The Creation of *Jus Cogens* – Making Sense of Article 53 of the Vienna Convention

Ulf Linderfalk[*]

I.	Introduction	359
II.	The Creation of Customary International Law	363
III.	Why Article 53 of the Vienna Convention Is Not Circular	370
IV.	Further Consequences of the *Jus Cogens* Analysis	374

Abstract

This essay provides an analysis of the creation of *jus cogens*. The analysis makes intelligible the definition of *jus cogens* provided in Art. 53 of the 1969 Vienna Convention on the Law of Treaties. It has been said repeatedly about this definition that it is circular. If a *jus cogens* status is conferred on a rule of law because the international community of states accepts and recognizes this rule as non-derogable and modifiable only by the creation of a new norm of *jus cogens*, then the definition assumes what remains to be established: the creation of *jus cogens*. As shown in this essay, this criticism builds on wrongful assumptions. It assumes that Art. 53 explains the creation of *jus cogens*, which it does not; it explains only its existence. A full explanation of the creation of *jus cogens* requires further elaboration. According to the proposition argued in this essay, *jus cogens* obligations derive from the usual processes creating ordinary customary international law.

I. Introduction

Jus cogens is in vogue. While not so very long ago, peremptory international law was regarded by international lawyers as an idea of little more than academic interest, today it is part of the common rhetoric of the international legal profession. More than ever before international lawyers resort to *jus cogens* for the construction and reinforcement of legal arguments. Even more importantly, they do so in an exceptionally wide variety of dif-

[*] Associate Professor of International Law at the Faculty of Law, Lund University, Sweden.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

ferent legal contexts. As I have argued extensively elsewhere, from the perspective of international legal science at least, this raises a need for a better understanding of the relevant international law.[1] This is a need I am intent to meet. In this essay, I will focus on what appears to be one of the more crucial issues for the accomplishment of this task, if not the most crucial issue of them all: the rather peculiar wording chosen for Art. 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[2]

Let me begin by setting this provision into its proper context. As we are used to thinking, *jus cogens* is a legal concept closely associated with the application of a particular set of norms in customary international law. In my earlier writing, I have referred to this set of norms as the international *jus cogens* regime.[3] This is to stress the complexity of the *jus cogens* concept, which obviously presupposes the existence of norms with rather distinct functions. First of all, *jus cogens* presupposes the existence of norms commanding or prohibiting certain actions, such as for instance aggressive warfare:

If a state engages in aggressive warfare, then this shall be considered a breach of an international obligation owed by that state to the international community as a whole.[4]

In the international legal literature, these norms are often (rather bluntly) referred to as peremptory norms of international law, or just *jus cogens*. To add clarification, they will here be referred to as *first order rules of jus cogens*.[5] Secondly, the concept of *jus cogens* presupposes the existence of norms specifying the legal consequences that ensue from the postulated superiority of *jus cogens* over ordinary international law, as illustrated by the following examples:

- If a treaty is in conflict with a first order rule of *jus cogens* created prior to the conclusion of the treaty, then the treaty shall be considered void.[6]

---

[1] See *U. Linderfalk*, Normative Conflict and the Fuzziness of the International *ius cogens* Regime, ZaöRV 69 (2009), 961 et seq.

[2] UNTS, Vol. 1155, 331.

[3] See *U. Linderfalk* (note 1).

[4] See e.g. the Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, ILC, Report on the Work of its 53rd Session, Session 20, at 85 (Draft Art. 26).

[5] See *U. Linderfalk* (note 1).

[6] Compare Arts. 53 and 44 of the VCLT.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

- If the purport of a reservation to a treaty is in conflict with a first order rule of *jus cogens*, then that reservation shall be considered void.[7]

- If a resolution adopted by an international organization is in conflict with a first order rule of *jus cogens*, then that resolution shall be considered void.[8]

- To the extent that a claim of sovereignty over a certain territory is based on action violating a first order rule of *jus cogens*, that claim shall be considered invalid.[9]

To facilitate reference, tentatively I will refer to these norms as *second order rules of jus cogens*.[10]

As can be seen from the way first and second order rules of *jus cogens* are described, if we expect the international *jus cogens* regime to be effective, then those rules cannot themselves be sufficient. Any application of the second order rules of *jus cogens* presupposes that first order rules of *jus cogens* (like the prohibition of aggressive warfare) can be identified. In other words, first and second order rules of *jus cogens* need to be accompanied by a norm that helps define the *jus cogens* concept for the overall purpose of general international law. This is where Art. 53 of the 1969 VCLT enters the picture. It reads:

> 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.

---

[7] Compare the Dissenting Opinion expressed by Judge *Tanaka*, International Court of Justice, *North Sea Continental Shelf* (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*), Judgment of 20.2.1969, ICJ Reports 1969, 3, at 182. In the same vein, *Alain Pellet*, Special Rapporteur, Tenth Report on Reservations to Treaties, submitted to the International Law Commission at the occasion of its 57th session (UN Doc. A/CN.4/588/Add.1), 34-35, §§ 135-137. For a further discussion of this rule, see *U. Linderfalk*, Reservations to Treaties and Norms of *Jus Cogens* – A Comment on Human Rights Committee General Comment No. 24, in: I. Ziemele (ed.), Reservations to Human Rights Treaties and the Vienna Convention Regime, 2004, 213 et seq.

