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The Rule of Law, Democracy, and International Law - Learning from the US Experience

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The rule of law, democracy and international law
Learning from the U.S. experience. *

Introduction. The general issue which this article addresses concerns the relationship between the "rule of law", as a matter of national law, and the rule of international law. Different institutional conceptions of this relationship lead to the adoption of different attitudes towards international law system. Nonetheless, there are questions which appear to cast doubts on age-old tenets of certain Western countries concerning the radical separability between the rule of law within the domestic order and the rule of law in the international realm. The main question arises from the appeal itself to the rule of law: can our attitude to the rule of international law be exempted from consistency with the rule of law which we claim for our domestic system? Our commitment to the "rule of law" appears to require a "unitary" conception of that concept, not to embrace different standards when international or supra-national basic norms are at issue. One of the arguments justifying this "separation" and allowing for a double standard within the appeal to the "rule of law" is *democracy.* However, despite the faith in constitutional democracy, not all Western legal orders use internal democracy as a trump card when facing, for instance, generally recognized principles of the rule of international law.
Instead of addressing this problem in the abstract, this article choices, in its first sections, to deal with the analysis of positive law, focusing, as a start, on a recent decision of the United States Supreme Court, the value of which is very high as regards its treatment of democracy and the separation of powers, alongside its stressing of the importance for the country to respect international law. The nature of the theoretical problems at issue cannot be adequately recognized in this case, regardless of their concrete appearance through the structures, language and choices in law. Thereafter, two related issues will be recalled: the meaning of deference to constitutional democracy and its relevance as a matter of international law. On the other hand, it is also helpful to remind ourselves of some of the fundamental standards on which contemporary international law is based, along with some comparative view of constitutional Western attitudes towards them. After this critical reconstruction of existing law, it is possible to focus on the *ratio juris*: addressing which, by a sounder theoretical perspective, is the reason for the present analysis, as well as the philosophical objective of it. The model of the rule of law articulated by the Supreme Court inevitably confirms the old school of thought, with large family resemblance to a wider Anglo-Saxon pattern. It does not show, either legally or theoretically, a sensible approach to- and it cannot offer an adequate account of- the changing face (and the "geology") of international law in the last century, as well as of the incremental growth of reliance on *jus cogens* as a matter of *positive* law. The patterns of relationships with domestic systems are today asked completely new and unprecedented questions, which converge on the insistence that states respect commitments to certain fundamental principles of the rule of law in order to ensure consistency between the domestic and international realms, a matter of law presupposing rather different philosophical premises.

1. The Rule of Law "in this jurisdiction".

The United States Supreme Court decision in Hamdan v. Rumsfeld[1] was welcomed by those who, against the backdrop of the Bush Administration's fight against terrorism, had voiced concerns about human rights, the guarantee of *habeas corpus*, and compliance with international law.

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[1] * This article profited from a debate with Neal Katyal hosted in March 2007 by Georgetown University (in Florence).

Hamdan v. Rumsfeld, 548 U. S.___ (2006)

Electronic copy available at: http://ssrn.com/abstract=1657854

In a previous decision, Rasul v. Bush[2], the Supreme Court had held that alien detainees in Guantanamo Bay were entitled to ascertain the legality of their detention through habeas corpus. In Hamdi v. Rumsfeld[3], the Court declared Congress's Authorization of the Use of Military Force (*Aumf*) in the aftermath of the 9\11 attacks had not authorized an "indefinite detention"[4], even of those Al Quaeda or irregular combatants whom the Government had defined as "unlawful" and "enemy combatants" (as opposed to prisoners of war)[5]. The Supreme Court recognized that U.S. Presidential power cannot be stretched to the extent of annulling prisoners' rights of access to a Court, to a defence, to a trial before a neutral judge, as well as to be informed of the charges against them along with alleged evidence[6].

The importance and extent of the Hamdan judgment (2006) are definitely wider and more far-reaching. The Supreme Court held that military commissions created by the Government[7] to try detainees are not created on the basis of the powers that Congress authorized with the Aumf or the Detainee Treatment Act of 2005 (*Dta).*

According to the Court, the Government gave no evidence that Hamdan's case amounted to that of a compelling emergency[8] to try the enemy in the midst of open hostilities', thereby resorting to military procedures unconstrained by the "Articles of War", now the Uniform Code of Military Justice (*Ucmj*).[9]

While as far as the substantive aspect is concerned even the charge itself, that of "conspiracy", appears to be non cognizable by military tribunals alone (a position which was also rejected in the Nuremberg trial)[10], "the commission lacks power to proceed" because the Ucmj "conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the Ucmj itself, insofar as applicable, and with the 'rules and precepts of the law of nations' (…)including, *inter alia*, the four Geneva Conventions signed in 1949. (…). The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws" [11].

In fact, according to the Court, the GCs become "judicially enforceable" (despite the contrasting previous judgment of the Court of Appeals) *because* they are part of the law of war. Regardless of whether the GCs directly provide rights enforceable in the courts, Congress has brought them within the scope of U. S. law. In particular, the common article 3 of the GCs in fact refers even to *non international* conflicts, and is applicable in the fight against terrorism, not being limited to conflicts between States; therefore it offers a minimum level of protection even to members of al Qaeda, including protection against the "passing of sentences and the carrying out of

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[2] 542 U.S. 466 (2004)
[3] 542 U.S. 507 (2004)
[4] Ibid., 519
[5] Ibid., 516
[6] Ibid., 533
[7] Military Commission Order, No. 1: "Procedures for Trials by Military Commissions of Certain Non United States citizens in the War against Terrorism", Mar., 21 2002.

[8] Hamdan v. Rumsfeld, 126 S. Ct. 2749, U.S., 2006, at 2797-8.
[9] The UCMJ authorizes the President to rule "by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter" (art. 36); it authorizes military commissions "with respect to offenders or offences that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals" (art. 21).

[10] See *Hamdan,* cit., at 2777; UCMJ, art. 21, and Hamdan, at 2786-7. A footnote, however, also refers to the International Criminal Tribunal for the former Yugoslavia (ICTY) which, "drawing on the Nuremberg precedents, has adopted a 'joint criminal enterprise' theory of liability", but as a "species of liability for the substantive offence (…) not a crime on its own": and therefore not a liability "for conspiring to commit crimes" *(ibid.,* at 2785).

[11] Ibid., at 2786.

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executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." (GC: Treatment of Prisoners of War, August 12, 1949, art. 3 § 1(d)). Despite the flexibility and vagueness of some of the requirements of the common article 3, the Military Commission procedures also fail to satisfy them under the terms of article 75 of the 1977 Protocol I to the Geneva Convention which provides "fundamental guarantees" for all kinds of persons in the hands of an enemy[12].

This Supreme Court decision is thus a victory for the Rule of Law. Or should we simply say, as the Supreme Court says, for the Rule of Law "that prevails in this jurisdiction" ?[13].

I would like to consider whether this question is worth asking.

2. Reasons and structure.

2.1. The findings of a Court are, of course, as important as the arguments made in support of them. While rejecting the Government's claim that it had been granted a "unitary" power and therefore a blank cheque to protect national security, the Court relied on one basic motivation: the constitutional duty to obtain congressional consent even for the exceptional powers of the President in wartime. According to article I §8 of the U.S. Constitution, Congress has the power to punish offences "against the law of nations" and "to make the rules concerning captures on land and water".

In Rasul v. Bush (2004), habeas corpus was guaranteed to a Guantanamo detainee on the basis of the principled argument that the powers of the Government had not been attributed to the President in order for him to avoid jurisdictional control[14]. Even there, the "indefinite (incommunicado) detention" had not been directly held to infringe universal rights recognized to human beings. The constitutional problem was mainly constructed in a way which I believe is akin to the concept of abuse (committed, not suffered) of the delegated powers: such abuse compromises the exercise of legitimate power, yet does not openly violate other rules, but pursues ends which are totally extraneous to that power, and are not conceived of as part of its rationale (Palombella 2006a). In fact, thanks to the territorial jurisdiction of the American courts, the Government had found (or rather thought that it had found) a way, given the extra-territoriality of Guantanamo, both to detain individuals and to bring them beyond the reach of the courts. Depriving detainees of the guarantee of a judge meant *at the same time* something structurally and institutionally relevant, i.e. pursuing a goal which the Government has not been attributed by U.S. Constitution - namely the goal of making the acts and behaviour of the Government's decision makers and officials invisible to the Judiciary.

