

WHAT'S RUNNING THE WORLD:

Global Values, International Law, and the United Nations

Otto Spijkers*

I. INTRODUCTION

The language of values is in fashion nowadays. Global values are often employed, either as elements of a coherent theory or simply as rhetorical tools, by some of the most influential politicians of our age.¹ However, despite all this attention to global values, the concept itself remains somewhat obscure. The various lists of values, proposed by individual politicians,² scholars,³ NGO's,⁴ and international organizations,⁵ differ to some extent, both in content and in character, and a clear definition of what constitutes a global value is lacking.

This article aims to explore the concept of global values. It focuses on the relationship between such values and international law. The main assumption of this article is that international law has moved from an essentially value-free order of sovereign and independent States,⁶ to a more cosmopolitan order, based on universal values and common interests.⁷ Taking that assumption as its starting point, this article aims to explore how and to what extent the language of global values has encroached on the traditional, consent-based foundation of the international legal order.

Before turning to this central theme, i.e., the relationship between global values and international law, this article first aims to shed some light on the concept of global values itself (Part 2). Then, the central theme will be dealt with. First, *ius cogens* and *erga omnes* will be discussed as legal techniques that might be used to give special legal protection to fundamental, value-based norms of general international law (Part 3). After that, we will look at the role of the United Nations in "translating" the language of global values into that of international law (Part 4). We will end with a brief conclusion and look into the future (Part 5).

* PhD Candidate, Grotius Centre for International Legal Studies of Leiden University.

¹ See, e.g., Barack Obama, *Responsibility for our Common Future*, statement delivered at the 64th session of the General Assembly, 23 Sep. 2009; Dmitry Medvedev, President of the Russian Federation, statement delivered on the same day at the same session; Kofi Annan, *Global Values: The United Nations and the Rule of Law in the 21st Century* (Institute of South-East Asian Studies, 2000); Tony Blair, *A Battle for Global Values*, FOREIGN AFF., January/February 2007.

² See, e.g., statement by Jan Peter Balkenende, Prime Minister of the Netherlands, at the 62nd session of the General Assembly, 27 Sept. 2007; Tony Blair, *PM's foreign policy speech: third in a series of three*, 26 May 2006; Kofi Annan, *Do We still have Universal Values?*, *Third Global Ethic Lecture*, delivered at Tübingen University, Germany, 12 Dec. 2003.

³ See, e.g., Richard A. Falk, *A STUDY OF FUTURE WORLDS* 11-30 (1975); Nigel White, *THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE* (2002); Myres Smith McDougal, *STUDIES IN WORLD PUBLIC ORDER* (1987).

⁴ See, e.g., the Parliament of the World's Religions' *Declaration toward a Global Ethic* (adopted in Chicago in 1993), available at www.weltethos.org; American Humanist Association, *Humanist Manifesto II* (adopted in 1973), available at www.americanhumanist.org.

⁵ The United Nations Millennium Declaration is surely the most influential. It was adopted by the United Nations General Assembly on 18 Sep. 2000, UN Doc. A/RES/55/2.

⁶ Reference is always made in this context to the Permanent Court of International Justice's Judgment in the *Case of the S.S. "Lotus"*, Judgment of 7 Sept. 1927, 18 (1927), where this "old order" is succinctly described by the Court.

⁷ Political scientists ask themselves a similar question; one can simply replace the words "international law" with "the world." See, e.g., Richard A. Falk and Saul H. Mendlovitz (eds.), *STUDIES ON A JUST WORLD ORDER*, especially No. 3 in the series: Richard A. Falk, Samuel Kim & Saul H. Mendlovitz, *THE UNITED NATIONS AND A JUST WORLD ORDER* (1991).

II. A DEFINITION OF GLOBAL VALUES

Although it is sometimes suggested to “never define your terms,”⁸ it seems helpful to begin our exploration of the influence of global values on international law by defining the concept of global values. The idea of this chapter is not so much to provide a complete overview of the philosophy of values,⁹ but rather to come up with a tentative definition of global values and briefly mention some key characteristics of that concept. This might serve as a good starting point for the remainder of the discussion.

As a first step in our attempt to define the concept of global values, it is necessary to determine the context, or *le théâtre des opérations*, of these values.¹⁰ Many books on values start by distinguishing the concept of value in a moral, religious, or normative sense from the same concept as applied in economics.¹¹ This article is concerned with the former type of values, i.e., normative values that guide human interaction.

Rokeach, in his treatise on the nature of such values—Rokeach referred to them as “human values”—proposed the following definition of a value which will be used here as the starting point:

A *value* is an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence.¹²

Let us have a closer look at some of the key words in this definition. First, to say that values are *beliefs* is basically to contrast them with “facts.” Values, as a subcategory of beliefs, cannot be falsified the way facts can.¹³ Because values are beliefs, they can only be called “global,” if these beliefs are actually shared globally. A list of global values must thus reflect a global consensus, i.e., it must be the out-

⁸ This was recently suggested by Michael Walzer when he was interviewed in Amsterdam. See Marcel Becker, *In Gesprek met Michael Walzer* [transl.: *A conversation with Michael Walzer*], in Michael Walzer, OORLOG EN DOOD: OVER DE RECHTVAARDIGE OORLOG IN ONZE TIJD [transl.: *WAR AND DEATH: ON JUST WAR IN OUR TIME*] 36 (2008).

⁹ Cosmopolitan philosophers have since ancient times been preaching for a world led by common interests and values. Boosted by globalization, one can see that in recent years this strand of cosmopolitanism is experiencing a revival. Many modern cosmopolitan philosophers were inspired by John Rawls’ latest book, *THE LAW OF PEOPLES* (1999), which is itself not really a cosmopolitan book. See, e.g., Charles Beitz, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1999); Thomas Pogge, *REALIZING RAWLS* (1989); Thomas Pogge, *An Egalitarian Law of Peoples*, 23:3 PHIL. & PUB. AFF. 195-224 (1995); Andrew Kuper, *Rawlsian Global Justice: Beyond The Law of Peoples to a Cosmopolitan Law of Persons*, 28:5 POLIT. THEORY 640-674 (2000); Allen Buchanan & Charles Beitz, 110:4 ETHICS (2000), which contained a Symposium on John Rawls’s *THE LAW OF PEOPLES*.

¹⁰ See also Nicholas Rescher, *INTRODUCTION TO VALUE THEORY* (1969). See also Bertrand Schneider, *A la recherche d’une sagesse pour le monde: quel rôle pour les valeurs éthiques dans l’éducation?* 43, UNESCO BEP-87/WS/8 (1987).

¹¹ See, e.g., Aligarh Muslim University (Directorate of General Education Reading Material Project), *Man, Reality, and Values* 50-51 (1964).

¹² Milton Rokeach, *THE NATURE OF HUMAN VALUES* 5 (1973).

¹³ See also Hilary Putnam, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* (2002); Henry Margenau, *Facts and Values*, 31 BROWN UNIVERSITY PAPERS (1955); Bernard Williams, *Consistency and Realism*, in Bernard Williams, *PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956-1972* (1973).

come of a genuine global conversation about values involving all the world's citizens.¹⁴

Second, values are *enduring* beliefs. Rokeach added this word to his definition because he believed that "any conception of human values, if it is to be fruitful, must be able to account for the enduring character of values as well as for their changing character."¹⁵ In other words, values are both "everlasting" and continuously evolving at the same time. In a sense, values function somewhat like the carrot on a stick that dangles a few centimeters from the donkey's nose. The donkey will never get close enough to the carrot to take a bite but will keep running to try and catch up with the carrot. Similarly, since the world's values evolve continuously, instead of ever reaching the goal, i.e., the realization of all global values, "we seem to be forever doomed to strive for these ultimate goals without quite ever reaching them."¹⁶ Rokeach has formulated this in a somewhat negative sense, as if the realization of global values is a meaningless, never-ending task, somewhat like the task of Sisyphus. But there is nothing frustrating about having a set of values that will forever inspire people to improve things, to make progress. In this sense the world's everlasting attempt to realize global values is different from the donkey's attempt at eating the carrot, since in the latter case, little progress is made.