[8] See e.g. Separate Opinion of Judge *Lauterpacht*, International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*), Further Requests for the Indication of Provisional Measures, Order of 13.9.1993, ICJ Reports 1993, 325, at 440.

[9] See e.g. *A. Orakhelashvili*, Peremptory Norms in International Law, 2006, 218 et seq. and the further references cited there.

[10] See *U. Linderfalk* (note 1). With regard to this designation, see, however, the remark below, section 4.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Some international legal scholars argue that Art. 53 cannot possibly be the general rule required by the international *jus cogens* regime, since, according to the wording of the VCLT, this provision applies only for the limited purposes of the Convention.[11] Stated more specifically, the provision is applied only to resolve conflicts between treaties and first order rules of *jus cogens*,[12] and then only in the relations between the parties to the VCLT and with respect to treaties concluded by those parties after they entered the Convention.[13] This objection, however, builds on an overly narrow reading of the Vienna Convention. It ignores the role played by Art. 53 in modern-day international legal discourse. In judicial decision-making, as well as in scholarly debate, the contents of Art. 53 are applied to situations with little regard to whether they come within the personal, material or temporal scope of application of the VCLT or not.[14] Obviously, the great majority of international lawyers look upon Art. 53 as a reflection of customary international law. They regard Art. 53 as the expression of a general definition that reaches beyond the rather limited scope of application of VCLT, Arts. 53 and 64. The present essay will start off from this same assumption.

All since the beginning of the 1960s, when the provision finally adopted as Art. 53 began to take shape, it has been criticized for its rather peculiar wording. According to critics, the definition provided in Art. 53 is circular.[15] Naturally, when states accept and recognize a rule (R) as a norm, from which no derogation is permitted, and which can be modified only by the creation of a new rule of *jus cogens*, this cannot be the constitutive act by which a *jus cogens* status is conferred on R. That would commit us to the conclusion that states wrongly assumed R to be a norm, from which no derogation is permitted, etc. It has to be taken for granted that if states accept and recognize R as *jus cogens*, they do so for a good reason. They do so because according to their judgment, *international law* does not permit derogations from R, and *international law* accepts modifications only when accomplished by a new norm of *jus cogens*. Hence, by the way Art. 53 is stated, the definition assumes what remains to be established: the creation of *jus cogens*.

---

11 See e.g. *D. Dubois*, The Authority of Peremptory Norms in International Law: State Consent or Natural Law?, Nord. J. Int'l L. 78 (2009), 133, at 144.

12 See Arts. 53 and 64 of the VCLT.

13 Compare Art. 4 of the VCLT.

14 See *U. Linderfalk* (note 1), at 962, notes 3-7.

15 See e.g. *D. Dubois* (note 11), 155; *G. Christenson*, Jus Cogens: Guarding Interests Fundamental to International Society, Va. J. Int'l L. 28 (1987-1988), 585, at 594; *C. L. Rozakis*, The Concept of *Jus Cogens* in the Law of Treaties, 1976, 45.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

This criticism inspires me. Indeed, it seems a rather fair requirement that if international legal science wishes to uphold the idea of Art. 53 as a reflection of a valid rule of law, one way or another it has to come to grips with the argument just reiterated. It has to provide an explanation of the creation of *jus cogens* that renders Art. 53 intelligible. This – to put it in a short sentence – is exactly what I now aim to do. As the investigation will show, if international legal scholars consider Art. 53 deficient, it is not because of what is actually stated in this provision. It is because of the wrongful assumption that Art. 53 explains the creation of *jus cogens*. In fact, Art. 53 offers no such explanation. The real explanation of the creation of *jus cogens* has to be looked for elsewhere. According to the proposition that I wish to establish, *jus cogens* is created by the same processes that create customary international law.

I will argue this proposition in three steps. In section 2 of the essay, I will briefly delineate the processes that create customary international law. For the accomplishment of this task, I will draw on the analysis provided by the British legal philosopher *John Finnis*. In section 3, I will show how *Finnis'* analysis can be used for the resolution of the particular problem at hand. Stated more specifically, I will provide an analysis of the creation of *jus cogens*. As section 3 will establish, contrary to what many international legal scholars have argued, there is nothing circular about the definition laid down in Art. 53 of the VCLT. In section 4, I will continue exploring the consequences ensuing from my *jus cogens* analysis. As the investigation will show, the analysis has many virtues. Not only does it take care of the circularity that seems to inhere in the wording of Art. 53. It can also be used for explaining a host of other related issues, such as for instance the meaning of the expression "accepted and recognized by the international community of States as a whole", the modification of *jus cogens* rules, and the status of the second order rules of *jus cogens*.