In the Hamdan (2006) judgment (as it emerges explicitly from the arguments made by Justice Stevens, and by the first part of Justice Kennedy's *concurring* opinion[15]), the separation of powers again appears to be the decisive factor. By creating and regulating these military commissions, the President had not legitimately exercised his power, wartime conditions notwithstanding, because the specific choices made by the President do not fall within his exclusive prerogatives but must be conferred by Congress.

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[12] Ibid., at 2797

[13] Ibid., at 2798

[14] Which instead was exactly what dissenting Justice Scalia maintained in Rasul v. Bush, 542 U.S. 466 (2004), at 497-498.

[15] See Justice Kennedy's concurring opinion in Hamdan, cit., at p. 2800: "Trial by military commission raises separation-of-powers concerns of the highest order"; and before it, at p. 2799: "Military Commission Order No. 1, which governs the military commission established to try petitioner Salim Hamdan for war crimes, exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts. This is not a case, then, where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority".

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If in *Rasul* it had been a puzzling "abuse" in a strict sense, a *vulnus* to the principles of separation and to the exercise of judicial power, here the abuse amounted to the use of a sort of non-conferred power which was directly *vested in the Legislative* branch. However, the violation of the principle of separation operates here to the detriment of Congress, the bedrock of representative democracy.

This again shows the greater explanatory power of structure-based arguments, so to speak, as opposed to rights-based ones, along with the prevailing relevance of constitutional *geometry* and the rule of law over the advocation of individual rights (and namely human rights).

This structural profile and the nature of the *interest* which the Court is willing to protect , i.e. the prerogatives of the democratic institutions, are explained clearly in the short *concurring opinion* written by Justice Breyer: "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine- through democratic means- how best to do so. The Constitution places its faith in those democratic means. Our Court to day simply does the same"[16].

This legal reasoning is perhaps the available means of proceeding *de jure condito*. It does reduce, however, the violation of human rights or of humanitarian law, to the problem of the lack of debate by Congress.

However, we can consider the issue also from, say, an external point of view, whilst being equally attentive to democracy and the rule of law. Accordingly, it might not appear from the outside to be inappropriate to reflect more on the most celebrated point: whether these are actually the circumstances in which a liberal democratic order should exclusively "place its faith in those democratic means".

In fact, one of the principal achievements of these decisions includes the re-balancing of powers and the vocation of Congress, in other words the "democracy forcing" intent of the Supreme Court majority. The representatives must explicitly and responsively adopt a stance on military commissions (Katyal 2006, 94-5). The centrality of political will is a pillar in constitutional democracy: but what is, or what should be, the role of democratic majorities in the sphere of such a broad and delicate matter?

Even in this case (as in Justice Rutledge's dissenting opinion in the precedent dating from the last forties, *In re Yamashita* 327 US 1 (1946), 379) the leading counsel Neal Katyal cited Thomas Paine's words in the oral hearing before the Supreme Court : "He that would make his own liberty secure must guard even his enemy from oppression. For if he violates this duty, he establishes a precedent that will reach unto himself" (Paine 1969, 277). This sentence can be interpreted in two ways: in a weak sense, as the general warning looming large over that discussion, that the violation of the Geneva Conventions would endanger the life of U.S. soldiers all over the world. A stronger interpretation reminds us of the common link to humanity, the idea of justice, and the universality of freedom.

I think that Tom Paine's sentence was in fact a plead for rights, not for democracy. A general caveat, which is not subject to modification by the democratic will and is not subject to its preferences. Instead, it is to be considered as a kind of self evident point, so to speak, which is inherently incapable of being tested through democratic means, and it should be inconceivable that such a question for democracy be left over to the democratic majority. If it were possible to use democratic procedures to reach decisions on such a matter, then the substance *of democracy* would become blurred.

Of course, against the theories supporting an omnipotent Executive, we should not disregard the possibility of *running the risk of democracy*, because it grades and judges civil government, and separates it from tyranny. Yet democracy represents a "risk" when e.g. it decides on itself or constrains the powers of its Government, etc.. There is no doubt that this *is* to some extent the case:

[16] Hamdan v. Rumsfeld, cit., at 2799.

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nonetheless, the major risk here is that Congress might not give sufficient consideration to the interests of those who are *not* represented in U.S.; to conclude, the risk is that of being faced by all those who are the object of this deliberation, i.e. those susceptible to be classified as enemy combatants. The point here is whether it is theoretically possible for the right of Congress to stand in a more balanced relationship with some other principle, which is not rooted in democracy.

2.2. This brings to consider how, in fact, the Supreme Court decision not only reaffirms the separation of powers, but also confirms the long-standing tradition of compliance by the U.S. with the Geneva Conventions and other inderogable rules of international law.

In a sense, it seems that since international treaties form part of the law of the land, there should be a much thinner gap between the Rule of Law and the Rule of International Law. But a question arises as to the relationship which is construed between safeguarding the separation of powers and the need to comply with international law. Does one objective determine the meaning and scope of the other? This would be tantamount to making the Rule of International Law a sort of secondary "ought": this is what happens when a set of rules which form the fundamental core of international law falls within the scope of the issues usually decided by ordinary politics .[17]

The question can also be posed from a point of view that is "internal" to the domestic legal system, but albeit with peculiar features. A clue comes from the fact that the Court expressly affirmed the enforceability of the GCs, along with the fact that U.S. law currently (as we shall also discuss below) formally expresses its willingness to comply with international law.

In asserting that the provisions of the common article 3 of the GCs can be invoked before the courts, the Supreme Court was still in the middle of the wading. It certainly would not have encouraged any exemptions for the Government from the constraints of the GCs, either formally or substantively, whilst at the same time recognizing the power of Congress to take such decisions. It is rather difficult to accept that the duty to endow individuals with some minimum protection can be brushed aside, provided that it is done by a "legitimate" power. If even this does not occur, it still means that the relevant right is purely basis contingent.

There is no doubt that there are similar concerns for the fate of the habeas corpus. However, it is possible at least either to interpret the Habeas Suspension Clause (article I, section 9. clause 2) of U. S. Constitution as implying the constitutional direct protection of a core of habeas corpus, or to invoke the endurable support for it from the Common Law.[18] The issue of the habeas corpus therefore appears to be a constitutional one, since, after all, article I of the US. Constitution was the one guarantee of civil liberties which, before the Bill of Rights, was included in the original Constitution. For the International Law contained in the GCs, there is no such constitutional safeguard and it is replaced by a realism of concerns and willingness on the part of the Executive and Legislative branches. It is for this reason that the Supreme Court decision did not endorse some kind of internationalist mindset.

The rule of International law is not the same thing as the solemnly proclaimed Rule of Law "in this jurisdiction": at least in the sense that whatever universal guarantees may be contained in peremptory international rules, the Executive is not bound by them according to the Constitution, unless political majorities make due provision, without any duty of compliance with any superior rule.

3. Surveying the connection between international law and the State perspective.

International law is incorporated into a system which does not interfere directly with the system of national law, unless it is adopted internally through an endogenous rule. Even the

[17] I use "ordinary politics" here as opposed to "constitutional" politics, in the sense of the dual tracks of Ackerman 1993, 266-322.

[18] In other words, the habeas corpus does not simply depend on statutory law (in contrast to arguments of those who, to this end, interpret the Marshall's decision in Ex Parte Bollman, 1807).

enforceability of treaty law in the domestic Courts can only be based on a domestic Constitutional rule which permits such enforcement (Jacobs 1987, XXIV)..

To express this point in the theoretical language of systems theory, each system appears to be normatively closed, while each is (hopefully) cognitively open (Luhmann 2004, 76-141). However, this plurality can indeed be considered through the basic fact that international law is still produced by the same actors which are "sovereign" in their own systems. And it is quite obvious that international law depends on states for its implementation. But how this role is interpreted by each state depends on its respective history, on the rules which it has enacted, on the internal distribution of jurisdiction between the Executive and the Legislative branches, and finally on the status which is granted to international law within the hierarchy of state's legal order.