Rokeach's definition refers to values as beliefs that a certain state of existence is either *personally* or *socially* preferable to its alternatives. Indeed, there are values with an "individual-centered" focus and those with a "society-centered" focus. Another way to make that distinction is to divide values into "intrapersonal" and "interpersonal" values. While "peace of mind" may be a desired intrapersonal state of existence, "world peace" is an interpersonal state of existence.¹⁷ In the same vein, Oyserman distinguished between values operating at the individual level, and values operating at the group level. The latter set of values was defined as "scripts or cultural ideals held in common by members of a group; the group's 'social mind.'"¹⁸

It is still somewhat controversial whether one can speak of the "social mind" of the entire world, since that would require the existence of something we might genuinely refer to as a "global community." Further, the existence of such a community, and its legal significance, is still somewhat disputed.¹⁹ However, it could be argued that with the ongoing globalization, all human beings indeed together constitute a community, and thus that each individual has certain basic responsibilities towards all other human beings. As Peter Singer put it:

Ethics appears to have developed from the behavior and feelings of social mammals. [. . .] If the group to which we must justify ourselves is the

¹⁴ For an interesting discussion on how such a conversation should be organized in international relations, see Thomas Risse, *Global Governance and Communicative Action*, 39:2 GOV. OPPOS. (2004).

¹⁵ Milton Rokeach, *THE NATURE OF HUMAN VALUES* 6 (1973).

¹⁶ *Id.* at 14.

¹⁷ *Id.* at 7-8.

¹⁸ Daphna Oyserman, *Values: Psychological Perspectives*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 16151 (2004). Richard Robinson made a similar distinction when he divided values into personal and political values. See Richard Robinson, *AN ATHEIST'S VALUES* (1975).

¹⁹ René-Jean Dupuy asked about the meaning of the "international community" in international law, and his son, Pierre-Marie Dupuy, later attempted to answer his father's question. René-Jean Dupuy, *LA COMMUNAUTE INTERNATIONALE ENTRE LE MYTHE ET L'HISTOIRE* 16 (1986); Pierre-Marie Dupuy, *L'UNITE DE L'ORDRE JURIDIQUE INTERNATIONAL* 257-258 (2000). See also Christian Tomuschat, *Die internationale Gemeinschaft*, 33 ARCHIV DES VÖLKERRECHTS (1995). For a more critical point of view, see, e.g., Separate Opinion of Judge van Wijk, in the *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, 1966 ICJ REP. 6, 88-89 (18 July).

tribe, or the nation, then our morality is likely to be tribal, or nationalistic. If, however, the revolution in communications has created a global audience, then we might feel a need to justify our behavior to the whole world. This change creates the material basis for a new ethic that will serve the interests of all those who live on this planet in a way that, despite much rhetoric, no previous ethic has ever done.²⁰

Admittedly, this global ethic is relatively “thin.”²¹ In other words, one might argue that only those acts that shock the conscience of mankind concern the international community as a whole, and that other individual behavior remains the concern only of the State, or the local community, or sometimes the concern just of the family, or the individual.

Another keyword in the definition is the word *preferable*. The concept of value is presented in the definition as a relative concept, in the sense that values do not describe a perfect world that is imagined out-of-the-blue, but rather it involves a preference between two or more possibilities. Such a relative approach to values is often suggested in the context of global politics and lawmaking. For example, McDougal and Lasswell have defined a value as “a preferred event;” one cannot have it more straightforward than that.²² Allott suggested defining a value as “an idea which serves as a ground for choosing between possibilities.”²³ There is the choice between peace and war, for example, or between sustainable development and unsustainable development.²⁴ The preferred option is the one that is valued. And thus “peace” is a value, and “war” is not, simply because we prefer to have peace. From these examples, it already becomes clear that the best source for a list of global values is an actual sense of lack, a sense that the world could be “better” than it is today.²⁵ In other words, without the existence of war, for example, we would never see peace as a value. In order to actually be able to guide international affairs, values should refer to *possible* preferences, and not to preferred states of the world that are simply unattainable, somewhat like heaven on earth. This “realist” aspect of values is often emphasized. For example, values have been referred to “not [as] abstract ideals beyond our reach but [as] determinate, desirable actions anchoring on the process of the movement from the actual to the ideal stage.”²⁶

Global values thus share certain characteristics. They are globally shared beliefs that together describe the “basics” of a world which is preferable to the one we currently live in. Such beliefs are enduring but also constantly evolving. And together these globally shared beliefs constitute the world’s “social mind.” What, then, are these global values? It is not possible to show in this brief article which values actually share all these characteristics. However, we might refer to some of the values that seem to be suitable candidates: respect for human dignity, for the

²⁰ Peter Singer, ONE WORLD: THE ETHICS OF GLOBALIZATION 12 (2002).

²¹ I took this expression from Michael Walzer, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD (1994).

²² Myres S. McDougal, STUDIES IN WORLD PUBLIC ORDER 11 (1987). The part of this book that is referred to was written together with Harold Lasswell.

²³ Philip Allott, EUNOMIA: NEW ORDER FOR A NEW WORLD 48 (1990).

²⁴ Milton Rokeach, THE NATURE OF HUMAN VALUES 9-10 (1973).

²⁵ See also Bruno Simma, *From Bilateralism to Community Interest*, 250:4 RECUEIL DES COURS 235 (1994).

²⁶ Aligarh Muslim University, MAN, REALITY, AND VALUES 59 (1964). Similarly, Kekes defined values as “possibilities whose realization may make lives good.” The word “possibilities” is appealing, because it makes explicit that values describe a state of affairs which can in fact be realized. John Kekes, THE MORALITY OF PLURALISM 27 (1993).

dignity of peoples, social progress and (sustainable) development, peace and security, justice and international law.²⁷

III. GLOBAL VALUES AND GENERAL INTERNATIONAL LAW

We now turn to the main theme of this article, i.e., the relationship between global values and international law. In this section, we will focus on the relationship between global values and general international law. We shall do this essentially by looking at two special legal techniques that might be used, by the international community as a whole, to “defend” value-based norms: *jus cogens* and *erga omnes*.

A. Value-based norms as non-derogable norms

Above, it was said that global values essentially constitute the world’s “social mind.” Global values are thus directly based on a global consensus, or a “community consensus” as Danilenko called it. Danilenko defined this “community consensus” as the “general community will overriding dissent of individual States.”²⁸ Indeed, if there is a small subset of norms directly based on global values, one would assume that these value-based norms would be “invulnerable,” in the sense that individual States could not derogate from them.

As is well known, Article 53 of the Vienna Convention on the Law of Treaties, which authoritatively defines the concept of *jus cogens*, has introduced to international law a subset of non-derogable norms: “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 [. . .].”²⁹ In the world of treaties, the consequence of the *jus cogens* character of a certain norm is that “[any] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”³⁰ In the world of State responsibility, at least according to the International Law Commission (ILC), there is actually very little that distinguishes the consequences of a violation of a *jus cogens* norm from the consequences of the violation of an “ordinary” norm of international law. The only special obligations are that “States shall cooperate to bring to an end through lawful means any serious breach [of a *jus cogens* norm],” and that “no State shall

²⁷ For similar lists, see, e.g., Richard A. Falk, A STUDY OF FUTURE WORLDS 11-30 (1975). See also Richard A. Falk, Samuel Kim & Saul H. Mendlovitz (eds.), TOWARD A JUST WORLD ORDER (Studies on a Just World Order, No. 1), (1982); Richard A. Falk, Friedrich Kratchowil & Saul H. Mendlovitz (eds.), INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE (Studies on a Just World Order, No. 2) (1985), and Richard A. Falk, Samuel Kim, Donald McNemar & Saul H. Mendlovitz, THE UNITED NATIONS AND A JUST WORLD ORDER (Studies on a Just World Order, No. 3) (1991). See further Lynn H. Miller, GLOBAL ORDER: VALUES AND POWER IN INTERNATIONAL POLITICS (1990); Nigel D. White, THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE 15 (2002); Anne-Marie Slaughter, A NEW WORLD ORDER (2004); Hans Küng, TOWARDS A COMMON CIVILIZATION: PUBLIC LECTURES BY HANS KUNG AND MOHD KAMAL HASSAN 7 (1997); American Humanist Association, *Humanist Manifesto II* (1973), available online at www.americanhumanist.org.

²⁸ Gennadii Mikhailovich Danilenko, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 199 (1993).

²⁹ Vienna Convention on the Law of Treaties, 23 May 1969, UN Doc. A/Conf. 39/27, Art. 53. The Convention entered into force on 27 Jan. 1980.