II. The Creation of Customary International Law

In the rich literature on the sources of international law, references to Art. 38, para. 1 of the Statute of the International Court of Justice (ICJ) are a commonplace.[16] Although, by its wording, Art. 38, para. 1 remains a list of the sources to be applied by the Court, it is the general assumption that these same sources are applicable also outside ICJ proceedings, in the rela-

16 UNTS, Vol. 1, xvi.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

tions between international legal subjects in general. The sources listed in Art. 38, para. 1(b) include "international custom, as evidence of a general practice accepted as law". International lawyers infer from this wording a general definition of the concept of customary international law. According to this definition, in order for a rule of customary international law to exist, two conditions have to be met: (i) there has to be a certain pattern of conduct, in the sense of a general, constant, and uniform usage; (ii) there has to be a widespread belief among states (often referred to as the *opinio juris* or the *opinio juris generalis*) that this same pattern of conduct is prescribed, permitted, or prohibited (whatever might be the case) by customary international law.[17]

This definition forms a usual starting-point for scholarly analysis and discussion of the question how customary international law is created. Since obviously, the existence of a rule (R) presupposes the creation of that same rule R, commentators assume that the criteria applied to establish the existence of customary international law must also be the criteria that explain its creation. Hence, statements like that made by *Rosalyn Higgins* follow quite naturally: "For the formation of customary international law, practice and *opinio juris* is required."[18] Analytically, however, such descriptions of the customary law-creating process remain problematic. If someone suggests that a rule of customary international law is created by a conviction on the part of states that some certain action is required by or consistent with the existing customary international law, then this statement can be assessed in two different ways. Either the statement is circular – it assumes what remains to be established. Or, the statement assumes that a rule of customary international law can come into existence by virtue of the erroneous belief that it already exists. Both alternatives are equally unattractive.

The British legal philosopher *John Finnis* has written on this problem, and as I have already stated, I will base my essay on his findings.[19] It should be realized that *Finnis'* enquiry into the process creating customary international law has a very particular purpose. In want of arguments for a secular version of natural law theory, *Finnis'* aim is to establish that legally authoritative rules can emerge although there is no one with authority to make them. Separated from this context, however, *Finnis'* analysis can be viewed as theory-neutral. On further scrutiny, it does not commit us either to the

---

[17] See e.g. *I. Brownlie*, Principles of International Law, 6th ed. 2003, 7et seq.

[18] *R. Higgins*, Problems and Process: International Law and How We Use It, 1994, 19. For other similar statements, see e.g. *H. Thirlway*, The Sources of International Law, in: M. Evans (ed.), International Law, 2nd ed. 2006, 115, at 122; *V. Lowe*, International Law, 2007, 38.

[19] *J. Finnis*, Natural Law and Natural Rights, 1980, 231 et seq.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

natural law position adopted by *Finnis* himself, or to the position of legal positivism. This is why I find it useful.

To solve the paradox inherent in the *opinio juris* criterion, *Finnis* introduces the distinction between practical, empirical, and juridical judgments.[20] His important point is that a statement like "R is an authoritative legal rule" can be analyzed in three different ways. First, it can be analyzed as a *practical judgment*. In this case the statement is viewed as asserted by an utterer, who treats the rule R as authoritative not merely for others but also for himself. According to the utterer, the rule R gives anyone, including the utterer himself, an exclusionary reason for action in accordance with that rule.[21] Secondly, "R is an authoritative legal rule" can be analyzed as an *empirical judgment*. In this case the statement is viewed as asserted by a person who does not necessarily consider the rule R to have authority in relation to himself. What the statement aims to describe is the fact that some other person or persons consider the rule R authoritative. The utterer in this case speaks in the capacity of an observer. Finally, "R is an authoritative legal rule" can be analyzed as a *juridical judgment*. In this case the statement is viewed as asserted by a person "from the legal point of view".[22] The statement is made neither in recognition of the rule R's authoritativeness in relation to the utterer, nor by way of report about other people's attitude to the rule R, but rather by way of stating what is the case from the viewpoint of law, without either endorsing or rejecting that view.

Finnis' observation is that these distinctions bear on the analysis of the processes that create customary international law.[23] At the root of the formation of custom, *Finnis* explains,[24] is a practical judgment:

PJ_0: "In this domain of human affairs, it would be appropriate to have *some* determinate, common, and stable pattern of conduct and, correspondingly, an authoritative rule requiring that pattern of conduct; to have this is more desirable than leaving conduct in this domain to the discretion of individual states; the particular pattern of conduct P is appropriate, or would

[20] In using this distinction, *Finnis* draws on *Raz*. See *J. Raz*, Practical Reason and Norms, 1975, 170 et seq.

[21] By an exclusionary reason, *Finnis* understands "a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant and would in the absence of the exclusionary reason have sufficed to justify proceeding in some other way". *J. Finnis* (note 19), 34. The terminology derives from *Raz*. See *J. Raz* (note 20), 35 et seq., 58 et seq.

[22] This expression derives from *Raz*. See *J. Raz* (note 20), 177.

[23] *J. Finnis* (note 19), 238 et seq.

[24] *J. Finnis* (note 19), 239 et seq.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

be if generally adopted and acquiesced in, for adoption as an authoritative common rule of conduct."

This practical judgment PJ_0, however, is quite distinct from the empirical judgment (EJ_2) that many states in fact subscribe to it:

EJ_2: "The opinion PJ_0 is widely subscribed to by states."