For example, under the U.S. Constitution, the Supremacy Clause grants, through article VI, international treaty law the status of the supreme law of the land, so that at least self-enforcing treaties (treaties which governments do not intend to be self enforceable need a federal statute in order to be implemented: Vasquez 1995, 695) are ranked at the same level as federal law. As already said, this does not expressly guarantee the same status to customary international law[19], nor does it exempt international treaty law from the effects of a *lex posterior derogat priori* rule, through which the Congress might backtrack - through the expression of an explicit intent- on a commitment previously undertaken by the U.S (Ku 2005, 334).

It is true that international law needs to be validated through internal treatment before being applicable as the law of the land. However, this is generally true of our constitutional States, regardless of their inclusion amongst those that think of the legal world in a monist or dualist way (Cassese 2005, 213-17; Benvenisti 1993, 160). Of course, separation between international and domestic systems has its most "dualist" expression in the U.K doctrine of parliamentary supremacy. Any disputes between monism and dualism, together with its technical instruments, cannot get way from the fact that treaty law normally enters the domestic legal order through a constitutionally prescribed procedure. The particular type of procedure required should be considered not only as the sign of the peculiar *external* attitude, but also as a consequence of the *internal* constitutional structure, i.e. of the balance and articulation between internal authorities endowed with the power to conclude a treaty and the distribution of powers between legislative and executive. In other words, each State as a matter of domestic law is not only in its own right to define its internal procedures, but must define them also according to its internal equilibrium. According to Benedetto Conforti, monist or dualist attitudes pose a theoretical question "with no practical implication, which can be left in the hands of philosophers".(Conforti 2001, 18). What then is the practical question? It is "to persuade" states "to use all means and mechanisms provided by municipal law, and to perfect them in order to ensure compliance with international rules"(*ibidem*) - and this really means any mechanism. States are the true instruments which international law can really count on in order to be guaranteed implementation in domestic orders, and "no matter what means is used" the issue concerns the willingness of State institutions to implement international law as a part of domestic law.

If we try to develop this view, we might say that this willingness is entirely independent on and should not be hidden behind or traced back to the different mechanism for implementation, as if the difficulty in abiding by international law resulted from the different processes through which international law becomes part of domestic law. In the United Kingdom, Parliament does not participate in the process of ratification, which is entirely in the hands of the Government, but it detains the sole right to implement the Treaty: this of course mirrors Dicey's statement about the sovereignty of Parliament (Dicey 1982, 3-35) . But is it the centrality of Parliament in U.K. the factor which really makes the difference? Indeed, it is also the case in Italy that treaties become

[19] But see for the U.S., the words of Justice Gray deciding in *Paquette Habana,* 175 U.S. 677 (1900) on the exemption from capture for fishing vessels due to "the general consent of the civilized nations of the world, and independently of any express treaty or other public act". See also Henkin (1987, 873).

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part of Italian law only after being passed by Parliament, which also authorises the ratification of the Treaty; moreover, in for instance the Netherlands (1983 Constitution, articles 91 et seq) international treaties must also be passed by Parliament: this is why they can overrule Dutch law, or even the Constitution, provided they are endorsed by a qualified majority. In any case, there is no doubt that the various mechanisms by different countries can be understood as revealing the respective attitudes towards international law, taking account of the interplay between internal powers.

Having said this, the true problem with the harmonization of international and domestic laws lies in the capacity of the State to present itself as *really committed* following ratification, without manipulating internal procedures in order completely to freeze and separate the conclusion of the international agreement and its ratification from implementation measures or Parliamentary consent. States grapple with the paradox of undertaking full international commitments, while retaining the enduring ability to deny domestic implementation, i.e. not to step consistently into the "other" (domestic) system. Of course, this has often been a way for states both to agree on the international plane and at the same time stay the internal effect of their own agreement: the U.S. signed the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination, but attached to them "non self-execution" declarations or similar reservations (Sloss 1999). Formally speaking, the UK took half a century to "incorporate" through legislation the ratified treaty of the European Convention on Human Rights (Conforti 2001, 19).

The "harmony" problem is therefore an overarching one (even with reference to human rights: Francioni 1997, 15-19; in general, Conforti 1997, 3-14).

The "internationalist" idea of the self executing nature of international law is often criticised: in fact, declarations of non self execution are often attached to ratified Treaties[20]. But if no such declaration is made, then interpretation comes to the fore, and the question applies well beyond the cases of the "per se" inapplicability of a rule. Indeed it has been noted that: "the general *escamotage* is always to say that the rule is not self-executing. This appears to be nothing but an *escamotage* if we consider what happens in some countries where the same rule is initially considered to be a simple binding directive to the legislator, and subsequently, by a change in the case-law without a change in statute law, a full self-executing rule" (Conforti 2001, 21).

Whilst it is a problem of states' "willingness", a material problem of "power" or interests, it is less a legal consequence of the different procedural requirements in place in order to transform international laws into domestic law. Consequently, it can neither be protected nor fully explained under the guidance of "dualist" or "monist" structures or traditions.

In spite of this, it should be considered that legal *procedures* and *constitutional* choices can normally be seen as reflecting the general ("original") attitude of states towards international law. However, the provisions of municipal law which prescribe what is necessary in order for the state fully to implement international law still have important consequences. Thus, under a different view, states' mechanisms for transposing external rules do depend on choices which show a more or less dualist detachment of the state from international law, reflecting both internal needs and a degree of "nationalist" attitude towards foreign law. In this sense therefore, structural provisions do of course show up quantifiable differences[21]. Irrespective of where this might lead us, there is no

[20] Or perhaps this is true so long as some actors are involved. The practice of reservations also has another side: "The ability to chose one's obligations has gone: The Single Undertaking; the No Reservations Treaty are today increasingly the norm, rather than the exception. It is either all, or nothing, and nothing is not an option, so it has to be all. So even those States where there is a meaningful internal democratic control of foreign policy are obliged, democratically, to click the "I Agree" button of, say, the WTO or the Law of the Sea" (Weiler 2004, 558)

[21] It is not by chance that the latter have proved capable of being collectively characterised as "the number of actors and voting rules to enact a treaty; the ease of over-riding or exiting treaties as a matter of domestic law; the symmetry between entry and exit; and the relationship of treaties to domestic statutes, including the relative

doubt that the constitutional arrangements which construct in their way those central relationships between internal power and international law are evidently at the very least a form of *pre-commitment*: i.e. they choose how to interface with the external system in some more open or closer way, how to attribute the relevant competences, how establish the appropriate distribution between the Executive and the Legislative, and so on.

The pre-commitment should, in other words, work in the same way as the Constitution as a whole does, i.e. by defending ourselves even from our own changes of opinion. In a certain sense therefore, the constitutional treatment of international law can be seen as "a means of locking in policies"(Ginsburg 2006, 757). The expression was also used earlier to explain how new European democracies enter into international treaties with a view to pre-committing themselves to the general rules of international law protecting human rights, or in other words "locking-in" human rights [22] .

These considerations contribute to building a plausible heuristic framework. As far as the age-old democracy of the U.S. and its bicentennial Bill of Rights are concerned, how should the locking-in consequence be understood? Experience seems to show that strong states and strong democracies, like the U.S., rely on themselves rather than on international laws, and cautiously scrutinize the internal effects of external norms by slowing the implementation process and interpreting Constitutional provisions as leaving sufficient room, where appropriate, for a further "democratic" appropriation.

This is also consistent with the uncertain attitude towards *customary* law. Customary international law should be afforded the same status as treaties and federal legislation, because it is, under international law, on a par with treaty law (Henkin 1984, 1564): however, there is much in this realm that is controversial, especially concerning the question as to whether customary law should be binding on all nations regardless of internal constitutional provisions (Henkin 1987, 869). Nevertheless, we might believe that customary law sometimes has some virtues that treaties do not possess: customary law forms part of the common venture of states in a truly collective sense, and while its strength is generated out of common habits and *opinio juris*, its very nature seems to commit states through forms of practice which cannot be traced back to any precisely identifiable "democratic" decision. On the other hand, the U. S. courts appear to be of the same opinion in considering that "in the case of a conflict between a federal statute and a rule of customary international law, the statute prevails" (Bradley 1999, 549; see also decisions cited).

This weakness of customary law is sometimes balanced in some countries' constitutional provisions which provide that treaties have a normative status ranked above ordinary legislation. The point, however, is in fact one of attitude.