³⁰ *Id.*

recognize as lawful a situation created by [such] a serious breach [. . .] nor render aid or assistance in maintaining that situation.”³¹

The definition of *jus cogens* in the Vienna Convention on the Law of Treaties does not link *jus cogens* with global values, and the ILC essentially just referred back to that definition. If we look at the *travaux préparatoires* of this provision, we see that such a link had been suggested by some of the representatives of States that participated in the Vienna Conference on the Law of Treaties, but that there was a failure to reach an agreement, and thus Article 53 in the end did not contain any reference to the substance of *jus cogens* norms.

Let us look very briefly at these discussions. The debate was essentially between those who believed that State consent was the basis of all international law, even *jus cogens*, and those who believed that some norms could also be based directly on moral values. In other words, the debates on *jus cogens* in the 1960’s already reflected the difficulties that came with the gradual shift in the international legal order from an essentially value-free order of sovereign and independent States to a cosmopolitan, value-based international legal order. The representative of Kenya at the Vienna Conference on the Law of Treaties believed that we should move away from State consent. He said that “at a time when the international community was developing mutual co-operation, understanding, and interdependence, the will of the contracting States alone could not be made the sole criterion for determining what could lawfully be contracted upon by States.”³² The representative of India added to that statement that “it was the particular nature of the subject-matter with which a norm dealt that might give it the character of *jus cogens*.”³³

So what, then, is this particular nature of the subject-matter of *jus cogens* norms? Some States believed it was their essentially “moral” character. They stressed the need to “moralize” international relations and international law, and saw *jus cogens* as the primary tool for doing so. For example, the representative of the Ivory Coast summarized nicely the evolution from a “jungle law,” which completely lacked any morality, to a framework of inter-State relations with an increasingly expanding moral component.³⁴ The United Republic of Tanzania, the Central African Republic, Peru, Nigeria, Ceylon, and Uruguay also referred to morality as source of *jus cogens*.³⁵ Indeed, the horrors of the Second World War, more than anything else, have led to a moralization of international law, and this has been the main motivation behind all efforts to differentiate between “ordinary” norms of international law, and norms that deserve special protection.³⁶ Interestingly, Deleau later suggested that France, the strongest opponent of *jus cogens*, would have accepted the concept if it referred exclusively to such morality-based norms:

³¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at www.un.org/ilc.

³² UN Doc. A/Conf.39/11[A], at 296.

³³ *Id.* at 307-308.

³⁴ *Id.* at 321.

³⁵ For the United Republic of Tanzania, see UN Doc. A/Conf.39/11[A], at 321; for the Central African Republic, see *id.* at 333; for Nigeria, see *id.* at 298; for Ceylon, see *id.* at 319; for Uruguay, see *id.* at 303; for Peru, see UN Doc. A/Conf.39/5 (Vol. II), at 313.

³⁶ This is very accurately explained by Mr. Roberto Ago, ILC Special Rapporteur on State Responsibility. See Roberto Ago, *Fifth Report on State responsibility*, 2 Y.B. INT’L L. COMM’N Part 1: ¶ 97 (1976). See also, *Report of the International Law Commission on its Twenty-Eighth Session*, 2 Y.B. INT’L L. COMM’N Part 2 (1976).

*Si le domaine du jus cogens devait se limiter à ces notions inspirées de hauts soucis d'humanité et de moralité internationale, la France, qui a pour habitude de les respecter, n'aurait eu aucune objection à les voir reconnues comme impératives par la Convention sur le droit des traités.*³⁷

Virally, a well-known French scholar, also suggested that it was the fact that a *jus cogens* norm “possède une valeur éthique qui rendrait moralement inacceptable sa mise à l'écart.”³⁸ Similarly, Lachs remarked that “[w]hile it is understood that law is not in general to be identified with morality, a *jus cogens* may be expressive of rules of international morality so cogent that an international tribunal would consider it as forming part of principles or rules of international law.”³⁹

However, the reliance on morality and moral values reminded many scholars of natural law, an approach which was rejected because it was too subjective, i.e., too close to doctrines of religion and moral philosophy.⁴⁰ Tunkin was one of the strongest opponents of this reliance on global morality alone. In his view,

international law and international morality are different systems of social norms and in spite of a close connection between principles of *jus cogens* and principles of international morality, a principle of general international law is a principle of *jus cogens* on the basis of international law, not on the basis of international morality.⁴¹

Virally also admitted that reliance on ethical values alone was necessarily subjective, and that it was difficult to solve any disagreement if *jus cogens* were based entirely on such values.⁴² This was later pointed out also by Yasseen, a very influential Iraqi lawyer and scholar, who remarked that a *jus cogens* norm was not a moral principle *per se*, but “une règle de droit dont la teneur est de protéger une certaine valeur morale,”⁴³ and whose violation would “choque la conscience internationale.”⁴⁴ In other words, these moral rules still needed to be translated into rules of international law through the traditional, consent-based sources, such as treaties and custom. Similarly, Danilenko stressed that “it was [. . .] clear that community interests and moral values cannot be regarded as part of law, let alone part of ‘higher law,’ without some form of approval within the recognized normative processes.”⁴⁵ In a somewhat puzzling remark, de Hoogh summarized the dilemma of relying both on the traditional sources and on the moral nature, or subject-matter, of the norm:

Although it is, of course, the subject-matter of a certain rule that makes it a candidate for promotion to peremptory ranks, yet whether or not it actually is a peremptory norm depends on the element of will inherent in

³⁷ Olivier Deleau, *Les Positions Françaises à la Conférence de Vienne sur le Droit des Traités*, 15 A.F.D.I. 16 (1969).

³⁸ Michel Virally, *Réflexions sur le Jus Cogens*, 12 A.F.D.I. 11, 14-15 (1966).

³⁹ Manfred Lachs, *The Development and General Trends of International Law in Our Time*, 169:4 RECUEIL DE COURS 204 (1980).

⁴⁰ See Jerzy Sztucki, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* 59-66 (1974).

⁴¹ Grigory Tunkin, *International Law in the International System*, 147:4 RECUEIL DE COURS 93 (1975).

⁴² Virally, *supra* note 38, at 18-23. Virally thus suggested a more formal approach, where a *jus cogens* norm would be explicitly recognized as such in a treaty or through another source of international law. See *id.* at 26.

⁴³ Mustapha Kamil Yasseen, *Réflexions sur la Détermination du Jus Cogens*, L'ELABORATION DU DROIT INTERNATIONAL PUBLIC 206 (1975).

⁴⁴ *Id.* at 208.

⁴⁵ Danilenko, *supra* note 28, at 217.

the notion of ‘acceptance and recognition by the international community of States.’ Thus the concepts move away from the notion of subject-matter, and rely instead on the objective determination by the international community of States.⁴⁶

In any case, instead of reconciling all these theoretical differences of opinion, and instead of attempting to base *jus cogens* both on ideas (moral values) and facts (State-consent) at the same time,⁴⁷ Tunkin simply proposed to ignore these theoretical difficulties, and to agree that *jus cogens* existed, whatever its theoretical basis or “true” source.⁴⁸ Indeed, all the views discussed so far all reached the same conclusion: there are *jus cogens* norms, whatever their origin may be. Other ILC members also suggested not to philosophize too much, but rather to come up with a workable definition of *jus cogens*, which all States could adopt.⁴⁹ At the Vienna Conference on the Law of Treaties, many State representatives also seemed somewhat irritated by those colleagues that engaged in extensive philosophical teaching.⁵⁰ The representative of Switzerland remarked that “[d]espite the diversity of doctrines, the conclusions reached on the essential points were very similar or even identical,” and that should be enough to move forward.⁵¹ Thus, in the end, Article 53 of the Vienna Convention on the Law of Treaties does not have a reference to any substantive element, such as a reference to global values.

Jus cogens norms thus seem to be distinguishable from other norms solely by their non-derogability, not by any substantive element, such as their link with global values.⁵² Although, as we have just seen, some of the *travaux préparatoires* of Article 53 do suggest a link between *jus cogens* and global values,⁵³ and although many scholars have later argued for such a link,⁵⁴ the definition of Article 53 does

⁴⁶ Andre de Hoogh, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 56 (1996).

⁴⁷ This is a problem that has plagued international law almost from the beginning, and not just in the context of *jus cogens*. See Martti Koskeniemi, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

⁴⁸ See 1 Y.B. INT’L L. COMM’N 76 (1963).

