordan J. Paust, *Letter to the Editors in Chief*, 88 AM. J. INT'L L. 715 (1994); Benjamin B. Ferencz, *Letter to the Editors in Chief*, 88 AM. J. INT'L L. 717 (1994).

247. Anthony A. D'Amato, *Reply*, 89 AM. J. INT'L L. 94 (1995).

248. See *supra* notes 44–47 and accompanying text.

249. S.C. Res. 942, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/942 (1994). See also *supra* discussion at notes 48–49.

250. See *supra* discussion at note 50.

251. Franck, *supra* note 182, at 16.



various Security Council actions relating to Bosnia-Herzegovina as unlawful because they are contrary to *jus cogens*.<sup>252</sup> But, as discussed above, such claims make no sense if Article 53 *jus cogens* is at issue. This follows since, as noted above, it seems a contradiction in terms to characterize any action taken by the Security Council as contrary to a rule accepted and recognized by the community of states as a whole. Thus, Security Council actions can raise no *jus cogens* problems unless "*jus cogens*" is taken to mean Verdrossian *jus cogens*. Yet, as also noted above, Verdrossian *jus cogens* has very weak claims to legitimacy in international law, since it is inconsistent with the easily legitimated Article 53 *jus cogens*. The fact that some authorities consider *jus cogens* relevant in this situation, then, indicates the continuing confusion in international law over the concept and the failure of many to understand the extremely limited character of the only version of that idea with any claim to serious standing in international law.

The crisis in Bosnia-Herzegovina also reveals another aspect of the issue of the legitimacy of *jus cogens* not previously discussed. To assert that a state is legally required or forbidden to act in a particular way necessarily means that the desire of the state to act in some different way is legally irrelevant. But of course, the "desire" of a state is more precisely the "desire" of those individuals constituting the government of the state. And those desires in the cases of governments democratically selected and responsive to an electorate may well reflect the views of that electorate. To say that international law in a particular case forbids a state from acting on its "desires" even when those desires are reflective of the views of the people of the state is thus to say that rules of international law take precedence over democratic decision making. That conclusion in itself is not troubling, since with respect to most issues of international law there is no reason to treat states' decisions differently depending on their domestic governmental organization. The Bosnia-Herzegovina situation suggests a limit on that attitude, however.

This follows because what is at issue, ultimately, is whether third states should go to war. As has been noted, the Security Council's concerns in this situation apparently extend beyond Bosnia-Herzegovina to include the objective of limiting the spread of the conflict in the former Yugoslavia.<sup>253</sup> But if the achievement of that goal depends on an end to the fighting in Bosnia-Herzegovina, and if *jus cogens* forbids ending that fighting in a way which leaves Bosnia-Herzegovina's territorial integrity infringed by force, then, as discussed above, adherence to *jus cogens* norms in this context will require the defeat of the Bosnian

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252. See, e.g., Scott et al., *supra* note 202, at 82-90.

253. See *supra* note 13 and accompanying text.

Serbs. This could not be accomplished unless third states go to war to end the fighting in Bosnia-Herzegovina; even the August–September 1995 territorial losses by the Bosnian Serbs came about only because of the heavy intervention of Croatian forces in the fighting in Bosnia-Herzegovina.<sup>254</sup>

In short, taking *jus cogens* seriously in this context comes perilously close to asserting that an obscurely derived doctrine of international law curtails the freedom of a democratically elected government to respond to its electorate's desire *not* to go to war. It seems doubtful, to put it mildly, that any doctrine of international law should be treated as being so overwhelmingly authoritative. Yet such a result would seem to be one implication of treating Article 2(4) as non-derogable in Bosnia-Herzegovina.

To sum up, the situation in Bosnia-Herzegovina demonstrates many of the points made in Part III.A. First, the assumptions underlying the public policy concept in domestic legal systems are not necessarily transferrable to the international system. Second, it is in fact a bad idea to treat as absolutely binding a number of rules thought to enjoy *jus cogens* status. Finally, the practice of states in this crisis suggests doubts about the legitimacy of the *jus cogens* character of rules normally alleged to enjoy that status. It can be said that the events in Bosnia-Herzegovina show what happens when one contemplates applying *jus cogens* in the actual conduct of international relations: at a great many levels, it doesn't work.

### C. Implications

What are the implications of all this for the concept of *jus cogens*? This question is difficult to address, particularly given that idea's demonstrated immunity to modification by experience. Nonetheless, one can imagine two possible effects.

First, it is commonplace to describe *jus cogens* rules as in some way "overriding" or "fundamental."<sup>255</sup> Bosnia-Herzegovina has shown that certain rules commonly thought to enjoy *jus cogens* status are not treated by states as fundamental in any recognizable sense. Thus, the Security Council has been unwilling to use force to protect Bosnia-Herzegovina from violation of its rights under Article 2(4). While, as noted above, this is a perfectly defensible decision, it necessarily implies that a number of states are prepared to tolerate a violation of Article 2(4). Further, as Anderson has pointed out eloquently, the establishment

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254. See *supra* notes 32–33 and accompanying text.

255. See, e.g., Brownlie, *supra* note 54, at 512–13.

of the Tribunal, so far from demonstrating that prevention of violations of humanitarian law is a "fundamental" interest, more closely resembles window-dressing intended to conceal the failure to take the action that would have shown the centrality of that interest — intervention to prevent the violations of humanitarian law from taking place.<sup>256</sup>

Related to the first point is the second: the war in Bosnia-Herzegovina is the first situation in which the international community, to the extent that there is one, has acted formally, to the extent that it can, to undercut a rule supposed to enjoy *jus cogens* status. Of course, there have been many cases in the past in which acts supposed to violate *jus cogens* evoked no effective international response. In those cases, however, the violations were simply ignored, or ascribed to Cold War politics, or allowed to fall from public view after drawing condemnatory resolutions in the U.N. General Assembly. In this case, however, the Security Council did not ignore the situation; it addressed it, affirmatively supporting a resolution that appears inconsistent with what is supposed to be the best-established rule of *jus cogens*, Article 2(4). It did this, moreover, in the absence of the usual alibis — the Cold War is over.

These developments should force international lawyers to begin to re-examine the concept of *jus cogens*. It is by no means clear, however, that such a re-examination will take place.

#### IV. CLOSING OBSERVATIONS

Christenson has described *jus cogens* as "surely conceal[ing] substantive emptiness"<sup>257</sup> and as "a normative myth masking power arrangements that avoid substantive meaning until later decision, thereby both postponing and inviting political and ideological conflict."<sup>258</sup> Certainly, this paper suggests that he is right about the concept's substantive emptiness and avoidance of substantive meaning. What is more difficult to determine is what role such a concept can play in a legal system.

Of course, any legal system needs some standard against which the justice of its enactments is evaluated. The difficulty with the concept of *jus cogens* is that it purports to be, not a standard for evaluating law, but law itself.

As law, *jus cogens* fails. Its content is inevitably uncertain, reflecting intellectual confusion as to the core of the doctrine. Correspondingly, its claim to legitimacy in international law is murky. It is applied as a characterization to rules which, if treated as though they really were

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256. Anderson, *supra* note 36, at 405 n.56.

257. Christenson, *supra* note 109, at 590.

258. *Id.*

non-derogable, would do more harm than good in many contexts. And the means most often suggested for determining its content lack both the authority and the capability to carry out the task.

This article has sought to demonstrate that to the extent that *jus cogens* has been applied in Bosnia-Herzegovina, it has done harm, and when it has not done harm, it is because the concept has not been taken seriously. Bosnia-Herzegovina further demonstrates the confusion about the sources, the content, and the scope of application of *jus cogens*.

Perhaps the concept works well as Christenson's normative myth. As a part of the international legal system, however, it is a source of confusion and distraction. *Jus cogens* should be allowed to go the way of monism, and fade away.