The more pressing in this context however is to ascertain how to defend the fundamental pillars of international law as such when according to municipal law the question ultimately boils down to democratic decision making, while the issue at stake is on the contrary a matter, so to speak, of whether or not to recognize the international system as a "legal" whole. I will comment in greater depth below on the consistency of our attitudes towards that part of international law which is customary (though currently also codified), but is at the same time so fundamental for the international legal order as to be, according to the Vienna Convention, "accepted" by the community "as a whole", "peremptory", and such that "no derogation is permitted" from it, i.e. the

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difficulty of enacting each" (Ginsburg 2006, p.719). According to the author, it should be expected "that stronger states and new democracies will write constitutions that will have more actors involved in the treaty making process" in order to insure credibility. Further, also should be expected "more direct applicability of CIL (customary international law) in newer democracies", but "states will be less inclined to incorporate CIL than they will be to provide for treaty commitments, which can be precisely tailored." (ibid., at 753).

[22] According to Moravcsik 2000 (243-244) the origins of European Convention on Human Rights lie in "self interested efforts by newly established (or re-established) democracies to employ international commitments to consolidate democracy- "locking in" the domestic political status quo against their non-democratic opponents".

jus cogens[23]. The obvious answer that the behaviour of a state in the international arena, as a matter of law, depends on the democratic will of its people, despite its visible realism, does not address concerns which arise at least on this ultimate level of normativity where the concept of Rule of Law and its very consistency are at stake.

But let us now turn to consider how things actually turn out in practice.

4. A Military Commission Act

As has already been noted, the Supreme Court decision in the Hamdan case was both welcomed by internationalists and realistically interpreted as a decision upholding the force of democracy. The value of this ambivalence should not be underestimated. Even international law can run the "risk of democracy". The result was however the Military Commission Act (*Mca*) (17 October 2006).

It would be short sighted indeed to view the Mca as an enactment intended to "clarify" that the particular government officials were not responsible for war crimes. Congress instead expressed its own views on military commissions, limiting the possibility for defendants to be informed of the evidence against them, and providing that the GCs not be enforceable in the courts, thereby significantly reducing the protection against the serious maltreatment or quasi-torture of prisoners and similar actions, going on to assert that the civilian courts have no jurisdiction to control the legality of either the detention or even the treatment of those foreign nationals that the government chooses unilaterally to qualify as "enemy combatants": from then on they are deprived both of habeas corpus and criminal procedural guarantees. The Mca resolves the dispute on the proper use by the U.S. courts of (or deference for) foreign or international materials: this is now prohibited when military commissions are involved. Questions concerning the Mca are now growing: the latter overrules the decision of the Supreme Court in the *Rasul* case (2004) in which it granted the habeas rights; disputes also extend to the question of whether water-boarding, hypothermia and prolonged standing are "cruel treatments", a crime under the Mca. The Detainee Treatment Act of 2005 forbids all "cruel, inhuman, or degrading treatment or punishment", defining the terms for detainees on the basis of the equivalent domestic prohibition by the U.S. Constitution. Unfortunately, the President released a signing statement of the Dta confirming his constitutional authority as Commander-in-Chief to treat detainees as deemed necessary in the national interest. The constitutional legitimacy of the provision which eliminates the habeas corpus for aliens[24] is itself much disputed, and perhaps untenable. Even its double standard citizens\aliens might be seen here as illegitimate. At any rate, if no one can dispute classification as an enemy combatant, and thus the lawfulness of their detention, it is true in practical terms that Congress cannot deny habeas corpus to anyone without denying it to *everyone.*

For the District of Columbia Court of Appeals, it is now clear that the habeas corpus is a constitutional right, as such reserved to citizens and not to aliens. It therefore comes as no surprise that it can be denied by the Mca to aliens - so much so that the dissenting Judge Rogers wrote: "Far from conferring an individual right that might pertain only to persons substantially connected to the United States, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990), the Suspension

[23] Vienna Conventions on the Law of Treaties of 23 May 1969, article 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

[24] As a consequence of the Mca judges in the U.S. Court of Appeals have dismissed the pending habeas petitions of hundreds of Guantanamo detainees.

Clause is a limitation on the powers of Congress"[25]. the point of this is to try to (re-) open its availability to all[26].

It is not difficult to understand how we have come to this, but it is difficult to accept. Our interest in the domestic arrangements of U.S. has not to be a fortiori an "internal" interest. Unsurprisingly, a few days after the passing of Mca, an official statement by the UN Special Rapporteur[27] concluded that many Mca' provisions "are incompatible with the international obligations of the United States under human rights law and humanitarian law". The Mca contradicts "the universal and fundamental principles of fair trial standards and due process enshrined in Common Article 3 of the Geneva Conventions". It confers on the Executive the power to declare anyone, "including US citizens, without charge as an 'unlawful enemy combatant' – a term unknown in international humanitarian law – resulting in these detainees being subject to the jurisdiction of a military commission composed of commissioned military officers". Moreover, even "the material scope of crimes to be tried by military commissions is much broader than war crimes in the meaning of the Geneva Conventions". Since the detainees are denied the opportunity "to see exculpatory evidence if it is deemed classified information", this "severely impedes the right to a fair trial". Finally the denial, even retroactive, of habeas corpus to non US citizens (including legal "permanent residents"), i.e. " to challenge the legality of their detention", appears to be "in manifest contradiction with article 9, paragraph 4 of the International Covenant on Civil and Political Rights".

In fact, the strategy of the Mca is to present itself as complying with the Geneva requirements. It does not reject them: it rather declares that "[a] military commission established under this chapter" satisfies the requirements "of common Article 3 of the Geneva Conventions." (section 948b(f)). Since the United States has not withdrawn from the GCs, it remains bound by them under international law: however, it has legislated in such a way as to reduce their guarantees and scope, effectively declaring them unenforceable[28].

It is therefore hard to accept that the true meaning of the "rule of law" is satisfied by this result: on the basis of the rule of law, the Supreme Court in *Hamdan* deferred to Congress's role to keep the power of the Executive in check. Yet Congress has the authority to override the Geneva Conventions, which have the same status as federal law. At this point, if we focus on this democratic decision "forced" by the Court, we realize that from an external point of view what

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[25] US Court of Appeals, District of Columbia Circuit, February 20, 2007, no. 05-5062., at 26.

[26] This is a further proof that "structural" reasons have been part of the winning strategy in the relevant Supreme Courts decisions, indirectly serving human rights or "internationalist" or "moral" claims. On the other hand, it is impressive, and indeed ironic, from an *external* point of view that in order to grant or extend *habeas corpus* to non-citizens it is necessary to conclude that it is not construable as a constitutional "right". It is also worth noting that were it a constitutional right then it would *not* relate to persons, but only to citizens (as if "rights" in constitutions could not *conceptually* concern or protect persons as such, as by contrast is the case in for instance Italy).

[27] *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin: United Nations Press Release, October 27, 2006: viewed at http://www.unog.ch/unog/website/news_media.nsf

[28] In other words, Congress re-interprets the military commission as complying with the Geneva Conventions. This ambiguity means that the Congress has the power to interpret the Treaty. On this, it is possible that the Supreme Court might intervene, affirming that despite the power to legislate overruling treaties, if this power is not exercised, then the interpretation of two statutes is a matter for the Supreme Ccourt and not for Congress. It is true that, under the last-in-time rule, Congress and the President can pass legislation contrary to a given treaty obligation. But it is significant that, in the 2006*, Sanchez-Llamas v.Oregon* decision of June 28 , *t*he Court relied on Article III of the Constitution and quoted *Marbury v. Madison* in holding that it is the task and duty of the Supreme Court to interpret treaties.

deliberation ends up doing is to undermine our general conviction that the rule of law, democracy, and the basic rights of human beings are all different sides of the same coin[29].

If we consider the problem simply as a "constitutional" question, then we might also think that when solutions are democratic, they are accordingly good by definition, or we might reasonably expect that perhaps the Mca is unconstitutional. Of course the question of the separation of powers should not be set aside within a truly liberal democratic enquiry. But there is more which is of interest for *all* of us, including in particular the relationships between international and domestic law. And as a special issue in that dispute, we also find debates over the meaning and content of the Geneva Conventions, as well as the constitutional treatment of them within democratic states.

5. The other international law.

We find ourselves at the cross road of two main streams of international law, humanitarian law and human rights law. Here we are dealing with both: the protection of individuals against the violence of war regardless of territorial limitations; and human rights law appealing to state responsibilities starting within their respective jurisdictions.

Human rights law developed out of the 1948 Universal Declaration of Human Rights. Within its scope, according to article 7 of the International Covenant on Civil and Political Rights[30], "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". It is a non-derogable provision (according to article 4) even in times of public emergency[31]. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984[32] prohibits both torture and cruel and inhuman treatment (articles 2 and 16) and the use or admission in legal proceedings of evidence obtained through torture (article 15). But of course every human rights provision can be still opposed on the basis of exceptional circumstances, in times of war, and here derogations are easily justifiable, simply in the view of the very survival of a state. This is where human rights law meets humanitarian law, The Hague Convention (1899 and 1907), and Geneva (1949, and 1977 Protocols). The Common article 3 of the Geneva Conventions provides for *ius in bello,* and not for protection to be guaranteed in peacetime. In its 1986 *Nicaragua* judgment, the International Court of Justice assumed that the common article 3 incorporated "elementary considerations of humanity"[33]. In sum, article 3 requires nothing less than the respect for dignity through the prohibition of torture and the granting of a fair trial even with very limited standards in emergency situations.

"General and treaty rules proscribing torture" -according to the International Criminal Tribunal for the Former Yugoslavia judgment in *Furundzija* (10 December, 1998)- intend to "suppress any manifestation" of this crime both on the international and individual level, leaving "no loopholes" (§ 146); moreover, "the prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency (on

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[29] There is still much hope that at least some of the main provisions contained in the Mca may be decided unconstitutional and void. However it is unlikely that the Supreme Court could interpret the *relationship* between the domestic legal order and first principles of customary international law or jus cogens in a different way.

[30] ICCPR, adopted Dec. 16, 1966, S. Exec. Doc. No. E, 95-2 (1978), 999 U.N.T.S. 171.

[31] The reservation attached by the United States "[T]he United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States".

[32] 1465 U.N.T.S. 85 ("Torture Convention"), ratified by the United States in October 1994 and entered into force for the United States on November 20, 1994.

[33] *Nicaragua v. United States of America, Merits,* Judgment of 27 June 1986, ICJ Reports 1986, par. 218. The Court recalled its first use of the expression in the *Corfu Channel* Case (United Kingdom v. Albania, 9 April 1949). (See also, Dupuy 1999, 117-30).

this ground the prohibition also applies to situations of armed conflicts). This is linked to the fact, discussed below [§§ 153 ff.], that the prohibition on torture is a peremptory norm or jus cogens" (ibid, § 144).

Rules banning slavery, genocide, and racial discrimination and the rule banning torture have become customary. They impose community obligations, as noted in the dictum in ICJ Barcelona Traction case, and moreover "have acquired the status of *jus cogens*" (Cassese 2005, 394). The influence of the rules of *jus cogens* can be diverse, and may even be dissuading and pre-emptive (ibid, 210); on a legal plane it can annul treaty provisions which are in breach with *jus cogens*, requires conformity with peremptory norms when interpreting treaties or the resolutions of international organizations, de-legitimizes contrary national provisions, and eventually opens up the path towards universal criminal jurisdiction. In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* the ICJ held that "a great many rules of humanitarian law applicable in armed conflict are so fundamental (…) to be observed by all States whether or not they have ratified the Conventions that contain them".[34]

The question then arises as to whether some human rights norms and humanitarian law can be hostage to the internal geometrics of different legal orders. It is also clear that it would be too easy a way out to say simply that international law has no bearing on domestic law, and for "us" what really counts are "constitutional" rights. We would fail to respect those who are not protected by us as our citizens, or those we encounter in wartime. But as far as the Geneva Conventions come into play, this is the case we enter into an area of *jus cogens*, which means that international law is considered as "imperative" and "intransgressible"[35].

The argument that some core provisions (protecting human dignity against torture or from being executed without evidence, or guaranteeing a neutral judge) can be set aside by ordinary domestic legislation sounds grotesque, even from a non –monist perspective There is of course no surprise in the traditional claim that even jus cogens is a rule in international law and not of domestic law. National law will address it through the constitutional choices of each country. Yet even so, the particular constitutional device which is chosen- or re-chosen, reformed etc.- makes an important difference.

6. Recognizing the importance of Jus Cogens

The Swiss constitution was amended in 1999 to grant clear supra-constitutional status to "*les règle imperatives du droit international*" . The Greek Constitution grants the recognized rules of treaty or customary international a superior status to ordinary law. In 1995 the Russian Constitutional Court was able to refer to "both human rights treaties and to generally recognized principles and rules of international law" as a basis for declaring internal domestic law *unconstitutional* (Cassese 2005, 226).

However, the Geneva Conventions might still be seen as they are, i.e. treaty law, though of a very universal and universally shared scope. They can be endowed with a status superior to ordinary law, for example by article 55 of the French Constitution of 1958, although not superior to constitutional norms. As already mentioned above, the Netherlands gives treaties a status above ordinary law. To summarise, with reference to common article 3 of the Geneva Conventions, we should consider how they are recognized, and evaluate which solutions are preferable. Each country can find *its own* way. But some ways are more exemplary than others. Article 25 of the German Constitution of 1949 introduced a special automatic incorporation clause for general international rules. It not only provides that general international rules are part of federal law, but it also adds that "They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of federal territory". As Ingolf Pernice has written, thanks to this provision, the general rules of international law are thereby incorporated into national law, and are considered in Germany

[34] *ICJ Advisory Opinion* of 8 July1996, I.C.J. Reports, § 79, 1996, 8.

[35] Ibid.

to have a status above ordinary legislation but below the Constitution. It is remarkable that this is not regarded as a manifestation of an ideological, incurable internationalist "monism", since it is held to be a version of a "dualist approach". Moreover, "there are compelling (historical and dogmatic) reasons, however, to argue that the rules of *ius cogens* range above the constitutional level" (Pernice 1998a, 59, 60, fn 91. See also Pernice 1998b).

What is particularly important is not so much how procedures for the transformation or incorporation of international law are part of the dualist or monist spectrum: it is rather necessary to articulate the principle that some fundamental international rules cannot be left over to pure democracy within domestic legal orders, but should be part of a constitutional belief.

This possibility is also well known in Italy, where article 10(1) of the Constitution provides: **"**The Italian legal system conforms to the generally recognized principles of international law". Although international law cannot alter other constitutional values, this article has been taken as a basis for declaring *unconstitutional* all internal provisions which contrast with the generally recognized principles of international law [36] .

However, by granting customary general principles or conventional law a supra- legislative status, codified or unwritten rules of jus cogens are provided with recognizable mechanisms for protection.

It is understandable that the very concept of what a generally recognized international rule always requires an interpretive endeavour[37]. But there should be less dispute around core rules: there is in principle a kind of overlap between different evaluations, although it is always less clear than it need be. But would a nation lose its systemic autonomy were it to grant jus cogens an automatic standing within domestic law? The problem is not really one of tradition or of different philosophies of law, as it does not ask all nations to believe in the existence of just one god or just one system.

Where a higher constitutional pre-commitment can be made to the binding nature of international jus cogens, it cannot be the case that the Constitutional Court has not other choice than to appeal to majoritarian (and hence contingent) democracy[38] . If it is a matter of jus cogens, it is not a question for the democratic will of states.

As I will assume in the last sections below, if jus cogens forms part of the "Rule of Law", it should intertwine *common* or *trans-systemic* rules. The need to make it internally intransgressible (e.g. as appropriate grounds for holding a statute to be unconstitutional) therefore appears to be a question of credibility and coherence for each country. This is even more so the case for those who are most concerned with democracy and liberty.

If the destiny for the rule of (international) law is not left up to a majoritarian debate, then the question accordingly becomes whether some essential rules of the international "system" are common or *trans-systemic* rules to the extent that they can present themselves as the legal point of connection, i.e. as the rationale, between the two systems. Whereas the main "internal" dispute in US has been about the constitutional legitimacy of the unitary (unified) power of the Executive in wartime, from an "external" vantage point the issue instead should be whether the *rule of law* can ever be conceived of as "unitary", and if so to what extent.

7. A theoretical perspective.

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[36] The Italian Constitutional Court, in its decision n. 278 of 1992 reaffirmed the principle that when a rule of international law is identified as being generally recognized, then a contrary provision of municipal law is unconstitutional on the basis of the "conforming principle" of article 10(1) of the Constitution. See also the decision of the Constitutional Court, n. 48 of 1979.