⁴⁹ *Id.* at 62.

⁵⁰ See UN Doc. A/Conf. 39/11[A], at 316.

⁵¹ *Id.* at 323.

⁵² See also Hoogh, *supra* note 46, at 56.

⁵³ See, e.g., 2 Y.B. INT’L L. COMM’N 41 (1958), UN Doc A/CN.4/SER.A/1958/Add.I. The debate on the “origin” of *jus cogens* that followed was eventually ended by ILC member Tunkin, who suggested that the ILC members agreed to disagree on the origins of *jus cogens* (1 Y.B. INT’L L. COMM’N Part 1: 38 [1966]). For an overview including the ILC’s work, see Shabtai Rosenne, THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION 290-293 (1970) (listing the relevant documents); or Gómez Robledo, *Le Ius Cogens International: Sa Genèse, Sa Nature, Ses Fonctions*, 172:3 RECUEIL DE COURS 37-68 (1981). See also Christos L. Rosenstein-Rozakis, THE PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS) UNDER THE VIENNA CONVENTION ON THE LAW OF TREATIES 26-46 (1973).

⁵⁴ A very early example is Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 31:4 AJIL 57 (1937). See also Lauri Hannikainen, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 4 (1988); Stefan Kadelbach, ZWINGENDES VÖLKERRECHT 23 (1992). Robert Kolb, who does not fully agree with this conclusion, has gathered an impressive series of references to values/interests as basis of *jus cogens*. See Robert Kolb, THÉORIE DU IUS COGENS INTERNATIONAL 73-75 (2001). For more recent examples (since 2001), see Santiago Villalpando, L’ÉMERGENCE DE LA COMMUNAUTÉ INTERNATIONALE DANS LA RESPONSABILITÉ DES ÉTATS 89 (2005); for a list of literature relating values to *jus cogens*, see *id.* at 89 n.299.

not make such a link explicit, and thus according to the only authoritative definition of *jus cogens* that we have in international law, norms without a connection to global values may also be accepted by the international community as a whole as non-derogable and thus as *jus cogens*.⁵⁵

Moreover, there is no reason to suggest that all value-based norms should have the power to invalidate all international law that is somehow inconsistent with it. In other words, not all value-based norms are non-derogable. There are more flexible ways through which the international community can reflect, in international law, the fundamental importance of value-based norms.⁵⁶ In fact, it seems justified in many situations to prefer to introduce rules of *priority* for value-based norms of international law, meaning that “ordinary” norms give way to those value-based norms in particular situations, without however being invalidated by them now and forever.⁵⁷

There is thus more than one reason to distinguish *jus cogens* norms from norms based on global values.⁵⁸ What unites the two categories of norms, is that both types of norms have to be accepted by the international community (of States⁵⁹) as a whole, and that they are in some sense formally labeled, again by the international community as a whole, as more important than other norms.⁶⁰

⁵⁵ See Kolb, *id.* at 181-182, (2001); Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and other Rules—The Identification of Fundamental Norms*, in Christian Tomuschat & Jean-Marc Thouvenin (eds.), *THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES* 29, 39-40 (2006). Some scholars have rejected such an enlarged interpretation of *jus cogens*. See Pierre-Marie Dupuy, *L'Unité de l'Ordre Juridique International: Cours Général de Droit International Public*, 297 RECUEIL DE COURS 281 (2002); See Villalpando, *supra* note 54, at 93 (rejecting the first category); Bruno Simma, *From Bilateralism to Community Interest*, 250 RECUEIL DE COURS 288 (1994).

⁵⁶ One can think of Article 103 of the UN Charter (see Part IV *infra*).

⁵⁷ This is sometimes suggested also for *jus cogens* norms. For example, the minority in *Al Adsani* suggested that “[i]n the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails. The consequence of such prevalence is that the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule.” See Joint Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, in *Al-Adsani v. The United Kingdom*, ECHR 35763/97 (2001), at ¶ 1. The latter type of consequence cannot be derived from Article 53 Vienna Convention on the Law of Treaties. See also Kolb, *supra* note 54, at 139.

⁵⁸ See also Christian Tomuschat, *Reconceptualizing the Debate on Jus Cogens and Obligations Erga Omnes—Concluding Observations*, in Tomuschat and Thouvenin, *supra* note 55, at 431.

⁵⁹ The phrase “of States” in Article 53 of the Vienna Convention was hardly discussed at all. See James Crawford, *Multilateral Rights and Obligations in International Law*, 319 RECUEIL DE COURS 446-447 (2006). Maurizio Ragazzi found an explanation of this exclusive membership of the international community in the ILC’s discussions of an identical article on *jus cogens* in the ILC Draft Articles on Treaties between States and International Organizations. There, the ILC noted that “On reflection, and because the most important rules of international law are involved, the Commission thought it worthwhile to point out that, in the present state of international law, it is States that are called upon to establish or recognize peremptory norms.” See *Report of the International Law Commission on the Work of its Thirty-fourth Session*, 2 Y.B. INT’L L. COMM’N Part 2: 56 (1982). See Maurizio Ragazzi, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* 55 (2000). Thirty years later, and in a different context, the ILC explained that “[t]he insertion of the words ‘of States’ in article 53 of the Vienna Convention was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character.” See *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, 2 Y.B. INT’L L. COMM’N Part 2: 204 (2001).

⁶⁰ See Villalpando, *supra* note 54, at 84 n.282. Villalpando rightly remarked that the sentence “by the community of States as a whole,” which constitutes in his view “*l’axe de la defi-*

B. Compliance with value-based norms is the concern of the international community

Besides the possibility of labeling value-based norms as non-derogable, there is another legal technique that might be used to collectively defend respect for, and compliance with, value-based norms. That is to consider all participants in the international legal community as having a legal interest in the compliance with such value-based norms.⁶¹

Indeed, if there were no collective legal means to ensure compliance by all States with their obligations under value-based norms of international law, then the recognition of such special norms would be nothing but “*une victoire à la Pyrrhus*,” at least from a legal point of view.⁶² Thus, the respect and observance of all value-based norms should constitute a legal interest of the international community as a whole, and all participants of that community should have a duty towards all other participants to respect that shared legal interest. What is meant by this is not that all States coincidentally happen to have an overlapping legal interest in some situations, but rather that they all have a legal interest *as members of the international community*.⁶³

This reminds one of *erga omnes*. The Institut de Droit International (IDI) defined an obligation *erga omnes* as

[a]n obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action.⁶⁴

Interestingly, the IDI did refer explicitly to values in its definition, contrary to the provision on *jus cogens* in the Vienna Convention on the Law of Treaties that we discussed in the previous section. However, the IDI’s definition does not “bind”

nition du jus cogens” in the *Vienna Convention on the Law of Treaties*, was added at the last moment to the article by an amendment of a group of states which was later modified by the Drafting Committee (see A/Conf.39/C.1/L/306, cited in the Reports of the Committee of the Whole, Vienna Conference on the Law of Treaties, UN Doc. A/Conf.39/11/add.2, at 174, and UN Doc. A/Conf.39/11[A], at 471). It thus does not originate in the International Law Commission. For the ILC’s final text, See 1 Y.B. INT’L L. COMM’N Part 2: 331 (1966), and 2 Y.B. INT’L L. COMM’N 247 (1966).

⁶¹ See also Draft Articles for the Responsibility of States, *supra* note 31, Art. 48.

⁶² Pierre-Marie Dupuy, L’UNITÉ DE L’ORDRE JURIDIQUE INTERNATIONAL 311, 387 (2001); Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248:4 RECUEIL DE COURS 423 (1994).

⁶³ See also Christian J. Tams, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 41 (2005).

⁶⁴ Article 1(a), of Obligations and Rights *erga Omnes* in International Law, resolution adopted by the Institut de Droit International on August 27, 2005. In a first draft, general *erga omnes* was defined as “an obligation under general international law that a State owes in any given case to all other States, in view of their common values and concern for compliance.” See Volume 71:2 A.I.D.I. 83 (2006). Prof. Schermers objected to the state-centered nature of the definition. However, his amendment to improve the definition was not adopted (see *id.* at 90, 116-118, 123). After various objections, by Hafner (*id.* at 93), Dugard (*id.* at 96-97), Picone (*id.* at 118-119), and Fox (*id.* at 136), the first version was changed to “an obligation under general law that a State owes in any given case to all the other States, in view of the common values and concern for compliance *of the international community*” (*id.* at 111 [emphasis added]; see also *id.* at 116). This was later changed to the final version quoted in the text.

the international community of States, since the IDI is an independent group of experts and thus does not speak on behalf of States.

Perhaps the more authoritative definition of *erga omnes* is that provided by the International Court of Justice, since that Court can issue decisions binding on the States that appear before it. The ICJ defined *erga omnes* obligations as “obligations of a State [owed] towards the international community as a whole.”⁶⁵ Similarly, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined *erga omnes* obligations as “obligations owed towards all the other members of the international community.”⁶⁶ Contrary to the IDI’s proposal, neither of these two definitions has any substantive element in it, i.e., a reference to values. Thus, arguably, *erga omnes* status can be granted also to “ordinary” or perhaps even “trivial” obligations, as long as the community of States decides that these obligations are owed to the international community as a whole. Further, there is no reason to suppose that there are no trivial obligations owed to the entire community. Only later, when the ICJ spoke about the legal interest of all States in the protection of these *erga omnes* norms, did the Court refer to the “importance of the rights involved.”⁶⁷ This suggests that only those norms qualify as *erga omnes* that are somehow more important than other norms, but we still do not know on what basis to differentiate important norms from “ordinary norms.”⁶⁸

Nonetheless, it is often suggested in the literature that all *erga omnes* obligations by definition aim to protect global values. For example, Ragazzi suggested that

it would be wholly unacceptable to suggest in general terms [. . .] that the defining characteristic of obligations *erga omnes* is that their breach affects all States [. . .] This proposition, by reversing the order of priority between cause and effect, is unduly restrictive: it reduces the fundamental problem of the content of obligations *erga omnes* and the values they protect to issues of legal technique which, while important, certainly do not exhaust the definition of obligations *erga omnes*.⁶⁹

⁶⁵ *Case Concerning the Barcelona Traction, Light and Power Co., Ltd.* (New Application 1962) (Belgium v. Spain), 1970 ICJ. REP. 4, at ¶ 33-34 (5 February).

⁶⁶ See *Prosecutor v. Furundzija*, *Prosecutor v. Furundzija*, No. IT-95-17/1 (ICTY Trial Chamber), Dec. 10 1998, ¶ 151.

⁶⁷ *Barcelona* case, *supra* note 65, at ¶ 33-34.

⁶⁸ The examples mentioned by the Court, i.e., the outlawing of aggression, genocide, slavery and racial discrimination, also show that the Court was not thinking about trivial obligations. In fact, all these examples have been accepted as fundamental, indeed as *jus cogens*. See also Jochen A. Frowein, *Jus Cogens*, in Rudolf Bernhardt, Rudolf Bindschedler & Peter Macalister-Smith (eds.), 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 66-67 (1997). However, according to another scholar, the Court was “clearly referring to a characteristic distinct from that of non-derogability” and thus its intention was not to talk about *jus cogens* at all. Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66:2-3 NORDIC J. INT’L L. 230 (1997).

⁶⁹ Ragazzi, *supra* note 59, at 202. As support Ragazzi refers to UN Doc. A/CN.4/291, plus Add.1 and Add.2. See also Villalpando, *supra* note 54, at 106-107 (2005). There are other examples of scholars stating that all *erga omnes* obligations are based on global values, albeit not as many as when it comes to the relationship between *jus cogens* and global values. See, e.g., Claudia Annacker, *The Legal Régime of Erga Omnes Obligations in International Law*, 46:2 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT 136 (1993); Cançado Trindade, *International Law for Humankind: Towards a New jus gentium (I)*, 316 RECUEIL DES COURS 363 (2005); Jost Delbrück, *Laws in the Public Interest: Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law*, in Volkmar Götz, Peter Selmer, Rudiger Wolfrum, Christiane Philipp & Gunther Jaenicke (eds.), LIBER AMICORUM GÜNTHER JAENICKE, ZUM 85 GEBURTSTAG 18 (1998); Karl Zemanek, *New*

Unfortunately, Ragazzi does not really explain why it would be “wholly unacceptable” to see *erga omnes* simply as a legal technique, which can be used for various purposes. In any case, Ragazzi’s view is a personal view. It is not based on any authoritative definition of *erga omnes* linking the concept with global values. Thus the concept of *erga omnes* in a sense suffers from the same confusion as *jus cogens*: that what is really a category of norms sharing a specific legal characteristic, namely that all States have a legal interest in the protection of these norms, for whatever reason, is considered by some as a category of norms sharing a specific legal characteristic *because* these norms are of fundamental importance to the international community and aim to protect global values.⁷⁰ Arangio-Ruiz accurately explained what was the essence of *erga omnes*:

It is well known [. . .] that the concept of *erga omnes* obligation[s] is not characterized by the importance of the interest protected by the norm [. . .] but rather by the “legal indivisibility” of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others.⁷¹

Of course, the lack of an authoritative link between *erga omnes* and global values does not mean that this legal technique cannot be used to defend global values. As was the case with *jus cogens*, all that is suggested in this section is that *erga omnes* might be used to defend value-based norms, but it might also be used to defend other *erga omnes* norms.

It is still disputed what legal means exactly are available to the international community as a whole, or the States representing this community, to defend obligations *erga omnes*. It is sometimes suggested that States are allowed to plead on the community’s behalf before the International Court of Justice (*actio popularis*),⁷² but only once the Court’s jurisdiction has been established.⁷³ Another op-

Trends in the Enforcement of Erga Omnes Obligations, 4 MAX PLANCK YRBK UN L. 42 (2000); Tams, *supra* note 63, at 129-130.

⁷⁰ This is especially true for Ragazzi’s book, whose description of *erga omnes* is based entirely on the examples given by the Court in the *Barcelona-dictum*. See especially Ragazzi, *supra* note 59, at 215. In the mean time, the Court itself has added a few more examples of *erga omnes* to its list. See Villalpando, *supra* note 54, at 102-104.

⁷¹ Gaetano Arangio-Ruiz, Fourth Report on State Responsibility, UN Doc. A/CN.4/444/Add.1 (1992) ¶ 92, cited in Ragazzi, *supra* note 59, at 202.

⁷² The Court explicitly rejected *actio popularis* in the *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, 1966 ICJ Rep. 6, 47 (18 July), but this is considered “overruled” by the *Barcelona Traction* case, *supra* note 65. See also Boeglin Naumovic, REFLEXIONS SUR L’ACTIO POPULARIS EN DROIT INTERNATIONAL DANS LE CADRE DE LA RESPONSABILITE INTERNATIONALE : MEMOIRE PRESENTE A LA 17EME SESSION DE L’INSTITUT DE DROIT INTERNATIONAL PUBLIC ET DE RELATIONS INTERNATIONALES SUR LA RESPONSABILITE DES ETATS, A THESSALONIQUE, SEPTEMBRE 1989, at 7. Since *Barcelona Traction*, the Court has not had occasion to pronounce itself on this issue. In a separate opinion, Judge Simma *did* consider the issue, and explicitly accepted that a legal interest (and standing) could be based on a “community interest,” as recognized in a treaty. See Separate Opinion of Judge Simma, ¶¶ 16-41, to the Judgment of 19 December 2005 in the *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), 2005 ICJ REP. See also Tams, *supra* note 63, at ch. 5; Jean-Marc Thouvenin, *La Saisine de la Cour Internationale de Justice en Cas de Violation des Règles Fondamentales de l’Ordre Juridique International*, in Tomuschat & Thouvenin, *supra* note 55; Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248:4 RECUEIL DES COURS 427-429 (1994); Vera Gowlland-Debbas, *Judicial Insights into Fundamental Values and Interests of the International Community*, in Sam Muller, David Raic & Hanna Thuránszky

tion is to allow States to take countermeasures in the general interest, sometimes referred to as *solidarity measures*, in order to secure the community's interest in compliance, by all States, with *erga omnes* obligations.⁷⁴ Reference must also be made in this context to compliance mechanisms introduced in multilateral and widely ratified treaties, especially human rights treaties.⁷⁵ And, finally, we might refer to the International Criminal Court, as the culmination of the international community's efforts to collectively punish and prevent "the most serious crimes of concern to the international community as a whole."⁷⁶

In conclusion, we can thus say that the international community is slowly developing certain legal techniques to give a certain prominence to value-based norms, and to ensure that such norms can be defended collectively, by the international community as a whole. Some of the norms that are clearly value-based have indeed been labeled as *jus cogens* norms, or as norms whose compliance is owed *erga omnes*. We might refer to the prohibition of torture as a norm directly based on the value of human dignity.⁷⁷ Or we might refer to the prohibition of genocide as a norm protecting the dignity, or the very existence, of peoples.⁷⁸ The same can be said of the prohibition of racial discrimination, *apartheid*,⁷⁹ and the right to self-determination of peoples.⁸⁰ As an example of a norm immediately related to the value of peace and security we might refer to the prohibition of aggression.⁸¹ When

(eds.), *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 351-362 (1997); Hannikainen, *supra* note 54, at 271; Anna Maria Helena Vermeer-Künzli, *THE PROTECTION OF INDIVIDUALS BY MEANS OF DIPLOMATIC PROTECTION: DIPLOMATIC PROTECTION AS A HUMAN RIGHTS INSTRUMENT* 120 (2007); Christian Hillgruber, *The Right of Third States to Take Countermeasures*, in Tomuschat & Thouvenin, *supra* note 55, at 269.