Also, the practical judgment PJ_0 must be distinguished from the empirical judgment (EJ_1) that the practice of states is convergent with the pattern referred to in PJ_0:

EJ_1: "There is widespread concurrence and acquiescence in this pattern of conduct P by states."

The empirical judgments EJ_1 and EJ_2 in turn are pertinent for the making of a new practical judgment. This judgment (PJ_1) expresses the utterer's understanding of the empirical judgments EJ_1 and EJ_2 relative to the prevailing doctrine of sources:

PJ_1: "The widespread subscription to PJ_0, and the widespread concurrence and acquiescence in the pattern of conduct P, are sufficient to warrant the judgment (PJ_2) that there is now an authoritative rule of customary international law (R) requiring or permitting P (as the case may be)."

The practical judgment PJ_2, obviously, corresponds to the *opinio juris* as traditionally defined:

PJ_2: "There is now an authoritative rule of customary international law (R) requiring or permitting P (as the case may be)."

This is not the end of the matter, however. As *Finnis'* analysis goes, the practical judgments PJ_1 and PJ_2 have to be distinguished from yet another empirical judgment. According to what this judgment (EJ_3) asserts, the rule R is effective, in the sense that, as a matter of fact, states generally recognize R as an authoritative rule of customary international law:

EJ_3: "States generally accept the rule (R) that P is to be done, or may be done (as the case may be)."

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Finally, to make the analysis complete, the practical judgments PJ_1 and PJ_2 have to be distinguished from the juridical judgment (JJ_1) made by anyone speaking "from the point of view of law":

JJ_1: "According to international law, P is required or permitted (as the case may be)."

This analysis has many virtues. Clearly, the distinctions suggested provide a basis for a more subtle analysis of the creation of customary international law than those usually attempted in the international legal literature. *Finnis* himself, however, rests content with the observation that there is a conceptual difference between the *opinio juris* (i.e. the practical judgment PJ_2) and the other beliefs that create customary international law (i.e. the practical judgments PJ_0 and PJ_1); while the former is clearly dependent upon the latter, analytically, it is quite distinct.[25] He does not bring out explicitly the full consequences ensuing from his analysis for the understanding of Art. 38, para. 1(b) of the ICJ Statute and the relevance of this provision for an explanation of the creation of customary international law. I will now try to fill this void.

To make my account concrete, I will use *Finnis'* analysis relative to a specific rule of customary international law. I will assume that according to customary international law, a receiving state is prohibited from instituting criminal proceedings against the diplomatic agents of a sending state.[26] For the purpose of easy reference, henceforth, I will call this *the rule of diplomatic immunity*. Applied to this rule, the important distinctions entailed by *Finnis'* analysis can be specified as follows:

PJ_0: "For every relation between a receiving and a sending state, it would be desirable and appropriate if a rule of customary international law prohibited the former from instituting criminal proceedings against the diplomatic agents of the latter."

EJ_1: "Receiving states generally do not institute criminal proceedings against the diplomatic agents of a sending state."

EJ_2: "States widely subscribe to the opinion that for every relation between a receiving and a sending state, it would be desirable and appropriate if a rule of customary international law prohibited the former from instituting criminal proceedings against the diplomatic agents of the latter."

---

[25] *J. Finnis* (note 19), 231 et seq.

[26] Compare Art. 31, para. 1 of the 1961 Vienna Convention on Diplomatic Relations. (UNTS, Vol. 500, 95.)

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

PJ_1: "The widespread subscription to the practical judgment PJ_0, and the widespread concurrence and acquiescence in the pattern of conduct described by the empirical judgment EJ_1, are sufficient to warrant the conclusion that there is now an authoritative rule of customary international law, according to which, in every relation between a receiving and a sending state, the former is prohibited from instituting criminal proceedings against the diplomatic agents of the latter."

PJ_2: "There is now an authoritative rule of customary international law, according to which, in every relation between a receiving and a sending state, the former is prohibited from instituting criminal proceedings against the diplomatic agents of the latter."

EJ_3: "States generally accept the rule of customary international law, according to which, in every relation between a receiving and a sending state, the former is prohibited from instituting criminal proceedings against the diplomatic agents of the latter."

JJ_1: "According to customary international law, in every relation between a receiving and a sending state, the former is prohibited from instituting criminal proceedings against the diplomatic agents of the latter."

This scheme helps to explain why the criteria applied to establish the existence of a rule of customary international law, as reflected in Art. 38, para. 1(b) of the ICJ Statute, do not easily serve as an explanation of the creation of that same rule. Let us assume, for instance, that we wish to establish the existence of the rule of diplomatic immunity. Obviously, this amounts to showing that the juridical judgment JJ_1 is supported by good reasons. Following the definition enshrined in Art. 38, para. 1(b), we need to show (i) that receiving states generally do not institute criminal proceedings against the diplomatic agents of a sending state, and (ii) that there is a widespread belief among states that according to customary international law, in every relation between a receiving and a sending state, the former is prohibited from instituting criminal proceedings against the diplomatic agents of the latter. Obviously, this is tantamount to showing that the empirical judgment EJ_3 is correct. Stated somewhat differently, Art. 38, para. 1(b) makes the state of affairs described by the empirical judgment EJ_3 a sufficient reason for the juridical judgment JJ_1. The state of affairs described by the empirical judgment EJ_3 entails the existence of the rule of diplomatic immunity *as a matter of fact*.