[37] The analysis which (in 1984) dealt with the use, service, logic and nature of legal argumentation in international law has now been reissued in Koskenniemi 2005.

[38] Nor for the Commander in Chief to request a legislation to confirm his power to infringe the Geneva Convention and the Habeas Corpus.

7.1. There is a kind of universality which does not aim to expand the power of one partial view over the rest of the world, and in fact strives to do precisely the opposite, that is to provide a logical, rational, or procedural means of control over that risk (starting from Kant 1999, 73). As Juergen Habermas rightly insisted, the principle of universalization works as a ground for the justification of our claims, requiring that those norms be justified "which all possibly affected persons could agree as participants in rational discourses" (Habermas 1996, 107). The rational check on the partiality of power-based and self-interested views is undoubtedly the *ideal* objective both in national legal systems which conjugate law, liberty and democratic equality, as well as in the international realm where the conditions for that control are very far from being satisfied. But even those who point out this dramatic state of international law significantly claim that in some cases a violation of international law is felt as a "universal" violation, which has nothing to do with our "interests or preferences": "International law may act precisely as an instrument through which particular grievances may be articulated as universal ones and in this way, like myth, construct a sense of universal humanity through the act of invoking it" (Koskenniemi 2004, 254).

The root of this sense of universal humanity cannot be investigated here. We must rather instead consider what the *law* has to offer on this aspect.

Law is not just will or just reason[39], as it is claimed from the respective opponents in the eternal debate between natural law and positive law doctrines. The vantage point from which modern natural law doctrine referred to law was that of truths cognizable through reason: Grotius paved the way for law to be detached from religious faith, assuming that reason could lead us to some universal principles, regardless of our belief in God's existence (Grotius, 1625). But as Hobbes had earlier insisted, law originated from a sovereign will (*auctoritas facit legem, non veritas*). In medieval history however, this contrast was considered in a balanced way, and was reflected within the complexity of the ancient constitutions: here the law is only partly "gubernaculum", i.e. under the will of the sovereign. It is also, partly, "jurisdictio", where the fundamental laws of the land are beyond his reach (McIlwain 1947, 67-92). If ancient law referred both to justice (in terms of guarantees and immemorial principles) *and* to authoritative will, contemporary constitutions claim *inter alia* to have "positivised" elementary guarantees, principles of reason and humanity, while at the same time have chosen a set of values to be elaborated through fair democratic deliberation (Habermas 1996). In this sense, Western constitutional democracies assume that they are based on the interplay between democratic sovereignty and "positivised" reason.

It is not necessary here to resolve the dispute between positivism and natural law, and to address the question as to whether the validity of law must ultimately depend on some *moral* arguments, instead of (contingent) *social sources* (Raz 1979, 47 ff.). Legal documents in our Western tradition lay bare firm commitments rooted, for instance, in fundamental assumptions like the Kantian concept according to which law is law because it provides for the *rational conditions for the co-existence of human beings as endowed with liberty* (Kant 1996, 1-138) (human beings are *naturally* entitled to liberty, thus explaining the concept of law as the opposite of violence, tyranny, crude oppression and slavery). As a matter of law, our Western tradition has given *legal* force to norms which, from the Magna Carta to the present day, guarantee respect to human beings both in the national and the international domain. And just as for the age old notion of the Rule of Law, no King is legally authorized to violate the fundamental laws of the land (Haskins 1955, 535-6)[40].

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[39] Jeremy Waldron (2005a, 146-7) appropriately recalls the alternative idea of law as will or law as reason as in fact explaining different views on the role of foreign law as well as some attitudes to international law. Since in my view law is both, both will and reason have irrefutable implications.

[40] I have discussed the notion of the "rule of law" specifically in G. Palombella, *The Rule of Law and Its Core,* to appear in G. Palombella, N. Walker (eds.), *Re-locating the Rule of Law*, Oxford and Portland: Hart Publisher. forthcoming.

In international law it is also possible to recognize this side of the law which cannot be modified by the "sovereign", especially given the legal qualification and role assigned to jus cogens - a legally structured and recognized notion, despite the interpretive controversies surrounding its contextual detailed content and consequences.

For instance, according to the International Criminal Tribunal for the Former Yugoslavia (judgment of 14 January 2000), due to their "absolute character", some imperative norms of humanitarian law "do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather (…) they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a 'legal interest' in their observance and consequently a legal entitlement to demand respect for such obligations."[41]

In the opinion of international law scholars, the common article 1 of the Geneva Conventions ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances") is very relevant for a broader understanding of international law: article 1, in fact, "calls on States both 'to respect' *and* 'to ensure respect' the Conventions. 'To respect' means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction. 'To ensure respect' means that States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict" (Boisson and Condorelli, 2000).

International law encompasses different and complex sets of norms: some are the product of the will of states and gubernaculum, whilst others, such as the one immediately above, are different. The system therefore cannot be reduced to a single logic, or to the logic of a single plane.

7.2. We can pursue this point further by reiterating the complexity of international law, which Joseph Weiler suggested viewing as a "geology", and accordingly as multi-layered. In fact, international law can be "unpacked" into "different co-existing 'command' modes which the 'geological' survey reveals: International law as Transaction, international law as Community, and international law as Regulation. Each one of these modes presents different normative challenges, entails a different discourse of democracy and legitimacy, and, eventually, will require a different set of remedies" (Weiler 2004, 552).

There is no doubt that the main passage, in our context, is the one featured by Cassese as that from international law *inter partes* to international law *super partes* (Cassese 2005, 217).

The latter can be also called, using Weiler's metaphor, the Community layer: it refers to common assets and cannot be seen within the logic of transactional law simply because it deals with something else: "Rights or ecological norms represent common spiritual assets where States can no more assert their exclusive sovereignty, even within their territory, than they could over areas of space which extend above their air-space"(Weiler 2004, 556). Certainly, this layer generates theoretical and political difficulties. It leads one to the idea of some common good which is perhaps too thick to preserve its legitimacy as a universal one[42]. Therefore, beyond its Kantian slant, it also discloses our discomfort with its weaknesses, "the fictions of consent, the closure of exit, the unpacking of the State and, finally, the existence of 'Community' without Polity." (Weiler 2004, 557).

I would suggest testing and re-locating jus cogens and the interplay between national and international systems within the coordinates of this geology.

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[41] *The Prosecutor v. Zoran Kupreskic and others*, ICTY Trial Chamber, Judgment, The Hague, 14 January 2000, Case No. IT-95-16-T, para.519.

[42] Nonetheless, on its substantive capacities there is much reflection and study: this issue can be differentiated and refers instead to constitutionalization of international law. See lastly, Petersmann 2006.

The point with the multi-layered system of international law is its capacity of evolving through the production of new layers. This suggestion should enable us to realise that evolution in the geology of the system of international law cannot be addressed by domestic legal orders through interface rules incorporated into their structure years or centuries ago. While States produce the "community" layer, providing international law with new "communal" interests, granting protection that is directly referred to actors and subjects- like individuals- unknown in previous "slices" of its development, the question begs itself as to whether this has now accordingly brought constitutional states to register such changes.

It is not reasonable to suggest that domestic systems should address the problem of international law on the basis of rules which were constitutionally enacted when the rule of international law was totally different from its present-day form. The concern for the accommodation between the two different systems originates from some constitutional rules which belong mostly to a different "geological" era, when international law was based simply on sovereign equality as a matter of authority and on the maxim "pacta sunt servanda" as its imperative rule of law. Whilst International law does not exclude any of this from the layers perspective, it in fact includes much more.

As far as the transactional layer is concerned therefore, what was perceived as a "rule of international law" was restricted by the perspective prevailing at the time and was entirely based on the recognition of the public personality and equality of territorial states (Kingsbury 1998). There was perhaps an order of natural law which reason and /or God had created: but the order of universe was subject (Hugo Grotius, *The Rights of War and Peace*, Book I) to the principle of *pacta sunt servanda:* the logical premise of international treaty law. In fact, the principle should be seen, beyond any moral considerations, as the only possible *logic* on which international law is conceivable as transactional law among states, and capable of providing existential services. Without this principle, no actor would ever become a party, would ever enter a legal setting. There would be no (transactional) law. To abide by the rule of law would in this case mean excluding the very possibility of law in the absence of this premised ought-rule.

