Questions of General International Law with Special Regard to the Security Council's Competence

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Abstract

Based on Article 1 of the UN Charter, the Security Council (SC) shall act in accordance with international law to prevent and remove threats to international peace and security. Even though Article 103 of the UN Charter confers some sort of supremacy on the decisions of the SC, there are nevertheless certain fundamental norms in international law that restrict the SC's powers from which no derogation is permitted. These are referred to under the heading General International Law (GIL). Principles of GIL are classified into two types: axiomatic and axiological. The former consists of rational principles developed from the logic of nature and the structure of international law and society, and the latter are derived from the values of the international community. GIL does not require the consent of states and impacts the freedom of all subjects of international law, including the UN and its organs. Throughout the course of performing its tasks under the UN Charter, the SC must adhere to the requirements of GIL.

Keywords: Security Council, UN Charter, general international law, jus cogens, erga omnes.

1. Introduction

Once the Security Council ascertains that the commission of mass atrocities by a state is a threat to peace, it can apply a wide range of powers conferred upon it by the UN Charter. The scope of this wide competence makes it necessary to examine whether the SC's competence is limited by general international law when it comes to maintaining international peace and security. The first paragraph of Article 1 of the UN Charter is the point where further elaboration is justified. Due to the ambiguity in the Article's language, the question has been raised as to whether the UN Charter grants certain exemptions to the SC when it comes to implementing international law.

Several commentators have interpreted the Article as giving the SC *carte blanche* to disregard the mandatory aspects of international law whenever

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maintaining peace and security is the focus[1] *(exceptional interpretation)*. This paper will critically evaluate their contentions and argue that all bodies of the UN, including the SC, must adhere to general international law *(integral interpretation)*.

As a consequence of integral interpretation, certain rules of international law are binding without exception, on all subjects of international law.[2] They are known as GIL. Due to the fact that scholars use the term GIL in various contexts with different meanings, there is no general definition or consensus regarding its concept, and each author provides evidence to support their argument. In some cases, GIL is regarded as a customary rule of international law, in others as a synergy of customary and general principles of law, and the last group of scholars places emphasis on the number of subjects of a rule, namely, if all or a large number of states are members of a treaty or are involved in a customary rule, the relevant rule becomes a GIL. The authors argue that GIL is used in contemporary international law as an indication of the basic norms of international law in a novel concept. The concept of GIL was applied in this sense in Article 53 VCLT as well as in the practice of certain international courts and tribunals. In this context, GIL cannot be equated with the main sources of international law, as reflected in Article 38 ICJ Statute, but is much rather an *infra* legal issue. Essentially, it refers to the principles that are the pillars upon which modern international law is based and developed. These principles are rooted in the realities of international relations and were developed in response to the requirements of the collective life of states. If states resolve to form an international community, as they do, inevitably they must be conscious of the requirements of building a society. The principles of GIL are dynamic in nature,

1 David Schweigman, *The authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice*, Kluwer Law International, The Hague, 2001, p. 29; Hans Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, Stevens & Sons, London, 1951, p. 730; Bernd Martenczuk,'The Security Council, the International Court and judicial review: what lessons from Lockerbie?', *European Journal of International Law*, Vol. 10, Issue 3, 1999, pp. 544-545; Devon Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action', *European Journal of International Law*, Vol. 26, Issue 3, 2015, p. 680; Leland M. Goodrich *et al.*, *The Charter of the United Nations*, Columbia University Press, London, 1969, pp. 27-28; Miguel Lemos, 'Jus Cogens Versus the Chapter VII Powers of the Security Council: With Particular References to Humanitarian Intervention and Terrorism', *Chinese Journal of International Law*, Vol. 19, Issue 1, 2020, pp. 31-32; Stefan Talmon,'The Security Council as world legislature', *American Journal of International Law,* Vol. 99, Issue 1, 2005, p. 184.

2 Simon Chesterman, 'The UN Security Council and the Rule of Law', UN General Assembly Security Council, Doc. A/63/69-S/2008/270, 2008, p. 10; Ramses A. Wessel, 'The UN, the EU and Jus Cogens', *International Organizations Law Review*, Vol. 3, Issue 1, 2006, p. 3; Matthew Saul & Nigel D. White. 'Legal means of dispute settlement in the field of collective security: The quasi-judicial powers of the Security Council', *in* Duncan French *et al.* (eds.), *International Law and Dispute Settlement: New Techniques and Problems,* Hart, Oxford, 2010, p. 206; Rosalyn Higgins, 'The place of international law in the settlement of disputes by the Security Council', *American Journal of International Law*, Vol. 64, Issue 1, 1970, p. 9; Terry D. Gill, 'Legal and some political limitations on the power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter', *Netherlands Yearbook of International Law*, Vol. 26, 1995, pp. 78-79.

for society is also a dynamic phenomenon. Therefore, GIL is the legal manifestation of international community requirements.

This article begins by discussing GIL as a novel concept. In this context, we discuss whether GIL should be viewed as an independent concept or as an equivalent to treaties, customs, general principles of law, or as a synthesis of the same. Next, we discuss Article 1 of the Charter as a point of disagreement between two interpretative approaches: the exceptional and the integral approach, and finally, the last section is devoted to the limitations placed on the SC by GIL.

2. General International Law in Positive International Law

Article 53 VCLT stipulated that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. […]" and Article 64 provided that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

The 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA) in Articles 26, 40 and 50 mentioned the "obligation arising under a peremptory norm of general international law". Articles 26, 41 and 53 of the 2011 Draft Articles on the Responsibility of International Organizations enshrined the same discourse and in both drafts, peremptory norms are considered to be rooted in general international law. In *Pulp Mills*, the ICJ held that,

> "[…] the obligation to protect and preserve, under Article 41(a) of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment when there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context."[3]

While in the *Certain Activities carried out by Nicaragua in the Border Area*, the ICJ, with finely tuned nuances, considered an obligation to conduct an environmental impact assessment under a treaty or customary law, rather than GIL.[4] In *Iron Rhine*, arbitration pointed out, that

> "where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm […] This duty, in the

3 ICJ, *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, judgment, ICJ Reports 2010, pp. 14, and 83, para. 204.

4 ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, judgment, ICJ Reports 2015, pp. 708-710, paras. 108, and 112.

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> opinion of the Tribunal, has now become a principle of general international law."[5]

In the *Indian Waters Kishenganga* arbitration, environmental impact assessment was considered under general international law and the ICJ's approach was reaffirmed once again.[6] In *Chagos*, in the same vein as the ICJ, the tribunal constructed its reasoning about international environmental law on the basis of general international law. The arbitration held that

> "[a]s a general matter, the Tribunal has little difficulty with the concept of procedural constraints on State action, and notes that such procedural rules exist elsewhere in international environmental law, for instance in the general international law requirement to carry out an environmental impact assessment in advance of large-scale construction projects."[7]

It is noteworthy that in all these cases, instead of considering the relevant rules from the perspective of treaties or customary law, the international courts and tribunals addressed them under the chapeau of GIL.