Now, this same state of affairs does not itself explain how the rule of diplomatic immunity was created. As *Finnis'* analysis makes fairly plain, however, it is a basis on which such an explanation can be founded. The empiri-

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

cal judgment EJ_3 entails the empirical judgment EJ_1 and the widespread subscription to the practical judgment PJ_2. Stated in clear language, the correctness of the empirical judgment EJ_3 requires that it can be shown (i) that receiving states generally do not institute criminal proceedings against the diplomatic agents of a sending state, and (ii) that there is a widespread belief among states that according to customary international law, in every relation between a receiving and a sending state, the former is prohibited from instituting criminal proceedings against the diplomatic agents of the latter. If the practical judgment PJ_2 is not to lead to the fallacy indicated in the beginning of this section, it too requires further explanation, however. Hence, in an explanation of the creation of customary international law, obviously, the practical judgment PJ_2 presupposes the empirical judgments EJ_1 and EJ_2 and the widespread subscription to the practical judgment PJ_1. For the establishment of the existence of the rule of diplomatic immunity, given what is provided in Art. 38, para. 1(b) of the ICJ Statute, this dependency of the practical judgment PJ_2 on the empirical judgments EJ_1 and EJ_2 and the widespread subscription to the practical judgment PJ_1 *is of no relevance*. For the explanation of the creation of this same rule, however, *it is*. Consequently, as revealed by *Finnis'* analysis, the real explanation of the creation of the rule of diplomatic immunity lies in a combination of the states of affairs described in the empirical judgments EJ_1, EJ_2, and EJ_3, together with the widespread subscription to the practical judgments PJ_1 and PJ_2. Contrary to what is assumed by international legal scholars, it does not lie solely in state practice and *opinio juris*, i.e. the factual state of affairs described in the empirical judgment EJ_1 and the widespread subscription to the practical judgment PJ_2.

Secondly, and perhaps most importantly, *Finnis'* analysis renders Art. 38, para. 1(b) of the ICJ Statute intelligible. According to Art. 38, para. 1(b), if we wish to establish the existence of the rule of diplomatic immunity, we are required to show the existence of a certain belief: an *opinio juris*. Stated more specifically, we are required to show that among states there is a widespread belief that according to customary international law, in every relation between a receiving and a sending state, the former is prohibited from instituting criminal proceedings against the diplomatic agents of the latter. There is nothing paradoxical or circular about this requirement. In this respect Art. 38, para. 1(b) makes perfectly sense. The *opinio juris* criterion becomes paradoxical only when it is applied to explain the creation of a customary international legal norm, such as the rule of diplomatic immunity, and when in this explanation it is treated as self-sufficient.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Certainly, beliefs are important for the creation of customary international law, but those beliefs include more than just the *opinio juris* as traditionally defined. As stated earlier, the creation of the rule of diplomatic immunity requires not only the belief that according to customary international law, in every relation between a receiving and a sending state, the former is prohibited from instituting criminal proceedings against the diplomatic agents of the latter. Furthermore, it requires, first, the belief that for every relation between a receiving and a sending state, it would be desirable and appropriate if a rule of customary international law prohibited the former from instituting criminal proceedings against the diplomatic agents of the latter. Secondly, the creation of the rule of diplomatic immunity requires the belief that the widespread subscription to the practical judgment PJ_0, and the widespread concurrence and acquiescence in the pattern of conduct described by the empirical judgment EJ_1, are sufficient to warrant the practical judgment PJ_2. The conclusion that remains to be drawn from this analysis appears rather obvious. The problem with the *opinio juris* criterion does not occur because of Art. 38, para. 1(b) of the ICJ Statute, which clearly does not pretend to explain the creation of customary international law. The problem, rather, occurs because of the wrongful assumption made by international legal scholars that Art. 38, para. 1(b) can be used for this purpose exactly.

III. Why Art. 53 of the Vienna Convention Is Not Circular

Now, let us return to where we started: to the definition laid down in Art. 53 of the 1969 Vienna Convention on the Law of Treaties. According to this definition – it might be worth repeating – "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". There is a striking similarity between this provision and Art. 38, para. 1(b) of the ICJ Statute. Art. 53, like Art. 38, para. 1(b), is interested, not in the law-creating process as such, but in the existence of law *as a matter of fact*. Stated more specifically, for Art. 53 the only relevant question is whether a rule of international law is *jus cogens* or not. This notwithstanding, Art. 53, like Art. 38, para. 1(b), is used by international legal scholars to explain the law-creating process exactly. While Art. 38, para. 1(b) is used to explain the creation of customary

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

international law, Art. 53 is used to explain the creation of a rule of law as *jus cogens*. (It should be noted that by "the creation of a rule of law as *jus cogens*" I mean, not the creation of a rule of law as law, but rather the elevation of a rule of law to a *jus cogens* status.) This raises the assumption that the circularity alleged to inhere in the wordings of Art. 53 can be unraveled in much the same way as the paradox traditionally associated with the *opinio juris* criterion. This is the assumption now to be investigated.