⁷³ The Court itself has stressed that the *jus cogens* or *erga omnes* character of a certain right or obligation is not sufficient to establish jurisdiction. See ¶ 125 (see also ¶ 64) of the ICJ's judgment on Jurisdiction of the Court and Admissibility of the Application, of 3 February 2006, in the *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), 2006 ICJ REP. See also Rosalyn Higgins, 71:2 A.I.D.I. 94 (2006); Crawford, *supra* note 59, at 333; Naumovic, *supra* note 72, at 6.

⁷⁴ Martti Koskeniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 72 B.Y.B.I.L. 339 (2001); Tams, *supra* note 63, at 339; Villalpando, *supra* note 54, at 106, 265-323. See Articles 3 and 5, Obligations and Rights Erga Omnes in International Law, resolution adopted by the *Institut de Droit International*, 27 Aug. 2005.

⁷⁵ Various human rights treaties have set up a system with special compliance mechanisms, such as inter-State complaints, individual complaints, and reporting mechanisms.

⁷⁶ See Preamble of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998. The Statute entered into force on 1 July 2002.

⁷⁷ In *Prosecutor v. Furundzija*, Judgment (ICTY, Trial Chamber), case no. IT-95-17/1-T, 10 Dec. 1998, ¶¶ 153-157, the prohibition was referred to as *jus cogens*.

⁷⁸ See International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, 2006 ICJ REP. 64 (3 February).

⁷⁹ Martti Koskeniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION 13 April 2006, UN Doc. A/CN.4/L.682, at 189.

⁸⁰ See International Court of Justice, *Case Concerning East Timor* (Portugal v. Australia), 1995 ICJ REP. 29 (30 June). See also ¶ 155, International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004.

⁸¹ Reference can be made to ¶ 190 of the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, 1986 ICJ REP. (27 June), in which an ILC Report is cited (2 Y.B. INT'L L. COMM'N 247 [1966], A/CN.4/SER. A/1966/Add. 1), which labels the prohibition on the use of force as *jus cogens*.

it comes to social progress and sustainable development, it is somewhat more difficult to find a *jus cogens/erga omnes* norm.⁸²

IV. GLOBAL VALUES AND THE LAW OF THE UNITED NATIONS

Since the two legal techniques referred to above (*jus cogens* and *erga omnes*) are rather undeveloped, it might be useful to look further in our attempt to find special ways available within the international legal order to secure compliance with, and respect for, value-based norms of international law. In this Chapter, we will look at a possible alternative: to use the United Nations Charter as the constitutive document of a legal framework which might be used to guide the international community as a whole in defining its global values collectively, in “translating” those globally shared values into the language of international law, and, finally, in collectively defending compliance with these value-based norms of international law.⁸³

The United Nations has defined its norms and values primarily in its constitutive document, the United Nations Charter, which was drafted at the *United Nations Conference on International Organization*, held in San Francisco in 1945.⁸⁴ Since then, these norms and values have continued to evolve in the resolutions and declarations of the UN organs, especially the General Assembly, and in the general practice of all elements of the United Nations system. In what follows we will concentrate on the contribution of the Assembly, because that is the best suitable—but certainly not the only!—organ of the United Nations when it comes to formulating the values and norms of the Organization.

Most of the purposes of the United Nations ended up in Article 1 of the United Nations Charter:⁸⁵

- the maintenance of international peace and security [peace and security],
- the settlement of international disputes in conformity with the principles of justice and international law [justice],

⁸² Apparently, in the *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Hungary argued for the *jus cogens* character of the principle of sustainable development (1997 ICJ REP. 97 [25 September]). The Court did not embrace that view. In a Separate Opinion, Vice-President Weeramantry discussed the legal status of the principle of sustainable development, and attempted to find a balance between the right to development and the protection of the environment. Although he sought—and found—evidence of universal acceptance of the principle, he did not reach the conclusion that the principle has acquired the status of *jus cogens*.

⁸³ See also Ramesh Thakur, *THE UNITED NATIONS, PEACE AND SECURITY 10* (2006). See also *A New World, the Concept of Global Governance*, in Commission on Global Governance’s Report, *OUR GLOBAL NEIGHBORHOOD* (1996).

⁸⁴ For an overview, see Grayson Kirk & Lawrence H. Chamberlain, *The Organization of the San Francisco Conference*, 6:3 POLIT. SCI. QUART. (1945), and Wilhelm G. Grewe & Daniel-Erasmus Khan, *Drafting History*, in Bruno Simma et al. (eds.), *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* (2002). All documents of the conference are published by the United Nations in a series of 22 volumes: *DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION (1945-1955)*.

⁸⁵ See Nico Schrijver, *Les Valeurs Fondamentales et le Droit des Nations Unies*, in Regis Chemain & Allain Pellet (eds.), *LA CHARTE DES NATIONS UNIES, CONSTITUTION MONDIALE?* (2006).

- the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples [dignity of peoples],
- the achievement of international cooperation in solving international problems of an economic, social, cultural, or humanitarian character [social progress and development],
- and the promotion and encouragement of respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion [human dignity].

Although this was perhaps superfluous, for each purpose we have listed the corresponding global value in square brackets. However, as we remarked in this article's chapter on global values (Chapter 2), these values are not static, and much has changed since 1945, when the UN Charter was drafted. Indeed, somewhat like a snake shedding its skin each year, the international world order has also continuously renewed itself. Despite the virtual impossibility to amend the UN Charter, the UN system has nonetheless proven to be flexible enough to cope with this continuous change.⁸⁶ Nonetheless, as the world keeps changing and the Charter remains the same, some tensions become visible. It is sometimes suggested that the Charter should be amended to reflect this evolution of values, but in practice the lack of such amendments has not posed much of a hindrance to the ongoing modernization of the Organization's purposes.⁸⁷

It was principally the General Assembly that modernized the UN Charter's list of values through interpretation and through the adoption of Charter-based treaty texts. All of the above-mentioned values have been the subject of many important General Assembly resolutions.⁸⁸

It is undoubtedly true that the Assembly's resolutions are legally non-binding, and that therefore they themselves cannot make new international law nor authoritatively interpret existing international law, be it the UN Charter or any other international agreement. This view is supported by the text of the Charter, the *travaux préparatoires*, and State practice.⁸⁹ One can refer to the increasing institutionalization of the international community, and the need for a world legislator,

⁸⁶ On Charter amendment, see Articles 108 and 109 of the UN CHARTER, and Emile Giraud, *La Revision de la Charte des Nations Unies*, 90:2 RECUEIL DES COURS 340-399 (1956).

⁸⁷ See Nico Schrijver, *The Future of the Charter of the United Nations*, MAX PLANCK YRBK UN L (2006); Nico Schrijver, *Les Valeurs Fondamentales et le Droit des Nations Unies*, at *Colloque sur la Charte des Nations Unies*, Paris 88 (2006).

⁸⁸ In this short article, we will give one example of such a resolution for each value: for peace and security, we may refer to the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, General Assembly resolution 2625 (XXV), adopted on 24 October 1970; for justice and international law we can refer to the *Manila Declaration on the Peaceful Settlement of International Disputes*, General Assembly resolution 37/10, adopted 15 November 1982; for the self-determination of peoples we can refer to the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, General Assembly resolution 1514 (XV), adopted 14 December 1960; for social progress and development we can refer to the *United Nations Millennium Declaration*, already mentioned above; and for human dignity we can refer to the *Universal Declaration of Human Rights*, General Assembly resolution 217 (III), adopted on 10 December 1948.

⁸⁹ See Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137:3 RECUEIL DES COURS 445-452 (1972). It is also clear that over time, no custom has developed in the sense that the Assembly's lawmaking powers are recognized in practice (see *id.* at 452-460).

and the suitability of the Assembly to fulfill such a role, but all that does not change the non-binding character of the Assembly's resolutions.⁹⁰

However, the story does not end there. As Vallat remarked, "to say that the Assembly only has powers to discuss and to recommend would be a gross oversimplification."⁹¹ Despite the legal handicap just referred to, the Assembly does play a meaningful role in the process of determining or interpreting the value-based norms in the UN Charter.⁹² It is true that there is a danger for a "sliding scale of normativity" when we look at the lawmaking and law-interpreting powers of non-binding resolutions of international organizations, especially of an organ that is truly representative of the international community as a whole.⁹³ Thus it is crucial to avoid the temptation to "upset the traditional system of sources" by looking at this issue.⁹⁴

The dilemma is thus to reconcile the Assembly's formally nonexistent powers in the field of lawmaking with the fact that it has actually contributed quite significantly to the "progressive development of international law and its codification," which is described in Article 13 of the UN Charter as one of the Assembly's main responsibilities.⁹⁵ The solution is rather straightforward. In order to respect the traditional theory of sources, and the consent-based foundation of the international legal order, whilst at the same time acknowledging the need for a collective process through which value-based norms may evolve, we must explain the Assembly's role as lawmaker essentially by referring to its role in the development of value-based norms through the established lawmaking processes, most important of which are treaty interpretation, treaty-making and the development of customary international law.⁹⁶

Let us start with interpretation. The UN General Assembly authoritatively interprets the value-based norms of the UN Charter. Since these norms are formulated in such general terms, there is much room to interpret them in view of the changing circumstances.⁹⁷ It is true that the Assembly does not have the authority to bindingly interpret international law, and this is no different when it comes to the interpretation of the purposes and principles of the UN Charter.⁹⁸ However, a unanimously adopted resolution containing an interpretation of the principles of the UN Charter has a certain value, not because it is an Assembly resolution, but because it is adopted by all member States of the United Nations, i.e., all States party to the treaty that is being interpreted: the UN Charter.⁹⁹

Regarding treaty-making, we can refer to a long list of multilateral treaties, all of which aim to elaborate on the value-based norms in the UN Charter, and whose

⁹⁰ *Id.* at 460-468. See also the lengthy Appendix to the lecture.

⁹¹ Francis Vallat, *The Competence of the United Nations General Assembly*, 97:2 RECUEIL DES COURS 225 (1959).

⁹² See also Alain Pellet, *La Formation du Droit International dans le Cadre des Nations Unies*, 6 EJIL 9 (1995); Vallat, *supra* note 91, at 231.

⁹³ Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 416-417 (1983).

⁹⁴ Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241:4, RECUEIL DES COURS 240 (1993).

⁹⁵ See Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 306 (1999).

⁹⁶ *Id.* at 352.

⁹⁷ See Vallat, *supra* note 91, at 231.

⁹⁸ Arangio-Ruiz, *supra* note 89, at 503-518.

⁹⁹ *Id.* at 512. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations may serve as example here. See also *id.* at 523-525.

text was first prepared under the auspices of the Assembly and the Economic and Social Council, then adopted by the General Assembly in the form of a treaty text, which was then opened for signature, and signed and ratified by a majority of States.¹⁰⁰

Regarding custom, we can refer to the argument, often made, that a unanimously adopted resolution of the UN General Assembly, which contains a declaration on a certain legal issue, can serve as evidence of a collective “proposal” to establish new customary rules.¹⁰¹ In other words, through such a resolution—not all UN General Assembly resolutions contain such declarations of prospective legal principles—the Assembly suggests that all States ought to act in a certain way in the future. It is thus a suggested opinion of law, or *opinio juris*. States that vote in favor of such a resolution can be considered as accepting the proposal. Indeed, according to the ICJ, “*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of [. . .] States towards certain General Assembly resolutions.”¹⁰² If that is correct, then all we need to do after such a resolution is adopted, is find out whether State practice, especially that of the States most affected by the rule, accords with such State proclamations made in the General Assembly.¹⁰³ If that is the new way of finding custom, it would be a much less “messy” approach than distilling rules from the somewhat chaotic world of day-to-day State behavior. That traditional way of “finding” custom in the real world has always been a somewhat impractical method. Indeed, the lack of accessible “evidence” of the practice of most States has generally led to an overemphasis, by the Courts, on the “behavior” of a handful of States, evidence of which is more easily available.

Some of the declarations contained in a General Assembly resolution can be considered as an example of all three: they can be regarded as authoritative interpretation of a value-based norm in the UN Charter, as a source of inspiration for new treaty-law, and as the foundation for new norms of customary international law.¹⁰⁴

¹⁰⁰ For an overview, see Delegations and Conventions Contained in GA Resolutions, available at www.un.org/documents/instruments/docs_en.asp?type=conven. Some of the most important examples of treaties that went through this process are the *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted by the Assembly on 9 Dec. 1948, A/RES/260 [III], entry into force 12 Jan. 1951; the *International Convention on the Elimination of All Forms of Racial Discrimination* (21 Dec. 1965, A/RES/2106 [XX], entry into force 4 Jan. 1969; *International Covenant on Economic, Social and Cultural Rights* (16 Dec. 1966, A/RES/2200 [XXI], entry into force 3 Jan. 1976; *International Covenant on Civil and Political Rights* (16 Dec. 1966, A/RES/2200 [XXI]), entry into force 23 Mar. 1976; *Convention on the Elimination of All Forms of Discrimination against Women* (18 Dec. 1979 A/RES/34/180), entry into force 3 Sep. 1981; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (10 Dec. 1984, A/RES/39/46), entry into force 26 June 1987; *Convention on the Rights of the Child* (20 Nov. 1989, A/RES/44/25), entry into force 2 Sep. 1990.

¹⁰¹ The *Declaration on Permanent Sovereignty over Natural Resources* may serve as an example. See General Assembly resolution 1803 (XVII) of 14 Dec. 1962. Another example is the *Declaration on Principles of International Law concerning Friendly Relations*.

¹⁰² See ¶¶ 99-100, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, 1986 ICJ REP. (27 June).

¹⁰³ Sometimes the answer is “no,” and then there is no new rule of custom. See International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, 254-256, Advisory Opinion of 8 July 1996.

¹⁰⁴ The *Universal Declaration of Human Rights* is the best example. It aimed to interpret Articles 1(3) and 55, 56, of the UN CHARTER, but it also served as the foundation of various human rights treaties and customary human rights norms. Although only a limited number of States voted in favor of this resolution when it was adopted in 1948, the authority of that declaration, which just celebrated its sixtieth anniversary, is continuously strengthened by reiterations of its relevance. See, e.g., Preamble to the *Vienna Declaration and Pro-*

A. Value-based norms as United Nations Charter norms prevailing over others

We can thus safely say that the United Nations indeed provides a legal framework in which States can “translate” their globally shared values into norms of international law, and in which there is room for a continuous evolution of these values and value-based norms. What remains to be explored is whether the United Nations system provides a legal technique, like *jus cogens*, to distinguish between value-based norms and “ordinary” norms.

Many of the value-based norms contained in the UN Charter have been recognized as *jus cogens* elsewhere, especially in case law and scholarship.¹⁰⁵ More importantly, the Charter itself places the obligations resulting from it on top in a certain hierarchy of international legal obligations. After all, in Article 103 of the United Nations Charter we read that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

This hierarchy is recognized also in other sources of international law, such as the Vienna Convention on the Law of Treaties, and the ILC Articles on State Responsibility.¹⁰⁶ It is also generally accepted by regional and domestic courts,¹⁰⁷ even though the European Court of Justice has recently found a somewhat imaginative way to avoid this “supremacy clause” of the UN Charter, namely by declaring a separate European legal order which cannot be penetrated by general international law.¹⁰⁸

B. Compliance with value-based norms in the Charter is the concern of the United Nations

Finally, let us look at possibilities within the United Nations to collectively defend the global values and value-based norms. It must be admitted that not one organ of the United Nations has the mandate to enforce the norms of the United Nations on behalf of all the Members of the United Nations. The organ that is most often mentioned as a potential “enforcer” of the norms in the UN Charter is the Security Council. This section will thus concentrate on that organ.

gramme of Action, contained in the *Report of the World Conference on Human Rights, Vienna, 14-25 June 1993*, UN Doc A/CONF.157/24, where it was stated that “the Universal Declaration of Human Rights [. . .] constitutes a common standard of achievement for all peoples and all nations.”

¹⁰⁵ See Pierre-Marie Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, MAX PLANCK YRBK UN L. 8 (1997). Alexidze emphasized more on the way the UN Charter actually changed international society. See Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172:3 RECUEIL DES COURS 231 (1981).

¹⁰⁶ See International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, 2 Y.B. INT’L L. COMM’N Part 2:365 (2001).

¹⁰⁷ See, e.g., ¶¶ 146-152, Grand Chamber of the European Court of Human Rights, *Decision as to the Admissibility of Application no. 71412/01 by Agim Behrami and Bekir Behrami against France and Application no. 78166/01 by Ruzhdi Saramati against France, Germany and Norway*, Decision of 2 May 2007; and *Judgment in the Incidental Proceedings*, in the case between the *Foundation Mothers of Srebrenica et al. versus the Netherlands and the United Nations*, District Court The Hague, case no. 295247, judgment of 10 July 2008. See also Otto Spijkers, *The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court*, 13:1-2 J. INT’L PEACEKEEPING 197-219 (2009).

¹⁰⁸ See Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities (Eur. Ct. Justice 3 Sep. 2008), case no. C-402/05 P.

The Council has as its mandate the maintenance of international peace and security. For a long time, the Council could not be considered a serious candidate for the role of enforcer because of the extensive use of the veto and the failure to create a "UN Army," as envisaged in Article 43 of the Charter, which "at once paralysed and disarmed" the Council.¹⁰⁹ However, after the "*résurrection spectaculaire*" of this organ in recent times,¹¹⁰ it is argued that the Security Council did, at least for a few years, really act as the defender of United Nations values and norms, by considering any serious violation of such norms and values as "the existence of any threat to the peace, breach of the peace, or act of aggression."¹¹¹ Some scholars agreed with such an extensive interpretation of the Council's mandate. Hannikainen, for example, remarked that

[A]ccording to current interpretation of the Charter, those obligations which are most essential for the maintenance of international peace and security are the same as the basic obligations arising from the main purposes of the UN in Art. 1 of the Charter: the prohibition of acts of aggression, the respect for self-determination of peoples and the (elementary) respect for human rights without distinction, especially without distinction of race.¹¹²

Tomuschat also had no problem with an expanded interpretation of a "threat to the peace" so that whenever other values are violated "to such a degree that outbursts of violence may be expected,"¹¹³ the Security Council should use the far-reaching means to act in the general interest that it has at its disposal.¹¹⁴

Other scholars were less enthusiastic. According to Dupuy, an organ like the Security Council could not replace the decentralized way of upholding global values i.e., the *erga omnes* based system that we discussed above:

*La fonction de promotion et de défense des obligations (et valeurs) essentielles de la « communauté internationale dans son ensemble » ne pouvant décidément pas être prise en charge de façon suffisamment constante et impartiale par l'organe principal du maintien de la paix, ou par tout autre organe représentatif de la communauté, il reste un pis-aller.*¹¹⁵

Indeed, the Security Council's forceful response to some situations is contrasted with its inaction in response to other, equally grave, situations.¹¹⁶

In any case, one should keep in mind that even if it were accepted that the Security Council has the mandate to defend (most) global values and norms, as formulated in the list of purposes of the UN Charter, the Council still lacks its own

¹⁰⁹ See, e.g., Vallat, *supra* note 91, at 231.

¹¹⁰ Pellet, *supra* note 92, at 6. Simma and Paulus speak of the "revitalization" of the Council. See Bruno Simma & Andreas L. Paulus, *The "International Community": Facing the Challenge of Globalization*, 9 EJIL 274 (1998).

¹¹¹ Article 39 of the UN CHARTER. Through that Article, the Security Council can invoke Chapter VII of the UN Charter, which allows the Council to take, or authorize, far-reaching measures, including the use of military force.

¹¹² Hannikainen, *supra* note 54, at 284.

¹¹³ Tomuschat, *supra* note 94, at 342.

¹¹⁴ *Id.* at 333-346, 355-356.

¹¹⁵ Pierre-Marie Dupuy, *L'UNITE DE L'ORDRE JURIDIQUE INTERNATIONAL* 377 (2000).

¹¹⁶ The genocide in Rwanda and the genocide in Srebrenica can be considered as examples of situations where the Council refused to act effectively. See Samantha Power, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002); Romeo A. Dallaire, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2003); Otto Spijkers, *Legal Mechanisms to Establish Accountability for the Genocide in Srebrenica*, 2 H.R. & I.L.D. 229-265 (2007).

army, and that it thus relies on member States to respect and carry out its resolutions. This is why Simma and Paulus have referred to what they call the “authorization model,” under which “individual States assume the role of agents of the international community represented by the Security Council.”¹¹⁷ Then the actions taken by individual States at the authority of the Council, are not all that different from the decentralized *solidarity measures* that we discussed earlier, in which one State acts on behalf of the international community to ensure compliance with obligations *erga omnes*. The main difference is a prior authorization to act, stemming from a collective organ, established by all members of the international community together.

V. CONCLUSION

In this brief article, an attempt was made to explain what global values are, and how they can be defended in international law. We have referred to global values as globally shared beliefs that together constitute the world’s “social mind.” We then looked at legal techniques provided in the international legal order as it exists today, to grant special protection to those norms of international law that are directly based on these global values.

The two general legal techniques that we discussed were *jus cogens* and *erga omnes*. We concluded that these techniques were indeed suitable to give special protection to value-based norms. However, we saw that there was nothing “automatic” about the relationship between global values and these two legal techniques. In other words, nothing prevented the international community of States from using these techniques for the protection of other norms as well; and nothing obliged the international community to use these legal techniques for the protection of *all* value-based norms. In other words, it was up to the international community of States to employ these techniques, or decide not to.

We also looked at the UN Charter as constitutive of a legal framework designed to collectively protect global values and ensure compliance with value-based norms. We argued that the norms defined in the UN Charter and further developed by the international community through the UN system, with a leading role for the General Assembly, can be considered as norms based on global values as defined in the previous chapter. We then explained how the UN Charter aimed to provide special protection to these norms, in particular through the UN Security Council.

The two legal frameworks designed to protect value-based norms, i.e., the UN Charter system and the more general framework based on *jus cogens* and *erga omnes*, have strengthened each other from the beginning. However, attempts to literally unite them into one big *Global Value Defense Mechanism* have not been all that successful up to now. The most ambitious attempt to unite the two was that by ILC Special Rapporteur Arangio-Ruiz. He believed that “serious breaches of *erga omnes* obligations designed to safeguard fundamental interests of the international community as a whole”¹¹⁸ should be protected by the main organs of the United Nations, acting somewhat like a World Parliament (General Assembly), a World Court (International Court of Justice), and a World Executive (Security Council).¹¹⁹ Even though this might make sense from a purely theoretical point of view, it is clear that this is not the way forward in reality. Indeed, as Dupuy rightly

¹¹⁷ Simma & Paulus, *supra* note 110, at 275.

¹¹⁸ This is how he defined “state crimes,” which served as the central concept in his work. See *Fifth report by Arangio-Ruiz*, 2 Y.B. INT’L L. COMM’N Part 1:43 (1993).

¹¹⁹ See especially pp. 3-13 of *Eighth Report by Arangio-Ruiz*, UN Doc. A/CN.4.476, 14 May 1996.

pointed out, Arangio-Ruiz' "institutional designs" in fact worked somewhat like a *reductio ad absurdum*, even though the author never intended this. In other words, "the proposals demonstrate[d] the central failing of the whole codification effort in this area, that is, the manifest gap between normative advances and institutional inertia."¹²⁰ And thus, any cosmopolitan order, based on universal values and common interests, has to be firmly grounded in the existing legal framework of around two hundred sovereign and independent States, no matter how contradictory that may seem. That remains the major challenge for the future.

¹²⁰ Pierre-Marie Dupuy, *A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13:5 EJIL 1063 (2002).