3. Distinction Between GIL and Sources of International Law

The sources of international law establish one of the most important patterns that provide the framework for international legal discourse as well as legal claims.[8] It has long been agreed by scholars that sources of international law are causes of disagreement and the controversies surrounding the sources of international law will prevail.[9] The latter are taken here to refer to recognized formal sources, since there is a fundamental rule, that only those recognized sources may be referred to, or relied upon, as creative sources of international law. Hence, an allusion to Article 38 of the ICJ Statute is inevitable in this context.[10] As to the Article, it should be stressed that it outlines the legal framework for the judicial function of the ICJ through which disputes should be resolved. Consequently, it is therefore not an exhaustive list of international law sources as such. As Pellet noted, the list of Article 38 is undoubtedly incomplete and with time, its lacunae emerged, hence, it is argued that "general reference to international law in the opening sentence suffices to enable the Court to have

5 PCA, *Iron Rhine (Belgium v Netherlands)*, Case 2003-2, Award of 24 May 2005, p. 29, para. 59.
6 PCA, *Indian Waters Kishenganga (Pakistan v India)*, Case 2011-01, Award of 20 December 2013, p. 291, paras. 450-451.
7 PCA, *Chagos Maritime Protected Area Arbitration (Mauritius v United Kingdom)*, Case 2011-03, Award of 18 March 2015, p. 129, para. 322.
8 Jean d'Aspremont & Samantha Besson (eds.), *The Oxford Handbook of the Sources of International Law*, Oxford University Press, Oxford, 2017, p. 2.
9 Samantha Besson & Jean D'Aspremont, 'The Sources of International Law', *in* d'Aspremont & Besson (eds.) 2017, pp. 6-7.
10 Hugh Thirlway, *The Sources of International Law*, 2nd edition, Oxford University Press, Oxford, 2019, p. 8.

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recourse to other sources of international law whenever it deems this necessary."[11] Crawford wrote that

> "[i]n the context of international relations, however, the use of the term 'formal source' is misleading since it conjures up notions associated with the constitutional machinery of law-making within states. No such machinery exists for the creation of international law."[12]

Klabbers pointed out, that "this already suggests that the list is not exhaustive; it is possible that there are sources of law not mentioned in Article 38 Statute ICJ."[13] Tomuschat contended that "even by simple logical inference, one can conclude that Article 38 does not set forth an exhaustive regulation of all and any conceivable sources of international law."[14]

Regarding the interaction between the sources of international law and GIL, the latter is another whole level, and should be assessed in accordance with the nature of the international legal system and the requirements of the international community. The axiomatic (rational) principles arise from the structure of the international legal system, which is an indivisible component of the legal system like *pacta sunt servanda*. In essence, these principles are legal fictions that serve as the basis for a legal system to operate and make sense. As a result of the evolution of a community based on the axis of humanity, the international community develops axiological principles. Article 53 VCLT, in which GIL is described as the source of peremptory norms, makes reference to this concept.

In this vein, Tomuschat analyzed whether the concept of GIL could be equated with the three aforementioned sources, or whether it requires its own consideration. He started with the presumption that "[t]he concept of GIL presupposes that there exist legal rules which address every subject of international law."[15] Regarding the treaties, in constructing his argument, he relied on the principle of *pacta tertiis nec nocent nec prosunt*, which has application even to conventions whose implementation serves the interest of the entire international community.[16]

According to the principle of equality of sovereignty, a treaty cannot confer rights or impose obligations without the consent of the states.[17] Moreover, the rejection of a treaty is not always due to the incompatibility of a norm with the

11 Alain Pellet, 'Article 38', *in* Andreas Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary,* Oxford University Press, Oxford, 2012, pp. 1421-1422.

12 James Crawford, *Brownlie's principles of public international law,* 8th edition, Oxford University Press, Oxford, 2012, p. 20.

13 Jan Klabbers, *International law*, Cambridge University Press, Cambridge, 2017, p. 24.

14 Christian Tomuschat, 'General International Law: A New Source of International Law?', *in* Riccardo Pisillo Mazzeschi & Pasquale De Sena (eds.), *Global Justice, Human Rights, and the Modernization of International Law*, Springer, 2018, p. 188.

15 Id. p. 189.

16 Id.

17 Id. p. 190.

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national interest.[18] It could be the case that states may not be willing to subject themselves to the mechanism of the treaty concerned, while agreeing with its norms.[19] Therefore, international treaties cannot be classified as GIL.[20] Similarly, Thirlway believed that the rules of *jus cogens* are principally outside the purview of treaties.[21] As an example, let's say that most members of the international community have ratified a treaty on certain human rights. Would it be possible to consider the concomitant norms as GIL in this case? There answer would be in the negative. Because in lack of third-party consent, it is not possible to bind that third party. In light of the presumption outlined above, the given norm cannot be considered a rule of GIL, because it does not apply to all subjects of international law. In another possible scenario, all members have ratified a treaty in which a withdrawal clause had been inserted. In this case, at the time of membership of all parties, the norm may be considered as GIL, but what if some of the parties withdraw from the accord? Due to the fact that they no longer adhere to the rule of the norm, the treaty does not apply to them either as GIL or any other title, and the given norm would cease to be GIL due to the loss of universal membership. It is possible to argue that a state is bound by the given rule, since the latter had become a customary rule of international law. If the state was not a persistent objector, this argument would be valid. The majority of the members of the international community, but not all, ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. If a non-party, who is also a persistent objector, violates the Genocide Convention, then no one has the right to interrogate the state concerned,[22] while in *Genocide*, the ICJ held that the norms of the Genocide Convention are binding upon states, even in the absence of any conventional obligations.[23] In addition, South Africa's claim that it was a persistent objector to the prohibition of racial discrimination and apartheid was universally rejected on the grounds that a persistent objector is not exempt from peremptory norms.[24]

The same point was made by Byers, who argued that treaties merely generate obligations between parties and do not have the capability of establishing a rule of GIL. This is because firstly, it is impossible for treaties to compel parties to modify them in the future or to release them from their obligations thereunder,

18 Id.
19 Id.
20 Id.
21 Hugh Thirlway, *The Sources of International Law*, 2nd edition, Oxford University Press, Oxford, 2019, p. 176.
22 By referring to *jus cogens*, one can provide another argument for neutralizing the legal effect of persistent objectors. Due to the fact that genocide is prohibited under *jus cogens*, the persistent objector norm is irrelevant in this instance. Report of the International Law Commission on the Work of Its Seventy-First Session, UN GAOR, 74th Sess., Supp. No. 10, pp. 1-2, paras. 1, and 3, UN Doc. A/74/10, 16 September 2019, pp. 144-145.
23 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, ICJ Reports 1951, p. 23.
24 Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?', *in* Erika de Wet & Jure Vidmar (eds.), *Hierarchy in International Law: The Place of Human Rights,* Oxford University Press, Oxford, 2012, p. 26.