To make the analysis of Art. 53 concrete, let us assume the existence of some certain first order rule of *jus cogens*. Let us assume the existence of a rule (R) prohibiting states from engaging in aggressive warfare:

R: "If a state engages in aggressive warfare, then this shall be considered a breach of an international obligation owed by that state to the international community as a whole."

According to Art. 53, in order to establish the existence of the rule R as *jus cogens*, we have to show that generally, states accept and recognize that derogations from R are not permitted, and that modifications of R cannot be made by means of ordinary international law. In line with what Art. 53 provides, the existence of R as *jus cogens* can be described by the following empirical judgment:

EJ_3: "The international community of states accepts and recognizes that no derogations from the rule R are permitted, and that modifications of R cannot be made by means of ordinary international law."

Stated from the perspective of Art. 53, we may say that Art. 53 qualifies the state of affairs described by the empirical judgment EJ_3. It makes it a sufficient reason for the following juridical judgment:

JJ_1: "According to international law, the rule R is *jus cogens*."

The empirical judgment EJ_3 needs interpretation. As already stated, if the international community of states accepts and recognizes that no derogations from the rule R are permitted, and that modifications of R cannot be made by means of ordinary international law, then it has to be taken for granted that they do so for good reason. They do so because according to their judgment, *international law* does not permit derogations from R, and it accepts modification only when accomplished by a new norm of *jus cogens*. Any other interpretation of Art. 53 would commit us to the assump-

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

tion that states wrongly assumed R to be a norm, from which no derogations are permitted, etc. If international law does not permit derogations from R, and if it does not accept modification of R except by a new norm of *jus cogens*, then clearly this is what ensues from the application of the set of second order rules of *jus cogens* existing in international law. Hence, it would seem the empirical judgment EJ_3 can be restated as follows:

EJ_3: "The international community of states accepts and recognizes as legally authoritative the set of rules (in this essay referred to as second order rules of *jus cogens*) permitting no derogations from the rule R and prohibiting all modification of R by means of ordinary international law."

Obviously, the existence of the rule R as *jus cogens* turns on whether the empirical judgment EJ_3 can be justified or not. According to what seems to be the prevailing assumption among international lawyers, second order rules of *jus cogens* are customary international law.[27] If we accept this assumption, justifying the empirical judgment EJ_3 will be tantamount to showing the following two propositions to be true: (i) "States generally do not derogate from the rule R, and they generally do not modify R by means of ordinary international law"; (ii) "States widely subscribe to the opinion that by virtue of an authoritative set of rules existing in customary international law, no derogations from the rule R are permitted, and all modification of the rule R by means of ordinary international law is prohibited". In this respect, Art. 53 of the Vienna Convention compares favorably with Art. 38, para. 1(b) of the ICJ Statute. The criteria governing the existence of *jus co-*

---

27 Not only is this implicit in all writing on the effects of *jus cogens* beyond the personal, material, and temporal scope of application of the VCLT. It is also implicit in the work of the International Law Commission. See e.g. *A. Cassese*, International Law, 2nd ed. 2005, 205 et seq.; *L. Hannikainen*, Peremptory Norms (*Jus Cogens*) in International Law, 1988; *A. Orakhelashvili* (note 9); *D. Shelton*, Normative Hierarchy in International Law, AJIL 100 (2006), 291 et seq., and the further references cited there; *C. Focarelli*, Promotional *Jus Cogens*: A Critical Appraisal of *Jus Cogens'* Legal Effects, Nord. J. Int'l L. 77 (2008), 429 et seq., and the further references cited there. For the work of the ILC, see particularly the Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, Report of the International Law Commission on the work of its 53rd session, 23.4.-1.6. and 2.7.-10.8.2001, UN Doc. A/56/10, 20, at 84et seq. (Draft Art. 26) and 132 et seq. (Draft Art. 50 § 1(d); Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Chaired by *Martti Koskenniemi* (UN Doc. A/CN.4/L.682), 184 et seq., Report of the International Law Commission on the work of its 58th session, 1.5.-9.6. and 3.7.-11.8.2006. For substantial arguments supporting this same position, see *U. Linderfalk*, The Source of Jus Cogens: How Legal Positivism Copes with Peremptory International Law, forthcoming.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

gens are very much the same as those governing the existence of customary international law. First, there has to be a certain pattern of action: states generally do not derogate from the rule R, and they generally do not modify R by means of ordinary international law. Secondly, there has to be a certain belief: states widely subscribe to the opinion that by virtue of an authoritative set of rules existing in customary international law, no derogations from the rule R are permitted, and all modification of the rule R by means of ordinary international law is prohibited.

For the very same reason as Art. 38, para. 1(b) of the ICJ Statute does not explain the creation of customary international law, Art. 53 of the Vienna Convention does not itself explain the creation of *jus cogens*. It provides a basis on which such an explanation can be founded, which is a different thing. As already stated, the empirical judgment EJ_3 entails the following empirical judgment:

EJ_1: "States generally do not derogate from the rule R, and they generally do not modify R by means of ordinary international law."