When we refer to human rights, humanitarian law, environmental law, the "community" or the "constitutional" arrangements of international legislation, the law is not just dealing with "states" but is also addressing common problems through states' participation, and making individuals (albeit passive) objects of the law.

For sure, the merit of the thousands of provisions of international law is a problem both from the point of view of legitimacy and democratic concerns. Nevertheless, the premises for this new area within which also individuals fall under the jurisdiction of international law again concern the rule of law. In a sense, yes, for individuals to be "touched" by international law means that their appearance among the "objects" is preserved (perhaps, " international law deals with humans the way it deals with whales and trees") (Weiler 2004, 558). For this new layer, however, the rule of law obeys the principle of recognition of people as human beings on the very thin premise that humanity is worthy of respect as a matter of law. Arbitrariness, violence, unjust procedures would therefore fall within the category of non-law. Moreover, any claims about the legality, so to speak, of such actions would "torture the law" (Alvarez 2006).

In a sense, what holds true of the rule of law as a historical and institutional concept, along with its reference to conditions of coexistence within a fundamental law of the land *which must not be distorted by the sheer will of the sovereign*, has come to influence and "contaminate" international law. From the point of view of this different "layer" an aspect of internal consistency comes into view to which any appeal to the rule of law should logically speaking be bound: the issue of consistency applies between the national and international domains, and it arises because someone (say a court or a state) intends to evoke- and believes that it is necessary to refer to- the rule of law. The question is one which is incumbent on this latter entity: and it concerns the meaning assigned to the rule of law, i.e. consistency or coherence between the meaning of this appeal both internally *and* externally.

This however would not be such a visible issue were international law to be conceptualised mostly from the transactional layer, i.e. as involving the domain of sovereign wills.

As far as their substantive aspect is concerned however, the principles and rules which are commonly held to form part of jus cogens - even where there are disputes involving semantics, applicability or implementation - are considered to define an area of positive law that cannot be changed at will by sovereigns. And that which constitutes the grammar of that content is immune to transactions, coincides with that which is necessary to differentiate between living under the law or outside of it. Crimes such as genocide, slavery or torture [43], as well as breaches of other provisions providing humanitarian protection or recognizing the principle of a fair trial, cannot seriously (i.e. consistently) be regarded as a changeable part of international law and if anything amount to projections onto international domain of meta-rules endowed with the same rational status and already positivised within our own national law. And it is precisely this circumstance which teaches us, when some Western concept such as the rule of law is invoked (as part of a specific institutional tradition), that nonetheless its meaning and principled claims, protecting individuals as human beings per se, express a universal concept as such incompatible with the imposition of spatial limits. This is why the invocation of the rule of law prevents us from closing our eyes when confronted with the concept's supra-national scope.

To summarise therefore, our "geology" shows up a new level, that of *super partes* law. This new context within international law within its broadest understanding cannot be explained by way of the meta norm *pacta sunt servanda,* nor is it possible to refer to that norm alone. The respect for the rule of law, an issue normally regulated internally within national legal systems, can no longer simply be contained within those same limits.

7.3. Returning to our "geological" model, it can be used in order to engage with a second question of no lesser importance. Within the framework which I propose, jus cogens contains the essential elements on the basis of which the very idea of the rule of law can be conceived outwith the confines of national law and within international law. Jus Cogens in fact displays a feature of positive law which requires obedience even for the actions and agreements of "sovereigns": this is a *semantic* characteristic of the rule of law and a factor enabling the rule of law as such to exist, irrespective of whether it applies to the structure of the rule of law within a particular legal system or within international law. For this reason, jus cogens can offer a reason for reviewing the connection between systems (both international and national legal orders). It encapsulates general principles which are born directly out of the legal culture which is already part of the Western baggage.

Moreover, those very same peremptory norms which form part of jus cogens do not depend on a direct political content and do not express choices of a similar nature, even though they may deeply interfere with political decisions which appear to be incompatible with them: by contrast they progressively set out the contours of an area of protection from states and other actors or from the very "policies" of the international community; eventually, they do not thereby call for the abolition of the boundary or the distinction between single states and the international community.

Now, a potential problem arises from the observation that the rule of international law seems to have no connection with democracy (Weiler 2004, 547 ff). This observation can be unfolded on different planes. Surely it means that it is rather unfair to celebrate the myth of the rule of law on the one hand, whilst on the other hand concealing the fact that *our* belief *today* would ask for a strict connection between the rule of law *and* democracy (the missing term in the international arena). This second element is unfortunately unavailable (or better, not yet obtainable) and the two terms appear to be decoupled when we pass from our national constitutional democracies to the international scenario.

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[43] Waldron (2005b) defends the prohibition of torture in terms of "repugnance to law" (1718 ff.), and accordingly as an "archetype" both in American Law and in International Law.

On the other hand, it is worth noting that this critical argument can also be used to support different "conservative" aims: this same argument, i.e. the lack of democracy in world relationships, is presented as a reason to disregard international or supranational normativity, and to conceive-- as rightly subordinated to national democracies' priorities-- of all international law, including both jus cogens and free conventional agreements, both "justice" and transactional policies. Here lies one of the most important misunderstandings.

The acknowledgment of the international democratic deficit is of course rightly referred to when the system of international law is considered to universally impose substantive preferences, choices which should result from contingent legislation between international actors. But we should be careful in reiterating the same concerns when dealing with the pre-conditions for the respect of human beings and coexistence under the rule of law, which are positivised especially through jus cogens, and as a matter of fact do not necessarily depend on any democratic participation. The *legality* of those positive rules might turn out not to be the worst of starts, even were we to move towards a kind of international democracy. The point is that both rule of law and democracy are Western ideals, which all countries other than Western countries are entitled to use against one another. Moreover, on historical evidence, they are not always coincident, and conceptually they are different. Democracy as such was for many centuries not a full and feasible reality, even though nonetheless the ideal of the rule of law was institutionally concrete, and was already fighting absolutism, arbitrariness, and protecting certain basic rights of the "English".

The area of jus cogens, as far as humanitarian law and the respect for dignity are concerned, is *legally* assumed to be located prior to the point where "ethical- political" issues can start. *Beyond* that line, the struggle for human rights and the protection of the environment are issues which certainly reflect a great deal of the tension between political choices, economic power, and the impossible "neutrality" of legal decisions. By contrast, the realm of inderogable norms is much thinner, and the *necessity* of such norms, as endowed with the legal force of positive law, is non-negotiable (even- and all the more so- where their content is controversial), and as such should not be exposed to these objections. The good arguments based on democracy, relevant as they are, are nonetheless of less central importance here.

As just mentioned, the connection between the rule of law and democracy, with which we are so familiar, is one between two distinct concepts, and the appeal to the former was cherished for decades and centuries before democracy was able to emerge. Whilst we cannot *now* appreciate the rule of law as a series of rules compatible even with a not *democratic* community, it is also true that we could reasonably grant priority to the rule of law as a premise for rooting the exercise of any kind of "authority", and would not thereby conceive of democracy as casting aside the rule of law, or operating without[44]. We easily acknowledge that democratic decision does *not* have the chance to accept or reject the rule of law, but the latter (and, say, the separation of powers which is associated as part of the rule of law) is a pre-condition for the existence of a system which is not based on the sheer whim of the dominant rulers.

If all this holds true, this is *in*consistent with the assumption that the rule of international law must still be "decided" when it must be enforced in national law or asks for its compliance. *Reliance on internal democracy* is undoubtedly needed when assessing the relevance or implementing the range of international commitments*:* but *it is inconsistent* when it is not such issues that are at stake, but rather the very existence and meta-rules implied by the rule of law onto the international domain. This inconsistency should foster appropriate constitutional interpretations or changes where appropriate.

[44] The virtue of the "rule of law" (Raz 1979, 212-229) is discussed by a huge legal theory literature. For an overview, Tamanaha, 2004. Cf. also my elaboration in Palombella, *The Rule of Law and Its Core*, supra footnote 40, and some previous general premises in Palombella 2006b. For the "priority of the right", Rawls 1993 (Lecture V).

8. Conclusion.

Since any law can be infringed, we are not arguing here that international law cannot be broken. Moreover, there is no legal reasoning which can supply material political will. But as a matter of legal reasoning, there are cases in which we cannot appeal to those solemn theories which refer to one's "own country", as in the spirit of "right or wrong, our law".