and secondly, despite the fact that *jus cogens* norms are universally applicable and binding, none of the international treaties that include *jus cogens* have been universally ratified.[25] Articles 53 and 64 VCLT would appear to indicate that GIL does not fall within the customary rules of international law since it does not recognize practice as an essential component of *jus cogens*, and that the consensus of the international community as a whole determines which norm should be considered *jus cogens*.[26] Thirlway raised an intriguing question in this regard, namely, "[i]f jus cogens norms exist without the custom-generative process being followed, then why class them as custom at all: why not recognize them as something different?"[27]

Lastly, with respect to General Principles of Law, Tomuschat maintained

> "general principles of law and GIL remain alien to one another. In all the cases that constitute the testing ground for the present considerations, where the concept of GIL was resorted to, the requisite broad scope of the norm concerned as a 'principle' was visibly absent. In the *Pulp Mills* case, the concept of environmental impact assessment denotes a complex procedure with well-known specificities, the fruit of some environmental principles whose legal nature has not yet been fully established under international law, the principle of prevention and the precautionary principle. Accordingly, to range an environmental impact assessment among the general principles of law pursuant to Article 38(1)(c) ICJ Statute would amount to a misleading systematization of that procedure, hardly compatible with the original understanding of general principles."[28]

Relying on the ICJ's methodological approach in *Bosnia-Herzegovina v Serbia and Montenegro* and *Croatia v Serbia*, he reinforced his argument. In fact,

> "rules on interpretation of treaties, on State responsibility and on succession in respect of obligations that have arisen as a consequence of the commission of an internationally wrongful act [...] are in principle straightforward rules that do not require lengthy deductions from a general principle"

and therefore, the ICJ's method implied a specific place for general international law.[29] He noted that, in practice, the ICJ often used GIL and customary law interchangeably, for example in *Fisheries (UK v Norway)*, but at other times, it used GIL in a manner that did not correspond to customary law, like in *Pulp Mills*.

25 Michael Byers, 'Conceptualising the relationship between Jus Cogens and Erga Omnes Rules', *in* Koen De Feyter (ed.), *Globalization and Common Responsibilities of States*, Routledge, London, pp. 220-221.
26 Tomuschat 2018, p. 195.
27 Thirlway 2019, pp. 178-182.
28 Id. p. 193.
29 Id. p. 194.

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> "The rule proclaimed [in these cases] is not inferred from the accumulation of practice by way of induction but is deduced from axiomatic premises of the international legal order. ICJ preferred [...] to invoke GIL without attempting to show that its approach was supported by that kind of consistent practice which, in theory, it views as a condition for the existence of a rule of customary law."[30]

Additionally, since there is no hierarchy between the formal sources of international law (treaties, customary law, and general principles of law), if one considers GIL to be equivalent to any of these sources, then two or more subjects of international law may conclude a treaty or establish a customary rule inconsistent with GIL, which is the birthplace of peremptory norms.[31]

4. Nature of General International Law

In the wake of the treaties of Westphalia, the face of the world changed and classical international law emerged as the minimum legal order to govern relations between sovereigns. States were not forced into such a legal order by a powerful state or a super-state entity, it was much rather the result of the requirements of living together in an international society.

As Stephan wrote, "[t]he international order insists that states bear certain duties by their very nature of existing in an international system, independent of any manifestation of assent to the obligation."[32] It was a matter of facts and circumstances that prompted the states to adopt a legal mechanism to control the absolute will of international actors, or otherwise no sovereignty would be immune from the other's aggression or interference, and consequently, nobody would be safe. The states submitted to international law not out of courtesy or true belief in the common good, but rather because they had no other alternative to pursue their interests. Thus, after many years, the international forum evolved into an international society based on two constituent elements: state and law.[33] Although this order is significant, it should not be overstated. The fact that international society was governed by law does not mean that states did not rebel against it. As long as their interests so require, they disregard the law. Further, classical international law was a kind of private law, meaning the states did not engage with the international society in order to advance a common good, but rather to safeguard and defend their national interests. Accordingly, international law was informed by reciprocity, and provided a mechanism for

30 Id. p. 200.

31 Report of the International Law Commission Fifty-seventh session (2 May-3 June and 11 July-5 August 2005), Supplement No. 10 (A/60/10), p. 223, para. 487. However, some commentators believed that peremptory norms are the basis of hierarchy in international law. This approach can be justified under the category of material hierarchy in international law.

32 Paul B. Stephan, 'The political economy of jus cogens', *in* Alberta Fabbricotti (ed.), *The Political Economy of International Law*, Edward Elgar Publishing, Northampton, 2016, p. 1078.

33 Hermann Mosler, *The international society as a legal community*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1980, pp. 18-19.

organizing the freedom to act, the distribution of responsibilities, and the corresponding obligations.[34]

The aftermath of classical international law has left its mark on world history through regional wars, colonialism, and most notably, two destructive World Wars. The negative impact of the private law nature of classical international law was experienced with all its inevitable ramifications. The international community responded to these facts by revising and rearranging international law to meet the requirements of collective life. Hence, the Members moderated the private nature of international law by incorporating the common good as a new element of international law. During this phase, international law underwent a dramatic transformation from classical to modern international law. This, however, was not an easy task. Unlike in national societies, where unifying elements are already in place as a result of a historical common ground, international societies lack both of these factors, as well as the willingness of its members to sacrifice their own interests for the benefit of the international community.[35] For this reason, modern international law was developed to achieve the common good by unifying members of the international community. Toward this end, the international community is perceived as a fiction and its realization relies on the fulfillment of the requirement of collective life. These requirements are reincarnated as general principles, which are distinct from general principles of law. As regards the former, it is one of the sources of international law, while the latter is an *infra*-legal principle and a constituent element of General International Law. According to Judge Cancado Trindade, international law has certain principles "pertaining to the *substratum* of all international legal norms, and, accordingly, to the very foundations of the international legal system."[36] These principles are characterized as

> "fundamental principles of law which identify themselves with the very foundations of the legal system, revealing the values and ultimate ends of the international legal order, guiding it, protecting it against the incongruencies of the practice of States, and fulfilling the necessities of the international community."[37]

GIL consists of two types of principles: those derived from rational requirements associated with membership in the international community *(axiomatic)*, and those rooted in values *(axiology)*. The principles of GIL apply to every subject of international law who aspires to become a member of the fiction of international community. As Mosler pointed out, "[p]rinciples and Rules Derived from the Specific Nature of the International Community."[38] States shall accept the

34 Hedayatollah Falsafi, *International law of Treaties*, Nashr Now publications, Tehran, 2016, p. 28.

35 For instance, nuclear states are reluctant to achieve an agreement in order to nuclear weapon disarmament.

36 Antonio Augusto Cançado Trindade, *International law for humankind: towards a new jus gentium*, Brill/Nijhoff, Leiden, 2010, p. 63.

37 Id. p. 59.

38 Mosler 1980, p. 130.

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requirements of an international community governed by the rule of law if they assume such a community. Hence, the term "general" signifies the potentiality embodied in the content of these principles as well as their status, namely the basis, rank, and importance of these principles in the international legal system.[39] A broad scope of application is not a constituent element of GIL, but much rather an inevitable consequence of the same. Due to the importance of GIL and its function as a fundamental pillar of international law and a guarantee of collective life, it must be applicable to all subjects of international law. As Tunkin wrote, "[…] general international law, which is the foundation of the whole system of international law."[40]

What differentiates GIL from other sources of international law is the states' will. In contrast with obligations arising from other sources, obligations originating from GIL do not require the consent of states. An opponent of positivism might argue that such an interpretation of GIL is contrary to the positive nature of international law, since there is no evidence of consent. In response, the practice of ICJ may be instructive. As previously mentioned, the axiomatic principles of GIL are *a priori* principles that enable the establishment and formation of a society. Hence, they directly originate from societal requirements. In *Reparation for Injuries Suffered in the Service of the UN*, the ICJ's argument concerning the determination of the legal personality of the UN is noteworthy. The ICJ shed light on the impact of the requirements of international life on the development of international law, and confirmed that international law evolves together with social change. The ICJ held that

> "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States."[41]

In addition, the ICJ illustrated the basis for the international legal personality of the UN by arguing that

> "the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims."[42]

39 Falsafi 2016, p. 45.

40 Grigory Tunkin, 'Is general international law customary law only', *European Journal of International Law*, Vol. 4, Issue 4, 1993, p. 538.

41 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, ICJ Reports 1949, p. 178.

42 Id. p. 185.

At first glance, one may be inclined to question that the UN Charter is a treaty, and under the principle of *res inter alios acta alteri nocere non debet*, it cannot affect third states and be construed as being applicable to them. The ICJ, however, ruled that UN has objective international personality, which entitles it to exercise its duties and rights even against non-member parties. It is noteworthy that the ICJ did not tie the establishment of legal personality to the will of the states parties, that is, since they constitute a majority, they can grant a new entity legal personality. Even though fifty states have established the UN, its personality is not a result of their will. Only through independent personality will the UN be able to fulfill its vocations. Given that the UN is the defender of common good for all members of the international community, it must necessarily enjoy rights and duties under international law and must be opposable to all. Therefore, the common good, for which the UN is responsible, necessitates objective personalities, and the will of fifty states, as representatives of the international community, is evidence of such a personality.

As an example of GIL being applied to a dispute by the ICJ, *Nicaragua* is another case. As part of its allegations, Nicaragua accused the US of violating the UN Charter and customary rules of international law and general international law by use of force. The US claimed that the ICJ cannot proceed under the Charter, due to the Vandenberg Amendment. This reservation excluded

> "disputes arising under a multilateral treaty, unless *(i)* all Parties to the treaty affected by the decision are also Parties to the case before the Court, or *(ii)* the United States of America specially agrees to jurisdiction."[43]

Regarding the reservation, the US claimed that the ICJ is not permitted to proceed under the Charter because the affected states, as Charter members, have not accepted the compulsory jurisdiction of the ICJ in this case.[44] Despite accepting the defense, ICJ proceeded to the charge in accordance with customary international law. To determine whether prohibition of use of force is a customary international law rule, the ICJ considered *opinio juris* and practice. According to ICJ, the US *opinio juris* exists through consent to conventions and numerous resolutions that prohibit the use of force.[45] But, the approach of the ICJ is intriguing in terms of identifying the practice. There was no recognition of any practice by the US. In principle, identifying a specific act as a customary rule is not an easy task,[46] let alone identifying an omission of act as a constituent element of customary law, particularly as far as the use of force is concerned, since there has been a proliferation of such incidents since the adoption of the

43 Declaration of the United States of America recognizing as compulsory the jurisdiction of the court, in conformity with Article 36, para. 2, of the Statute of the International Court of Justice, UN Treaty Series, Vol. I, 1946-1947, p. 10.

44 ICJ, *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v US),* judgment, ICJ Reports 1986, p. 92, para. 173.

45 Id. pp. 99-100, paras. 188-189.

46 Martti Koskenniemi, 'General principles: reflections on constructivist thinking in international law', *in* Martti Koskenniemi (ed.), *Sources of International Law*, Routledge, London, 2000, p. 397.

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UN Charter. However, the ICJ's approach was innovative. Rather than focusing on practice, it focused again on *opinio juris*. The ICJ held that

> "[t]he Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."[47]

The ICJ's reasoning regarding this practice is ambiguous. It found that if state conduct generally complies with the rule, it can be regarded as practice, whereas it is unclear which practice the ICJ was referring to, despite the fact that it did not address or identify "practice". One might argue that if the ICJ was seeking to identify practice, the international society is replete with war, although not on the scale of the two World Wars, thus, it is most likely that there is no customary rule prohibiting the use of force. Although the ICJ brought attention to practice, it shed light on the claim of the states that they always justified their use of force under the exceptions contained within the rule. Once again, the ICJ focused on the states' *opinio juris*, not their practice.

Regarding the *axiological principles of GIL*, this paper claims that it revolves around the axis of humanity. In the case concerning the *Genocide Convention*, the ICJ affirmed that adherence to the principles underlying the Genocide Convention is not contingent upon the states' consent. The ICJ held that

> "[t]he first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)."[48]

4.1. General International Law: The Provenance of Jus Cogens and Erga Omnes

Legal literature also refers to GIL under the title of *jus cogens* and *erga omnes*. Article 53 VCLT identifies the provenance of peremptory norms in general international law. In the same vein, Article 40 DARSIWA, declares that the

47 ICJ, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, judgment, ICJ Reports 2015, p. 729, para. 186.

48 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, ICJ Reports 1951, p. 23.

peremptory norms of international law are derived from general international law. The concept of *erga omnes* was introduced to the international society by the ICJ[49] as a judicial body of the UN. Thereafter, legal literature revolved around the judgment to deliver clearer concepts of *erga omnes*.[50]

As *erga omnes* pertains to the common interest of the international community, its obligations are enforceable against any subject of international law, regardless of whether the consent of the subject has been expressed or not.[51] *Erga omnes* norms are derived from GIL[52] and for this reason they are associated with *jus cogens*. While the latter protects GIL norms within the context of treaties, the former seeks to do so in other areas of international law by bringing up the issue of responsibility for violation of correlative obligations. In its effort to codify articles related to the DARSIWA, the ILC did not refer ro the term *erga omnes*, but discussed it in the Commentary under Articles 40 and 48.[53] These Articles are included in Chapter three, titled "serious breaches of obligations under peremptory norms of general international law". The ILC did not add any new insights on *erga omnes*, but rather highlighted the practice of the ICJ by citing the ICJ's opinion regarding this issue.[54] Although the ILC's work appears not to add any new insight on *erga omnes* norms, their inclusion as particular consequences of a serious breach of an obligation under international law implies a subtle message. In the opinion of the ILC, the breach of peremptory norms and *erga omnes* norms have the same consequences.

5. Article 1 of the UN Charter, Place of the Dispute: Is International Law Applicable to the Security Council?

The competence of the SC has been a contentious issue since the San Francisco negotiations. The principal concern is whether, when the SC acts to maintain international peace and security, it is subject to any limitations. In *Lockerby*, Judge Shahabuddeen, in his separate opinion wrote that

> "In the equilibrium of forces underpinning the structure of the UN within the evolving international order, is there any conceivable point beyond which a

49 ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Merits, Second Phase, judgment, ICJ Reports 1970, p. 32, para. 33.

50 Christian J. Tams, *Enforcing obligations erga omnes in international law*, Cambridge University Press, Cambridge, 2005, p. 100.

51 Gaetano Arangio-Ruiz, *Fourth Report on State Responsibility*, Vol. II(1), Year book of ILC 34, 1992, para. 92; Robert Ago, Fifth Report on State Responsibility, Vol. II(1), Yearbook of ILC 29, 1976, para. 89; Thomas Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge, pp. 352-353; Antonio Augusto Cançado Trindade, 'Jus Cogens: The Determination and The Gradual Expansion of Its Material Content in Contemporary International Case-Law', p. 6, at www.oas.org/en/about/who_we_are.asp.

52 Tams 2005, pp. 100, 114, and 121-122.

53 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, PP112-128

54 Id. pp. 112, 115, 116, and 127.

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> legal issue may properly arise as to the competence of the Security Council to produce such overriding results? If there are any limits, what are those limits and what body, if other than the Security Council, is competent to say what those limits are?"[55]

In the same vein, Judge Weeramantry raises this issue in his dissenting opinion. He wrote "does [...] the Security Council discharge [...] its variegated functions free of all limitations, or is there a circumscribing boundary of norms or principles within which its responsibilities are to be discharged?"[56] To answer this question, naturally, but not exclusively, the Charter is the primary source. Article 1 provided that

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;"

With regard to this paragraph, there are two opposing interpretative approaches: exceptional interpretation and integral interpretation.

5.1. Exceptional Interpretation

Based on the UN Charter, certain scholars believe that while the SC strives to maintain international peace and security, it is not subject to any limitations imposed by international law and is given *carte blanche* authority. Their argument rests on paragraph 1 of the UN Charter. They argue that the first part of the Article, which concerns collective measures, specifies the competence of the SC when acting for international peace and security, and the second segment refers to the duty of the Members and Organs, including the SC, to pursue peaceful

55 ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom),* Order of 14 April 1992, Provisional measures, Separate Opinion of Judge Shahabuddeen, at p. 33.

56 Id., Dissenting Opinion of Judge Weeramantry, p. 61.

settlement of disputes, in compliance with justice and international law, but the latter condition does not apply to collective measures.[57]

In short, they hold that if the international community is in a normal state, relations are governed by justice and international law, but when international peace and security are in danger, the SC may disregard justice and international law in order to restore or maintain peace and security. Therefore, extraordinary situations call for extraordinary measures.

In the context of exceptional interpretation, one approach classified the SC's actions into two clusters, namely those aimed at the peaceful resolution of disputes and those directed toward the maintenance and restoration of international peace and security. As far as the former is concerned, the SC is required to observe justice and international law, while regarding the latter, it is not, and such a derogation is justifiable under the theory of the extra-legal model.[58]

According to this approach, a connection was made between prevailing circumstances and the powers of the SC. Under normal circumstances, the SC is subject to international law, while when an abnormal situation arises, the SC enjoys freedom in the name of peace. Whittle acknowledged that such a scenario is clearly beyond the realm of the law, and therefore invoked the doctrine of mitigation.[59]

As per this doctrine, normal law applies in all situations, including an emergency, a violation of law by the executive may be ratified after a political, moral, and non-legal assessment which exempts the executive from the usual legal consequences of the unlawful action.[60] Such subsequent ratification does not modify the existing legal order, nor is it a derogation, but it exempts the executive from responsibility for wrongful actions taken in the event of an emergency.[61] The extra-legal measures model justifies unlawful action in light of

57 David Schweigman, *The authority of the Security Council under Chapter VII of the UN Charter: legal limits and the role of the International Court of Justice*, Kluwer Law International, The Hague, 2001, p. 29; Hans Kelsen, *The law of the United Nations: a critical analysis of its fundamental problems: with supplement*, Stevens & Sons, London, 1951, p. 730; Bernd Martenczuk, 'The Security Council, the International Court and judicial review: what lessons from Lockerbie?', *European Journal of International Law*, Vol. 10, Issue 3, 1999, pp. 544-545; Devon Whittle, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action', *European Journal of International Law*, Vol. 26, Issue 3, 2015, p. 680; Leland M Goodrich *et al.*, *The Charter of the United Nations*, Columbia University Press, London, 1969, pp. 27-28; Miguel Lemos, 'Jus Cogens Versus the Chapter VII Powers of the Security Council: With Particular References to Humanitarian Intervention and Terrorism', *Chinese Journal of International Law*, Vol. 19, Issue 1, 2020, pp. 31-32; Stefan Talmon, 'The Security Council as world legislature', *American Journal of International Law,* Vol. 99, Issue 1, 2005, p. 184.

58 Whittle 2015, p. 680.

59 Id. p. 681.

60 Oren Gross, 'Chaos and rules: Should responses to violent crises always be constitutional', *Yale Law Journal*, Vol. 112, Issue 5, 2002, pp. 1096-1106.

61 Oren Gross, 'Extra-legality and the ethic of political responsibility', *in* Victor V. Ramraj (ed.), *Emergencies and the Limits of Legality*, Cambridge University Press, Cambridge, 2008, p. 62.

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the values deemed to be protected by the law.[62] In the same vein, Whittle wrote that

> "[w]hen the UNSC acts under the Chapter VII, it could be argued that it enters an 'exceptional' phase of action, governed by a limited form of law different to the normal legal order."[63]

Taking precautions to avoid leaving the SC in a state of absolute freedom, he conditioned the SC's extralegal measures taken under Chapter VII on two requirements: *(i)* first, the SC must explicitly acknowledge the extra-legal nature of the action; and *(ii)* second, the action must be evaluated and adjudged by the international community.[64]

Rosand argues that the Charter's principles and purposes do not apply to the actions of the SC when it acts under Chapter VII, including the principles that prohibit the UN from interfering with matters that are essentially within the domestic jurisdiction of any state, as well as the need to act in conformity with the principles of justice and international law.[65] He went on to explain that international law merely restricts the actions of the SC under Chapter VI with regard to the exercise of its dispute resolution powers and concluded that

> "the measures the Council seeks to impose to address threats to peace and security need not be consistent with existing international law and may touch upon issues of largely domestic concern."[66]

The most radical opinion was taken by Miguel Lemos, who argued that when the SC acts to maintain or restore international peace and security, not only it is not obliged to observe justice and international law, but is also free to disregard *jus cogens* as well.[67] Otherwise, the measures for maintaining international peace and security would not be "effective" (according to Article 1) or "prompt and effective" (according to Article 24).[68]

In response to the argument that Article 53 VCLT (which states that any international agreement in conflict with the peremptory norm of general international law is void) has changed the classical legal order and appears as a limit on the SC,[69] he made the counterargument that *(i)* firstly, according to Article 103 of the UN Charter, obligations arising from the UN Charter take precedence over other international obligations, as reflected most prominently in

62 Gross 2002, pp. 1096-1106; Nomi Claire Lazar, *States of emergency in liberal democracies*. Cambridge University Press, Cambridge, 2009, p. 5.
63 Whittle 2015, p. 686.
64 Id.
65 Eric Rosand, 'The Security Council as Global Legislator: Ultra Vires or Ultra Innovative', *Fordham International Law Journal*, Vol. 28, Issue 3, 2005, p. 556.
66 Id.
67 Lemos 2020, p. 36.
68 Id. p. 32.
69 Id.

Articles 30, 52 and 75 VCLT; *(ii)* secondly, Article 4 of the Convention provided that it "applies only to treaties which are concluded by States after [its] entry into force". Hence, VCLT *per se* is not sufficient to strengthen the idea that the SC is bound by *jus cogens*.[70] Regarding the relationship between the UN Charter and *jus cogens* he wrote that

> "[t]his suggests that the superiority of any jus cogens norm – irrespective of whether such norm was already in existence at the time of the adoption of the Charter or it was created only at a later stage – has to be reconciled with the superiority of Chapter VII decisions of the SC. Reconciliation is easy: as jus cogens norms exist in an international system the primordial objective of which is the maintenance of international peace and security, their superiority is only absolute to the extent that such superiority does not conflict with the primordial objective."[71]

Finally, Lemos and scholars sharing the same point of view, in order to reinforce their argument, invoked in preparation for the UN Charter given that the drafters deliberately failed to restrict the SC to act in compliance with justice and international law.[72] As Schweigman observed

> "[t]he obligation to act in conformity with international law is only prescribed for the latter category, and the negotiating history of the Charter reveals that this was done deliberately. An amendment that would have extended the obligation to act in conformity with the principles of justice and international law to measures taken by the Council pursuant to its responsibility for the maintenance of international peace and security, was rejected by the major powers as curtailing the Council's freedom of (swift) action."[73]

5.2. Integral Interpretation

The UN Charter is first and foremost an international treaty and should be interpreted in light of the rules of the law of the treaties. Regarding the general rule of interpretation, Article 31(1) VCLT provided "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and Article 31(3)(c) stated that "[t]here shall be taken into account, together with the context: [...] *(c)* any relevant rules of international law applicable in the relations between the parties." According to these Articles, any interpretation shall be done in the context of international law.

Although Article 4 VCLT provided that it is binding only on the parties of the Convention and does not have retroactive effect, a set of rules for interpretation

70 Id. pp. 32-33.
71 Id.
72 Id.; Schweigman 2001, p. 29.
73 Id.

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is also contained in customary law, which operates in conjunction with the rules of interpretation outlined in Articles 31, 32 and 33. These rules of international custom are identical to those specified in the VCLT.[74] Therefore, Articles 31-33 VCLT should be considered as evidence of both the rules of interpretation applicable under the convention between its parties, as well as the rules that apply under customary international law.[75] The authors argue below that an integral interpretation of Article 1(1) is consistent with the context of international law.

6. Interaction Between the Security Council and General International Law

We now move on to analyze the interaction between the SC and GIL. The GIL, as discussed above, is a response to the needs of collective life and constitutes the foundation of an international legal order that is binding on all.[76] Therefore, the SC as an organ of the UN is subject to GIL.[77] The SC was established in order to maintain international peace and security in light of international order.

In the aftermath of World War II, *opinio juris* became the legitimate basis for conduct and as such, the absolute will of the state was replaced by the rule of law. Rule of law has the effect of distributing competence between subjects of international law and limiting uncontrolled freedom of action. The SC is not an exception and must adhere to the legal order upon which it came to exist. As the International Criminal Tribunal for the Former Yugoslavia (ICTY) held

> "[t]he Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large [...]."[78]

Considering this scenario, it is difficult to accept the conclusion that the SC has the authority to disturb the international legal order for the maintenance of international peace and security, which in turn is directly related to the international legal order. There appears to be an obvious contradiction in such an approach. The proposition that the SC is not bound by international law amounts to the denial of the rule of law and the establishment of international law, while

74 Ulf Linderfalk, *The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer, Netherlands, 2007, p. 7.

75 Id. *See* more about the existence of agreements on the customary character of Articles 31-33 among states, scholars, and international courts in Linderfalk, 2007, endnotes 21, 22, 23, p. 24.

76 Josef L. Kunz, 'General International Law and the Law of International Organizations', *The American Journal of International Law*, Vol. 47, Issue 3, 1953, p. 456.

77 Id. p. 458.

78 ICTY, *Prosecutor v. Dusko Tadic aka "Dule",* Trial Chamber in the Trial Chamber Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T, 10 August 1995, para. 28.

at the same time turning the Council into a super-state – a view that was explicitly rejected by the ICJ. The Court held that

> "[s]till less is it the same things as saying that it is "a super-State", whatever that expression may mean. It does not even imply that all its right and duties must be upon the international plane, anymore that all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties […]."[79]

Last but not least, the commentators who support the SC's freedom from compliance with international law, cite the preparatory work of the UN Charter at San Francisco. According to them, Norway's government proposal to incorporate certain rules of conduct for the SC in the Charter was rejected, and this rejection implies that the drafters did not intend to limit the SC by international law. Nevertheless, no consensus has been reached concerning such an understanding of the preparatory work. As noted by some commentators, the legislative history of the SC leaves some doubt as to whether the SC can adopt measures that are contrary to international law.[80] Furthermore, Norway's primary concern was the political independence and equality of states, and its amendment was tailored to provide some assurance regarding "independence, territorial integrity [and] of their continued existence as political entitles".[81] The Norwegian government sought to ensure that the SC would not act as a superstate. If rejection of the amendment is considered to imply that the SC can disregard international law, they must accept *contrario* the argument, that the SC has the power to target the independence and territorial integrity of a state. Such an interpretation runs counter to both the Charter and the foundations of international law.

In addition, one may also refer to Article 32 VCLT. The Article considered preparatory work of the treaty as a supplementary means of interpretation (not primary) when the interpretation according to Article 31 VCLT would be ambiguous, obscure, or manifestly absurd or unreasonable, while Article 1(1) of the UN Charter is clear, calling for all actions to maintain international peace and security to be carried out in accordance with justice and international law.

As to the exception interpretation, it remains unclear why states attempt to form relations based on the rule of law to ensure social order, while at the same time establishing the SC with unlimited power, capable of violating any order, norm, or rule in the interest of peace and security.

The findings of this study suggest that the phrase "in conformity with justice and international law" in Article 1 of the UN Charter applies to the SC, and since GIL is a component of international law, the SC is subject to it.

79 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, ICJ Reports 1949, p. 179.

80 Rüdiger Wolfrum, 'Purposes and Principles, Article 1', *in* Bruno Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, Vol. I, Oxford University Press, Oxford, 2012, p. 114.

81 *See* at https://archive.org/details/documentsoftheun008818mbp/page/n395/mode/2up.

6.1. Article 103 of the UN Charter and Jus Cogens

It is important to analyze the conflict between the SC decision and *jus cogens*. Which obligation has supremacy? Article 103 of the UN Charter provided that

> "[i]n the event of a conflict between the obligations of the UN Members under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The main question that may arise is whether the term "obligations under any other international agreement" also encompasses *jus cogens*. It is contended that the article is primarily directed "to secure the efficacy of UN action in the maintenance of peace"[82] and according to Article 25 of the UN Charter the Members undertake to carry out the decisions. Regarding Article 103, it should be noted that it is not only related to the decisions of the SC, but also to all the norms listed in Articles 1 and 2. Therefore, any interpretation of the Article relating to the SC should be consistent with other Charter norms. The issue of a possible conflict between Article 103 and *jus cogens* has been debated in the Repertory of practice of UN organs and the Article was mostly discussed in the light of Articles 1 and 2 of the UN Charter. According to the delegations, the above Articles are "uncontestable norms of international public law", and Article 103 was designed to neutralize the legal effects of subsequent treaties which may override the Charter's norms.[83] The necessity of Article 103 in international law was justified in terms of the dignity and importance of the Preamble, Articles 1 and 2.[84] The Charter does not generate these norms, rather, they already exist in international law. Hence, "the rules of *jus cogens* undoubtedly included the purposes and principles set forth in Articles 1 and 2 of the Charter and in its Preamble."[85] Under these circumstances, the SC has primary responsibility to maintain international peace and security in order to safeguard all norms and its measures must abide by *jus cogens* otherwise it would defeat the purpose. Hence, it is generally acknowledged that a conflict between Charter Law and *jus cogens* would result in the nullification of the Charter Law.[86] As Tomuschat wrote,

> "[Article 103] does not refer to general international law. General international law reflects the consensus of the international community. On the other hand, Article 103 is designed to override specific national

82 Robert Kolb, 'Does Article 103 of the Charter of the United Nations Apply only to Decisions or also to Authorizations Adopted by the Security Council?', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 64, Issue 1, 2004, p. 21.

83 Repertory of practice of United Nations organs. Supplement no. 4, Vol. 2, Articles 55-111 of the Charter, covering the period 1 Sept. 1966 to 31 Dec. 1969, p. 368, at 17.

84 Id. p. 369, at 27.

85 Id.

86 Johann Ruben Leiß & Andreas Paulus, 'Article 103', *in* Simma *et al*. (eds.) 2012, p. 2119.

> peculiarities. It has a totally different purpose and would be used contrary to its meaning if applied against general international law."

Judge Lauterpacht in his separate opinion in *Genocide* asserted, that

> "[t]he concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of noms – extend to a conflict between a Security Council resolution and *jus cogens*. Indeed, one only has to state the opposite proposition thus – that a Security Council resolution may even require participation in genocide – for its unacceptability to be apparent."[87]

Therefore, Article 103 should be interpreted in favor of *jus cogens*. The purpose of the Article is to protect the norms of *jus cogens* that are included in the Charter, not to grant the SC the authority to override them. The Article is to guarantee efficiency of the Charter and to eliminate barriers in "ordinary treaty norms" for the implementation of obligations arising under the Charter,[88] not standing against *jus cogens*.

6.2. Different Function

Through subsequent legal action, states can neutralize the legal effects of the UN Charter norms or the SC decisions[89] and, in this way, weaken the UN system and lead it to the fate of the League of Nations. For this reason, in order to ensure the successful implementation of the Charter, the drafters have given primacy to its obligations. The ILC clarified that

> "[t]he lower-ranking rule is merely set aside to the extent that it conflicts with the obligation under Article 103. […]. [T]he very language of Article 103 makes it clear that it presumes the priority of the Charter, not the invalidity of treaties conflicting with it."[90]

Article 103 is, therefore, a rule of conflict and cannot be invoked to nullify other legal actions in conflict with the UN Charter.[91] It merely indicates primacy. Not

87 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Order of 13 September 1993, Separate opinion of Judge ad hoc Lauterpacht, para. 100.

88 Leiß & Paulus 2012, p. 2123.

89 Andreas L. Paulus, 'Jus cogens in a time of hegemony and fragmentation-an attempt at a re-appraisal', *Nordic Journal of International Law*, Vol. 74, Issue 3, 2005, p. 319.

90 International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (2006) UN Doc. A/CN.4/l. 682, p. 170, para. 333.

91 Paulus 2005, p. 317; Leiß & Paulus 2012, pp. 1297-1298; Rain Liivoja, 'The scope of the supremacy clause of the United Nations Charter', *International & Comparative Law Quarterly*, Vol. 57, Issue 3, 2008, p. 584.

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only does the Article not grant *carte blanche* to the SC but neither does it confer upon the SC the power to annul agreements between states, while *jus cogens* is a matter of merit and voids any legal action that conflicts with the fundamental values of international law, including the UN system. The UN's fundamental norms are enshrined in the Preamble, Articles 1 and 2, which provide authority for Article 103. In the preamble 'faith in fundamental human rights' was reaffirmed. As part of the UN's purposes, Article 1 defines 'equal rights', 'self-determination of peoples' and respect for 'freedoms for all without distinction as to race, sex, language, or religion'. As a prerequisite to achieving the purposes of the UN, Article 2 stipulated the prohibition of use of force. All of these norms are *jus cogens* and *erga omnes* in nature.[92]

Furthermore, the primacy conferred by Article 103 on the SC's decision rests on the common presumption that the SC acts within its remit and "if the Security Council adopts a resolution in excess of its competence (*ultra vires*), then no obligation arises under the resolution."[93] As a result, there is no clash between Article 103 and *jus cogens*, and any action by the SC must be crystallized through filter of *jus cogens*. As Kitharidis pointed out,

> "where the UNSC breaches a permissive norm, there can be no conflict capable of allying under Article 103; ultra vires resolutions cannot exist within obligations that may fall under the scope of Article 103. Ultra vires resolutions cannot authorize states to violate their other international law obligations [...]."[94]

6.3 Article 103 and the Principle of Nemo Dat Quod Non Habet

As a final point, the question of whether, in principle, states can endow the SC with the power to override *jus cogens* is worth analyzing. An answer to this question is tied to the issue of whether states in turn may override *jus cogens*. ILC discussed the issue at its fifty-eighth session and concluded as follows:

92 The following norm was included in the list of non-exhaustive jus cogens provided by the ILC at its seventy-first session: "*(a)* The prohibition of aggression; *(b)* The prohibition of genocide; *(c)* The prohibition of crimes against humanity; *(d)* The basic rules of international humanitarian law; *(e)* The prohibition of racial discrimination and apartheid; *(f)* The prohibition of slavery; *(g)* The prohibition of torture; *(h)* The right of self-determination". Report of the International Law Commission on the Work of Its Seventy-First Session, UN GAOR, 74th Sess., Supp. No. 10, at 1-2, paras. 1, 3, UN Doc. A/74/10, 2019, p. 147; also in Draft Articles on State Responsibility, Commentary on Article 40, paras. 4-6 in Official Records of the General Assembly, Fifth-sixth Session (A/56/10), pp. 283-284.

93 Kjetil Mujezinović Larsen, *The human rights treaty obligations of peacekeepers*, Cambridge University Press, Cambridge, 2012, p. 323; Alexander Orakhelashvili, 'The impact of peremptory norms on the interpretation and application of United Nations Security Council resolutions', *European Journal of International Law*, Vol. 16, Issue 1, 2005, p. 69.

94 Id.; Sophocles Kitharidis, 'The Power of Article 103 of the un Charter on Treaty Obligations: Can the Security Council Authorise Non-Compliance of Human Rights Treaty Obligations in United Nations Peacekeeping Operations?', *Journal of International Peacekeeping*, Vol. 20, Issue 1-2, 2016, p. 1229.

> "[i]f United Nations Member States are unable to draw up valid agreements in dissonance with *jus cogens*, they must also be unable to vest an international organization with the power to go against peremptory norms. Indeed, both doctrine and practice unequivocally confirm that conflicts between the United Nations Charter and norms of *jus cogens* result not in the Charter obligations' pre-eminence, but their invalidity."[95]

There is no norm of *jus cogens* contained in Article 103 of the UN Charter, it merely indicates that the Charter, including the decisions of the SC, has precedence over other international agreements. Here, the key question is whether the decision of the SC qualifies as *jus cogens*. There is no doubt that the SC is not "the international community of States as a whole", because it involves fifteen members and even to reach a decision, participation of all members is not mandatory.[96] Moreover, during the discussion on identifying specimens of *jus cogens*, the ILC assigned to states the responsibility "to establish or recognize peremptory norms".[97] Thus, the SC is not qualified to introduce *jus cogens*.

The SC may be argued to be a representative of the international community of states, therefore, it may transgress *jus cogens* in accordance with Article 103 on their behalf. It is not clear, however, how states can confer powers on the SC when they are deprived of them in substance. It was noted by the ILC that even though international organizations possess independent legal personality, they are created by states, so it is difficult to accept the idea that states are permitted to disregard *jus cogens* by establishing international organizations.[98] A presumption must exist that an international organization may not deviate from peremptory norms, and any contravention would be *ultra vires*.[99] The UN and its members are equally bound by the norms of international law, and are required to comply with its obligations.[100] In the same vein, Liivoja aptly held that

> "if jus cogens norms are, by definition, norms from which no derogation is possible, it would be nonsensical to stipulate that Security Council resolutions are an exception - this argument would involve a complete discarding of the very concept of *jus cogens*."[101]

Judge Fitzmaurice, in his dissenting opinion in the *Namibia Advisory Opinion* reckoned that "the Security Council is as much subject to it (for the UN is itself a

95 International Law Commission, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August, 2006, A/CN.4/L.682, p. 176, para. 346.
96 UN Charter, Article 27.
97 The United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vol. II, 1986, p. 39.
98 Id.
99 Orakhelashvili 2005, p. 68.
100 Dapo Akande, 'The International Court of Justice and the Security Council: Is There Room for Judicial Control of Decisions of the Political Organs of the United Nations?', *International & Comparative Law Quarterly*, Vol. 46, Issue 2, 1997, p. 320.
101 Liivoja 2008, p. 610.

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subject of international law) as any of its individual members are".[102] In *Kadi* the CJEU spelled out that

> "[i]nternational law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community."[103]

7. Conclusion

By adopting the UN Charter following World War II, a new legal order was established. The international legal order is founded on the assumption of the rule of law, which settles the relationships between all subjects of law in the international society.

In this regard, the SC, following the legal personality of the UN, is bound by the requirements of the rule of law. The first paragraph of Article 1 endorses this assumption and states that in order to maintain international peace and security, international law and justice must be observed and on the other hand, Article 103 of the UN Charter denotes the primacy of SC decisions over other international agreements. There are, however, certain principles in international law, known as GIL, that limit the jurisdiction of the SC, and in the event of a conflict, GIL will prevail over Article 103. GIL is not derived from the will of states, as is the case with the sources of international law, but rather stems from the necessities of collective life. GIL includes two clusters of principles: axiomatic and axiologic principles. The former is derived from the structure of international society and law; salient examples are the prohibition of use of force or *pacta sunt servanda*. The latter originated from values of the international community which revolve around the axis of humanity. In this line of arguments, one could say that *jus cogens* and *erga omnes* originate from GIL and almost all norms identified as *jus cogens* and *erga omnes* are related to humanity. When the SC acts to maintain international peace and security, it must adhere to limits set by GIL. The crucial responsibility of maintaining international peace and security does not alter the status of the SC as a *sui generis* organ. The SC, as an organ of the UN, shall fulfill its mission according to the fundamental norms of the international legal order.

102 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion),* ICJ Reports 1971, p. 294, para. 115, Dissenting Opinion by Judge Gerald Fitzmaurice.

103 Judgment of 21 September 2005, *Case T-315/01, Kadi,* ECLI:EU:T:2005:332, para. 230.