It also entails the widespread subscription to the following practical judgment:

PJ_2: "There is now in customary international law an authoritative set of rules (in this essay referred to as second order rules of *jus cogens*), by virtue of which no derogations from the rule R are permitted, and all modification of the rule R by means of ordinary international law is prohibited."

The practical judgment PJ_2 presupposes in turn the following empirical judgments:

EJ_1: "States generally do not derogate from the rule R, and they generally do not modify R by means of ordinary international law."

EJ_2: "The following opinion (PJ_0) is widely subscribed to by states: it would be desirable and appropriate if customary international law permitted no derogations from the rule R and prohibited all modification of that same rule by means of ordinary international law."

In addition, the practical judgment PJ_2 presupposes the widespread subscription to the following practical judgment:

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

PJ_1: "The widespread subscription to the opinion PJ_0, together with the fact that states generally do not derogate from R, and do not modify R by ordinary international law, are sufficient to warrant the judgment that there is now in customary international law an authoritative set of rules permitting no derogations from the rule R and prohibiting all modification of R by means of ordinary international law."

As revealed by the analysis, the real explanation of the creation of R as *jus cogens* lies in a combination of the states of affairs described in the empirical judgments EJ_1, EJ_2, and EJ_3, together with the widespread subscription to the practical judgments PJ_1 and PJ_2. Contrary to what is assumed by international legal scholars, it does not lie in the factual state of affairs described in the empirical judgment EJ_3.

This analysis renders Art. 53 of the Vienna Convention intelligible. According to Art. 53, if we wish to establish the existence of a rule of law as *jus cogens*, we are required to show the existence of a certain belief. Stated more specifically, we are required to show that states widely subscribe to the opinion that by virtue of an authoritative set of rules existing in customary international law, no derogations from the rule R are permitted, and all modification of the rule R by means of ordinary international law is prohibited. There is nothing paradoxical or circular about this requirement. The requirement becomes paradoxical only when it is offered as the sole explanation of the creation of R as *jus cogens*. As shown in this section, however, the real explanation of the creation of R as *jus cogens* requires further elaboration. The conclusion ensuing from this analysis is almost a reproduction of the conclusion that ended section 2. If international legal scholars regard as deficient the definition of *jus cogens* laid down in Art. 53 of the Vienna Convention, it is not because of what is actually stated in this provision. It is because of the wrongful assumption that Art. 53 can be used to explain something it does not pretend to explain: the creation of *jus cogens*.

IV. Further Consequences of the *Jus Cogens* Analysis

In order to appreciate the full value of the analysis just accomplished, we have to realize just how productive it is. As shown in section 3 of this essay, my *jus cogens* analysis helps us come to grips with the criticism claiming that Art. 53 of the VCLT is circular. This is not its sole virtue. Above and beyond this, as I will now argue, the analysis provides a tool for the resolution of a host of other, equally perplexing questions.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

First, my *jus cogens* analysis helps us understand the meaning of the expression "accepted and recognized by the international community of States as a whole". According to Art. 53 of the VCLT, in order for a *jus cogens* rule to exist, it has to be shown that it 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". Some international legal scholars have remarked that this in effect amounts to a requirement for a special form of *opinio juris*.[28] This statement needs modification. As observed in the earlier section 3, the existence of a rule (R) as *jus cogens* depends on whether for good reasons the following empirical judgment (EJ_3) can be made:

EJ_3: "The international community of states accepts and recognizes as legally authoritative the set of rules (in this essay referred to as second order rules of *jus cogens*) permitting no derogations from the rule R and prohibiting all modification of R by means of ordinary international law."

In other words, the existence of R as *jus cogens* turns on the existence and scope of application of the second order rules of *jus cogens*. Those rules are customary international law.[29] If we accept this analysis, then the expression "accepted and recognized by the international community of States as a whole" will entail no further requirements beyond those applied for the establishment of customary international law in general. Certainly, to establish the existence of the rule R as *jus cogens*, as commentators have argued, there has to be a certain belief, an *opinio juris*. According to the analysis accomplished in section 3, we have to show that states widely subscribe to the following practical judgment (PJ_2):

PJ_2: "There is now in customary international law an authoritative set of rules (in this essay referred to as second order rules of *jus cogens*), by virtue of which no derogations from the rule R are permitted and all modification of R by means of ordinary international law is prohibited."

Contrary to the claim, however, there is nothing special about this belief. It is like any *opinio juris* establishing any rule of customary international law. We cannot infer from the expression "accepted and recognized by the international community of States as a whole" that the *opinio juris* establish-

---

28 See e.g. *M. Ragazzi*, The Concept of International Obligations *Erga Omnes*, 1997, 53.

29 This was the assumption adopted in the earlier section 3.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

ing the existence a rule of law as *jus cogens* is either more express or more widespread than the *opinio juris* establishing customary international law in general.