In the case of jus cogens, it is not logically permissible to state that its violation concerns the international system, not the domestic rule of law, unless in the contingent case that internal proper provisions (if any) are made.

On the one hand, any infringement of the minimum conditions for the rule of law means denying that the international legal system is a system of law of its own, and not just contesting some particular provisions. On the other hand, assumed the unity of the rule of law, it is not possible to conceive of the rule of (international) law as not being valid under the rule of law within "this" jurisdiction.

My contention is that if jus cogens is part of the rule of international law, its legal implication, regardless questions about its moral nature, is that its normative content offers a common frame of reference: as long as its normative content also remains part of the institutional ideal of the rule of law, it provides in Western countries for a thin common basis between national and international systems. In other words, the minimum guarantees of jus cogens are undeniably trans-systemic connections, and the appeal to the rule of law (even that "in this jurisdiction") cannot be but contradictory if it purports to de-activate them.

Given the material and formal separation between systems, this structural link should be recognized and implemented by means of appropriate constitutional provisions, or through constitutional interpretation, and there is no reason why democracy based considerations can obstruct it. Although the international and domestic legal systems are separated, the rule of law offers a final argument against the total lack of any relation between the systems. The rule of law is not compatible with the denial of the applicability of jus cogens which would be legally untenable and contradictory insofar as it denies the rule of law in both systems.

References

Ackerman, Bruce 1993. *We the People. Foundations*, III ed., Cambridge (Mass.): Belknap Press..

Alvarez, Josè E. 2006. Torturing the law, *Case Western Reserve Journal of International Law,* 37: 175

Benvenisti, Eyal 1993. Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts, *European Journal of International Law,* 4: 159

Bradley, Curtis A. 1999. *Breard,* Our Dualist Constitution, and the Internationalist Conception, *Stanford Law Review,* 51: 529.

Boisson de Chazournes Laurence 2000. (with Luigi Condorelli) Common Article 1 of the Geneva Conventions revisited: Protecting collective interests*, International Review of the Red Cross,* 837, 31-03-2000, 67-87.

Cassese, Antonio 2005. *International Law,* II ed., Oxford: Oxford University Press.

Conforti, Benedetto 2001. Notes on the Relationship between International Law and National Law, *International Law Forum du droit international,* 3: 18.

Conforti, Benedetto 1997. National Courts and the International Law of Human Rights, in B. Conforti and F. Francioni, *Enforcing International Human Rights in Domestic Courts*, The Hague: Martinus Nijhoff Publ..

Condorelli, Luigi 2000. (with Laurence Boisson de Chazournes), Common Article 1 of the Geneva Conventions revisited: Protecting collective interests*, International Review of the Red Cross*. 837, 31-03-2000, 67-87.

Dicey, Albert V., 1982. *Introduction to the Study of the Law of the Constitution,* Indianapolis (In.): Liberty Fund Inc.. Reprint of 8th ed., 1915, London: Macmillan & Co.

Dupuy, Pierre-M. 1999. Les 'considérations élémentaires d'humanité' dans la jurisprudence de la Cour internationale de Justice (117-130), in R.-J. Dupuy (direct.) L.A. Sicilianos (coord.), *Droit et justice : Mélanges en l'honneur de Nicolas Valticos*, Paris : Editions A. Pedone.

Francioni, Francesco 1997. The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience, in B. Conforti and F. Francioni, *Enforcing International Human Rights in Domestic Courts*, The Hague: Martinus Nijhoff Publ.,..

Ginsburg, Tom, 2006. Locking in Democracy: Constitutions, Commitment and International Law, *New York University Journal of International Law & Politics*, 38: 707.

Grotius, Hugo, 1625. *De iure belli ac pacis. Prolegomeni*

Jacobs, F. G., 1987. Introduction, in F. G. Jacobs and S. Roberts (eds), *The Effect of Treaties in Domestic Law*, London: Sweet and Maxwell.

Habermas, Juergen 1988. *Law and Morality*, translated by K. Baynes, in S.M. McMurrin (ed.), *The Tanner Lectures on Human Values*, vol. 8, Salt Lake City: University of Utah Press , 217-79.

Habermas, Juergen 1996. *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1992), translated by W. Rehg, Cambridge: Cambridge University Press.

Haskins, George L. 1955. Executive Justice and the Rule of Law: Some Reflections on Thirteenth-Century England, *Speculum*, Vol. 30, No. 4, Oct., 529-538.

Henkin, Louis 1984. International Law as Law in the United States, *Michigan Law Review*, 82: 1555.

Henkin, Louis 1987. The Constitution and the United States Sovereignty: A Century of Chinese Exclusion and its Progeny, *Harvard Law Review,* 100: 853.

Kant, Immanuel 1996. *The Metaphysics of Morals*, transl and ed. by Mary Gregor, with an Introduction by R. J. Sullivan, (Part I, *Metaphysical First Principles of the Doctrine of Right*). Cambridge: Cambridge University Press

Kant, Immanuel 1999. *Groundwork of the Metaphysics of Morals,* ed. Mary Gregor. New York: Cambridge University Press.

Katyal, Neal K. 2006. Hamdan v. Rumsfeld: The Legal Academy Goes To Practice, *Harvard Law Review*, 120: 65.

Kingsbury, Benedict 1998. Sovereignty and Inequality, in *European Journal of International Law*, vol. 9 (n. 4): 599.

Koskenniemi, Martti 2004. Global Governance and Public International Law, in: *Kritische Justiz* 37 (3): 241.

Koskenniemi, Martti 2005. *From Apology to Utopia. The Structure of International Legal Argument.* Reissue with a new Epilogue. Cambridge: Cambridge University Press

Ku, Julian G. 2005. Treaties as Laws: A Defence of the Last-in-Time Rule for Treaties and Federal Statutes, *Indiana Law Journal,* 80: 319.

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Luhmann, Niklas 2004. *Law as a Social System,* transl. by Klaus A. Ziegert, Oxford : Oxford University Press.

McIlwain, Charles H. 1947. *Constitutionalism: Ancient and Modern,* Ithaca, New York: Cornell University Press

Moravcsik, Andrew 2000. The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, *International Organizations,* 54: 217.

Paine, Thomas 1969. *Dissertation on First Principles of Government* (1786), *The Writings of Thomas Paine*, edited by Moncure Daniel Conway, vol. 3. New York: Burt Franklin

Palombella, Gianluigi, 2006a. The Abuse of Rights and the Rule of Law, in A. Sajo (ed.), *The Dark Side of Fundamental Rights*, 5-28. Utrecht : Eleven International Publishers.

Palombella, Gianluigi 2006b. *Dopo la certezza. Il diritto in equilibrio tra giustizia e democrazia,* Bari: Dedalo editore [After Certainty. Law in Balance between Justice and Democracy]

Pernice, Ingolf 1998a. Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and „Multilevel Constitutionalism" in Eibe Riedel (ed.): *German Reports on Public Law*, 40-66, Baden-Baden: Nomos.

Pernice, Ingolf 1998b. Artikel 25: Voelkerrecht als Bestandteil des Bundesrechts, in H. Dreier (ed.), *Grundgesetz Kommentar*- Bd II., Tuebingen: Mohr Siebeck.

Petersmann, Ullrich 2006. *Justice in International Economic Law? From the 'International Law among States' to 'International Integration law' and 'Constitutional Law'*, EUI Working Papers, Law, 2006/46.

Rawls, John 1993. *Political Liberalism*, New York: Columbia University Press

Raz, Joseph 1979. *The Authority of Law: Essays on Law. and Morality,* Oxford: Clarendon Press.

Sloss, David 1999. The Domestication of International Human Rights: Non Self Executing Declarations and Human Rights Treaties, *Yale Journal of International Law*, 24: 129.

Tamanaha, Brian Z. 2004. *On the Rule of Law,* Cambridge: Cambridge University Press.

Vasquez, Carlo M. 1995. The Four Doctrines of Self Executing Treaties, *American Journal of International Law*: 89: 695.

Waldron, Jeremy 2005a. Foreign Law and the Modern Jus Gentium, in *Harvard Law Review*, 119: 129.

Waldron, Jeremy 2005b. Torture and Positive Law: Jurisprudence for the White House, in *Columbia Law Review,* 105: 1681.

Weiler, Joseph H.H. 2004. The Geology of International Law – Governance, Democracy and Legitimacy, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 64: 547.

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