Secondly, my *jus cogens* analysis helps explain the status of the second order rules of *jus cogens*. It is a disturbing fact that although the 1969 Vienna Convention presupposes the existence of a set of rules tailored to govern such things as possible conflicts between first order rules of *jus cogens* and ordinary international law, the Convention is silent as to the particular status of this set of rules. Some commentators have suggested that, clearly, they must be *jus cogens*, too. It would be pointless "if a norm was endowed with peremptory status, but its effects and legal consequences were governed by the criteria of ordinary rules" – this is the argument typically used.[30] It does not convince. According to the conclusions of section 3 – I repeat – the classification of a rule R as *jus cogens* turns on the existence and scope of application of the second order rules of *jus cogens*. The claim that R is *jus cogens* is correct if it can be shown that R comes within the scope of application of the set of second order rules of *jus cogens* existing in international law. If this analysis is accepted, the second order rules of *jus cogens* cannot possibly be classified as *jus cogens*. That would assume that second order of *jus cogens* can be used to explain their own status. In the alternative, it would assume the existence of third order rules of *jus cogens*, which assume in turn the existence of fourth order rules of *jus cogens*, and so on *ad infinitum*. Like *Occam*, I prefer simpler solutions. Hence, it is my conclusion that second order rules of *jus cogens* do not themselves have the status as *jus cogens*. They are ordinary customary international law. For this reason, the *second order rules of jus cogens* designation used in this essay may seem misplaced. However convenient from the point of view of description, in order not to cause unnecessary confusion, it should perhaps be avoided.

Thirdly, my *jus cogens* analysis helps explain how first order rules of *jus cogens* can be modified and replaced. Although Art. 53 of the VCLT expressly envisages the possibility that *jus cogens* norms be changed, the Convention says very little about this procedure exactly.[31] The only indication given is the requirement that *jus cogens* norms shall be modified by means of *jus cogens*. However, if we accept that norms of *jus cogens* derive from one of the usual norm-creating processes recognized by international law, it appears pretty obvious that the modification of a first order rule of *jus cogens* (R) will always entail, at least partly, a derogation of that same rule.

[30] *A. Orakhelashvili* (note 9), 80.

[31] Presumably, it does so for the same reason as it does not explain the creation of *jus cogens*.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

The complicating fact is that according to Art. 53, *jus cogens* norms must not be derogated from. This has led some international legal scholars to conclude that Art. 53 is in fact self-contradictory.[32] If a modification of a first order rule of *jus cogens* (R) inevitably entails derogation from that same rule R, and derogations from the rule R are prohibited, the modification of R would seem to be logically impossible. This argument builds on a wrongful assumption. It assumes that the modification of a first order rule of *jus cogens* is achieved by the immediate change of that rule itself. As suggested in this essay, this is not so. The *jus cogens* status of rules derives from the second order rules of *jus cogens*. Since a first order rule of *jus cogens* cannot be derogated from, consequently, the modification of such a rule requires, first of all, a modification of the second order rules of *jus cogens*. The second order rules are not themselves *jus cogens*, but ordinary customary international law. They can be modified the same way as any rule of customary international law, through a process of *desuetude* accompanied by a new *opinio juris* and a new practice. This would seem to solve our problem. Contrary to what some international legal scholars assume, first order rules of *jus cogens* can indeed be modified. Modification is accomplished by a two step procedure: first, there is a modification of the second order rules of *jus cogens*, and then, only secondly, is there a modification of the first order rule itself.

On the negative side – it has to be admitted – my analysis still leaves the *jus cogens* concept rather empty. As shown in section 3, the creation of *jus cogens* builds on a practical judgment. Applied to the creation of the rule R, this judgment was stated as follows:

PJ_0: "It would be desirable and appropriate if customary international law permitted no derogations from the rule R and prohibited all modification of the rule R by means of ordinary international law."

The practical judgment PJ_0 entails the utterer's opinion that a determinate, common, and stable pattern of conduct would be desirable and appropriate. It does not indicate the utterer's reason for holding this opinion, however.[33] Naturally, this affects the practical usefulness of my analysis. While the analysis explains the definition of *jus cogens* laid down in Art. 53

[32] See e.g. *A. d'Amato*, It's a Bird, It's a Plane, It's Jus Cogens!, Conn. J. Int'l L. 6 (1990), 1, at 5 et seq.; *M. J. Glennon*, Peremptory Nonsense, Human Rights, Democracy and the Rule of Law, in: S. Breitenmoser (ed.), Liber Amoricum Luzius Wildhaber, 2007, 1265, at 1269; *T. Meron*, On a Hierarchy of International Human Rights, AJIL 80 (1986), 1, at 9.

[33] Consequently, different people uttering the practical judgment PJ_0 may have different reasons for thinking said pattern of conduct desirable and appropriate.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

of the VCLT, it does not help us identify rules of *jus cogens* in concrete cases. As should be realized, however, this is more a reflexion of a political reality than a flaw in the analysis itself. The fact remains that in the international community of states there is very little agreement as to what makes *jus cogens* desirable and appropriate. In this regard, *jus cogens* can be viewed as a meddling link between the consequences ensuing from the application of the second order rules of *jus cogens* and ideas that are highly controversial. Politically and morally, *jus cogens* remains a contested concept.[34] My analysis cannot do anything to change this fact.

[34] See *U. Linderfalk*, What's so Special About *Jus Cogens*: On the Distinction between the Ordinary and the Peremptory International Law, International Community Law Review (2011), forthcoming.

http://www.zaoerv.de/
© 2011, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht