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Jus Cogens: Quo Vadis?

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Volume Editors

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Jus Cogens: Quo Vadis?

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Part I
Jus Cogens: Quo Vadis?

Chapter 1
Jus Cogens and the Humanization and Fragmentation of International Law

Maarten den Heijer and Harmen van der Wilt

Abstract This editorial explores how two developments—the humanization and fragmentation of international law—permeate all aspects of *jus cogens*: its foundations, content and consequences. The authors are particularly intrigued by the question of how the unceasing popularity of *jus cogens* can be reconciled with its limited role in legal practice. It has often been observed that *jus cogens* owes its proliferation to the increased focus on human rights. This, in turn, has yielded two effects. First, such focus on human rights has triggered greater attention for the enforcement of peremptory norms. Secondly, it has put the responsibility of non-state actors for violation of *jus cogens* norms on the agenda. It may not be too far-fetched to understand the reticence of states to accept the expansion of *jus cogens* and its effects against the background of the fear that this will weaken the power of the state, whereas one might argue that the state is rather in need of reinforcement, in view of the manifold challenges it is confronted with. Next to the process of 'humanization' of international law, the appeal of *jus cogens* can be explained from the international lawyer's desire for a single and coherent system of law, including a more clearly established hierarchy of norms. This aspiration is primarily infused by the concern for 'fragmentation' of international law. However, as in the case of humanization, countervailing factors prevent a further expansion of *jus cogens* in international law. For one thing, *jus cogens*, belonging to the realm

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of general international law, is too coarse and inflexible to be of effective use in special sub-fields of international law. A second explanation for the limited role played by *jus cogens* is that specialized international or regional courts and tribunals are hesitant or may even lack the competence to pronounce on a conflict between their legal order and other branches of international law.

Keywords *Jus cogens* · Human rights · Fragmentation · State sovereignty · Sources of international law · Hierarchy in international law

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1.1 Introduction

Jus cogens is a very powerful and contested concept in international law. It is contested, precisely because it appeals to our deepest convictions and evokes strong reactions. The adjective '*cogens*' meets our yearning for hierarchical order, in view of our abhorrence of entropy and chaos. The substantive '*jus*' obviously connotes our craving for justice. The compound suggests an eternal and cohesive moral order, a mighty stronghold in an unstable, if not anarchical society. *Jus cogens* encourages international lawyers to consider their own discipline as serious business, not merely as a warehouse of lofty aspirations. However, these very features also instigate resistance, because the protagonists of *jus cogens* rarely take the trouble to explain whence these superior norms stem from. In the worst case, as the skeptics assert, *jus cogens* is nothing more than an apodictic incantation, pronounced by a magician waving his stick, to end all discussion.[1]

The Editorial Board of the *Netherlands Yearbook of International Law* has decided to revisit the topic. Not, of course, with a view to reconciling the divergent opinions, but rather to clarify the concepts and doctrines relevant to *jus cogens* and to sharpen the related debate in its current context. The book includes chapters written by scholars in general public international law who address the 'grand' themes, like the foundations, content, identification, functions and effects of *jus cogens*. Moreover, specialists in functional sub-disciplines of international law

[1] Compare with the provocative title of Bianchi's seminal article: 'Human rights and the magic of *jus cogens*'. Bianchi 2008. See also D'Amato's title: 'It's a bird, it's a plane, it's *jus cogens*'. D'Amato 1990.

analyse whether, and if so, how, *jus cogens* has made inroads in their field of expertise.[2]

In this editorial, we take stock of the contributions to this volume by explaining both the appeal of *jus cogens* as well as its unfulfilled potential. One common thread throughout the chapters is that *jus cogens* is very much alive and kicking in literary scholarship, but much less so in legal practice. We address this gap between theory and practice through the lens of two key drivers behind the concept of *jus cogens*: human rights and the search for some measure of normative hierarchy.

Developments in human rights law shed light on the *jus cogens* debate because they compel us to think about *jus cogens*' addressees and beneficiaries. Who are bound to comply with peremptory norms? Whose—legal—interests are served by the normative supremacy of *jus cogens*? And does the answer to these questions in any way predict whether one is in favour of a broad or a more narrow conception of *jus cogens*? In the classic paradigm in which states are considered as the predominant, if not exclusive, actors in international law the responses to these questions may, at first blush, seem to be rather straightforward. Those who consider states as the pillars of the international public order are expectedly sceptical of the concept, as *jus cogens* encroaches upon the state's sovereignty. Protagonists of a post-World War II approach of international law that aims to safeguard human rights against tyranny may well be more sympathetic to *jus cogens*, as they seek protection of individuals against a powerful and repressive state. It further seems reasonable to assume that this division of minds corresponds, at least to some extent, with the divide between the legal positivist and naturalist theories.

Accordingly, the *jus cogens* debate cannot be isolated from the broader paradigm shift in international law from state-centrism to the so-called humanization of international law.[3] That shift includes the recognition of actors other than states as subjects of international law, the emergence and blooming of disciplines focusing on the protection of individuals such as human rights, international humanitarian law and international criminal law, the individualization of dispute settlement, the shift from bilateralism to multilateralism, and so on. These developments are likely to affect the course and purport of *jus cogens*. A complicating factor is that the image of the strong and potentially oppressive state does not entirely match today's reality. Many states face competition from power contenders, be it political rebels or organized crime, and most states are hardly able to cope with global challenges like climate change or refugee flows. In short, states are often not capable of performing their protective function vis-à-vis their own citizens. *Jus cogens* may, in view of the ever more complex international relations and waning state power, impose demanding and even contradictory obligations, expecting states to be both liberal and strong, whereas in reality some of them are simply weak.

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[2] Compare the contributions of Vadi 2016; Costello and Foster 2016; Cottier 2016; and Kotzé 2016.

[3] Meron 2006.

Neither can the *jus cogens* debate be isolated from broader thinking about hierarchy in international law. Put to its extremes, the horizontal nature of international law is seen by some as its most defining and precious feature, and by others as a structural weakness.[4] Depending on one's view, *jus cogens* may be international law's menace or saviour.

Regardless of one's position, the growth of treaty-making activity, the functional differentiation of international law, the proliferation of international institutions and agencies—in short, the fragmentation of international law—leads to concerns about conflicts, different standards and a loss of overall perspective.[5] *Jus cogens* may bring harmony and order in the (seemingly) anarchical structure of international law. Yet, the very development of isolated or self-contained regimes may also be a *cause* for reluctance or unwillingness to apply *jus cogens*. Specialized or regional courts and tribunals may feel ill-equipped or legally barred from invoking the concept; *jus cogens* must compete with hierarchical solutions specific to a specialized regime; or *jus cogens* may simply be considered too inflexible or enigmatic to be of use for conflict resolution in a particular area.

In this editorial, after summarizing the *jus cogens* debate, we explore how these two developments—the humanization and fragmentation of international law—permeate all aspects of *jus cogens*: its foundations, content (or identification) and consequences. Where appropriate, we refer to the insightful contributions to this volume, seeking both corroboration and contestation of the hypotheses just mentioned.

1.2 The *Jus Cogens* Debate

There is an inherent tension between the concept of *jus cogens* and the idea that international law is derived from the consent of states. Linderfalk convincingly demonstrates that the 'schism' between legal positivists and legal idealists (or naturalists) pervades all aspects of the *jus cogens* debate.[6] However, the most critical and essential 'separation of minds', arguably, concerns the very existence of *jus cogens*. Indeed, for a devoted positivist the idea that some norms transcend the sovereign will of states must be irreconcilable with the very notion of sovereignty itself. D'Aspremont censures the proponents of *jus cogens* for neglecting the issue of foundation of the concept, by applying all kinds of 'avoidance techniques'.[7] Whether one proposes to abandon consent as a source of *jus cogens* outright or

[4] For an overview, see Shelton 2006.

[5] International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006 (Fragmentation of international law).

[6] Linderfalk 2016.

[7] d'Aspremont 2016.

seeks to circumvent the issue of consent by pointing out that Article 53 of the Vienna Convention[8] at least offers proof of states' recognition of the concept, neither solution is, indeed, likely to allay the positivist's qualms.[9]

Any concern on the sources and genesis of *jus cogens* cannot be detached from its content and functions. If *jus cogens* were to remain an 'empty box' or a 'car that has never left the garage'—to use the famous metaphors of Georges Abi-Saab and Ian Brownlie,[10] respectively—no one would be really alerted and cry wolf. However, all contributors to this volume seem to agree that the concept has a tendency to proliferate. While the skeptics have denied its very claim to existence,[11] its proponents have enthusiastically claimed *jus cogens* status for a myriad of norms.[12] Moreover, they have sought to extend the functions or effects of *jus cogens* beyond its initial capacity of trumping and invalidating conflicting treaty rules. The presumptive consequences of *jus cogens* have, indeed, been manifold. *Jus cogens* has been mobilized in order to invalidate customary international law and resolutions of the Security Council; it has been invoked in the national context in order to nullify domestic law; and it has been claimed to create obligations, like a duty to prosecute violations of *jus cogens* ('international crimes') or to lift state immunities.[13] Importantly, the growth of the content of *jus cogens* and the proliferation of its effects functions are inter-related. After all, accepting that a standard acquires the status of a peremptory norm is likely to provoke procedural and enforcement efforts to make the norm effective.

Whether efforts to increase the scope and relevance of *jus cogens* have been effective is a different issue. The contributions to this volume demonstrate that the results of legal activism have been sobering. Kadelbach observes that states and court practice have generally revealed a narrow notion of the functions of *jus cogens* and stresses its symbolic value outside the letter of the law. Likewise, Shelton confirms that the role of *jus cogens* has been predominantly expressive.[14] Other authors, on the other hand, acknowledge the potential value of *jus cogens* in specific areas of international law—like Kotzé in respect of environmental law, Cottier in respect of international economic law and Vadi in respect of international investment law—or defend the expansion of its consequences. Concerning this latter aspect, Santalla actively seeks to augment the practical effects and scope of *jus cogens*, emphasizing its customary international law character.[15] In a similar

[8] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[9] For the first mentioned suggestion, see Hameed 2014.

[10] Abi-Saab 1973, at 53; Brownlie 1988, at 110.

[11] See, for instance, Koskenniemi 2005, at 113 and 122 (disqualifying it as 'kitsch').

[12] See Vadi 2016; Cottier 2016; Costello and Foster 2016; and Kotzé 2016. While these authors do not necessarily agree with the expansion of *jus cogens* in the area that they analyse, they convincingly demonstrate that its role is increasing.

[13] For an impressive enumeration, describing it as the 'creative pull of *jus cogens*', see d'Aspremont 2016, at 95.

[14] Kadelbach 2016; Shelton 2016, at 42.

[15] Santalla Vargas 2016.

vein, Orakhelashvili criticizes the distinction between substantive prohibitions and procedural consequences, arguing that *jus cogens* entails legal effects in and of itself.[16] Kleinlein seems to occupy the middle ground. While he acknowledges that *jus cogens* has rarely been applied to solve a norm conflict, he aims to demonstrate how its many attributes and its vast potential can be reduced to its hierarchical supremacy in general and its moral paramountcy in particular.[17]

In short—and what could be expected—there is a gap between aspirations and reality as far as the scope and consequences of *jus cogens* is concerned. However, it cannot be denied that *jus cogens* has invaded new areas of international law, like environmental law, investment law and economic law, that the International Court of Justice has formally acknowledged the *jus cogens* status of several norms and that the scholarly debate on the functions of *jus cogens* has not abated. What interests us here is how this unceasing popularity of *jus cogens* and its limited role in legal practice can be explained.

1.3 *Jus Cogens* and Human Rights

In our opinion, the increase of the scope and, arguably, the relevance of *jus cogens* can be attributed to the fact that the realm of *jus cogens* is predominated by human rights. This, in turn, has yielded two effects. First, it has triggered greater attention for the enforcement of peremptory norms (the 'functions'/'effects' of *jus cogens*). Secondly, it has put the responsibility of non-state actors for violation of *jus cogens* norms on the agenda. Initially, *jus cogens* was 'invented' to serve the interests of weaker states.[18] This explains its limited application in the realm of treaties. Article 53 VCLT provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. Moreover, if a new peremptory norm emerges it will invalidate any previously concluded treaty, which is in conflict with that norm (Article 64 VCLT; *jus cogens superveniens*). These provisions prevent that mighty states would entirely eclipse weaker states by entering into agreements to that purpose and reflect the predominance—if not exclusivity—of states in international law. Nowadays, however, it is generally acknowledged that peremptory norms serve to protect the rights of individuals, which according to Shaw, has always been the essence of international law (though it has been obscured by positivist, nineteenth century's theories).[19]

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[16] Orakhelashvili 2016, at 145. 'There is little sense in insisting on the strict separation between the prohibitions stipulated under substantive *jus cogens* rules and legal consequences arising after these prohibitions are violated, given that all pertinent frameworks in which *jus cogens* is relevant have rejected such separation.'

[17] Kleinlein 2016.

[18] Kleinlein 2016, who refers to Pellet 2006, at 83–84.

[19] Shaw 2008, at 258.

Most authors, including the ones that have contributed to this volume, acknowledge that *jus cogens* mainly encompasses human rights.[20] A brief look at the peremptory norms beyond contestation—prohibition of apartheid, slavery, torture, genocide, crimes against humanity—immediately confirms this contention.[21] The evolution of *jus cogens* as a stronghold of normative expression and protection of human rights has a number of important consequences. For one thing, it has implied that the focus of the function of *jus cogens* has shifted from invalidating treaties to inhibiting concrete administrative or judicial acts. Against this backdrop, the argument of Costello and Foster that the principle of non-refoulement has developed into a peremptory norm can be convincingly argued. The wider purport of *jus cogens* has been recognized by the International Criminal Tribunal for the former Yugoslavia in the *Furundžija* case where the Trial Chamber held that

> At the inter-state level, the *jus cogens* concept serves to internationally de-legitimize any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law.[22]

Human beings are more directly and personally affected by concrete (administrative) acts than by treaties.

Secondly, the idea that *jus cogens* primarily serves to protect the most fundamental human rights is conducive of an expansion of the realm of agents to which the norm is addressed. Ever since Nuremberg it has been formally and legally

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[20] Kadelbach points out that '[m]ore significant than its technical function, however, is its symbolic value, most notably in the area of human rights.' Kadelbach 2016, at 149. Costello and Foster argue that 'indeed it is well recognized that most norms that have attained the status of customary international law and even *jus cogens* are human rights norms'. Costello and Foster 2016, at 299. According to Vadi '[l]ike natural law, *jus cogens* emphasises the importance of human beings rather than necessarily conforming with the consolidated positivist and state-centric Westphalian understanding of international law.' Vadi 2016, at 359.

[21] Compare para 5 of Commentary to Draft Article 26, in: ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentary*, A/56/10: 'peremptory norms that are clearly recognised include the prohibition of aggression, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.' For similar findings of the ICJ, see *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Rwanda*), ICJ, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, para 64, affirming that 'jus cogens is part of international law and that the prohibition of genocide belongs to this category of norms' This was confirmed in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia Herzegovina v Serbia and Montenegro*), ICJ, Judgment of 26 February 2007, para 161. As for the prohibition of torture as *jus cogens*, see *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), ICJ, Merits, Judgment of 20 July 2012, para 99. '[T]he prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).'

[22] *Prosecutor v. Furundžija*, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 155.

established that individuals can incur criminal responsibility for international crimes under international law.[23] In the Kenya decision, the International Criminal Court has confirmed that the commission of crimes against humanity is not the 'privilege' of state officials, but that they can be committed by powerful organizations having the means of carrying out a widespread or systematic attack against a civilian population.[24] Moreover, it is increasingly accepted that non-state armed groups can be held accountable for human rights violations, provided they comply with certain strict conditions, like wielding control over territory and possessing the organizational capacity to observe those human rights.[25] Whereas the question of whether non-state actors are bound by *jus cogens* is still highly contested, from a material point of view that seems to be a foregone conclusion. After all, from the perspective of the victim it is not important *who* inflicts the injury, but what matters is *that* the harm is inflicted. The orthodox position that only states would be obliged to observe and not derogate from *jus cogens* is too much engrafted upon the outmoded conception that non-state actors have no treaty making capacity that would contravene peremptory norms.

Thirdly, the penetration of *jus cogens* in the non-state realm—both in respect of the beneficiaries of its normative regime, and in regard to the potential violators—has repercussions for the state as well. While the traditional conception of *jus cogens* compelled states to abstain from violating essential norms, the modern approach, entailing the protection of fundamental human rights and interests against incursions from both state and non-state actors, involves positive obligations that the state is exclusively expected to fulfil. Both negative and positive obligations are neatly summarized in the 'responsibility to protect' (R2P) commitments, spurring states to 'respect and to ensure' basic rights. Nonetheless, states, (international) courts and tribunals and many scholars are highly reluctant to attach such positive obligations to *jus cogens* rules.[26] Costello and Foster point at the cautious findings of the International Court of Justice (ICJ) in the case of *Belgium v Senegal* (*Questions Relating to the Obligation to Prosecute or Extradite*), where the Court held that the obligation to prosecute or extradite (*aut dedere, aut judicare*) flowed from and was confined to the parties to the UN Convention against Torture and did not automatically follow from its confirmation

[23] Principle 1 of the Nuremberg Principles. International Law Commission, Report of the International Law Commission on its second session, UN Doc. A/CN.4/34, 29 July 1950. 'Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment'.

[24] *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09, 31 March 2010. On this decision, see Kress 2010.

[25] For a seminal analysis, see Fortin 2015.

[26] Costello and Foster 2016.

that the prohibition of torture, indeed, constituted a *jus cogens* obligation.[27] Moreover, the ICJ has drawn a distinction between substantive and procedural norms in the *Germany v. Italy* case, damping excited hopes that the bulwark of (state) immunity could be demolished in case of violation of peremptory norms. The Court denied the conflict between substantive prohibitions that would arguably have *jus cogens* status and rules of state immunity.

> Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules of State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought are lawful or unlawful.[28]

In short, as Shelton observes, *jus cogens* primarily appears to have an expressive function and has little or no practical consequences.[29]

It is interesting to speculate why states and international judicial institutions are so reluctant to attach consequences to and boost the enforcement of *jus cogens* norms. One of the reasons might be that traditionally *jus cogens* is closely associated with the image of the strong (authoritarian) state that both tramples the sovereignty of its neighbours and impinge upon the fundamental rights of its citizens. The function of *jus cogens* is then to curb the power of the bully and secure a space for the vulnerable. That representation of the repressive state corresponds with the emphasis on the negative obligation to refrain from violating peremptory norms, but does not necessarily entail positive commitments.

However, while the paradigm of the powerful state probably still prevails, the international order is increasingly confronted with a phenomenon that is sometimes considered as a relapse into the anarchy of bygone times. We are referring here to weak or failed states whose monopolies of sword power and taxation are challenged by insurgents or criminal gangs. Such non-state actors often equal and even surpass official governments in the commission of atrocities. Islamic State, Boko Haram, the Lord's Resistance Army in Uganda and the Revolutionary

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[27] *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), ICJ, Judgment of 20 July 2012, para 100. 'However, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned.'

[28] *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*), ICJ, Judgment of 3 February 2012, para 93. The opinion of the ICJ dovetails with the findings of the European Court of Human Rights in *Al-Adsani v. United Kingdom,* ECtHR, No. 35763/97, 21 November 2001, para 61. 'Nothwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State were acts of torture are alleged.'

[29] Shelton 2016.

United Front (RUF) in Sierra Leone are but the most visible and speaking examples.[30] For the weak or failed state Steven Pinker has coined the neologism 'anocracies', which are administrations

> that don't do anything well. Unlike autocratic police states, they don't intimidate their populations into quiescence, but nor do they have the more-or-less fair systems of law enforcement of a decent democracy. Instead they often respond to local crime with indiscriminate retaliation on entire communities. They retain the kleptocratic habits of the autocracies from which they evolved, doling out tax revenues and patronage jobs to their clansmen, who then extort bribes for police protection, favourable verdicts in court, or access to the endless permits needed to get anything done.[31]

And Pinker cites the statistics of the *Global Report on Conflict, Governance, and State Fragility*, claiming that anocracies are 'about six times more likely than democracies and two and one-half times as likely as autocracies to experience new outbreaks of societal wars'.[32] In a similar vein, Mueller has pointed at the blurring of political and criminal motives in the mind-set of the leading actors in most modern times armed conflicts:

> They engage in armed conflict either as mercenaries hired by desperate governments or as independent or semi-independent warlord or brigand bands. The damage perpetrated by these entrepeneurs of violence, who commonly apply ethnic, nationalist, civilizational, or religious rhetoric, can be extensive, particularly to the citizens who are their chief prey, but it is scarcely differentiable from crime.[33]

Now we do not claim that all these crimes would amount to violations of peremptory norms, but they may do so when the perpetrators engage in slavery, war crimes or crimes against humanity.[34]

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[30] On the latter's dark reputation, see Gberie 2005. Gberie strongly censures the prosecutorial strategy of Prosecutor David Crane of the Special Court for Sierra Leone who, instead of starting the prosecution against the leaders of the RUF 'whose campaign of terror had brought Sierra Leone down on its knees and killed tens of thousands of its citizens', entered charges against the 'putative leaders of the Civil Defense Force (CDF), a group of civilians who organized to liberate villages overrun by the RUF, keep the bloodthirsty rebel force in check, and restore a democratically elected government that had been overthrown by the rebels and rogue government soldiers.' Gberie 2014, at 625.

[31] Pinker 2011, at 310.

[32] Marshall, Cole and George Mason University 2008, at 6.

[33] Mueller 2004, at 1.

[34] At first blush, torture is slightly more complicated, because Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 requires the involvement of a public official. However, the ICTY has made it abundantly clear that this requirement is unnecessary for torture to qualify as a war crime or crime against humanity. See *Prosecutor v. Kunarac* et al., Trial Chamber, Judgment, Case No. IT-96-23-T and IT-96-23/1-T, 22 February 2001, para 496. 'The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.'

There are two avenues to sustain accountability under international law in respect of such international crimes that would qualify as violations of *jus cogens*. First, the perpetrators of these crimes may incur criminal responsibility and stand trial before the International Criminal Court (ICC) in The Hague. However, that is contingent on the Court having jurisdiction and being able to obtain custody over the suspects. Secondly, the acts of rebels or organized crime engaging in very serious offences might be imputed to the state. International law leaves very little room for direct attribution of acts of individuals to the state, unless they are organs of that state. Article 10 of the International Law Commission's (ILC) Articles on State Responsibility[35] covers the situation of an insurrectional movement that succeeds in becoming the new government or establishing a new state. The conduct of such a movement shall be considered an act of that state. However, this provision offers no relief in case of protracted and indecisive struggle and in case of defeat of the rebels. Crawford, in his commentary on the ILC Articles, quotes Commissioner Nielsen in the *Solis* case as authority for the

> 'well-established principle of international law' that no government can be held responsible for the conduct of rebellious groups committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection.[36]

Another option would be to hold the state responsible for the failure to prevent or repress the commission of violations of peremptory norms by non-state actors within its jurisdiction. Such responsibility will normally arise under the regime of human rights treaties and is well-known as the procedural limb of or 'positive obligations', ensuing from such treaties. However, as was explained before, the International Court of Justice refrained from inferring a duty to investigate and prosecute directly from a violation of a *jus cogens* norm. Interestingly, the Inter-American Court of Human Rights took another view. In the *La Cantuta* case, the Court qualified the forced disappearances as a violation of a peremptory norm, found that the need to eradicate impunity reveals itself as a duty of cooperation among states for such purpose and concluded that access to justice itself belonged to the realm of *jus cogens*.[37] The judgment has been censured for being too bold and lacking in thorough explanation of its findings. However, for two reasons we consider the judgment important. First, the Court explicitly acknowledged that individuals can violate *jus cogens* norms.[38] And second, the Court forged a direct link between the violation of the norm and the positive obligation to redress that situation, flouting the rather contrived separation between substantive and

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[35] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001.

[36] Crawford 2002, at 116.

[37] *La Cantuta v Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 162, Judgment of 29 November 2006, para 160 (discussed by Shelton 2016, n. 20).

[38] Ibid. 'As pointed out repeatedly, the acts involved in the instant case have violated norms of international law (*jus cogens*).' In other words: the Court recognized that non-state actors could be the authors of *jus cogens* violations.

procedural rules, as propounded by the ICJ and invigorating the enforcement of peremptory norms.

Nonetheless, we predict that this approach will not stand and that takes us finally back to the quintessential issue why states and international institutions are reticent to expand the scope and functions of *jus cogens*. The human rights revolution has incontrovertibly affected the system of international relations and international law that has traditionally been predicated on the supremacy of sovereign states. The legacy of Nuremberg and Tokyo has been that states should abstain from trampling the fundamental rights of their citizens and connotes self-control that belongs to the realm of the will. Such a concession on a reciprocal basis entailed an infringement of sovereignty, but could relatively easily be made, as it implied the negative obligation for states to curtail their unlimited powers to treat their citizens as they liked. The furthering of security and well-being of its nationals is the main task of the state and, arguably, constitutes its *raison d'être*. However, such positive commitments of the state towards its own citizens are not subject to regulation in international law, unless, of course, the state itself voluntarily decides to do so by ratifying human rights conventions. It only becomes critical—and triggers *jus cogens* concerns—if non-state actors acquire the power to commit international crimes and violate fundamental human rights, especially if this is done systematically and unhampered by law enforcement of the state. As we observed before, weak states often lack the power and resources to counter violations of *jus cogens* norms by mighty contenders.[39] It is increasingly acknowledged that the atrophy of state institutions, rather than the repression of authoritarian states, is conducive of the commission of atrocities.[40] In other words, it is often a question of deficient capacities and not lack of will. To postulate a positive obligation to prosecute and punish the perpetrators of international crimes is in this context both unfair and pointless.

There is another aspect to this. Some consequences that, according to the ardent advocates of *jus cogens*, emanate from the recognition of a peremptory norm may be considered by states as counterproductive. If one seeks to enforce *jus cogens* and to that purpose wishes to embolden strong institutions, it makes little sense to erode those very institutions by allowing the demolition of state immunity. Such measures are likely to play in the hands of the harbingers of chaos and anarchy.

Be as it may, states may have political reasons to disparage their enforcement powers and avoid responsibilities. The point is that we live in an international community in which states (still) play a controversial but pivotal role in the quest for the best balance between institutional order and security and human freedom. *Jus cogens* may be considered as instrumental to or may even embody that quest, but it cannot be detached from it. And it cannot therefore neglect the position and interests of states.

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[39] Compare with Cottier's point, who argues that '[h]ost countries of foreign direct investment often lack the political and legal structure to impose and enforce peremptory norms for various reasons.' Cottier 2016, at 345.

[40] See also Snyder 2015, Chapter 4.

1.4 *Jus Cogens* and the Quest for Hierarchy

Next to the process of 'humanization' of international law, the appeal of *jus cogens* can be explained from the international lawyer's desire for a single and coherent system of law, including a more clearly established hierarchy of norms. In contrast with domestic systems, which are characterized by a single lawmaker and a constitutional order, the international system is an aggregate of multiple sovereigns who make rules, which are not in a hierarchical relationship to each other. This is often found problematic, because such a horizontal system of rules does not allow for the ranking of norms or conflict resolution on the basis of normative value. Including Article 103 of the UN Charter,[41] *jus cogens* is one of the very few tools of international law expressing some measure of normative hierarchy.

For sure, the quest for hierarchy in international law is challenged by those who point out that it endangers the primordial idea of sovereign equality and that disunity in the modern world is, in a truer sense, its unity.[42] The lack of hierarchy protects weaker states and prevents the monopolization of power. As Weil observed:

> The sovereign equality of states is in danger of becoming an empty catch phrase: for now some states are more equal than others. Those privileged to partake of that legislative power are in a position to make sure that their own hierarchy of values prevails and to arrogate the right of requiring others to observe it. In this way the concepts of 'legal conscience' and 'international community' may become code words, lending themselves to all kinds of manipulation, under whose cloak certain states may strive to implant an ideological system of law that would be a negation of the inherent pluralism of international society.[43]

This debate—hierarchy versus pluralism—is still very much alive and the contested nature of *jus cogens* reflective of it. Yet, in today's international legal order, sovereign equality is at least qualified by a set of potent drivers behind the search for more normative coherence.[44] *Jus cogens* fits with the manifold challenges launched against the state-centred paradigm in international law. These are not only about human rights and non-state actors, but more generally about the proliferation of values that are common to mankind as a whole as well as about the challenges posed by the fragmentation of international law. Fragmentation, i.e. the emergence of specialized fields of international law and so-called self-contained regimes, the regionalization of international law, and the creation of a plethora of international institutions, leads to questions of overlap and conflict—and some have even argued to disintegration of international law—and thus fuels desires for normative hierarchy.[45]

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41 1945 Charter of the United Nations, 1 UNTS XVI.

42 Koskenniemi and Leino 2002, at 556 (quoting Sir Hersch Lauterpacht).

43 Weil 1983, at 441.

44 Reisman 1990; Schrijver 1999.

45 Fragmentation of international law.

Paradoxically, however, the increased potential for overlap and conflict in international law is not, or only to a limited extent, mirrored by a proliferating role of *jus cogens* in legal practice. The contributions to this volume, and especially those on the role of *jus cogens* in specialized areas of international law, tend to explain this paradox in two ways.

First, sub-fields of international law may make use of hierarchical solutions in their own, internal, legal orders. We may, indeed, discern a codification of hierarchy, in some way or the other, within the areas discussed in this volume. Vadi discusses at length the role of overriding transnational public policy rules in international investment arbitration; Cottier explains the importance of common concerns of humankind in international economic law; and Costello and Foster point out the relevance of fundamental human rights within international refugee law.[46] In international criminal law, the very formulation of international crimes is an effort of establishing hierarchy between crimes of concern to humanity at large and other crimes. In a similar fashion, grave breaches of international humanitarian law enliven distinct legal consequences in the sphere of enforcement and criminalization. Within international organizations as well, the European Union being the most clear example, hierarchical solutions are very common, making some of them appear to function more like domestic systems.

Less clear, however, is how such internal hierarchical solutions relate to *jus cogens*. One position is that internal hierarchies correspond with or are derived from *jus cogens*, as is argued by Cottier and Vadi in the contexts of international investment law and international economic law, respectively. As noted above, international criminal law is closely related to the concept of *jus cogens* and the same can be said of the formulation of grave breaches in the context of international humanitarian law.[47]

Yet, the more dominant approach seems to be that internal hierarchies are disentangled from *jus cogens*. To take human rights law as an example, *jus cogens* plays only a marginal role in the case law of human rights courts and committees, while distinctions between absolute and relative human rights, between derogable and non-derogable rights or between civil and socio-economic rights are far more common and consequential. These distinctions do have some overlap with *jus cogens*, but are in the view of most authors not commensurate with it.[48] In international refugee law, the all-decisive element of persecution within the refugee definition is generally considered to involve ‘serious human rights violations’, which is, as is also observed by Costello and Foster, a category which does not necessarily correspond with *jus cogens*.[49] Likewise, international crimes and grave breaches of the laws of war are in multiple ways linked with *jus cogens*, but may expand beyond that particular pedigree.

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[46] See Vadi 2016; Cottier 2016; and Costello and Foster 2016.

[47] E.g. Mitchell 2005.

[48] E.g., Meron 1986. See also Kleinlein 2016, at 182.

[49] Hathaway and Foster 2014, 193 ff; Costello and Foster 2016.

And this is not too surprising. Precisely because it belongs to general international law, *jus cogens* may well be considered too inflexible or too troubled a concept to be of effective use within a certain specialization. *Jus cogens* is anathema to the very benefits of having a self-contained regime. Kotzé, in exploring the value of *jus cogens* for international environmental law, observes that the traditional concerns of international law reflected in *jus cogens* do not allow for a straightforward fit in environmental law.[50] This, together with uncertainty about the requirements for accepting a norm as *jus cogens*, helps explain why *jus cogens* is not often used in international legal practice and plays only a limited role in the case law of specialized international courts and tribunals. Often, other legal constructs that are specific to the internal legal order may solve conflicts within a particular branch of international law.

A second explanation for the limited role played by *jus cogens* is that specialized international or regional courts and tribunals are hesitant or may even lack the competence to pronounce on a conflict between their legal order and other branches of international law. This is despite the widespread acceptance that the many different regimes of international law remain subject to the core rules of international law, including the universal system of the United Nations Charter and norms belonging to *jus cogens*.[51] According to that logic, *jus cogens* would set outer limits to the degree in which functional international law regimes may consider themselves to be self-contained. But some specialized courts may resist that function of *jus cogens*. A prime example is the Court of Justice of the European Union (CJEU), which has proclaimed autonomy to be a foundational concept of the Union legal order, which, on the one hand, serves to safeguard the Union from outside legal influence and, on the other hand, prevents the CJEU from ruling on the content of general international law.[52] Although *Kadi* revolved chiefly around Article 103 of the UN Charter, its reasoning would also imply that the whole concept of *jus cogens* is simply not of the Union's concern.

In one way or the other, the jurisdictional competences of other specialized international courts, and domestic courts as well, may prevent them from having recourse to *jus cogens*. For courts of states adhering to a dualist relation with international law, international law, including *jus cogens*, simply does not exist and is therefore none of their business. The same may be true for courts and tribunals, which are specifically tasked to ensure the observance of obligations undertaken within a specific treaty regime. It could be argued, for example, that any relationship or possible conflict between a human rights treaty and general international law is a matter only for the states party to the human rights treaty; the role of a

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[50] Kotzé 2016.

[51] W. Riphagen, Special Rapporteur, Third report on the content, forms and degrees of international responsibility (Part Two of the draft articles) UN Doc. A/CN.4/354 and Corr.1 and Add.1 & 2, 1982, at 39, paras 104–105.

[52] Case C–402/05 P and C–415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I–6351, paras 282–288.

human rights court being restricted to interpreting the relevant human right. Any conflict between such interpretation and *jus cogens* or another rule of international law is not of concern to the international court, but for the state party to resolve.

Obviously, not all international courts adhere to such an approach and some, indeed, have a keen eye for the relationship between the regime they have set up to protect international law more generally. This may also be ordained by treaty. In the ICC Statute,[53] it is laid down that the ICC shall apply applicable treaties and the principles and rules of international law as well as internationally recognized human rights.[54] Yet, it is one thing to seek inspiration from international law, but quite another to be involved in the formation, through interpretation, of international law. The European Court of Human Rights (ECtHR), for example, consistently considers that it must interpret the European Convention on Human Rights (ECHR) in harmony with the general principles of international law.[55] At the same time, it is 'mindful of the fact that it is not its role to seek to define authoritatively the meaning of provisions of the Charter of the United Nations and other international instruments'.[56] This seems wise, as such pronouncements may affect states outside the jurisdictional ambit of the ECtHR. The ICJ, on its part, has through its judgments, but also informally, voiced concerns that new tribunals of international law might produce conflicting interpretations of international law.[57] This may also explain why the rather activist approach of the Inter-American Court of Human Rights on *jus cogens* has received considerable scepticism and does not seem to play a significant role in legal scholarship on *jus cogens*.[58] Therefore, even though it was assumed at the time by the International Law Commission that any tribunal and state practice could decide on the nature of *jus cogens* norms,[59] such a development faces obstacles of conflicting interpretations and jurisdictional limitations.

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[53] 1998 Rome Statute of the International Criminal Court, Rome, 2187 UNTS 3 (ICC Statute).

[54] Article 21 ICC Statute.

[55] E.g., *X. v Latvia*, ECtHR, No. 27853/2009, 26 November 2013; and *Golder v The United Kingdom*, ECtHR, No. 4451/70, 21 February 1975.

[56] *Al-Jedda v The United Kingdom*, ECtHR, No. 27021/08, 7 July 2011, para 76.

[57] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para 403. The Court notes that positions adopted by the ICTY on issues of general international law 'do not lie within the specific purview of its jurisdiction'. See also the addresses of ICJ presidents Schwebel and Guillaume, quoted in Koskenniemi and Leino 2002, at 553–554.

[58] Alvarez-Rio and Contreras-Garduno 2013.

[59] Sir H. Waldock, Special Rapporteur, Second report on the law of treaties, UN Doc. A/CN.4/156 and Add. 1-3, 1963, at 53. See also International Law Commission, Draft articles on the responsibility of states for internationally wrongful acts, with commentaries, 53rd session of the ILC, UN Doc. A/56/10, 2001, at 112. 'The concept of peremptory norms of general international law is recognized in international practice, in the jurisprudence of international and national courts and tribunals and in legal practice.'

1.5 Conclusion

In this editorial the authors have contemplated the concept of *jus cogens* through the lens of two specific developments: the humanization and fragmentation of international law. We have argued that the proliferation of *jus cogens* can primarily be attributed to the increased focus on human rights. This shift in international law has both expanded the scope of *jus cogens* and prompted greater attention for its effects, as human rights-driven peremptory norms require new procedural provisions for their implementation and enforcement. Moreover, it has strengthened the idea that non-state actors are also obliged to observe *jus cogens*. Simultaneously, this last mentioned notion has put the contradictions, inherent in repressive and protective features of state power, in sharper perspective. These tensions are likely to rebound on the very development of *jus cogens* itself. It may not be too far-fetched to understand the reticence to accept the expansion of *jus cogens* and its effects against the background of the fear that this will weaken the state, whereas the state is rather in need of reinforcement, in view of the manifold challenges it is confronted with.

Next to the upsurge of human rights, the expansion and fragmentation of international law fuels the debate on normative hierarchy and helps explaining the unabated appeal of *jus cogens*. Yet, the coming into being of specialized areas of international law and so-called self-contained regimes also challenges the functioning and effectiveness of *jus cogens* as an instrument for solving norm conflict. The contributions to this volume demonstrate that *jus cogens* does not play a prominent role in most specialized areas of international law. Further, specialized courts or tribunals are generally reluctant to invoke the concept. This is at least in part to be explained from a lack of clarity and controversy on the identification and legal consequences of *jus cogens* norms, but also from functional divides between general international law and specialized branches.

Shortly after deciding that *jus cogens* should be the theme of the present volume, one of the contributors to this volume alerted the editorial board that the ILC had decided to include the topic in its long-term programme of work.[60] The reasons advanced by the ILC to embark on the project more or less corresponded with the initial thoughts of the Editorial Board, namely that further studies could usefully contribute to the development of *jus cogens* by analysing the state of international law on *jus cogens* and providing an authoritative statement of the nature of *jus cogens*, the requirements for characterizing a norm as *jus cogens* and the consequences or effects of *jus cogens*.[61] The ILC also considered that *jus cogens* would be sufficiently advanced in terms of state practice to permit progressive development and codification.[62]

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[60] International Law Commission, Report of the International Law Commission, 66th session of the ILC, UN Doc. A/69/10, 2014, at 265–266.

[61] Ibid., Annex, at 274 ff.

[62] Ibid., n.60.

We welcome the ILC's decision and hope that the rich contributions in the present volume of the *Netherlands Yearbook of International Law* may assist it in its forthcoming work. In view of our introductory deliberations above, we feel that *jus cogens*, indeed, is a concept with promising yet unfulfilled potential. Future involvement of the ILC may contribute to alleviating some of the hesitance and skepticism surrounding the concept. On the basis of the studies collected in this volume, we are inclined to observe that further studies on the topic should focus not so much on the theoretical acceptance of *jus cogens*, but rather on the requirements for accepting a norm as *jus cogens* as well as its functions and legal consequences. The mystery of *jus cogens* dictates mindfulness and prudence, but should not hijack progressive development and further materialization.

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Chapter 2
Sherlock Holmes and the Mystery of *Jus Cogens*

Dinah Shelton

Abstract The doctrine of *jus cogens* attracts fierce advocates as well as strong sceptics, who debate the nature, functions and even the existence of such norms. Like Sherlock Holmes, the idea of *jus cogens* emerged as a concept in the imagination of writers. Over time both Sherlock Holmes and *jus cogens* have generated widespread belief in their reality, but it is a reality that is subjectively shaped by each follower. Early publicists creating and developing international law posited the existence of extra-consensual norms that constrained the exercise of state sovereignty, a theory that emerged in large part from Christian theology with its notions of overriding divine law. Later publicists argued that non-derogable norms originate either in natural law, 'necessary' law, the 'dictates of the public conscience', 'universal law', or international moral imperatives. Some recent scholars rely on the Vienna Conventions on the Law of Treaties to argue to the contrary that norms of *jus cogens* do not fundamentally differ from other international rules in their origin; they emerge only from state consent, being identified 'by the international community of states as a whole' as peremptory norms. Within the literature as to the origin of *jus cogens*, in the absence of state practice, theorists differ in their views of the functions the concept serves, some arguing that it is limited in application to treaty law. Others assert that such norms act to place absolute limits on the conduct of states, governments and individuals and establish a hierarchy of norms. This article examines the origin of *jus cogens* in doctrine and the scant evidence to be found in state practice. It also examines the functions of *jus cogens*, questioning whether these remain largely literary and theoretical, with an impact like Sherlock Holmes that derives primarily from belief in its existence.

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2.1 Introduction

The editors of the Netherlands Yearbook of International Law requested a chapter on the origin and functions of *jus cogens*, intended as an introduction to the issue. The topic necessarily involves retracing well-worn paths and revisiting many classic works, in an attempt to understand and present what are in fact quite divergent approaches to this complex issue. The result of the review is a conclusion that *jus cogens* is largely if not entirely a literary construct, a theoretical proposal for what ought to be, rather than what was or is. Publicists have long sought to develop a theory that would serve in practice to constrain unlimited state power to accept or reject legal limits on the exercise of their sovereignty. The need for the theory today may be questioned, because the norms most often cited as *jus cogens* have been accepted as customary international law or through adherence to treaties containing them by all states. Breach of any such norm is a violation of international law and labelling the norm *jus cogens* seems to add little. In fact, doing so could have the pernicious effect of diminishing 'ordinary' customary norms to something more like comity. On the positive side, however, it may be speculated, but it is only speculation that at least some support for the development of international criminal law was based in a similar desire to limit all ability to opt out of particularly important international norms. As for identifying *jus cogens* norms, this is akin to watching the many differing visual representations of literary creations or simply reading a classic novel; each person brings a particular vision to the characters. Similarly, the content of *jus cogens* appears to be subjective with various scholars, practitioners and judges identifying their own cherished norms for this classification. None of these critiques diminish the cultural value of *jus cogens* as

a representation of the idea that there is an international society with core values. In the end, belief that *jus cogens* exists may be its most important attribute, making it a little like Sherlock Holmes.

Sherlock Holmes first appeared in 1887 in Dr. John Watson's account, *A Study in Scarlet.*[1] In the century and a quarter since their first adventure, Holmes and Watson have been incarnated in print, films and television series, inspiring legions of tourists to emerge from London's Baker Street underground station to search for their apartments at 221B Baker Street. Sir Arthur Conan Doyle, who wrote the stories, tried to put an end to Sherlock Holmes during his lifetime,[2] but public outcry forced Conan Doyle to revive the famous detective. It is reported that during the First World War, when the author visited the allied front, a famous French general asked 'What rank does Sherlock Holmes hold in the English army, monsieur?' Conan Doyle replied that, alas, Mr. Holmes was too old for active service.[3] English postal authorities continue to receive letters addressed to Holmes, asking for his assistance; surveys done in 2008[4] and 2011[5] found that between 21 and 58 % of Britons believe that Sherlock Holmes actually lived. In sum, the literary creation has taken on a certain reality with some impact, not unlike *jus cogens*.

Available evidence suggests that international *jus cogens* originated as a construct of writers, in this case in the efforts of early publicists to explain an emerging legal system governing sovereign states, where rulers often claimed absolute power unrestrained by law.[6] Scholars sought to understand the nature and source of obligations that could limit the power of governments internally and internationally, binding them to a set of legal norms to which they did not necessarily express consent.[7] Finding the source of international obligation became a perpetual quest. Early writers also foresaw problems of hierarchy that would emerge with the existence of conflicting obligations. In attempting to propound a coherent legal system, they turned to analogies from private law, general principles of law, legal history and theory, moral and legal philosophy and religion. Like Conan

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[1] Although most of the facts about Sherlock Holmes are in the public domain, this paragraph relies on Starrett 1950, at v–xviii.

[2] Issue 12: The final problem. http://www.sherlockholmes.stanford.edu/print_issue12.html. Accessed 5 April 2015.

[3] Starrett 1950, at xii.

[4] Of 3000 persons surveyed in 2008, 58 % expressed the view that Sherlock Holmes was a real person. Winston Churchill didn't really exist, say teens, *Telegraph*, 4 February 2008, http://www.telegraph.co.uk/news/uknews/1577511/Winston-Churchill-didnt-really-exist-say-teens.html. Accessed 5 April 2015.

[5] As of 2011, '[t]wenty per cent of Britons believe the likes of Sherlock Holmes and Blackadder are based on historical personalities.' One in five Britons think Sherlock Holmes, Miss Marple and even Blackadder were genuine historical figures, *Daily Mail Reporter*, 5 April 2011, http://www.dailymail.co.uk/news/article-1373505/One-Brits-think-Sherlock-Holmes-Miss-Marple-Blackadder-historical-figures.html#ixzz3WElS4ehm. Accessed 5 April 2015.

[6] For historical development of *jus cogens,* see, Robledo 1982, at 10–68.

[7] For a discussion of early attempts to ascertain limits on the exercise of sovereignty, see Kadelbach 2006, at 21; Haimbaugh 1987, at 207–211.

Doyle's creation of Sherlock Holmes, these authors developed the notion of a 'higher' law, from which the doctrine *jus cogens* emerged. Since then, proponents have argued strongly for the existence and functions of *jus cogens* in international law, while critics have expressed scepticism about the reality or practical value of the concept.[8]

The only references to peremptory norms in positive law are found in the Vienna conventions on the law of treaties.[9] Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT), concerning treaties between states, provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. Such a norm is defined by the VCLT as one '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 having the same character'. Article 64 VCLT adds that the emergence of a new peremptory norm of general international law will render void any existing treaty in conflict with the norm. Behind these provisions are the writings of classic and modern publicists proposing various sources and functions for *jus cogens*, as this chapter discusses in the two sections that follow, the first examining theories of origin and the second addressing the possible functions of *jus cogens*. Both sections reveal the cultural importance of *jus cogens*, but the very limited role played in dispute settlement or enforcement of norms.

2.2 The Origins of *Jus Cogens*

Jus cogens has been largely developed by international legal scholarship,[10] which has attempted to identify the theoretical foundations of a world juridical order. Every classic author in the field of international law expounds a theory of the source of obligation and the nature of international law. They typically distinguish between voluntary or consensual law and compulsory norms that bind a state independently of its will. Some early writers found the source of compulsory law in divine or religious law binding all humans and human institutions.[11] For others, compulsory law was natural law applied to states. Some classic writers took an

[8] For critical assessments, see, e.g. Schwarzenberger 1967, at 29–30; Schwelb 1967, at 961 (referring to 'the vagueness, the elasticity, and the dangers of the concept of international *jus cogens*'); Sztucki 1974; Christenson 1988; Danilenko 1991; Weisburd 1995.

[9] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331; 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, UN Doc. A/CONF.129/15.

[10] Bianchi 2008.

[11] The earliest evidence of treaty practice indicates that the entire international obligation was perceived as originating in divine mandates and any trespass of borders or subjugation of one country by another was regarded as a violation of the divine established order and a grave offence which could lead to immediate sanction by the gods of the breaching party, Amnon 2012.

approach more grounded in logic, legal philosophy or sociology, holding that any society in which there is a system of law must have basic rules that are compulsory independent of the individual will of the members of that society and from which they cannot withdraw. A related theory derives the concept of *jus cogens* from general principles of law, noting the existence of overriding public policy and superior norms in all legal systems. Finally, positivists rely on state consent for the origin, content and functions of *jus cogens*. Each of these conceptual approaches is discussed in this section.

2.2.1 Natural Law

For most classical writers, there existed three levels of legal obligation: *jus dispositivum* or voluntary law, divine law and *jus naturale necessarium* (necessary natural law), the last mentioned being the highest category. Gentili[12] connected natural law to the law of nations, influencing Grotius who gave primary place to natural law, even over divine law:

> The law of nature, again, is unchangeable – even in the sense that it cannot be changed by God. Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend.[13]

If such principles of natural law were unchangeable even by God they necessarily bound all sovereigns on earth: 'Since this law is not subject to change and the obligations which it imposes are necessary and indispensable, Nations can not alter it by agreement, nor individually or mutually release themselves from it'.[14] So, while voluntary or consent-based law could be created by the express or tacit will of states such law could not override natural law.

Wolff[15] and Vattel[16] agreed that there existed 'necessary law' by which they meant it was binding and overriding of state consent. This law was natural to all states and made illegal all treaties and customs which contravened this necessary law. Wolff's necessary law of nations[17] included the immutable laws of justice, the 'sacred law', which nations and sovereigns are bound to respect and follow in all

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12 Gentili 1933.

13 Grotius 1625.

14 Ibid.

15 Wolff 1764, para 5.

16 de Vattel 1758, para 9.

17 Chitty 1849, at ix (citing Wolff 1764). '[T]he law of nations certainly belongs to the law of nature: it is, therefore, on account of its origin, called the Natural, and, by reason of its obligatory force, the necessary law of nations.'

their actions.[18] Pufendorf[19] and Vattel also all relied on natural law 'no less binding on states, on men united in political society, than on individuals'.[20] They saw the natural law of nations as a particular science, 'consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns'.[21] The distinction between *jus dispositivum* and the 'necessary principles of international law that bind all states regardless of consent' lies in the origin of the latter in the natural law of reason:[22]

> We use the term *necessary Law of Nations* for that law which results from applying the natural law to Nations. It is *necessary*, because Nations are absolutely bound to observe it…. This same law is called by Grotius and his followers the *internal Law of Nations*, inasmuch as it is binding upon the conscience of Nations…. It is by the application of this principle that a distinction can be made between lawful and unlawful treaties or conventions and between customs which are innocent and reasonable and those which are unjust and deserving of condemnation.[23]

Suy claims that the actual words *jus cogens* are not found in any text prior to the nineteenth century,[24] although the idea of a law binding irrespective of the will of individual parties is common through 'the whole theory and philosophy of law'.[25] Early twentieth-century publicists, such as Lassa Oppenheim and William Hall, continued to assert that states could not abrogate certain 'universally recognized principles' by mutual agreement,[26] but the rise of positivism reduced although it did not entirely eliminate natural law from theoretical discourse.

2.2.2 Logical or Legal Necessity

Necessity took on another meaning for authors who focused their attention on positing the fundamental needs of any legal system and on the definition of law itself. Several writers suggested that any society operating under law must have fundamental rules allowing of no dissent if the existence of the law and society is to be maintained. According to Rozakis, the *ratio legis* of *jus cogens* is to protect the common concerns of the subjects of law, the values and interests considered

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[18] Ibid., at xiii.

[19] Pufendorf 1710, at Book ii, Chapter iii, Section 23.

[20] Chitty 1849, at xi.

[21] Ibid.

[22] de Vattel 1849; Criddle and Fox-Decent 2009.

[23] de Vattel 1849, at 7 and 9.

[24] He cites first the 1847 Pandecten of von Glück I who refers to those laws which categorically prescribe an action or prohibit it and whose binding force is absolute. Suy 1967, at 19.

[25] Ibid., at 18.

[26] Hall 1924, at 382–383; Oppenheim 1905, at 528.

indispensable by a society at a given time.[27] Organized society creates an ordering of norms, but only when there is a minimum degree of community feeling does it elevate certain values as necessary, with primacy over others.[28] *Jus cogens* in international law therefore starts to appear in positive law as international society develops from relatively unorganized into an increasingly organized one with common interests and values.[29]

The existence of an international legal system means that public policy requires states to conform to those principles whose non-observance would render illusory the very concept of an international society of states or the concept of international law itself, such as the principles of sovereign equality and *pacta sunt servanda*. Public policy—*ordre public*—may be defined by its effects, that is, the impossibility for individuals of opting out, or by its objective: to protect the essential interest of the state and establish the legal foundations of the economic and moral order of the society.[30] This implies limiting the will of the individual to meet the essential needs of the community.

According to Tomuschat, such a society of fundamental principles has emerged internationally:

> [t]he fact is that the cohesive legal bonds tying States to one another have considerably strengthened since the coming into force of the United Nations Charter; … a community model of international society would seem to come closer to reality than at any time before in history.[31]

States live within a legal framework of a few basic rules that nonetheless allow them considerable freedom of action. Such a framework has become necessary in the light of global problems threatening human survival in an unprecedented fashion. Recalcitrant states would not only profit by rejecting regulatory regimes adopted by the overwhelming majority of states, they would threaten the effectiveness of such regimes and pose risks to all humanity.

In this public order theory, *jus cogens* norms exist as imperative and hierarchically superior to other international law in order to promote the interests of the international community as a whole and preserve core values. According to Verdross, this is inherent in all legal systems: 'A truly realistic analysis of the law shows us that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis'.[32] As a consequence, the principle of immoral agreements is recognized in every national legal order. In his third report on the law of treaties in 1958, rapporteur Fitzmaurice appeared to see *jus cogens* from the public order perspective, as he asserted that

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[27] Rozakis 1976, at 2.

[28] Carnegie Endowment for International Peace 1967, at 10.

[29] Ibid., at 12.

[30] de Page 1962, at 111.

[31] Tomuschat 1993, at 210–211.

[32] von Verdross 1937, at 574 and 576.

rules of *jus cogens* 'possess a common characteristic', namely 'that they involve not only legal rules but considerations of morals and of international good order'.[33] An international tribunal might refuse to recognize a treaty or to apply it where the treaty 'is clearly contrary to humanity, good morals, or to international good order or the recognized ethics of international behaviour'.[34] The origin of *jus cogens* would thus seem to lie in the sociology or logic of law which requires compliance with essential rules on which the system itself is based; it does not, however, indicate the process by which such rules may be identified on the international level.

2.2.3 General Principles of Law

Linked to logical or legal necessity, but more in keeping with international law doctrine on sources of law, is the theory that finds the origin of *jus cogens* in general principles of law recognized in all legal systems, where private agreements contrary to public policy or *ordre public* are void, voidable or unenforceable. The rules of public policy are an essential part of the legal and social framework on which every effective legal system, including the international one, ultimately rests.[35] In its study on fragmentation of international law, the ILC study group addressed *jus cogens*, noting that the idea of hierarchy of norms 'has found its expression in one way or another in all legal systems'.[36] Like many authors, the study group pointed to the Roman law distinction between *jus cogens* or *jus strictum* and *jus dispositivum* and the maxim *jus publicum privatorum pactis mutari non potest*.[37]

Domestic laws generally provide for the invalidity of agreements that conflict with public policy or *ordre public*. German authors writing in the early 1930s referred to *jus cogens* as general principles of law which are recognized as overriding norms by all civilized nations.[38] For some French scholars, humanitarian rules belong to general principles of law from which no derogation is possible.[39]

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[33] G.G. Fitzmaurice, Special Rapporteur, Third report on the law of treaties, 10th session of the ILC, A/CN.4/SER.A/1958/Add.l, 1958, at 41.

[34] Ibid., at 28.

[35] Schwarzenberger 1965, at 457.

[36] International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006, at 181 (Fragmentation of international law).

[37] Ibid., 182. *Jus publicum* was not only public law, but all rules from which individuals could not depart.

[38] von der Heydte 1932. The author cited, in particular rules indispensable and necessary to the existence of every legal order, e.g. *pacta sunt servanda* and the obligation to make reparation for damages.

[39] Delbez 1964, at 317–318. The object of a treaty is unlawful when the obligations it contains are contrary to prior conventional obligations, rules of customary law or rules based on universal morality of an imperative character. See also Cavare 1962, at 69 (agreements cannot be contrary to 'le droit commun de l'humanité'); and Reuter 1961, at 466–467.

Early work of the International Law Commission on the law of treaties based the notion of illegal agreements on this approach. The ILC's first special rapporteur on the law of treaties, Brierly, did not refer to *jus cogens*, but did speak of contractual limitations.[40] The first report of the second ILC Special Rapporteur, H. Lauterpacht, proposed an article on *jus cogens*,[41] arguing that:

> the voidance of contractual agreements whose object is illegal is a general principle of law. As such it must find a place in a codification of the law of treaties. This is so although there are no instances in international judicial and arbitral practice of a treaty being declared void on account of the illegality of its object.[42]

In Lauterpacht's view, the illegality of the object of the treaty and consequently the nullity of the agreement would result from 'inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*)'. These principles need not necessarily be codified or crystallized. In Lauterpacht's view, 'overriding principles of international law', such as the suppression of slavery,

> may be regarded as constituting principles of international public policy (*ordre international public*). These principles… may be expressive of rules of international morality so cogent that an international tribunal would consider them forming a part of those principles of law generally recognized by civilized nations which the ICJ is bound to apply [under] its Statute.[43]

In jurisprudence, the International Court of Justice's judgment in the *Corfu Channel* case may reflect the notion of obligatory general principles described in this section. Although the Court did not expressly refer to *jus cogens*, it held that Albania's obligations were founded in

> certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war, the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[44]

In McNair's classic work on the law of treaties, the author found it 'difficult to imagine any society, whether of individuals or of States whose law sets no limit whatever to freedom of contract'.[45] Every civilized community contains norms

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[40] J.L. Brierly, Special Rapporteur, Report on the Law of Treaties, UN Doc. A/CN.4/23, 14 April 1950, at 246 ff.

[41] H. Lauterpacht, Special Rapporteur, Report on the Law of Treaties, UN Doc. A/CN.4/63, 24 March 1953.

[42] Ibid., para 5.

[43] Ibid., para 4.

[44] *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)*, ICJ, Merits, Judgment of 9 April 1949, at 22.

[45] McNair 1961, at 213–214.

from which no derogation is allowed and the community of states is no exception. This extract suggests that he viewed *jus cogens* as originating in general principles of law, but he goes on to indicate that the specific content of such rules emerges from the consent of states. Where there is a conflict between a treaty and a norm of customary international law, McNair concludes that certain of these norms

> cannot be set aside or modified by contracting States … they consist of rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public interests of the society of States or to maintain the standards of public morality recognized by them.[46]

2.2.4 Consent

The notion of international law that emerged strongly in the nineteenth century was based strictly on the consent of states.[47] Nevertheless authors from the beginning of the twentieth century continued to assert the existence of fundamental norms (*Grundnorms*)[48] sometimes founded on *la solidarité naturelle*,[49] but more often contending that states themselves had recognized peremptory norms and their effect in customary international law. Oppenheim stated in 1905 that in his view 'a number of "universally recognised principles" of international law existed which rendered any conflicting treaty void and that the peremptory effect of such principles was itself a unanimously recognized customary rule of international law'.[50] Similarly, Hall stated that

> [t]he requirement that contracts shall be in conformity with law invalidates, or at least renders voidable, all agreements which are at variance with the fundamental principles of international law and their undisputed applications, and with the arbitrary usages which have acquired decisive authority.[51]

In 1934, Judge Schücking asserted that the League of Nations would not have embarked on the codification of international law

> if it were not possible, even to-day, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking

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[46] Ibid., at 215.

[47] 'Les règles de droit international n'ont pas un caractère imperatif. Le droit international admet en conséquence qu'un traité peut avoir n'importe quel contenu … L'appréciation de la moralité d'un traité conduit aisément à la reintroduction du droit naturel dans le droit des traités.' Guggenheim 1953, at 57–58. See also Morelli 1951, at 37; *The Case of the S.S. Lotus*, PCIJ, Judgment 9 of 7 September 1927, at 18.

[48] Kelsen 1945, at 110 ff.

[49] Scelle 1932, Première Partie, at 3; and Scelle 1948, at 5 ff.

[50] Oppenheim 1905, at 528.

[51] Hall 1924, at 382.

> that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void.[52]

Peremptory norms/*jus cogens* came into positive law with the Vienna treaties on treaties.[53] Of the four ILC *Special Rapporteurs* on the law of treaties two of them, Brierly[54] and Lauterpacht,[55] supported of the notion of peremptory norms in international law,[56] but during ILC work on the law of treaties, most of its members joined Sir Humphrey Waldock, the ILC's fourth special rapporteur on treaty law, in seeking to reconcile *jus cogens* with the doctrine of positivism,[26] without spending much time speculating on the origin of *jus cogens*. The final ILC draft on the law of treaties was produced by Waldock.

In the ILC report submitted to the Vienna Conference, the ILC stated that it had become increasingly difficult to sustain that there is no rule of international law from which states cannot at their own free will contract out. The law of treaties thus must accept that there are certain rules from which states are not competent to derogate, and which may be changed only by another rule of the same character. The ILC also stated that although there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*, the particular nature of the subject-matter with which it deals that may give it the character of *jus cogens*.[57] The final version of Article 53 VCLT[58] was adopted by a majority of 87 votes in favour, with 8 votes against,[59] and 12 abstentions.[60] René-Jean Dupuy, at the time a member of the Holy See's delegation to the Vienna Conference, noted that the inclusion of Article 53 in the VCLT sanctioned the 'positivization' of natural law.[61]

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[52] *The Oscar Chinn Case*, PCIJ, Judgment of 12 December 1934, Separate opinion of Judge Schücking, at 149–150.

[53] Schwarzenberger 1965, at 477.

[54] Brierly 1936, at 218–219.

[55] Lauterpacht 1937, at 153 ff.

[56] Ibid., at 306–307.

[57] International Law Commission, Report of the International Law Commission on the work of the second part of its seventeenth session, 17th session of the ICL, UN Doc. A/6309/Rev.1, 3-28 January 1966, at 247 ff.

[58] The draft article was adopted at the Vienna Conference largely as suggested, save for the addition of primarily the words 'accepted and recognised by the international community of States as a whole.' U.N. Conference on the Law of Treaties, Summary records of the plenary meeting and of the meetings of the Committee of the Whole, 1st session, A/CONF.39/11, 1968, at 471.

[59] Australia, Belgium, France, Liechtenstein, Luxembourg, Monaco, Switzerland and Turkey. U.N. Conference on the Law of Treaties, Summary records of the plenary meeting and of the meetings of the Committee of the Whole, 2nd session, A/CONF.39/11/Add.1, 12 May 1969, at 107.

[60] New Zealand, Norway, Portugal, Senegal, South Africa, Tunisia, United Kingdom, Gabon, Ireland, Japan, Malaysia and Malta. Ibid.

[61] Sztucki 1974, at 158.

Most contemporary commentators continue to view *jus cogens* through the prism of state consent.[62] Specifically, states may identify peremptory norms in treaties, accept them as a higher form of customary international law, or derive them from general principles of municipal law.[63] In practice, few if any examples can be found where states have expressly indicated their intent to identify or create a peremptory norm; identification is thus by implication. Yet, the positivist approach to identifying *jus cogens*, if not to explaining its origin, appears accepted by the ICJ. In *the Questions relating to the Obligation to Prosecute or Extradite* the Court concluded that the prohibition against torture is a norm of *jus cogens* based on 'widespread international practice and on the *opinio juris* of States'.[64]

It is unclear how, in a consent-based system, peremptory norms bind those who object to the very concept of *jus cogens* or to notion that such norms can be identified by a large majority and imposed on dissenters. The ILC's Commentary to Article 53 VCLT suggests that peremptory norms need not achieve universal acceptance to create a binding international consensus; it is sufficient if a 'very large majority' of representative states accept the norms as non-derogable.[65] The positivist concept of peremptory norms thus reaches a conundrum in having a consensual process with a non-consensual result—the imposition of rules adopted by a large majority on dissenting states. Even if states consented to a consensus-based source of international lawmaking, this would not preclude them from withdrawing their consent at will.[66] In fact, it is difficult to reconcile peremptory norms that bind dissenting states with the positivist theory of international law.[67]

2.3 Functions of *Jus Cogens*

The asserted functions of *jus cogens* are particularly important because the very definition of the term is often stated in relation to the primary function it serves, that is, on its being as a norm from which no states can derogate by mutual

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[62] Shaw 2008, at 97. '[O]nly rules based on custom or treaties may form the foundation of *jus cogens* norms.'

[63] See, e.g. Byers 1997, at 212 (jus cogens rules are derived from the process of customary international law).

[64] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment of 20 July 2012, at para 99.

[65] See Restatement (Third) of Foreign Relations of the United States, para 102, note 6. The Restatement cites the U.N. Conference on the Law of Treaties, Report of the proceedings of the Committee of the Whole, UN Doc. A/CONF.39/11, 21 May 1968 at 471–472 (comments of the chairman).

[66] See Sztucki 1974, at 97.

[67] See ibid., at 64. '[T]he introduction of a consensual ingredient into the concept of *jus cogens* leads inevitably, in the ultimate instance, to the very negation of that concept.' See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (stating that *jus cogens* norms 'transcend … consent').

agreement. A second function is sometimes asserted: that *jus cogens* imposes a duty on all states to respect such norms and as a consequence any unilateral act in violation of a *jus cogens* norm would be null and void. There is little state practice or jurisprudence in respect to either function; the actual function appears to be more akin to that of Sherlock Holmes, being an important, though symbolic expression or declaration of societal values.

National and international tribunals have begun to address some of the possible consequences deriving from the identification of *jus cogens* norms, such as the impact of peremptory norms on state and official immunities and the immunity of international organizations, as well as in judging the legality of Security Council resolutions and incompatible domestic laws. Various studies of the ILC, in particular the commentary to Article 26 of the Articles on State Responsibility[68] as well as Section E of the Report of the Study Group Fragmentation, provide some insights as well.[69] Nonetheless, in the absence of more jurisprudence and state practice, the effects and consequences of *jus cogens* remain primarily theoretical.

2.3.1 Functions in the Law of Treaties

Alfred Verdross's influential 1937 article, *Forbidden Treaties in International Law*, written in the shadow of Nazi Germany, argued that certain rules of international custom have a compulsory character notwithstanding contrary state agreements. Courts must set aside such agreements when they conflict with the 'ethical minimum recognized by all the states of the international community',[70] including the imperative 'moral tasks' of states to maintain law and order, defend against external attacks and ensure the welfare of their citizens.[71] Illegal treaties would thus include those 'binding a state to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an adequate manner, the life, the liberty, the honor, or the property of men on its territory'.[72] Treaties might also violate *jus cogens* if they oblige 'a state to close its hospitals or schools, to extradite or sterilize its women, to kill its children, to close its factories, to leave its fields unploughed, or in other ways to expose its population to distress'.[73] Taking up the issue in its work on the law of treaties, the ILC included draft articles on *jus cogens*, which were retained with some amendments as Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties. Outside the area of

[68] International Law Commission, Draft articles on the responsibility of states for internationally wrongful acts, with commentaries, 53rd session of the ILC, UN Doc. A/56/10, 2001, at 84–85.

[69] Fragmentation of international law, paras 329–409.

[70] von Verdross 1937, at 574.

[71] Ibid.

[72] Ibid.

[73] Ibid., at 575.

nullity of agreements or provisions therein, the Commission's Guide to Practice on Reservations to Treaties provides analysis on the effects of *jus cogens* on the permissibility and consequences of reservations.[74]

In practice, the invalidity of a treaty due to conflict with a *jus cogens* norm appears to have arisen only once since the adoption of the VCLT.[75] In the 1993 reparations judgment of the Inter-American Court in the *Aloeboetoe* case,[76] the Commission argued the applicability of a treaty dated September 19, 1762 between the Saramakas and the Dutch authorities, according to which the Saramakas were granted internal autonomy and rights over their own territory, both of which were relevant to the issue of reparations.[77] The Court held that it was unnecessary to inquire as to whether or not an agreement between an indigenous group and a state is an international treaty, because 'even if that were the case, the treaty would today be null and void because it contradicts the norms of *jus cogens superveniens*'. The Court seemed to conclude that the entire treaty would be void and not simply the two provisions concerning slavery that it cited as violating *jus cogens*. The fact of having provisions upholding slavery was enough for the Court: 'No treaty of that nature may be invoked before an international human rights tribunal'.[78]

The Inter-American Court's view in *Aloeboetoe* seems supported by the language of Article 53 VCLT, which refers only to the nullity *ab initio* of a treaty that conflicts with a norm of *jus cogens*. But it seems hardly reasonable that the entire UN Charter, for example, would be declared void for an action of the UN Security Council that was held to violate *jus cogens*.[79] Lauterpacht's 1953 draft Article 15

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[74] See, e.g. commentary to draft guides 3.1.5.4 and 4.4.3. International Law Commission, Guide to practice on reservations to treaties with commentaries, 63rd session of the ILC, UN Doc. A/66/10/Add.1, 2011. See also *Armed Activities on the Territory of the Congo (New Application 2002: Democratic Republic of the Congo v Rwanda)*, ICJ, Judgment of 3 February 2006, Separate Opinion of Judge Dugard, para 9 (discussing the effect of reservations that violate *jus cogens*); Principle 8 of the International Law Commission, Guiding principles applicable to unilateral declarations of states capable of creating legal obligations, with commentaries thereto, 58th session of the ILC, UN Doc. A/61/10, 2006, Principle 8.

[75] It appears that states have ignored other opportunities to invoke the doctrine. For example, various bilateral agreements that allowed secret interrogation of prisoners suspected of terrorism could have been challenged on the basis that they condoned and facilitated the commission of torture, but no challenges were mounted. See Donohue 2008, at 108.

[76] *Aloboetoe and others v. Suriname*, IACtHR, Reparations and Costs, Series C No. 15, Judgment of 10 September 1993.

[77] Ibid., para 56.

[78] Ibid., para 57.

[79] See, e.g. the *Yusuf* and *Kadi* cases, in which the European Court of First Instance (CFI) held that it could review the resolutions for compatibility with *jus cogens* because Security Council resolutions themselves must respect the fundamental peremptory norms of *jus cogens*. Case T-306/91, *Yusuf v. Council* [2005] ECR II-3533; Case T-315/01, *Kadi v. Council and Commission* [2005] ECR II-3649. The Court found the contents of *jus cogens* to be the 'mandatory provisions concerning the universal protection of human rights … intransgressible principles of international customary law.' *Kadi v. Council and Commission*, para 231.

made clear that 'a treaty, *or any of its provisions*, is void if its performance involves an act which is illegal under international law'.[80] The commentary makes clear his view that a single illegal provision does not entail the nullity of the treaty as a whole if the provision is severable and the objective of the treaty as a whole can be upheld. Waldock's later and more expansive provision on treaties void for illegality similarly contained a paragraph that allowed for declaring invalid as contrary to *jus cogens* a provision clearly severable and 'not essentially connected with the principal objects'.[81] Although the paragraph was not retained in the VCLT, it may be implicit in the version adopted.

2.3.2 Accountability

Apart from potentially rendering void international agreements, *jus cogens* has sometimes been invoked in an effort to hold accountable individuals or states for the commission of unilateral acts allegedly in violation of peremptory norms. Sir Peter von Hagenbach, Governor of the Austrian town of Breisach from 1469 to 1474, was tried and beheaded on May 9, 1474, for crimes against the 'laws of God and humanity [Man]'. His crimes included rape, murder and destruction of property during peacetime. General Telford Taylor, US prosecutor at the Nuremberg Military Tribunal, cited the Hagenbach trial to support prosecution for the commission of 'crimes against humanity' as a recognized principle of international law:

> It needs no elaborate research to ascertain that international penal law has long recognized the international character of certain types of atrocities and offenses shocking to the moral sense of all civilized nations… The Public Prosecutor, Henry Iselin of Basel, Switzerland, accused Sir Peter of having committed deeds which outraged all notions of humanity and justice and constituted crimes under natural law; in the words of the prosecutor, the accused had "trampled underfoot the laws of God and men."[82]

The number of judges who presided at the Hagenbach trial differs in several accounts from 26 to 28 judges, but there is agreement that the judges were drawn from different states, providing support to the widely held view that the trial was held before an international *ad hoc* tribunal.

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[80] H. Lauterpacht, Special Rapporteur, Report on the law of treaties: legality of the object of the treaty, 5th session of the ILC, UN Doc. A/CN.4/63, 24 March 1953, Article 15, at 154 (emphasis added).

[81] Sir H. Waldock, Special Rapporteur, Second report on the law of treaties: treaties void for illegality, 15th session of the ILC, UN Doc. A/CN.4/156 and Add.1–3, 1963, Article 13(3), at 52.

[82] See *U.S. v. Ernst von Weizsaecher*, Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, IMT Ministries Case No. 11/Vol. 13, October 1946–October 1949, at 96–97. See also *U.S. v. von Leeb*, Trials of War Criminals before the Nuremburg Military Tribunals under Control Council Law No. 10, The High Command Case No. 12/Vol. 11, October 1946–May 1949, at 476.

In *Jurisdictional Immunities of the State*, the ICJ considered various aspects of *jus cogens*, including its relationship with sovereign immunity from jurisdiction. It held that, because rules of immunities and possible *jus cogens* norms of the law of armed conflict 'address different matters', there was no conflict between them and states must continue to afford immunities under customary and treaty law.[83] According to the Court, immunities are procedural in nature, regulating the exercise of national jurisdiction in respect of particular conduct, and not the lawfulness of the conduct being proscribed by *jus cogens*. There could, therefore, be no conflict between immunity and *jus cogens*[84] even in cases where 'a means by which a *jus cogens* rule might be enforced was rendered unavailable'.[85] A similar view of the relationship between *jus cogens* and procedural rules was adopted by the Court in *Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, where the Court found that even though the matter related to the *jus cogens* prohibition on genocide, this fact 'cannot of itself provide a basis for the jurisdiction of the Court to entertain the dispute'.[86] These judgments suggest a narrow impact for *jus cogens* norms, limited only to acts directly related to the legality of the underlying conduct.

It seems that only the Inter-American Court has suggested the possibility of practical functions or consequences resulting from violation of a *jus cogens* norm, results that may lead to regional judgments inconsistent with those of the ICJ and the European Court in respect to immunities. In the *La Cantuta* case, the Court referred to the duty of all states in the system to cooperate in bringing to justice those individuals who were responsible for violating the *jus cogens* norm

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[83] See *Jurisdictional Immunities of the State* (*Germany v Italy, Greece intervening*), ICJ Merits, Judgment of 3 February 2012, paras 92, 95 and 97. Concerning the consequences of *jus cogens* on jurisdiction, see also *Armed Activities on the Territory of the Congo*, para 64. See also *Jones and Others v. United Kingdom,* ECtHR, Nos. 34356/06 and 40528/06, 14 January 2014, para 198 (finding that 'by February 2012, no *jus cogens* exception to State immunity had yet crystallised').

[84] With respect to national court decisions, in *Jurisdictional Immunities of the State* the Court cited to decisions in Canada, Greece, New Zealand, Poland, Slovenia, and the United Kingdom where sovereign immunity was acknowledged even in the face of allegations of *jus cogens* violations. *Jurisdictional Immunities of the State*, para 96. For the United States, intermediate courts have rejected an implied exception to sovereign immunity where the foreign State was accused of violating *jus cogens* norms. See *Siderman de Blake v. Argentina*; *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1997; and *Sampson v. Germany*, 250 F.3d 1145, (7th Cir. 2001). For immunity of officials, compare *Ye v. Zemin*, 7t383 F.3d 620, , (7th Cir. 2004), at 625-627; *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), at 14–15; *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012) (acknowledging immunity of foreign government officials despite allegations of *jus cogens* violations), with *Yousuf v. Samantar*, USSC, No. 08–1555, 1 June 2010.

[85] *Jurisdictional Immunities of the State*, para 95.

[86] *Armed Activities on the Territory of the Congo*, at para 64.

prohibiting forced disappearances.[87] The Court called the duty to prosecute and punish these crimes a *jus cogens* duty, which would directly conflict with norms on immunities. Secondly, the Court has referred to the concept of aggravated violations giving rise to enhanced reparations, a concept it is likely to apply in the context of *jus cogens* violations.[88]

2.3.3 Resolving Priorities Between Conflicting Norms

Systems of law usually establish a hierarchy of norms based on the particular source from which the norms derive. In national legal systems, it is commonplace for the fundamental values of society to be given constitutional status and afforded precedence in the event of a conflict with norms enacted by legislation or adopted by administrative regulation; administrative rules themselves must conform to legislative mandates, while written law usually takes precedence over unwritten law and legal norms prevail over non-legal (political or moral) rules. The mode of legal reasoning applied in practice is thus naturally hierarchical, establishing relationships and order among normative statements and levels of authority.[89] In practice, conflicts among norms and their interpretation are probably inevitable in the present, largely decentralized international legal system where each state is entitled initially and equally to interpret for itself the scope of its obligations and how to implement such obligations.

Some scholars argue based on the ICJ Statute and the idea of sovereign equality of states that no hierarchy exists and logically there can be none: international rules are equivalent, sources are equivalent, and procedures are equivalent all

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[87] *La Cantuta v Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 162, Judgment of 29 November 2006, para 160. 'As pointed out repeatedly, the acts involved in the instant case have violated peremptory norms of international law (jus cogens). Under Article 1(1) of the American Convention, the States have the duty to investigate human rights violations and to prosecute and punish those responsible. In view of the nature and seriousness of the events, all the more since the context of this case is one of systematic violation of human rights, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states for such purpose. Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States' erga omnes obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction. The Court points out that, under the collective guarantee mechanism set out in the American Convention, and the regional and universal international obligations in this regard, the States Parties to the Convention must collaborate with one another towards that end.'

[88] First discussed in the *Myrna Mack Chang* case, this notion of aggravated violations has been repeatedly cited in the Inter-American Court. *Myrna Mack-Chang Case*, IACtHR, Merits, Reparations and Costs, Series C No. 101, Judgment of 25 November 2003.

[89] Koskenniemi 1997.

deriving from the will of states.[90] Others point to the concept of the community of states as a whole, expressed in Article 53 VCLT, as an emerging limit on unilateral relativism.[91] The ILC study group on fragmentation of international law concluded that hierarchy does exist in international law with norms of *jus cogens* superior to other rules on account of their contents as well as the universal acceptance of their superiority.[92]

States have agreed on the means (or 'sources') to identify binding international obligations for the purpose of resolving their disputes, but they have not determined a hierarchy of norms. As formulated initially in the Statute of the Permanent Court of International Justice (PCIJ) and iterated in the ICJ Statute, the Court should decide an international dispute primarily through the application of international conventions, international custom and general principles of law. The Statute makes no reference to hierarchy, except by listing doctrine and judicial decisions as 'subsidiary' and evidentiary sources of law. Although the Statute is directed at the Court, it is the only general text in which states have acknowledged the authoritative procedures by which they agree to be legally bound to an international norm. No mention is made of *jus cogens* as a source of obligation nor do non-binding instruments figure in the Statute.

The ILC Articles on State Responsibility (ASR) and accompanying Commentary acknowledge that the issue of hierarchy of norms has been much debated, but find support for *jus cogens* in the notion of *erga omnes* obligations, the inclusion of the concept of peremptory norms in the Vienna Convention on the Law of Treaties, in international practice and in the jurisprudence of international and national courts and tribunals.[93] Article 41 ASR sets forth the particular consequences said to result from the commission of a serious breach of a peremptory norm. To a large extent Article 41 ASR seems to be based on United Nations practice, especially actions of the Security Council in response to breaches of the UN Charter in Southern Africa and by Iraq. The text refers to positive and negative obligations of all States. In respect to the first, '[w]hat is called for in the face of serious breaches is a joint and coordinated effort by all states to counteract the effect of these breaches'. The Commentary concedes that the proposal 'may reflect the progressive development of international law' as it aims to strengthen existing mechanisms of cooperation. The core requirement, to abstain from recognizing consequences of the illegal acts, finds support in state practice with precedents including rejection of the unilateral declaration of independence by Rhodesia, the annexation of Kuwait by Iraq and the South African presence in Namibia. Article 41 ASR extends the duty to combat and not condone, aid, or recognize certain illegal acts beyond those acts that breach the UN Charter.

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[90] Dupuy 1995, at 14–16.

[91] Salcedo 1997, at 588.

[92] Fragmentation of international law, paras 31–32.

[93] Draft articles on responsibility of states for internationally wrongful acts, with commentaries, at 84–85.

In order to have hierarchy determine an issue, there must first be a conflict between competing norms. International and national tribunals have thus far avoided finding such a conflict, probably to avoid having to conclude explicitly that one norm is superior to another. In December 2008, the Federal Republic of Germany filed an application against Italy at the ICJ, asserting that the Italian courts' exercise of jurisdiction over Germany in relation to claims of World War II forced labour and other war crimes constituted a wrongful denial of sovereign immunity.[94] In its judgment of 3 February 2012, the Court held for Germany, first finding that 'there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity' in a case of this type.[95] In addition, after reviewing treaty provisions, national legislation and the judgments of national and international courts, the Court found that 'there is a substantial body of State practice from other countries which demonstrates that customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated'.[96] Assuming without deciding that the alleged violations rose to the level of *jus cogens*, the Court held that there was no conflict between that determination and the rule demanding respect for sovereign immunity: 'the two sets of rules address different matters', one substantive, one procedural. There could be no conflict between the two.

Like the ICJ, a Grand Chamber of the European Court of Human Rights, in its first judgment mentioning *jus cogens*, called the prohibition of torture a peremptory norm, but denied that a violation of the norm could act to deprive a state of sovereign immunity.[97] The Court found that it was 'unable to discern' any basis for overriding state immunity from civil suit even where acts of torture are alleged. More recently, the Court followed the ICJ in calling the prohibition of genocide a peremptory norm.[98]

These judgments lessen considerably the potential function of *jus cogens* norms to enhance accountability, but the courts were faced with unpalatable alternatives. They could have declared sovereign immunity to be a *jus cogens* norm equal in value to the prohibition of torture or war crimes, which would likely have generated considerable disquiet about elevating the rights of states to a level equal to that of non-derogable human rights and humanitarian norms. Alternatively, the courts could have refrained from pronouncing on the substantive norms as *jus*

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[94] *Jurisdictional Immunities of the State (Germany* v *Italy)*, ICJ, Application of 23 December 2008.

[95] Ibid., para 80.

[96] Ibid., para 84.

[97] *Al-Adsani v. UK*, ECtHR, No. 35763/97. 21 November 2001. See also the following cases decided the same day as *Al-Adsani*: *Fogarty v. UK*, ECtHR, No. 37112/97, 21 November 2001; and *McElhinney v. Ireland and UK*, ECtHR, No. 31253/96, 21 November 2001. For a critique of the case, see Clapham 2007.

[98] *Jorgic v. Germany*, ECtHR, No. 74613/01, 12 July 2007, para 68.

cogens, despite the centrality of the issue to the cases before them. The resulting judgments would probably have been even more questionable in reasoning than is the artificial and unconvincing distinction between substantive and procedural norms. As a third alternative, the courts could have stepped back to examine the issue of sovereign immunity in the larger context of sovereign equality of states, a fundamental norm of the international community, and considered the underlying public policies favouring sovereign immunity, such as avoiding politically motivated lawsuits or prejudicial forums that could exacerbate hostility between states and threaten international peace and security. Acknowledging that fundamental values were engaged by both norms could have led to a balancing to resolve the conflict allowing for a narrow judgment restricted to the facts of each case.

2.3.4 Declaring Fundamental Values

The main appearance of *jus cogens* in practice has been in jurisprudence, but its role thus far has been predominately expressive, to declare that certain norms fall within the doctrine because of their content. Several scholars also support a declarative function for *jus cogens*, one that permits the expression of fundamental values. ILC member Mustafa Kamil Yaseen commented that 'the only possible criterion' for distinguishing peremptory norms from ordinary conventional or customary norms 'was the substance of the rule', including whether the norms were 'deeply rooted in the international conscience'.[99] Louis Henkin and Louis Sohn similarly suggested that *jus cogens* norms derive their peremptory character from their inherent rational and moral authority.[100] Bianchi more pointedly comments that the primary function of *jus cogens* has been symbolic or expressive of fundamental values: 'By fostering a political and normative project, clearly at odds with the paradigms of the past, *jus cogens* has produced a moral force of unprecedented character'.[101] Considerable evidence supports this thesis.

In jurisprudence, *jus cogens* has been used to signal that the norm in question reflects particularly important values in the eyes of the judges. The ICJ endorsed *jus cogens* in its 2006 Judgment on Preliminary Objections in *Armed Activities on the Territory of the Congo* (Congo v. Rwanda).[102] The Court stated that the prohibition of genocide is 'assuredly' such a norm, but the Court emphasized that the *jus cogens* status of the prohibition of genocide did not have an impact on its jurisdiction, which remains governed by consent. A dissenting opinion questioned whether the *jus cogens* prohibition of genocide meant that a reservation to the

[99] International Law Commission, Summary records of the 673rd to 685th plenary meetings, 6–22 May 1963, A/CN.4/SR.673–685, at 63.

[100] Henkin 1981, at 15; Sohn 1982.

[101] Bianchi 2008, at 496.

[102] *Armed Activities on the Territory of the Congo*.

Court's jurisdiction might be incompatible with the object and purpose of the Genocide Convention, but other judges declined to pronounce on the matter. In dicta in the *Jurisdictional Immunities case,* the Court added unnecessarily it would seem that it could not find a *jus cogens* norm requiring full compensation be paid to each and every individual victim of an armed conflict.

For eight years, the Inter-American human rights bodies were strongly expressive in declaring certain norms to represent fundamental values, a development that emerged from a particular composition of the Court.[103] The Inter-American Court of Human Rights referred to *jus cogens* in its 2003 advisory opinion on migrant workers, which discussed the legal status of the principle of non-discrimination and the right to equal protection of the law. According to the Court,

> [a]ll persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and which are, consequently, superior to the power of the State, whatever its political structure.[104]

The Court concluded that non-discrimination is *jus cogens*, being 'intrinsically related to the right to equal protection before the law, which, in turn, derives "directly from the oneness of the human family and is linked to the essential dignity of the individual".' The Court added that the principle belongs to *jus cogens* because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. The Court's opinion considerably shifts lawmaking from States to international tribunals, as the latter assess the demands of human dignity and international public order to elevate particular norms to peremptory status.

The Court has also affirmed *jus cogens* norms in contentious cases, broadening the list of such norms to include the prohibition of torture,[105] the right of access to

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[103] Judge Antonio Cancado-Trindade exercised considerable influence over the development of Inter-American jurisprudence during his time on the Court. For specific matters discussed by the Commission and the Court, see, e.g. *Domingues v United States*, IACHR, Case 12.285, Report No. 62/02, 22 October 2002, para 49; *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion, Series A No. 18, 17 September 2003, at 95–96.

[104] In stating that *jus cogens* has been developed by international case law, the Court wrongly cited two judgments of the ICJ, as neither of them discusses the subject, namely *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Bosnia-Herzegovina v Yugoslavia)*, ICJ, Preliminary objections, Judgment of 11 July 1996, at 595; and the *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ, Second Phase, Judgment of 5 February 1970, at 3.

[105] See the following Inter-American Court of Human Rights cases: *Bayarri v Argentina,* IACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No. 187, Judgment of 30 October 2008, para 81; *Martiza Urrutia v Guatemala*, IACtHR, Merits, Reparations and Costs, Series C No. 103, Judgment of 27 November 2003, para 92; *Tibi v Ecuador*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 114, Judgment of 7 September 2004, para 143; *Bueno-Alves v Argentina,* IACtHR, Merits, Reparations and Costs, Series C No. 164, Judgment of 11 May 2007, para 76; *Case of the Rochela Massacre v Colombia*, IACtHR, Merits, Reparations and Costs, Series C No. 163, Judgment of 11 May 2007, para 132; *Case of the Miguel Castro-Castro Prison v Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 160, Judgment of 25 November 2006, para 271.

justice,[106] the prohibition of forced disappearance and the duty to prosecute violations of *jus cogens* norms.[107] In its own jurisprudence, the Inter-American Commission on Human Rights has declared the right to life to be a norm of *jus cogens*, invoking natural law traditions:

> derived from a higher order of norms established in ancient times and which cannot be contravened by the laws of man or nations. The norms of *jus cogens* have been described by public law specialists as those which encompass public international order … accepted … as necessary to protect the public interest of the society of nations or to maintain levels of public morality recognized by them.[108]

In all of these cases, the declaration of *jus cogens* appears to have little or no practical consequence. All of the norms cited are extensively found in treaty law and most likely constitute customary international law as well. Thus, any contrary domestic law or practice contravenes international law and Inter-American agreements. One commentator has speculated that the Inter-American system's frequent invocation of *jus cogens* is in part due to the fact that its cases generally have concerned gross and systematic violations of non-derogable rights and that each judgment 'est pour elle une opportunité de rappeler avec fermeté aux gouvernements l'importance du respect de la dignité et des droits de la personne humaine'.[109] As noted earlier, it can also be attributed in part to the theories of a particular judge whose views resonated with a strong tradition of natural law in Latin America. The pronouncements on *jus cogens* have largely diminished with changes in the composition of the Court.

The declaratory function was perhaps made most clear by the International Criminal Tribunal for the Former Yugoslavia (ICTY), the first international

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[106] *La Cantuta v Peru*, para 160. 'Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States' *erga omnes* obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction.'

[107] Ibid., para 157. See also *Ríos* et al. *v Venezuela*, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 194, Judgment of 28 January 2009; *Tiu-Tojín v Guatemala*, IACtHR, Merits, Reparations and Costs, Series C No. 190, Judgment of 26 November 2008. '[W]e should reiterate to the State that the prohibition of the forced disappearance of persons and the related duty to investigate them and, if it were the case, punish those responsible has the nature of *jus cogens*. As such, the forced disappearance of persons cannot be considered a political crime or related to political crimes under any circumstance, to the effect of preventing the criminal persecution of this type of crimes or suppressing the effects of a conviction. Additionally, pursuant with the preamble of the Inter-American Convention on Forced Disappearance, the systematic practice of the forced disappearance of persons constitutes a crime against humanity and, as such, entails the consequences established in the applicable international law.' *Tiu-Tojín v Guatemala*, para 91. See also *Perozo* et al. *v Venezuela*, IACtHR, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 195, Judgment of 28 January 2009, para 157 (citing *La Cantuta v Peru*).

[108] *Victims of the Tugboat '13 de Marzo' v Cuba*, IACHR, Case 11.436, Report No. 47/96, OEA/Ser.L/V/II.95 Doc. 7 rev., 1997, at 146–147.

[109] Maia 2009, at 277.

tribunal to discuss *jus cogens* and declare the prohibition of torture as one such norm. The Court said it did so 'because of the importance of the values [the prohibition against torture] protects', which makes it

> a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. … Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.[110]

This *jus cogens* declaration had no bearing on the guilt or innocence of the person on trial, nor on the binding nature of the law violated, nor, apparently on the range of punishments. It was not asserted that any treaty or local custom was in conflict with the customary and treaty prohibition of torture. The reference served a rhetorical purpose only.

National courts also have reflected the declaratory function of *jus cogens*, enunciating a view that the particular norm is one taken very seriously in law and policy. Domestic court cases generally fall into one of two categories. First are cases in which sovereign immunity has acted to shield defendants from civil lawsuits for damages.[111] The issue has arisen most often in courts of the United States and the United Kingdom.[112] In both, fora lawyers argued that the foreign sovereign immunity must be interpreted to include an implied exception to sovereign immunity for violations of *jus cogens* norms. Nearly every court thus far has rejected the argument and upheld immunity, although some judicial panels have split on the issue.[113] The second category of domestic law cases in which the nature of norms as *jus cogens* has been asserted are cases filed pursuant to the US Alien Tort Claim Act (ATCA).[114] Some of the plaintiffs assert violations of norms *jus cogens*,[115] but no ATCA case has turned on the character of the norm as *jus cogens* instead of custom. One dangerous consequence of repeatedly pleading *jus cogens* in domestic cases may be emerging in US cases, where lawyers comment privately that some judges now only respond to pleas of *jus cogens* and discount customary international law, relegating it to a status akin to comity.

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[110] *Prosecutor v. Furundzija*, Trial Chamber, Judgment, Case No IT-95–17/1-T, 10 December 1998, para 153.

[111] See, e.g. *Bouzari v. Iran*, [2004] 71 O.R.3d 675 (Can.) (holding that the prohibition against torture does not entail a right to a civil remedy enforceable in a foreign court).

[112] *Al-Adsani v. Kuwait* was litigated in English courts before it was submitted to the European Court of Human Rights. For the Court of Appeal's judgment see *Al-Adsani v Government of Kuwait (No 2)* (1996) 107 ILR 536.

[113] See, e.g. *Siderman de Blake v Republic of Argentina*. But see *Yousuf v Samantar*, 699 F.3d 763 (4th Cir. 2012), (holding 'that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity.').

[114] 'The [federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. Judiciary Act of 1789, ch 20, §9(b) (1789), codified at 28 USC §1350.

[115] *Filartiga v Peña-Irala*, 630 F.2d 876 (2nd Cir 1980). The United States Supreme Court decisions arising under the ATCA, including *Sosa v Alvarez-Machain*, 542 US 692 (2004), reprinted in (2004) 43 ILM 1390, do not mention *jus cogens*.

The declarative or expressive function of *jus cogens* need not mean the absence of practical consequences or effects. As Bianchi notes, 'symbols reflect the values imposed by the prevailing social forces. However, once they materialise and become the pivotal structures of society, they may in turn coerce the power of the very same social forces from which they emanate'.[116] For decision-makers, *jus cogens* may thus cause them to pay greater attention to implementing effectively the underlying values: 'What matters most is not that the rule takes formal precedence in case of conflict, but rather the modalities of implementation of the underlying value, which ought to be given precedence at the interpretive level'.[117] *Jus cogens* can thus provide a means to balance interests and interpret legal obligations in ways that affirm 'the emergence of values which enjoy an ever-increasing recognition in international society'.[118] Systematically interpreting rules and principles in this way, to reflect the international normative, may help to resolve complex cases of potentially conflicting norms.

2.4 Conclusions

Notwithstanding countless scholarly articles and its inclusion in the VCLT, the origins, contents and legal effects of *jus cogens* remain ill-defined and contentious. Its precise nature, what norms qualify as *jus cogens* and the consequences of *jus cogens* in international law remain unclear. The International Law Commission has twice discussed the question of doing further work on the topic. In 1993 Commission member Andreas Jacovides presented a paper to a Working Group of the Planning Group on *jus cogens* as a possible ILC topic, noting that 'no authoritative standards have emerged to determine the exact legal content of *jus cogens*, or the process by which international legal norms may rise to peremptory status'.[119] The Commission decided not to proceed at that time. Commissioner Bowett expressed his doubt as to whether the Commission's consideration of *jus cogens* would 'serve any useful purpose at this stage' because practice on *jus cogens* 'did not yet exist' it would be 'premature for [the Commission] to enter into this kind of study'. In 2014, the ILC decided that enough development has occurred in practice to make it worthwhile to study the issue of *jus cogens*,[120]

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116 Bianchi 2008, at 507.

117 Ibid., at 504.

118 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ, Judgment of 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal, para 73.

119 The ILC's report on fragmentation of international law stated as follows: 'disagreement about [jus cogens'] theoretical underpinnings, scope of application and content remains as ripe as ever'. Fragmentation of international law, para 363.

120 International Law Commission, Report of the International Law Commission, *Jus cogens* (Mr. D.D. Tladi), 66th session, UN Doc. A/69/10 Annex, 2014.

although most of the practice appears negative as far as explaining the origin or consequences of the concept.

One purpose of asserting that a norm is *jus cogens* seems to be to override the will of persistent objectors to a norm of customary international law. The problem of imposing norms on non-consenting states has long troubled scholars and seems to be seen by some as a matter of increasing urgency. For the present, the problem of dissenting states is not as widespread as might be assumed. First, the obligations deemed basic to the international community—to refrain from the use of force against another state, to settle disputes peacefully and to respect human rights, fundamental freedoms and self-determination—are conventional obligations contained in the UN Charter, to which all member states have consented. All states have accepted the humanitarian conventions on the laws of war which express customary international law. The multilateral regimes for the oceans, outer space and key components of the environment are also widely accepted. Thus in most cases the problem is one of ensuring compliance by states with obligations they have freely accepted and not one of imposing obligations on dissenting states.

The question of dissenters could arise in the future if the number of purported norms *jus cogens* expands in an effort to further the common interests of humanity. The literature is replete with claims that particular international norms form part of *jus cogens*. Proponents have argued for inclusion of all human rights, all humanitarian norms (human rights and the laws of war), the duty not to cause transboundary environmental harm, the duty to assassinate dictators, the right to life of animals, self-determination and territorial integrity (despite legions of treaties transferring territory from one state to another).

The concerns raised are serious ones, for the most part, and the rationale that emerges from the literature is one of necessity and increasing recognition of fundamental values: the international community cannot afford a consensual regime to address many modern international problems. Thus, *jus cogens* is a necessary development in international law, required because the modern independence of states demands an international *ordre public* containing rules that require strict compliance. The ILC Commentary on the Articles on State Responsibility favours this position, asserting that peremptory rules exist to 'prohibit what has come to be seen as intolerable because of the threat it presents to the survival of states and their peoples and the most basic human values'.[121] The urgent need to act that is suggested fundamentally challenges what most scholars and certainly states see as the consensual framework of the international system by seeking to impose on dissenting states obligations that the 'international community' deems fundamental. State practice has yet to catch up with this plea of necessity and it has been international and national courts which have pushed the concept forward. In short, while the *jus cogens* concept has achieved widespread acceptance across the international community, its unsettled theoretical foundation has impeded its implementation and development. For *jus cogens* to achieve full legal standing, it will

[121] Draft Articles on State Responsibility, para 3.

need to be framed in a way that illuminates its normative origins, achieves agreement on its functions and explains its relationship to state consent.

In conclusion, it is perhaps useful to return to consideration of the similarities between Sherlock Holmes and *jus cogens* in origins, contexts and impacts. First, they both were created by authors who drew their ideas and inspirations not from existing relevant practices, but by developing new ideas from other sources. In other words, they were not based in reality, but in imagination. Arthur Conan Doyle created Sherlock Holmes not on the basis of investigative practices being used by police or detectives of the day, but on the observational skills and deductions of his tutor, Dr. Joseph Bell, a lecturer in medicine at the University of Edinburgh. Similarly, when Grotius argued for the existence of higher law, he did not cite any contemporary state practice, but instead invoked the Talmud, Biblical sources, Greek and Roman jurisprudence and classical literature like the play *Antigone*.[122]

Secondly, the emergence of both creations reflected important interests or concerns of their day. At the time Conan Doyle was writing, authorities in England were in finalizing the formation of a professional police force in London, with Parliament's adoption of the Metropolitan Police Act in 1829 leading to the force soon known as Scotland Yard. The sensational Whitechapel murders attributed to "Jack the Ripper" were contemporaneous with the circulation of the first Sherlock Holmes mysteries in 1888, adding to public fascination with crime and its detection. *Jus cogens* also emerged from and has been strengthened by the perceived needs of the international community. As discussed in the first part of this chapter, early authors sought not only to describe but also to help build a robust international legal system in which sovereign states would be restrained by the rule of law, even by rules to which they did not give express consent. The desire, and even the need for such rules, re-emerged in response to the atrocities of the twentieth century after a hiatus during the predominance of positivist thinking.

Finally, there are similarities in impact. It appears that neither police investigations nor state practices have been substantially influenced by these creations. Yet, both have had an undeniable impact on their respective cultures. Detective fiction remains a staple of the literature, while film incarnations of Sherlock Holmes seemingly appear every generation. In law, hundreds of articles and dozens of books have been devoted to *jus cogens*, or argued for the elevation of particular norms to this higher status. In sum, it seems that *jus cogens* like Sherlock Holmes, serves mainly as a cultural or literary concept that has assumed a certain limited reality. It expresses belief in a core set of fundamental values and in the existence of an international society accepting of those values. Substantial legal impact may yet arrive, because literary creations can and do influence society. Like the tourists who flock to Baker Street convinced of the reality of Sherlock Holmes, adherents of *jus cogens* may continue look for it to have an impact in the real world.

[122] Grotius 1625. For a detailed review of Grotius' religious sources, see Husik 1925.

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Chapter 3
Understanding the *Jus Cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism

Ulf Linderfalk

Abstract Although, today, *jus cogens* is a recognized element of international law and international legal discourse alike, many issues of vital importance to a well-functioning *jus cogens* regime remain unsettled. The current debate centres on the following six questions: (1) What is the source of *jus cogens* obligations? (2) What is the role of consent in the creation and modification of *jus cogens* norms? (3) How do we identify norms belonging to this category? (4) What does the category comprise? Are there such things, for example, as regional *jus cogens* or *jus cogens* principles? Are *jus cogens* rules necessarily rules of conduct? (5) What are the function and effects of the international *jus cogens* regime? (6) What is the function of *jus cogens* in international legal discourse? Overall, the intense scholarly debate had on peremptory international law over the last ten to twenty years has not been terribly productive. One important reason for this would seem to be the general failure of discussants to fully understand the relevance of some basic assumptions that they bring to bear on their respective analysis and consideration of the topic. To facilitate future constructive debate, this essay aims to clarify the relevance for any thoughtful consideration of *jus cogens* issues of legal positivism and legal idealism. While legal positivism and legal idealism are sets of theories offered to explain the concept of law, it is not surprising that lawyers of different camps will have different answers to questions (1) and (2). As argued in this essay, however, the influence of different theoretical approaches to the concept of law goes further than this—it permeates the entire *jus cogens* debate. Consequently, depending on whether lawyers take the position of a legal positivist or a legal idealist, they will be inclined to answer differently all questions (1)–(6).

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3.1 Introduction

Today, *jus cogens* is a recognized element of international law and international legal discourse alike. Article 53 of the two 1969 and 1986 Vienna Conventions defines the concept for in-treaty purposes,[1] and Articles 53, 64 and 71 of those same Conventions spell out the consequences of the conclusion of a treaty in conflict with a peremptory norm of general international law. International judicial practice has identified several norms having the character of *jus cogens*.[2] Examples include the prohibition on the use of force laid down in Article 2(4) of

[1] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331; 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, UN Doc. A/CONF.129/15, 21 March 1986. The two articles are perfectly identical.

[2] The Inter-American Court of Human Rights, known for generally taking a progressive stance to the idea of peremptory international law, adds several further candidates to the list, such as for example the prohibitions of slavery, enforced disappearance, extrajudicial execution, inhuman treatment, and discrimination. Compare with Alvarez-Rio and Contreras-Garduno 2014, at 167 ff.

the Charter of the UN,[3] the norm prohibiting genocide,[4] the prohibitions of war crimes and crimes against humanity[5] and the prohibition of torture.[6] As of yet, there is considerably less jurisprudence clarifying the effects of *jus cogens* on the application of international law generally, apart from those already confirmed by the Vienna Conventions. In *Jurisdictional Immunities of the State*,[7] the International Court of Justice (ICJ) established what possibly should be seen as a cardinal principle governing this issue. As the Court phrased it, '[a] *jus cogens* rule is one from which no derogation is permitted'.[8] Practice developing the further ramifications of this principle is still largely lacking,[9] however, although international bodies, such as the International Criminal Tribunal for the Former Yugoslavia[10] and the International Law Commission,[11] have admittedly made some contribution to this end.

In the legal literature, on the other hand, much has been written about the importance of *jus cogens*, what the concept of peremptory international law stands for and how it fits with international legal theory and the overall organization of international law. The number of monographs and articles produced over the last ten to twenty years is indeed notable.[12] Attention has come to centre on the following six questions specifically:

(1) What is the source of *jus cogens* obligations?
(2) What is the role of consent in the creation and modification of *jus cogens* norms?
(3) How do we identify norms belonging to this category?
(4) What does the category comprise?

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[3] See, e.g., *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ, Merits, Judgment of 27 June 1986, para 190.

[4] See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, ICJ, Merits, Judgment of 3 February 2015, para 87.

[5] *Case Concerning Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, ICJ, Judgment of 3 February, para 95.

[6] See, e.g., *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment of 20 July 2012, para 99.

[7] *Case Concerning Jurisdictional Immunities of the State*, para 95.

[8] Ibid.

[9] Compare with Crawford 2012, at 596. 'More authority exists for the concept of peremptory norms than for its particular consequences.' Similarly, Tams 2005, at 142–143.

[10] Prosecutor v *Furundžija*, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, paras 144 and 153–157.

[11] Articles 26, 40 and 50 of the Articles on the Responsibility of States for Internationally Wrongful Acts. International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001. See also Principle 4.4.3 of the Guide to Practice on Reservations to Treaties. International Law Commission, Guide to Practice on Reservations to Treaties, 63rd session of the ILC, UN Doc. A/66/10, 2011, para 75).

[12] See, e.g., monographs and articles cited throughout this essay.

(5) What are the function and effects of the international *jus cogens* regime?
(6) What is the function of *jus cogens* in international legal discourse?

Overall, as generally acknowledged, the *jus cogens* debate has among international law scholars not been terribly productive.[13] As a result, many issues of vital importance to a well-functioning *jus cogens* regime remain unsettled. Fruitful debate would seem mainly inhibited by a general failure of discussants to fully understand the relevance of some basic assumptions that they bring to bear on their respective analyses and considerations of the topic. This proposition is best illustrated by the generally rather heated discussion on the immunity of states and state officials in domestic court proceedings involving claims or criminal charges possibly originating in the commission of *jus cogens* violations.[14] Say, for example, that claims of tort are brought against Germany in Italian courts originating in the commission of war crimes and crimes against humanity by German armed forces during World War II.[15] Even assuming that the rules prohibiting war crimes and crimes against humanity have the character of *jus cogens*, it can be argued that for the purpose of the determination of whether Germany shall be immune or not, this characterization is simply irrelevant. The rule of state immunity and the rules prohibiting war crimes and crimes against humanity address different matters—so goes the argument—and consequently, those two sets of rules cannot be in conflict. This was the finding of the ICJ in *Jurisdictional Immunities of the State*.[16] Whether a commentator (NN) thinks that the Court decided correctly or not, his assessment will inevitably assume a definition of the concept of a normative conflict involving a *jus cogens* norm and a norm of ordinary international law. Such a definition will inevitably assume in turn an idea about the function of the international *jus cogens* regime, which will assume in turn a definition of the concept of international law.[17] If NN has not fully grasped those relationships, in his commentary of the findings of the ICJ, he runs the clear risk of arguing irreconcilable propositions. As will be explained later in this essay, if NN thinks that the ICJ decided incorrectly, for example, it would seem inconsistent if he was to argue at the same time that the definition of *jus cogens* generally to be applied in international law is the one laid down in Article 53 of the two Vienna Conventions. Conversely—other things being equal—when a person reads someone arguing that the ICJ decided correctly, if both the reader and the author have fully grasped the fundamental assumption or assumptions underlying this proposition, they will be able to engage in a more penetrating and coherent exchange of views.

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[13] See, e.g., Ruiz Fabri 2012, at 1051. '[T]he only traceable positive outcome that may be seen is that of naming norms.'

[14] See, e.g., Orakhelashvili 2006, at 320–359; Espósito 2011, at 61–174; Zimmermann 1994–1995, at 433–440; Bartsch and Elberling 2003, at 477–491; Talmon 2012, at 979–1002; Orakhelashvili 2013, at 89–103.

[15] Compare with *Case Concerning Jurisdictional Immunities of the State*.

[16] Ibid., paras 93–94.

[17] Compare with Linderfalk 2013b.

As the example indicates, and as this essay will argue, many assumptions that discussants bring to bear on their contributions to the *jus cogens* debate eventually turn on their definition of law. Since long, two schools of thought dominate the way lawyers think about the concept of international law: legal positivism and legal idealism. As readers of this *Yearbook* will recall, *legal positivism* is the thesis that ties the existence of law to its derivation.[18] Consequently, according to legal positivism, in a legal system every norm derives from the application of yet another norm belonging to the same system and, ultimately, depending on your particular theoretical inclination, either from a social custom recognizing a particular set of sources and decision-making procedures as authoritative, or from a hypothetical 'Grundnorm' that will have to be presupposed as long as law remains overall effective.[19] As legal positivism emphasizes, a law is not dependent on its moral or other merits. For legal positivism, law is identified with a system of norms and a system of norms only. This is not to say that law is morally neutral. As legal positivism readily acknowledges, many laws reflect the ideals held by the group of people or community that once created them. The only point that legal positivism is trying to make is that those same ideals do not themselves come within the scope of the concept of law. As succinctly stated by Leslie Green, '[t]he fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it.'[20]

Legal idealism, on the other hand, sees law as an enterprise or a practice.[21] Certainly, according to legal idealism, legal practice is governed by norms, but not only. There are also other guiding elements, of which legal idealism stresses ideals in particular. Ideals, in a sense, compare with values. As legal philosophers emphasize, it is a defining feature of ideals that they present a desirable state of affairs that can never be fully realized.[22] If 'value' stands for all notions of the good or desirable in life, then, consequently, ideals are a subcategory of values.[23] Ideals, however, are fundamentally different from norms. An ideal serves as a guide for improving social reality, but contrary to rules and principles it does not itself specify the precise steps to be taken for its realisation. Many times the realisation of an ideal will remain dependent on the existence of legal and other norms.[24] This explains why, according to legal idealism, every accurate description of a law governing a community must take into account the ideal or ideals, which this same community seeks to promote. For example, a description of a treaty governing the protection of human rights may require an understanding of the ideal of a

[18] See, e.g., Green 2009.

[19] Ibid.

[20] Ibid.

[21] See, e.g., Coyle 2006, at 257–288.

[22] Taekema and van der Burg 2009.

[23] Ibid.

[24] Ibid.

democratic society. Similarly, a description of a treaty governing trade in goods may require an understanding of the ideal of free trade. Hence, for legal idealism, ideals are a necessary part of the definition of law, just like norms.[25]

This essay aims to clarify the relevance of legal positivism and legal idealism for any rational consideration of *jus cogens* issues. While legal positivism and legal idealism are sets of theories that purport to explain the concept of law, it is not surprising that lawyers of different camps will have different ideas about the source of *jus cogens* obligations (Question 1), as well as the role of consent in the creation and modification of *jus cogens* norms (Question 2). As argued in this essay, however, the influence of the two different approaches goes further than this. It is no exaggeration to say that it permeates the entire *jus cogens* debate. Consequently, depending on whether lawyers take the position of a legal positivist or a legal idealist, they will be inclined to answer differently all Questions from 1 to 6.

The essay, apart from the introduction, consists of six main sections and a conclusion. The organisation of the six sections follows the general structure of the current *jus cogens* debate as represented by Questions 1–6. Consequently, each section will present in a summarized form the respective position that legal positivism and legal idealism assume relative to each question. As should be clearly understood, the overall description of the positivist's and idealist's respective view of *jus cogens* will not necessarily be representative of any single legal scholar. The description produced is a rational reconstruction.[26] It presents as a coherent whole a debate formed in fact by contributions, which often themselves—when considered one by one—give only fragments of the whole and are sometimes internally inconsistent. Single contributions to the *jus cogens* debate will be cited only for purposes of illustration and confirmation.

3.2 The Source of *Jus Cogens* Obligations

3.2.1 Legal Positivism

Describing the processes that confer on international norms the status of *jus cogens*, legal positivists build on the definition of *jus cogens* laid down in Article 53 of the two Vienna Conventions:

> [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.

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[25] See, e.g., ibid; Coyle 2006.

[26] On the concept of rational reconstruction, see, e.g., Bankowski et al. 1991, at 18 ff.

Legal positivists take this definition to be a reflection of customary international law. According to them, the definition laid down in common Article 53 is applicable not only for the rather limited purposes of the two conventions, but for purposes of international law generally.[27]

What makes common Article 53 particularly interesting for a discussion of the positive source of *jus cogens* obligations are its underlying assumptions. The definition assumes the existence of two kinds of norms.[28] First, it presupposes the existence of a set of norms that command or prohibit certain actions. Among the examples typically given are the prohibition of aggressive warfare, the prohibition of genocide, and the prohibition of torture.[29] Henceforth in this essay, norms belonging to this category will be referred to as 'first order rules of *jus cogens*'.[30] Secondly, the definition laid down in common Article 53 presupposes the existence of a set of norms that specify the legal consequences ensuing from the postulated superiority of first order rules of *jus cogens* over ordinary international law. Examples include the following:

If a treaty is in conflict with a first order rule of *jus cogens* created prior to the conclusion of the treaty, then the treaty shall be void.[31]

If the purport of a reservation to a treaty is in conflict with a first order rule of *jus cogens*, then that reservation shall be void.[32]

If a resolution adopted by an international organization is in conflict with a first order rule of *jus cogens*, then that resolution shall be void.[33]

To the extent that a claim of sovereignty over a certain territory is based on action violating a first order rule of *jus cogens*, that claim shall be invalid.[34]

Henceforth in this essay, norms belonging to this category will be referred to as 'second order rules of the *jus cogens* regime'.[35]

As explained more fully elsewhere,[36] for legal positivism, the distinction between first order rules of *jus cogens* and second order rules of the *jus cogens* regime helps explain the processes that confer on international norms the status of

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[27] This seems to be assumed by many commentators more or less as a matter of course. See, e.g., de Schutter 2010, at 61.

[28] Compare with Linderfalk 2013c, at 373–375.

[29] See Sect. 3.1.

[30] Linderfalk 2013c, at 374.

[31] Compare with Article 53 VCLT.

[32] Compare with Principle 4.4.3 of the Guide to Practice on Reservations to Treaties.

[33] See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ, Further Requests for the Indications of Provisional Measures, Order of 8 April 1993, Separate Opinion of Judge Lauterpacht, at 440.

[34] See, e.g., Orakhelashvili 2006, at 218–223, and the further references cited there.

[35] Linderfalk 2013c, at 375. For reasons that will be come apparent from subsequent sections of this essay, I will refrain from designating these rules 'second order rules of *jus cogens*'. I regret having used this term in my earlier writing. See, e.g., Linderfalk 2011, at 359–378.

[36] Linderfalk 2011.

jus cogens. It remains a fact, of course, that common Article 53 does not describe those processes explicitly.[37] If states accept and recognize that no derogation is permitted from a rule of law (R) and that R can be modified only by a subsequent norm having the same character, then this observation merely helps identifying norms that have already the status of *jus cogens*. However, with the addition of the following three easily acceptable premises, from the perspective of legal positivism, the analysis will immediately look rather more positive:

- If states accept and recognize that no derogations from a rule of law (R) are permitted and that R can be modified only by a subsequent norm having the same character, then they do so because according to their judgment, international law does not permit derogations from R, and it accepts modification only when accomplished by a new norm of *jus cogens*.
- If international law does not permit derogations from R, and if it does not accept modification of R except by a new norm of *jus cogens*, then this is what follows from the application of the second order rules of the *jus cogens* regime.
- The second order rules assumed in common Article 53 are customary international law.[38]

As it transpires, for legal positivism, in any discussion of the source of *jus cogens* obligations, the focus will have to be on the source of the second order rules of the *jus cogens* regime, rather than the source of the first order rules of *jus cogens* themselves. The *jus cogens* status of a rule of law (R) derives from the creation or modification of the second order rules of the *jus cogens* regime to cover situations of normative conflict involving R, and from the application of those second order rules to those same conflicts.[39] As will be explained in Sect. 3.5, for legal positivists, the second order rules of the *jus cogens* regime do not themselves have the status of *jus cogens*. In the positivist's universe, consequently, the *jus cogens* status of norms derives from ordinary processes creating customary international law.

3.2.2 Legal Idealism

According to legal idealism, if international lawyers wish to describe the processes that confer on international norms the status of *jus cogens*, this would have to be

[37] Compare with Criddle and Fox-Decent 2009, at 338. The flawed assumption that it does has led commentators to suggest that Article 53 of the Vienna Conventions is circular. See, e.g., Dubois 2009, at 155; Christenson 1987–1988, at 594; Rozakis 1976, at 45; International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006, para 375.

[38] For further references and substantial arguments supporting this proposition, see Linderfalk 2013c, at 378–380.

[39] See, e.g., Allain 2002, at 538.

done independently of Article 53 of the two Vienna Conventions, if for no other reason, then because common Article 53 applies only for purposes of the two Conventions.[40] Ideals are an essential part of that description. Simply put, as contended by legal idealists, the *jus cogens* status of norms derives from the existence in international law of some or other ideal.

Of course, different legal idealists have different suggestions explaining what this ideal might actually be. In the writing of some, the relevant ideal is fairly explicit, as when the *jus cogens* status of norms is said to originate in the idea of an international *ordre public*,[41] or the idea of a global constitutional order,[42] or again, in the notion of fundamental human rights,[43] or an open international market.[44] In the case of most idealist contributors to the *jus cogens* debate, however, the relevant ideal is not made explicit. The emphasis, rather, is on the various values entailed by that ideal. Typically, those values are described as shared—whether by the community of states, the international community, or humanity—in contrast to any values or interests of single states.[45] They are often referred to using more or less indeterminate language such as for example: 'the basic values of the international community';[46] 'the most fundamental values of the international community';[47] 'the most serious and essential values of the community of states';[48] the 'fundamental and superior values within the system';[49] 'fundamental values shared by the international community of states';[50] 'the common good of the international community';[51] 'the common values of all nations';[52] 'the conscience of mankind';[53] 'standards of public morality';[54] 'the universal juridical conscience';[55] and 'the common value fund cherished by all nations'.[56]

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[40] See, e.g., Dubois 2009, at 155.

[41] See, e.g., Orakhelashvili 2006, Chap. 1.

[42] See, e.g., Delbrück 1998, at 35.

[43] See, e.g., Gattini 2005, at 234.

[44] See, e.g., Allen 2004, at 346.

[45] Compare with Christopher 1999–2000, at 1233.

[46] *Al-Adsani v. United Kingdom,* ECtHR, No. 35763/97, 21 November 2001, Joint dissenting opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajić, para 2.

[47] J. Dugard, Special Rapporteur, First report on diplomatic protection, 52nd session of the ILC, UN Doc. A/CN.4/506, 2000, para 89.

[48] Sellers 2002, at 293.

[49] Shaw 2014, at 89.

[50] Zemanek 2011, at 383.

[51] See, e.g., Brudner 1985, at 249.

[52] Tomuschat 1993, at 307.

[53] *Roach and Pinkerton*, IACommHR, Case 9647, Res. 3/87, 22 September 1987, paras 55–56.

[54] Ibid.

[55] *Blake v. Guatemala*, IACtHR, Merits, 24 January 1998, Separate Opinion of Judge Cançado Trindade, para 24.

[56] Tomuschat 1993, at 307.

Legal idealism faces the task of having to explain how, precisely, the *jus cogens* status of norms derives from an ideal such as any of those referred to above. As this task seems to pertain more to the sources for identification of *jus cogens* norms than to the source of *jus cogens* obligations,[57] the issue will not be commented upon here, but in Sect. 3.4. For purposes of the present section, suffice it to note the basic premise of legal idealism. According to what legal idealism assumes, asking questions about the source of *jus cogens* obligations is tantamount to asking questions about the ontology of the ideal generating such obligations.[58] This observation prompts a distinction among legal idealists depending on their respective understanding of the nature of ideals.

Most legal idealist would seem to regard international legal ideals as the product of a social culture. More specifically, they are the result of the existence of a community of agents—on and off referred to as 'the international community', 'the international legal community', 'the world community' or 'the international society'—[59] joined by the idea of an international legal system. The argument is that, because some particular ideal or ideals are simply essential to the existence of an international legal system, they will be an intrinsic part of that system at any point of its existence.[60] Ideals are essential either for purely technical reasons—no system of international law can operate without them—[61] or because they are 'uncompromisable' morally speaking.[62] Theories such as this may explain comments such as any of the following:

> *'[J]us cogens* norms … are … essential to the existence of international law as a legal system.'[63]
>
> *'[J]us cogens* … are considered norms so essential to the international system that their breach places the very existence of that system in question.'[64]
>
> '[W]ithout the primacy of *jus cogens*, international law would have a grim future.'[65]

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[57] Compare the oft-made distinction between material and formal sources of law. See, e.g., Jennings and Watts 1992, at 23.

[58] Hence, from a legal idealist's perspective, the following statement by Alexander Orakhelashvili is not necessarily as difficult to accept as it would be for legal positivists: '[T]he question to which sources peremptory norms belong is not crucial from conceptual and practical perspectives as the peremptory character of a norm can be proved without proving the specific source.' Orakhelashvili 2006, at 105.

[59] See, respectively, Brudner 1985, at 249; Sellers 2002, at 290; Charlesworth and Chinkin 2006, at 90–91; Salcedo 1997, at 588.

[60] See, e.g., O'Connell 2011, at 1044.

[61] Tams 2005, at 152. This may explain why norms such as *pacta sunt servanda*, good faith, and the sovereign equality of states are sometimes said to have the status of *jus cogens*. Ibid.

[62] Lowe 2007, at 59.

[63] O'Connell 2011, at 1042.

[64] Allain 2002, at 535.

[65] *Jurisdictional Immunities of the State*, Dissenting Opinion of Judge Cançado Trindade, para 288.

Now, obviously, international legal ideals are not necessarily confined to the ideals implied by the mere existence of an international legal system. As most legal idealists seem to acknowledge, the precise ideals of the international community may be partly different at different points in time depending on how the activities of the community progress. This means that for some legal idealists at least, *jus cogens* remains a dynamic concept. Just like legal positivists they accept that 'through the general consensus of the international community' *jus cogens* norms may develop over time.[66]

Other legal idealists—sometimes referred to as 'naturalists'—take a fundamentally different position. As they argue, the true explanation of the existence of *jus cogens* norms lies not in the existence of an international community, but in the shared nature of all human beings.[67] The *jus cogens* status of norms derive from ideals, which are embedded in 'the universal conscience' borne equally by all human beings by reason simply of their being humans.[68] In the words of the Inter-American Court of Human Rights, they derive 'directly from the oneness of the human family'.[69] As such, the ideal or ideals that *jus cogens* norms represent are not only necessary for the survival of the international community, but also unavoidable; and, for the same reason as the universal conscience is inherent in humanity, any ideal entailed by this conscience will remain the same for as long as humanity exists.[70] It will be valid at all times, in all places, irrespective of law and irrespective of the particular legal system considered.[71] Consequently, in contrast to other legal idealists, naturalists will regard *jus cogens* norms as eternal and unchangeable.[72]

As a result of their different understanding of the ontology of ideals, legal idealists look differently upon the source of *jus cogens* obligations. For some, the existence of ideals lies in the shared nature of all human beings; for others, ideals are inferred from the social activities of the international legal community including its legal practices. If lawyers belong to the former group, they will think that ideals are *a priori*. They will think that the putative peremptory status of norms 'is not demonstrable by reference to level of compliance or other empirical criteria';[73]

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66 See, e.g., Mitchell 2005, at 231. See, similarly, Ford az1994–1995, at 148; de Schutter 2010, at 64.

67 On this idea, see, e.g., George 1999, at 235.

68 See, e.g., the statements made at the first session of the 1968–69 Vienna Conference on the Law of Treaties, by the delegates of Mexico and the Ivory Coast. United Nations Conference on the Law of Treaties, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 1st session, 1968, at 294 and 320–321, respectively. See, similarly, Ibler 2007, at 749.

69 *Condition and Rights of Undocumented Migrants*, IACTHR, Advisory Opinion, OC-18/03, 17 September 2003, paras 99–100.

70 See, e.g., Byers 1997, at 224 and the further references cited there.

71 Ibid.

72 O'Connell 2011, at 1044.

73 Onuf and Birney 1974, at 189.

that our knowledge of their existence is received directly from conscience;[74] that it needs no proof apart from 'the sheer "unimaginability" of believing otherwise'.[75] For this group of lawyers, the source of *jus cogens* obligations will lie either in the will of God, in nature, or in human reason, depending on each individual lawyer's philosophical or religious inclinations. If lawyers belong to the latter group, they will think that ideals are social constructs. They will see ideals as a way of rationalizing the activities of the international legal community—of intelligently explaining those same activities in terms of justifying reasons. For this group of lawyers, the source of *jus cogens* obligations lies partly in social facts, and partly in the idea of the rationality of the international legal community.

3.3 The Role of Consent in the Creation and Modification of *Jus Cogens* Norms

3.3.1 Legal Positivism

In international legal literature, legal positivism is often associated with the idea of international law as an emanation of state will or consent.[76] Intimately tied to this idea is the 'rule of persistent objection', which purports to explain how a rule of general customary international law can be created or modified, although one or several states have not consented to or acquiesced in that rule. According to the rule of persistent objection, consequently, if, during the process of formation of a customary rule (R), a state (S) consistently objects to whatever pattern of conduct R requires, and then after the entry into force of R persistently upholds this position, then R is not opposable to S.[77] International lawyers debate the relevance of this rule to the international *jus cogens* regime. Accepting that the *jus cogens* status of norms derives from ordinary processes creating customary international law, understanding this issue would seem to be tantamount to understanding the role of consent in the creation and modification of *jus cogens*.

According to what most commentators would seem to take for granted, the rule of persistent objection makes an exception for norms of customary international law that have attained the status of *jus cogens*:

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[74] de Visscher 1971, at 9, as cited by Danilenko 1991, at 44.

[75] Ford 1994–1995, at 162. Compare with *Roach and Pinkerton*, para 55. 'The rule prohibiting genocide … achieves the status of *jus cogens* precisely because it is the kind of rule that it would shock the conscience of mankind and the standards of public morality for a State to protest.'

[76] Compare with Lachenmann 2012, at 790–792.

[77] See, e.g., *Fisheries Case (United Kingdom v Norway)*, ICJ, Judgment of 18 December 1951, at 138–139.

Even though a state (S) may be able to show that already before a rule of law (R) was elevated to a *jus cogens* status, it objected to this categorization, and that it has kept doing so ever since, the *jus cogens* categorization of R shall be opposable to S.[78]

When seen in the light of the observations made in Sect. 3.2.1, this proposition comes out as rather peculiar. According to legal positivism, the *jus cogens* status of a rule of law (R) derives from the existence of the second order rules of the *jus cogens* regime, and from the application of those rules to R. If this proposition is accepted, it cannot also be accepted that persistent objection, while working to exempt a state from the scope of application of a rule of ordinary customary international, does not similarly exempt a state from the effects ensuing from the categorization of a rule of law as *jus cogens*. Analytically, the two cases are identical. If a state (S) objects to the categorization of a rule of law as *jus cogens*, this is because S does not accept the contents of the second order rules of the *jus cogens* regime. Those rules are ordinary customary international law no different from any other rules of ordinary customary international law.

For legal positivism, there are two possible solutions to this problem. A first solution is to discard the idea that the rule of persistent objection makes an exception for norms of *jus cogens*. This solution, of course, does not cohere with the common categorization of *jus cogens* as peremptory law. By accepting that the rule of persistent objection applies irrespective of the rule objected to—even though the rule may have attained the status of *jus cogens*—legal positivists acknowledge the possibility that the *jus cogens* status may be relative to the particular state or states considered. Two states may conduct their relations according to two rules (R_1 and R_2). If in the application of those two rules a conflict arises, it might be that R_1 takes precedence as *jus cogens*, but only from the perspective of the one state and not the other.

A second solution is to altogether reject the validity of the rule of persistent objection. This solution implies for legal positivism a revision of the idea of consent as the ultimate basis of international legal obligation. If a rule of international law is authoritative for a state (S), according to what must now be assumed, this is not because S has consented to, or acquiesced in, that very rule. Rather, it is because S has consented to, or acquiesced in, the relevant law-creating processes. Stated in this revised form—separating the processes creating a rule of law from the source of the ensuing legal obligations—legal positivism has no problem coping with the idea of non-derogable law.[79] If all states have agreed (in one form or another) that the creation of an obligation does not necessarily always require the consent or acquiescence of all those to which it applies, if the obligation happens to be non-derogable, then legal positivists can still argue that ultimately the basis of the obligation is consent. Seen in this way, in the positivist's universe, *jus cogens* obligations are no different than say any resolution adopted by the UN Security Council under Article 41 of the UN Charter. If member states of the UN

[78] See, e.g., Byers 1997, at 217; Dubois 2009, at 137; Hannikainen 1988, at 240–241; Orakhelashvili 2006, at 114; Ragazzi 1997, at 67–72; Rozakis 1976, at 78; Schmalenbach 2012, at 921–923.

[79] Compare with Linderfalk 2013c.

have agreed to confer on the Security Council, in specified circumstances, a power to take decisions that are legally binding, then if any such decision is taken, all member states have to comply whether they approve of the decision or not.

3.3.2 Legal Idealism

If, for legal idealism, the source of *jus cogens* obligations inevitably depends on the ontology of the ideal or ideals posited, legal idealists will look differently upon the role of consent in the creation and modification of *jus cogens* norms. For those who see ideals as *a priori*, obviously, consent will be of no importance at all.[80] For those who see ideals as social constructs inferred from the social activities of the international community, consent remains of some relevance, assuming that social activities are the product of a will on the part of any agent actively participating. The question can be asked of course whose consent those legal idealists would consider important. The international community does not necessarily include only states. The social activities of the international community can be understood to include at least all and everyone engaged (or potentially engaged) in international legal discourse. In the very broadest of senses, they can be understood to include any legal subject living or existing on planet Earth. On second thought, since ideals are the product of rationalisation, perhaps not too much attention should be paid to this question. To the extent that ideals are dependent on consent, it seems consent will itself be a social construct.[81] Comparison can be made with the relevance of the concept of party intention for the interpretation of treaties. When states have entered into a treaty relationship, they will be committed to holding any intention following from the assumption that they communicate rationally, irrespective of whether in fact they do hold that intention or not.[82] Similarly, when an agent engages in a social activity (say boxing), it will be committed to having consented to whatever consequences may rationally be expected to follow from that activity (say being punched at), irrespective of whether the agent in fact consented or not.

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[80] Symptomatically, Mary Ellen O'Connell, who is an outspoken naturalist, bluntly remarks: '*Jus cogens* norms … do not depend on consent.' O'Connell 2011, at 1045. See similarly, Orakhelashvili 2005, at 241. 'Norms are peremptory because of the values they protect. Such substantive value must be the value which is not at the disposal of individual States.' (All footnotes are omitted.).

[81] Compare with Lowe 2007, at 58. 'This is not strictly an exception to the requirement of consent, because logically necessary rules do not 'arise'; they have always been necessarily implicit in the system, and so no States could have the opportunity to object to them from the outset of their emergence.'

[82] Compare with Linderfalk 2014.

3.4 Identifying *Jus Cogens* Norms

3.4.1 Legal Positivism

As earlier indicated, legal positivists look upon common Article 53 of the Vienna Conventions as a reflection of the general understanding of the concept of *jus cogens*. Like all legal concepts, *jus cogens* works as a mediating link in legal inferences.[83] Stated specifically, it is a link between, on the one hand, the criteria used for the categorization of norms as *jus cogens* (what will henceforth be referred to as 'identifying criteria'), and on the other hand, the legal inferences allowed by the categorization of a norm as one that comes within the extension of the concept of *jus cogens* ('legal consequences').[84]

Technically, a legal concept like *jus cogens* can be defined in different ways: by reference to identifying criteria; or by reference to legal consequences; or again, by reference partly to identifying criteria and partly to legal consequences.[85] Common Article 53 defines the concept of *jus cogens* by reference to legal consequences only. According to this article:

> 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.

If the analysis conducted in Sect. 3.2 is correct, as positivists see it, this is just another way of saying that first order rules of *jus cogens* are those to which the second order rules of the *jus cogens* regime are applied.

Seeing common Article 53 as a reflection of the general understanding of the concept of *jus cogens*, consequently, legal positivism is forced to build entirely on the elements establishing rules of customary international law, in this case the second order rules of the *jus cogens* regime. First, there has to be a general practice: states generally do not derogate from a rule of law (R), and they generally do not modify R by means of ordinary international law. Secondly, there has to be an *opinio juris generalis*: states widely subscribe to the opinion that by virtue of an authoritative set of customary rules—in this essay referred to as the second order rules of the *jus cogens* regime—no derogations from R are permitted, and all modification of R by means of ordinary international is prohibited. Legal positivism acknowledges that if states consider second order rules applicable to a rule of law (R) prohibiting a particular pattern of conduct (P), they may have many different reasons for doing so. For example, they may consider P morally offensive. They may think P instrumentally important for the protection of some ideal such as human dignity, or international peace and security, or again economic growth and

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[83] Linderfalk 2012, at 7–8.

[84] Ibid.

[85] For further examples, see, ibid., at 8–9.

prosperity. They may consider P contrary to cultural tradition. Again, they may expect to individually benefit from P. Or again, they may consider P a necessary condition for the continued existence of the international legal system. For legal positivism, such considerations are altogether irrelevant. For the identification of a first order rule of *jus cogens*, the relevant thing is that an *opinio juris generalis* of states can be established. Why states hold their respective *opinio juris individuali* is an entirely different matter.[86]

This is where legal positivism runs into trouble. The problem with using the definition laid down in common Article 53 to identify *jus cogens* norms is that it makes the distinction between *jus cogens* norms and norms of ordinary international law rather difficult. Obviously, the difference between ordinary international law and *jus cogens* lies in the dichotomy defeasible–indefeasible law.[87] While *jus cogens* is indefeasible law, ordinary international law is not - this is the assumption. The problem inherent in this approach is that the defeasibility of ordinary international law is not an absolute property. It is context dependent: whether a rule of ordinary international law is capable of being overridden or invalidated by other rules of international law depends partly on the factual state of affairs prevailing in each particular case, and partly on the particular rule it runs into conflict with.[88] This makes the distinction between *jus cogens* and ordinary international law rather difficult to uphold in practice.

To illustrate, take UN Security Council Resolution 713.[89] Adopting this resolution, the Security Council decided, under Article 41 of the UN Charter, 'that all States … immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia'.[90] Assume that a legal positivist (NN) makes an attempt to assess the normative strength of this resolution by setting it against some other international legal norm, such as for instance the prohibition of genocide.[91] Assume also that NN is able to establish that in the given situation, Resolution 713 is invalidated or overridden. Obviously, by mere deduction, the conclusion follows that Resolution 713 is ordinary international law, and not *jus cogens*. Now, assume instead that Resolution 713 is set against an international bilateral agreement on the trade of arms or military equipment to Yugoslavia, and that in this second assumed situation, unlike the first, Resolution 713 is not invalidated or overridden. From the perspective of a legal positivist like NN, although Resolution 713 is not defeated, as of yet, there will be no convincing argument for the conclusion that the resolution is indefeasible law and *jus cogens*. If Resolution 713 prevails over the bilateral agreement, there may be many reasons

[86] Compare with Rozakis 1976, at 76.

[87] It should be added that according to some legal philosophers, there is no such thing as indefeasible law. See, e.g., Schauer 1998, at 223–240.

[88] See ibid.

[89] I admit to having used this example before in my earlier writing. See Linderfalk 2012, at 16–17.

[90] See UNSC Res. 713, 25 September 1991, para 6.

[91] Compare with *Bosnia Genocide*, Separate Opinion of Judge Lauterpacht, para 100.

for this. It might be that Resolution 713 prevails because it is *jus cogens*. But it might also be that the resolution prevails because of the mediating effect of Article 103 of the UN Charter, or because the embargo on Yugoslavia is considered induced by a situation of distress, or a state of necessity, precluding the international wrongfulness of any act in compliance with the resolution.[92] To justify the conclusion that Resolution 713 is indefeasible law, obviously, NN will have to considerably broaden his investigation.

As it appears, establishing the character of an international norm as indefeasible law is not an easy task. When studying the operation of an international legal rule (R_1) trying to assess whether R_1 is defeasible or indefeasible law, obviously, the chosen context will not always be decisive. If the operation of R_1 is investigated relative to a single rule of law (R_2) and a concrete set of facts, and studies indicate that R_2 either invalidates R_1 or overrides it, obviously, this immediately allows the conclusion that R_1 is defeasible law. If, on the other hand—all else being equal—R_2 does not invalidate or override R_1, no similar conclusion can be drawn: studies do not allow the conclusion that R_1 is defeasible law; neither do they allow the conclusion that R_1 is indefeasible law. To establish the proposition that R_1 is indefeasible law—assuming that in international law, defeasibility is the rule and indefeasibility the exception—typically, lawyers have to involve in their investigation a fairly great number of other international legal rules and factual situations. And even then, since they cannot possibly study the operation of a rule of law in relation to every existing norm of international law in every factual situation ever conceivable, the conclusion that R_1 is indefeasible law can only be inferred.

Because of its heavy reliance on the definition of *jus cogens* laid down in Article 53 of the two Vienna Conventions, legal positivism will typically have great difficulties upholding the distinction between *jus cogens* and ordinary international law. As concluded elsewhere, it lies in the nature of things that the concept of *jus cogens* will be made to include either far too much or far too little:

> The *jus cogens* concept will be made to include far too much, because in characterizing legal norms, international lawyers tend to be misled by the fact that some norms of ordinary international law—such as, for instance, those expressing obligations *erga omnes* and *erga omnes partes*—have a normative strength exceeding that of most others. The *jus cogens* concept will be made to include far too little, because international lawyers feel they rarely have the sufficient empirical basis to conclude on good grounds that a norm is *jus cogens*. This practical difficulty would seem to explain the great number of surprisingly different *jus cogens* catalogues suggested in the international legal literature. It would also seem to explain the reaction of some commentators questioning the credibility of the *jus cogens* concept altogether.[93]

[92] See Articles 24 and 25 of the Articles on Responsibility of States for Internationally Wrongful Acts, respectively.

[93] See Linderfalk 2012, at 17–18. (All footnotes are omitted).

3.4.2 Legal Idealism

For the identification of an international norm (N) as *jus cogens*, legal idealism recognizes the importance of two different methods. In this essay, they will be referred to as the 'deductive' and 'inductive-deductive' method, respectively. The deductive method uses ideals as its prime means for the determination of law. A two step procedure is involved: first, the agent posits the existence of an ideal, in the sense of a desirable state of affairs (Z); secondly, the agent infers from the existence of Z the proposition that N is *jus cogens*. This method, obviously, requires little studies of the practice of states, in the sense of Article 53 of the two Vienna Conventions. As Christian Tomuschat puts it, 'certain deductions from the constitutional foundations of the international community provide binding rules that need no additional corroboration by practice.'[94] The argument requires, however, a teleological argument of some sort. To go from the proposition that Z is a desirable state of affairs to the conclusion that N is *jus cogens*, legal idealists need to make an additional assumption. They need to assume the existence of an instrumental relationship between the conferring on N of a *jus cogens* status and the realization of Z. Interestingly, indications suggest that legal idealists have fundamentally different ideas about the exact nature of this relationship. For some, it would seem to be the argument that Z makes the *jus cogens* status of N *desirable*: If a *jus cogens* a status is conferred on N, then Z will be more effectively realized.[95] Others would seem to assume a relationship of *necessity*: If a *jus cogens* status is not conferred on N, then there is no way Z can be realized.[96]

The fact that legal idealists do not openly confront this ambiguity, but instead often vacillate between two analytically different conceptions of teleology, makes legal idealism vulnerable to criticism.[97] The inductive–deductive method serves to forestall some of this criticism using ideals only as a corrective. When legal idealists resort to the inductive–deductive method, if practice indicates that a norm (N) is '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', then this will be seen by them as a reason for the assumption that N is *jus cogens*. Contrary to legal positivists, however, legal idealists will regard this assumption as defeasible.[98] Consequently, when legal idealists find that states consistently give precedence to a norm N, this will not for them necessarily prevent the conclusion that, despite first appearances, N is not *jus cogens*. As legal idealists would then argue, if N is not instrumentally necessary or effective for the realisation of a

[94] Tomuschat 1993, at 307.

[95] Compare with Zemanek 2011, at 383.

[96] Compare with Schmalenbach 2012, at 909; Ibler 2007, at 753.

[97] Compare with Mitchell 2005, at 231. '*Jus cogens* norms are notoriously difficult to identify.'

[98] See, e.g. Schmalenbach 2012, at 907; Criddle and Fox-Decent 2009, at 338; de Schutter 2010, at 68; Tomuschat 1993, at 307.

given ideal (Z), then state practice must be motivated by some other reason than the *jus cogens* status of this same norm. Conversely, when legal idealists find that states do not consistently give precedence to N, this will nevertheless not prevent them from concluding that N is *jus cogens*. As the defeating argument goes, if N is instrumentally necessary or effective for the realisation of a given ideal (Z), then ultimately it is of no decisive importance whether states have understood this relationship and put it to practice or not.

3.5 The Scope of *Jus Cogens*: Delimiting the Concept

Irrespective of the difficulty of identifying particular *jus cogens* norms, taking the position of either a legal positivist or a legal idealist may help delimit the concept of *jus cogens*. A different set of questions would then have to be asked, of course. Instead of asking whether or not some particular norm or norms have the status of *jus cogens*, the inquiry would have to be organized bringing categories of norms into focus. Three questions can be raised in particular; they are the questions highlighted in this section.

3.5.1 Legal Positivism

Do the second order rules of the jus cogens regime themselves have the status of jus cogens? It is a notable fact that although the definition laid down in Article 53 of the two Vienna Conventions presupposes the existence of rules governing such things as normative conflicts between first order rules of *jus cogens* and ordinary international law, the article says nothing about the particular status of those rules. Some commentators have suggested that, clearly, they must be *jus cogens*, too.[99] 'It would be pointless', one colleague comments, 'if a norm was endowed with peremptory status, but its effects and legal consequences were governed by the criteria of ordinary rules.'[100] Legal positivists will not be convinced by such arguments. As argued in Sect. 3.2, for legal positivism, the *jus cogens* status of a rule of law (R) derives from the existence and application of the second order rules of the *jus cogens* regime. If this proposition is accepted, the second order rules of the *jus cogens* regime can hardly be *jus cogens*. That would assume that the second order rules of the *jus cogens* regime can be used to explain their own status. In the alternative, it would assume the existence of third order rules of *jus cogens*, which would assume in turn the existence of fourth order rules of *jus cogens*, and so on ad infinitum. Given that in research simpler explanations should always be

[99] See, e.g., Orakhelashvili 2006, at 80.

[100] Ibid.

preferred to more complicated ones, for legal positivism, it would have to be the conclusion that the second order rules of the *jus cogens* regime do not themselves have the status of *jus cogens*. They are ordinary customary international law.

Can there be such a thing as regional jus cogens? This is a question to which legal positivism takes a somewhat ambivalent stance. On the one hand, legal positivism builds heavily on the definition of *jus cogens* laid down in common Article 53, which categorises *jus cogens* as 'general international law', and requires acceptance and recognition 'by the international community of States as a whole'. By so doing, it would seem to deny the existence of regional *jus cogens*, at least as far as current practice is concerned. On the other hand, not all legal positivists would seem to deny the idea of regional *jus cogens* in principle. For example, as contended by Christos Rozakis:

> The fact … that the Vienna Convention does not deal with particular *jus cogens* for its purposes does not mean that particular rules of law governing relation between specific States or groups of States cannot become peremptory norms for the purposes of these States. Both regional-local law and particular treaties may have rules prohibiting a violation of their content by subsequent treaties concluded by subjects of the regional-local law or by parties to the particular treaties carrying peremptory norms. States cannot be prevented from deciding to produce law of a peremptory character on an *inter se* basis.[101]

As indicated in Sect. 3.3, according to one branch of legal positivism, if a rule of international law (R) is authoritative for a state (S), this is because S has consented to or acquiesced in R. To the extent that legal positivists belong to this camp, not only will they assume the validity of the rule of persistent objection, they will also refuse to accept that this rule makes any exception for norms of *jus cogens*. This is to say, they will acknowledge the possibility that the categorization of a rule of law as *jus cogens* may be relative—a rule of law may be *jus cogens* for some states but not others. Consequently, from the perspective of this branch of legal positivism, in principle at least, *jus cogens* does not necessarily have to be general law; it may exist also on a regional or other less-than-general basis.

Does the concept of jus cogens allow the inclusion of principles? The definition laid down in Article 53 of the two Vienna Conventions carefully characterizes *jus cogens* as 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 and which can be modified only by a subsequent *norm* of general international law having the same character.[102]

Generally speaking, a legal norm is either a *rule* or a *principle*. As legal philosophers argue,[103] the following three features distinguish principles from rules:

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[101] Rozakis 1976, at 56. See, similarly, Kolb 1998, at 98–102; Byers 1997, at 234; Gaja 1981, at 284; Pellet 2006, at 89. The argument assumes, of course, that whereas currently common Article 53 of the Vienna Conventions constitutes a reflection of state practice, practice may develop in directions prompting legal positivists to reconsider this conclusion.

[102] Italics added.

[103] On the distinction between rules and principles generally, see, e.g., Manero 2009.

(1) Rules describe a limit between what is permitted, prohibited or proscribed and what is not. Principles, on the other hand, describe what is desirable.
(2) When the conditions for the application of a rule are met, you either act upon the rule or you do not; there is never any third alternative. Principles, on the other hand, can be acted upon to various degrees.
(3) In situations of their application, rules are either valid or not. Consequently, when two rules are in conflict, only one of them can be validly applied. Principles, on the other hand, have a dimension of weight. When the requirements of two or more principles cannot be equally met, if the one does not altogether outweigh the other, the required solution is that you act upon the balance of both.

Some commentators have suggested that not only rules but also principles in this sense can have the status of *jus cogens*.[104] Popular candidates include 'the principle of the freedom of the high seas',[105] 'the principle of respect of sovereignty'[106] and the principle of good faith.[107] Legal positivists dismiss this suggestion, for different reasons. Some altogether reject the idea that principles can be part of international law just like rules. Others refer to the definition laid down in common Article 53, which categorises *jus cogens* as non-derogatory law. In the sense of legal language, when you *derogate* from a norm (N_1) you do not apply it, because either some other norm (N_2) invalidates N_1, or this other norm N_2 takes precedence over N_1. Given what we know about the nature of rules and principles, derogation is a means of resolving conflicts between rules, but not principles. Conflicts between principles are resolved by weighing.

3.5.2 Legal Idealism

Do the second order rules of the jus cogens regime themselves have the status of jus cogens? To the extent that legal idealists recognize the distinction between first and second order rules,[108] they would seem inclined to include both categories of rules in the concept of *jus cogens*.[109] The conclusion finds support in the idea of first and second order rules as a functional unit. As stated in earlier sections of this essay, for legal idealism, conferring a *jus cogens* status on international norms serves the realisation of some or other ideal. By their very nature, first order rules will not fill this function without the existence of the second order rules. The

[104] Compare with Tams 2005, at 142.
[105] See Sztucki 1974, at 84, and the further references cited there.
[106] Ibid., at 82.
[107] Ibid., at 83.
[108] Some do not recognize this distinction. See, e.g., Bartsch and Elberling 2003, at 486–487.
[109] See e.g., Orakhelashvili 2006, at 80.

assumed function of the *jus cogens* regime is entirely dependent on the joint operation of rules belonging to both categories. Consequently, if first order rules have the status of *jus cogens*, then second order rules must have that status, too. As remarked by Alexander Orakhelashvili:

> It may be contended that substance and enforcement of *jus cogens* are two different things … [S]uch restrictive view of *jus cogens* questions its general rationale. It is not clear what is the function of differentiation in substantive nature of certain norms if this has no consequential effect, and why should a norm be specific in nature because of embodying community interests and yet be unable to produce specific consequences to safeguard the integrity of that community interest.[110]

Can there be such a thing as regional jus cogens? For legal idealism, the answer to this question will depend on the nature of the particular ideal assumedly represented by the *jus cogens* concept. Some legal idealists would seem to assume that rules may be *jus cogens* already because they are necessary for the protection of the public interest of a particular region, such as, for instance, the Americas.[111] As indicated in Sect. 3.2, however, most idealists' definitions of *jus cogens* assume the existence of ideals that are without doubt universal. Those idealists, obviously, will have great difficulties accommodating the idea that there might be something like regional *jus cogens*.

Does the concept of jus cogens allow the inclusion of principles? For legal idealism, the answer to this question is fairly simple. If Article 53 of the Vienna Conventions does not exhaust the definition of *jus cogens* in international law, then there is no reason why a principle could not be *jus cogens*. To confer the status of *jus cogens* on a principle may be instrumentally necessary or effective for the realisation of an ideal, just like conferring this status on a rule. Legal idealism, of course, has yet to explore the further consequences of this position for the contents of the second order rules of the *jus cogens* regime.

3.6 The Function and Effects of the *Jus Cogens* Regime

Many commentators have inquired into the 'function of *jus cogens*', as they put it.[112] 'Function of *jus cogens*' is an ambiguous term; it may be used to refer to different things. To avoid confusion, for the purpose of this essay, it may seem warranted to distinguish between at least two different senses of the term. Consequently, Sect. 3.6 will inquire into the understanding of legal positivism and legal idealism of the function and effects of the *jus cogens* regime. Section 3.7 will inquire into the understanding of legal positivism and legal idealism of the function of the utterance of the *jus cogens* term in international legal discourse.

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110 Orakhelashvili 2003, at 25. See, similarly, Orakhelashvili 2005, at 244.

111 See, e.g., *Roach and Pinkerton*, paras 55–56.

112 See e.g., Onuf and Birney 1974, at 189.

3.6.1 Legal Positivism

For legal positivism, the international *jus cogens* regime consists of three elements. There are the first order rules of *jus cogens*; there are the second order rules of the *jus cogens* regime; and there is the definition of the concept of *jus cogens* laid down in Article 53 of the two Vienna Conventions. By inquiring into the function of the *jus cogens* regime, legal positivists assume that those three elements operate as a single unit serving one common purpose. What is that purpose exactly? For legal positivism, the answer to this question will be rather obvious: the *jus cogens* regime establishes a particular hierarchical order among norms of international law. On the one hand, there is *the superior law*: the first order rules of *jus cogens*. On the other hand, there is *the inferior law*: the remainder of all those rules that together form international law, 'the ordinary international law'. The function of the *jus cogens* regime is to ensure that in cases of real or potential conflict between rules of those two categories, the superior law is always applied.[113]

As explained in Sect. 3.4, according to legal positivism, first order rules of *jus cogens* are to be identified by reference to the application of the second order rules of the *jus cogens* regime. A first order rule of *jus cogens* is simply a rule to which second rules of the *jus cogens* regime are applied. For legal positivism, *why* individual states consider second order rules applicable to a rule of law is irrelevant. The only important thing is that the international community of states *does* consider second order rules applicable. For similar reasons, when inquiring into the function of the *jus cogens* regime, legal positivists feel no need to look beyond the rules of the *jus cogens* regime themselves, such as, for example, by asking questions about possible underlying teleological principles, value postulates or ideals. For legal positivism, the *jus cogens* regime establishes a hierarchical order among *rules*. This idea inevitably reflects upon the positivist's definition of the concept of a normative conflict. When legal positivists inquire into whether two rules are in 'conflict' or not, they do this based on an analysis of the purely logical relationship between those two rules (or rather the respective obligations that the rules entail). Given this context, the idealist's idea about the effect of the *jus cogens* regime follows naturally. Assuming that the effect of the *jus cogens* regime is a result of the application of the great number of second order rules hosted by that regime; and assuming that the application of a second order rule necessarily always presupposes the existence of a conflict between a first order rule of *jus cogens* and a rule of ordinary international law; then, in the legal positivist's universe, the *jus cogens* regime promotes and reinstalls logical coherence in the international legal system.

[113] Compare with Rozakis 1976, at 11–12. Is invalidating (or nullifying) a technique for the *resolution of conflicts*? Several commentators would seem to assume that it is. It could also be described as a technique for the *avoidance of conflicts*. Compare with Articles 53 and 64 of the Vienna Conventions.

3.6.2 *Legal Idealism*

For legal idealism, just like legal positivism, the *jus cogens* regime establishes in international law a particular hierarchical order. On the face of things, then, legal idealism has no problem accepting the positivist's suggestion that *jus cogens* is a device tailored 'to prevent the normative fragmentation of public international law'.[114] In contrast to legal positivism, however, legal idealism sees a definite need to look behind the purely material side of legal norms. Without knowledge of the ideal served by a rule of law, legal idealists argue, the rule will seem rather pointless. For legal idealism, consequently, if the *jus cogens* regime establishes a hierarchical order, this is primarily an order not among norms but among values.[115] That is to say, whereas legal positivism sees international law as a system in the logical sense, legal idealism sees it first and foremost as a system in the axiological sense. In the idealist's universe, if there is a conflict between a norm of *jus cogens* and a norm of ordinary international law, in the final analysis, this is not because those two norms are deemed incompatible in the logical sense. It is because by applying the norm of ordinary international law, 'the moral tasks that states have to accomplish in the international community' will be compromised.[116] This observation helps explain the idealist's idea about the effect of the *jus cogens* regime, in parallel with the analysis conducted in Sect. 3.6.1. Consequently, assuming that the effect of the *jus cogens* regime is a result of its application; and assuming that the application of the *jus cogens* regime necessarily always presupposes the existence of a conflict between a *jus cogens* norm and a norm of ordinary international law; in the legal idealist's universe, the *jus cogens* regime promotes and reinstalls axiological coherence in the international legal system.

3.7 The Function of *Jus Cogens* in International Legal Discourse

This section will inquire into the different ideas of legal positivism and legal idealism of the function of *jus cogens* in international legal discourse. By the function of *jus cogens* in international legal discourse, this essay will understand the pragmatic meaning of the utterance of this term. By asking questions about the pragmatic meaning of *jus cogens*, obviously, this essay will not concern itself with any particular intention of any particular utterer. The purpose of Sect. 3.7 is to explore the different ideas of legal positivism and legal idealism of the function of *jus cogens* in international legal discourse *generally*, without paying much regard

[114] Schmalenbach 2012, at 909.

[115] Compare with *Furundžija*, paras 154–157. See, similarly, Ruiz Fabri 2012, at 1050; Orakhelashvili 2005, at 241.

[116] von Verdross 1937, at 574. See, similarly, Ford 1994–1995, at 163.

to any particular context of utterance. This means that strictly speaking the focus of the inquiry will not be on the meaning of the utterance of *jus cogens*, but rather on the *meaning potential* of this term when uttered. The meaning potential of *jus cogens* is what the uttering of this term potentially does to the beliefs, attitudes or behaviour of participants of international legal discourse.[117] Section 3.7.1 will illustrate the meaning potential of *jus cogens* in international legal discourse—henceforth referred to as the functionality of the term.[118] Section 3.7.2 will explore how legal positivists and legal idealists, given their respective ideas of the concept of international law, can be expected to exploit this same potential.

3.7.1 The Meaning Potential of 'Jus Cogens'

Jus cogens has a normative functionality.[119] Like many other terms used in legal discourse, *jus cogens* is tied to a number of moral and political norms. Depending on what participants in international legal discourse are prepared to assume about those norms, the uttering of *jus cogens* potentially works to provoke reactions that international law itself cannot provoke. Stated more specifically, it potentially helps utterers convince audiences of the correctness of their arguments.[120] For instance, if an utterer wishes to argue that perpetrators of some particular international human rights norm must not be absolved by states through amnesty laws, even though legislating would otherwise be part of the *domaine reservée* of sovereign states, the characterization of the norm as *jus cogens* would typically work in the utterer's favour.[121]

Jus cogens has a systemising functionality.[122] According to the ontological stance taken in this article, concepts are formed through a process of abstraction. They are the result of the ability of the human brain to perceive of particular properties of phenomena or states of affairs as characteristics shared by all entities belonging to the extension of some certain concept.[123] Depending on whether participants in international legal discourse are prepared to recognize that the utterer uses *jus cogens* to represent a concept, consequently—whatever the utterer

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[117] Compare with Lyons 1977, at 725; Blakemore 1992, at 102–103.

[118] For further reading concerning the meaning potential of conceptual terms in international legal discourse generally, see Linderfalk 2013a.

[119] Linderfalk 2013a, at 36–39.

[120] Compare with Vidmar 2013, at 4. 'The *jus cogens* norms have a strong ethical underpinning and states are thus disinclined toward admitting their non-compliance. Breaching *jus cogens* norms is not seen only as a legal but also as a moral wrong.' In referring to this functionality, commentators similarly speak about 'the promotional rationale', and 'the charming power', of *jus cogens*. See, in turn, Focarelli 2008, at 455–459; Ruiz Fabri 2012, at 1050.

[121] Compare with *Furundžija*, paras 155–157.

[122] Linderfalk 2013a, at 42–44.

[123] See, e.g., Margolis and Laurence 2010.

assumes about the characteristic property or properties of *jus cogens* norms—the resort to *jus cogens* potentially helps participants in international legal discourse understand the utterer's argument as a generalized proposition. Say, for example, that a person publishes an article, in which he or she explicitly takes on to explain why the prohibition of enforced disappearance has attained the status of *jus cogens*.[124] To the extent that the explanation offered can be applied to other international norms, this statement will be interpreted to mean that as far as the author of the article is concerned, a *jus cogens* status should be conferred on them, too.

Jus cogens has a knowledge-generating functionality.[125] Depending on whether participants in international legal discourse are prepared to recognize not only the systemising functionality of *jus cogens*, but also the systemising criterion or criteria assumed by an utterer, indirectly, the uttering of *jus cogens* potentially helps them acquire new pieces of legal knowledge. Assume, for instance, that a particular norm (N) is referred to by an utterer as *jus cogens*. Depending on the systemising criteria assumedly used by the utterer, addressees may infer that N expresses an obligation *erga omnes*;[126] that N is non-derogatory law;[127] that N has the nature of a prohibition;[128] that N is customary international law;[129] or that N is applicable to all subjects of international law.[130]

Jus cogens has a camouflaging functionality.[131] Many scholars have tried describing the identifying criteria and legal consequences tied to the concept of *jus cogens*. As highlighted in Sect. 3.4 of this essay, *jus cogens* norms are extremely difficult to identify; this applies whether the identifying agent is a legal positivist or a legal idealist. Descriptions produced will therefore often be very much the result of something other than a scholar's assessment of the relevant sources for identification of *jus cogens* norms.[132] The usage of *jus cogens* as a link between identifying criteria and legal consequences may help to conceal this. Depending on whether participants in international legal discourse are already familiar with the poor productivity of the sources for identification of *jus cogens* norms, the uttering of *jus cogens* potentially helps convince participants in international legal discourse that utterers are in fact in possession of knowledge that allow them to give a fairly good description of the *lex lata*. Utterers may contribute to understanding an utterance of *jus cogens* in this sense by introducing, for example, a

124 Compare with Sarkin 2012, at 537–583.

125 Linderfalk 2013a, at 42–44.

126 See, e.g., Simma 1994, at 285 ff.

127 See, e.g., *Blake*, Separate Opinion of Judge Cançado Trindade, para 24.

128 See, e.g., Salcedo 1997, at 592.

129 Czapliński 1997–1998, at 88.

130 See, e.g., Salcedo 1997, at 594.

131 Linderfalk 2013a, at 39–40.

132 Compare with Glennon 2007, at 1270. 'Lacking specificity, commentators have been left to guess as to the doctrine's substantive content, with the result being a fill-in-the-blanks process that leaves subjectivity unchecked and that has resulted in a mode of analysis that consists of little more than a catalogue of favorite prohibitions.'

proposition as 'obvious' or 'self-evident', or by frankly remarking that 'anything else would be absurd'.[133]

Jus cogens has a buzz-word functionality. Depending on whether participants in international legal discourse are prepared to recognize all at the same time, both the moral and political norms underlying the *jus cogens* concept, and the allegedly false assumption that utterers can provide a fairly good description of the identifying criteria and the legal consequences tied to this concept, indirectly, first, the uttering of *jus cogens* potentially helps utterers inflate to importance statements that on closer scrutiny might be rather trivial.[134] If an utterer says 'The prohibition of torture is *jus cogens*', although she would just want to express that it is extremely important that torture be prevented, her utterance would typically be understood to carry more weight than this. Second, the uttering of *jus cogens* potentially prevents participants in international legal discourse from questioning the intents of utterers.[135] On further scrutiny, the effect of a sentence such as 'The prohibition of torture is *jus cogens*' may often be quite similar to that of the following: 'I find that the prohibition of torture is *jus cogens*, and if by any chance you do not share this opinion, this shows you are pro-torture'.

Jus cogens has an emancipating functionality. As emphasized earlier, Article 53 of the two Vienna Conventions defines the concept of *jus cogens* by reference to legal consequences, and legal consequences only. Thus, common Article 53 of the Vienna Conventions goes along with the argument that the identification of *jus cogens* norms is an issue always to be decided based on whatever identifying criterion or criteria happens to be practiced.[136] From this proposition there is but a small step to arguing that regard is to be paid not only to the practice of states but also to the conduct of other agents. Depending on whether participants in international legal discourse are prepared to recognize that non-state activities play a role in the identification of *jus cogens* norms, consequently, *jus cogens* potentially helps utterers muster agreement for arguments about the *jus cogens* character of norms independently of any understanding of states. Utterers may want to take action to ensure the understanding of an utterance in this sense. Consequently, they may refer to an act as 'universally condemned',[137] for example, or to *jus cogens* as the product of a 'world conscience'.[138] They may refer to the 'universal

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133 See Ford 1994–1995, at 153 and 164, respectively.

134 Compare with Barnidge 2008, Sect. 2.

135 Ibid.

136 Compare with the commentary to the Draft Articles on the Law of Treaties. 'The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals.' International Law Commission, Draft Articles on the Law of Treaties with commentaries, 18th session, UN Doc. A/6309/Rev.l, 1966, at, 248.

137 See, e.g., Christopher 1999–2000, at 1233.

138 See, e.g., ibid., at 1234.

juridical conscience' manifested in *jus cogens*.[139] Similarly, they may remark that the identification of *jus cogens* norms is to be done 'on the basis of the evolution of the understanding of the international community'.[140]

Jus cogens has a formative functionality.[141] As noted by linguistics, the meaning of most terms is dependent on their relationship with other terms belonging to the same language system.[142] This relationship assumes the existence of some organisational principle. It may be argued, for example, that if the meaning of 'kick' is dependent on its relationship with 'foot', then this is because there is always a relationship between a word representing bodily activity and words representing body parts engaged in this same activity. Due to this systematic structure of languages, the uttering of *jus cogens* potentially facilitates the understanding of addressees of other terms used by the utterer. Depending on whether participants in international legal discourse can acquaint themselves with the organisational principle or principles assumed by an utterer, consequently, if the utterer refers to a norm (N) as *jus cogens*, this may help addressees conceive of other norms as 'ordinary international law'.[143] Similarly, it may help addressees conceive of a breach of N as entailing 'aggravated state responsibility'.[144]

3.7.2 Legal Positivism and Legal Idealism

How can legal positivists and legal idealists be expected to exploit the meaning potential of *jus cogens* in their respective contributions to international legal discourse? The answer, of course, will depend on the applied definition of the concept of international legal discourse. Although, admittedly, international lawyers have many different opinions about the nature and purpose of international legal discourse,[145] this essay will take for granted that for legal positivists and legal idealists alike international legal discourse presupposes a communication of propositions about the *lex lata*. To the extent of this seemingly undeniable assumption, as transpires from the brief survey conducted in Sect. 3.7.2, legal positivists and legal idealists can be expected to exploit the meaning potential of *jus cogens* differently.

This is not to say, of course, that legal positivism and legal idealism look differently on all aspects of the meaning potential of *jus cogens*. To begin with the

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139 See, e.g., *Blake*, Separate Opinion of Judge Cançado Trindade, para 25.

140 de Schutter 2010, at 64.

141 Linderfalk 2013a, at 44–45.

142 See, e.g., Lyons 1977, at 230 ff.

143 See, e.g., Allain 2002, at 534.

144 See, e.g., Klein 2002, at 1247 ff.

145 Compare with Linderfalk 2013a, at 47–49.

systemising and knowledge-generating functionalities of the term, they are both dependent on a kind of contextual assumption that remains neutral to any positivist's or idealist's definition of the concept of international law: in the former case, on the assumption that the utterer uses *jus cogens* to represent a concept; in the latter case, on an assumption concerning the characteristic property or properties of *jus cogens* norms recognized by the utterer. Arguably, addressees will be equally prone to hold such assumptions whether they see international law as a system of rule, or whether they think that international law includes also other guiding elements such as, for example, ideals. The same conclusion applies to the kind of assumption that controls the formative functionality of *jus cogens*: an assumption concerning the nature of the relationship recognized by the utterer between *jus cogens* and other terms of language.

As for the contextual assumption that controls the camouflaging functionality of *jus cogens*, first instincts suggest that it is not in any similar way neutral to the positivist's and idealist's programme. This conclusion presupposes a superficial analysis of the issue. As stated in Sect. 3.7.2, depending on whether or not participants in international legal discourse are already familiar with the poor productivity of the relevant sources for identification of *jus cogens* norms, the uttering of *jus cogens* potentially helps convince them that utterers are in fact in possession of knowledge that allows them to give a fairly good description of the *lex lata*. Certainly, legal positivists and legal idealists use different sources for identification of *jus cogens* norms. However, as noted in Sect. 3.2, they struggle equally with the problem of having to rely upon sources and methods of identification that make *jus cogens* norms extremely difficult to identify. Whether addressees belong to the camp of legal positivists or legal idealists, consequently, they will be equally prone to the (typically false) assumption that the utterer is in fact capable of a fairly good description of the *lex lata*.

The difference in the positivist's and idealist's take on the potential meaning of the utterance of *jus cogens* lies rather in the three remaining functionalities of this term. To begin with the normative and buzz-word functionalities of *jus cogens*, as earlier observed, they both depend on an assumption on the part of addressees concerning the moral and political norms recognized by the utterer as tied to *jus cogens*. To the extent that addressees belong to the camp of legal positivists, obviously, they will disregard this dimension of the concept. If, according to legal positivism, international law can be described independently of its moral or other merits, then for the very same reason, a legal positivist will engage in international legal discourse on the assumption that it is possible to talk and write about the *jus cogens* regime independently of its moral or other merits. Legal idealists, on the other hand, will consider the moral and political norms tied to *jus cogens* fundamentally important, while they will often be instrumental to the realisation of the same ideal or ideals that legal idealists use to explain the existence of *jus cogens*. This is to say, legal positivists and legal idealists can be expected to exploit differently the normative and buzz-word functionalities of *jus cogens*.

The same can be said about the expected usage by legal positivists and legal idealists of the emancipating functionality of *jus cogens*, although for partly

different reasons. As noted in Sect. 3.7.2, the emancipating functionality of *jus cogens* depends on an assumption on the part of addressees that non-state activities play a role in the identification of *jus cogens* norms. Legal positivists and legal idealists are not equally prone to such an assumption. The existence of the assumption seems unlikely among legal positivists, who identify *jus cogens* norms based on the practice and *opinio juris* of states. Among legal idealists, who think that the *jus cogens* status of norms flow from ideals, the assumption would seem to come more or less naturally; it matters then little whether, according to legal idealists, ideals are *a priori*, or whether they are inferred from the social activities of 'the international legal community'.

3.8 Conclusions

In the *jus cogens* debate among international lawyers over the last twenty or so years, six questions are addressed in particular:

(1) What is the source of *jus cogens* obligations?
(2) What is the role of consent in the creation and modification of *jus cogens* norms?
(3) How do we identify norms belonging to this category?
(4) What does the category comprise?
(5) What are the function and effects of the international *jus cogens* regime?
(6) What is the function of *jus cogens* in international legal discourse?

As established in this essay, lawyers will be inclined to answer all six questions differently, depending on whether they take the position of a legal positivist or a legal idealist:

- For legal positivism, the *jus cogens* status of norms derives from ordinary processes creating customary international law. For legal idealism, it derives from ideals that are either a priori or inferred from the social activities of the international legal community.
- According to legal positivists, whereas consent certainly plays a role in the creation and modification of *jus cogens* norms, it does so differently for different positivists. For some, a *jus cogens* norm (N) can only be invoked against a state (S) *qua jus cogens* if S has consented to, or acquiesced in, the *jus cogens* status of N. For others, it is sufficient that S has consented to, or acquiesced in, the law-making processes that confer on N a *jus cogens* status. According to legal idealists, depending on whether they think that ideals are a priori or inferred from social practices, consent either plays no role at all, or it plays a role only as a social construct.
- Whereas legal positivists identify *jus cogens* norms based on the practice and *opinio juris* of states, legal idealists use two methods, referred to in this essay as the deductive and the inductive–deductive methods, respectively. Using the

former method, legal idealists draw directly on the assumed ideal or ideals represented by the *jus cogens* concept. Using the latter method, legal idealists draw on the practice and *opinio juris* of states, consulting ideals only as a corrective.

- For legal positivists, second order rules of the *jus cogens* regime do not themselves have the status of *jus cogens*; depending on the role that legal positivists assign to consent, they either acknowledge the possibility of regional *jus cogens*, or they do not; they unreservedly refuse to admit that principles can be included in the category of *jus cogens*. For legal idealists, to the extent that such a thing as second order rules of the *jus cogens* regime do exist, those rules have the status of *jus cogens*; depending on the particular ideal or ideals that legal idealists think are being represented by the *jus cogens* concept, they either acknowledge the possibility of regional *jus cogens*, or they do not; for legal idealists, there is no reason why a principle could not belong to *jus cogens*.
- Whereas for legal positivism, the *jus cogens* regime establishes a hierarchical order among rules, for legal idealism it establishes a hierarchical order among values. For the very same reason, whereas for legal positivism the application of the *jus cogens* regime has the effect of promoting and reinstalling logical coherence in the international legal system, legal idealism stresses instead that *jus cogens* preserves axiological coherence in the international legal system.
- By the function of *jus cogens* in international legal discourse, this essay understands the meaning of the utterance of this term. Legal positivists and legal idealists look differently on the meaning potential of *jus cogens*. Consequently, whereas legal idealists can certainly be expected to exploit the normative, buzzword and emancipating functionalities of *jus cogens*, legal positivists cannot.

As argued in this essay, if international lawyers can come to understand this dependency of the *jus cogens* debate on the affinity of discussants with the one or other school of thought, this will help make the debate much more constructive.

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Chapter 4
Jus Cogens as a Social Construct Without Pedigree

Jean d'Aspremont

Abstract This chapter revisits the mainstream foundational nonchalance witnessed in the international legal scholarship relating to *jus cogens* whereby the practice of courts and tribunals often suffice, for most international lawyers, to compensate a disinterest in the pedigree of *jus cogens*. The purpose of this chapter is accordingly to depict how international lawyers, by virtue of a series of avoidance-techniques, leave one of their most fundamental doctrines ungrounded without feeling any need to anchor it more firmly in the system of thoughts of international law. Whether such a pedigreelessness actually constitutes a sign of maturity of international legal argumentation, or a theoretical ailment, is not a question that is discussed here. The description of the argumentative constructions to which international lawyers resort in relation to *jus cogens* to avoid the question of its pedigree is sufficient to illustrate the light treatment generally reserved to the making of the main doctrines of international law and their mystical origin.

Keywords *Jus cogens* · Peremptory norms · Pedigree · Essentialism · Avoidance-technique · Social construct · Judicial empiricism · Mysticism

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4.1 Introduction

Jus cogens constructs cater for a new world of possibilities and impossibilities.[1] The creative pull of the possibilities and impossibilities allowed by *jus cogens* has captivated international lawyers. Rarely has an idea unlocked so much of the consciousness and imagination of international lawyers and proved as irresistible as *jus cogens*. The fascination for *jus cogens* usually starts at a young age or at an early stage in the career of an international lawyer. The gleam that is witnessed in the eyes of students after their first encounter with the idea of *jus cogens* is always a memorable experience for anyone involved in teaching. Such fascination rarely goes away as the training of international lawyers progresses.[2] And even if, in a career, scepticism grows unabated regarding the possibility of objectively constrained legal argumentation, the attachment to *jus cogens* usually remains untouched. It could even be said that being properly socialised as an international lawyer (and recognised as such) generally requires a commitment to the world of possibilities and impossibilities allowed by *jus cogens*. Such possibilities and impossibilities are now adhered to by an overwhelming majority of international lawyers.[3] In this context, it is no surprise that *jus cogens* has generated (and continues to generate) an inexhaustible and luxuriant scholarship.[4] Such scholarship is not only proliferous, it also denotes an unequalled creativity, especially when it comes to the legal effects attached to *jus cogens*.[5]

4.1.1 The Premises: Post-ontological Nonchalance

This chapter is predicated on the idea that, albeit luxuriant and creative, the international legal scholarship on *jus cogens* remains rather predictable. In the view of the author, scholarly debates and, more generally, legal argumentation about *jus cogens* can be read as continuous and recurring disagreements on the identification

[1] Compare with the idea of 'Nomos' developed by Cover 1983, at 4–5.

[2] On the socialisation of international lawyers, see d'Aspremont 2015a, at 1–32.

[3] In the same vein, see Dupuy 2002, at 271; Hameed 2014, at 55; and Zemanek 2011, at 409.

[4] Early 2015, a quick search in the catalogue of the Peace Palace Library on the entry 'jus cogens' generates not less than 239 hits and 'peremptory norm' 52 hits.

[5] See Sect. 4.2.2 below.

of *jus cogens* norms and the effects that ought to be attached to them. For the rest, debates are barely foundational as an overwhelming majority of international lawyers, aside from their disagreement on the identification and consequences of *jus cogens*, rally behind a post-ontological empiricist posture whereby *jus cogens* is held as a mechanism firmly and formally anchored in the international legal order. Debates on the pedigree of the notion have turned rather limited. The literature on *jus cogens* reads as if the doubts vented at the inception of the notion with regard to its pedigree and formal embedment in the international legal order are now all gone. For international lawyers, *jus cogens* debates have reached 'post-ontological' maturity[6] in that the foundations of *jus cogens* no longer seem to warrant scholarly bickering. *Jus cogens* nowadays boils down to a pattern of arguments—that is, a set of narratives—the foundations of which no longer need to be discussed.

It must be acknowledged that such a foundational nonchalance is not purely coincidental. Numerous judicial authorities have been referring extensively to the idea of *jus cogens*, not only in symbolic or cosmetic *obiter dicta*, but also as kingpins of their legal reasoning. Since it has been widely and continuously reported and discussed in the literature, such a judicial practice ought not be recalled here.[7] For the sake of the argument made here, it matters more to highlight that, although embracing or recognising the very idea of *jus cogens* has sometimes been a protracted process for some of them, most courts and tribunals have eventually been, like scholars before them, seduced by the world of possibilities and impossibilities that accompany *jus cogens*.

The solid body of case-law now supporting *jus cogens* has led most international lawyers to believe that *jus cogens* cannot be refuted or put into question because it is accepted and used by courts and tribunals.[8] This is the reason why most contemporary scholarly pieces on *jus cogens* are now often accompanied by a reminder of the 'empirical irrefutability' of *jus cogens*.[9] For international lawyers, *jus cogens* exists as a matter of judicial practice and foundational debates no longer seem permitted. For them, *jus cogens* can no longer be demoted to an under-used treaty provision or an academic fantasy. Now sheltered by the

[6] The expression is famously from Franck. See Franck 1995, at 6.

[7] For a recent account, see Saul 2014, at 26–54; Cannizzaro 2014, at 261–270; Verhoeven 2008a, at 234–239; and Focarelli 2008, at 429–459.

[8] See, e.g., International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006; Meron 2003, at 202; and O'Connell 2012, at 79.

[9] Danilenko 1991, at 43.

authoritative pronouncements of august judicial institutions, *jus cogens*—and its world of possibilities and impossibilities—have acquired a social existence in all strands of international discourses.[10]

These introductory considerations would prove overgeneralising, did they fail to mention the small cohort of deniers who still trumpet their allergy to the notion. Obviously, such rejections—which either deny the existence of the concept or bemoan its dangers—are far less numerous than used to be at the time when the notion was introduced in the inter-war period[11] and not yet endorsed by courts and tribunals.[12] Yet, opposition persists until today.[13] The notion remains accused of shattering the formal unity of international law,[14] creating degrees of bindingness,[15] being conceptually and empirically useless,[16] being kitsch,[17] falling short of an explanatory framework on how it came into existence,[18] boiling down to a hegemonic manoeuvre[19] or a nostalgic aspiration.[20]

Because of the overwhelming adherence to the idea of *jus cogens* errant to the possibilities and impossibilities it generates, such broadsides against the idea of *jus cogens* and its world of possibilities and impossibilities seem to constitute a bit of a waste of energy. Indeed, it seems hard to buy into the sceptical attitudes because of the deep entrenchment in the consciousness of international lawyers of the notion of *jus cogens*. Hence, this chapter does not deem it relevant to engage with the above-mentioned sceptical accounts. Taking the social existence of the idea of *jus cogens* for granted, it seems more apposite to revisit the mainstream foundational nonchalance witnessed in the international legal scholarship whereby

[10] On international law as an argumentative practice made of foundational doctrines and argumentative techniques, see d'Aspremont 2015a.

[11] See the seminal (short) article by Verdross 1937.

[12] For an early rejection of the notion, see Guggenheim 1953, at 57–58; Schwarzenberger 1965, at 212–214; Lachs 1980, at 203.

[13] For two famous outright rejections, see Glennon 2006, at 529–536. See also D'Amato 1990, at 1–6. For a critique of Glennon's argument, see Verhoeven 2008a, at 229. For an overview of some of the deniers' arguments, see Gomez Robledo 1981, at 69–87; Kolb 2015; and Zemanek 2011, at 405–409.

[14] Weil 1983, at 423. In the same vein, Combacau has claimed that *jus cogens* is an 'intruder' ('intrus'). Combacau 1986, at 102.

[15] Weil 1983, at 424.

[16] Sur 2012, at 197; and Weisburd 1995, at 21.

[17] Koskenniemi 2005b, at 122. See the remarks of Dupuy 2005, at 131.

[18] For criticisms of the foundationlessness of the notion, see D'Amato 1990, at 1–6. For a sketch of the way in which foundationalessness manifests itself in contemporary legal scholarship, see Sect. 4.3.

[19] Koskenniemi 2005b, at 122 and 116.

[20] Ibid.

the practice of courts and tribunals often suffice, for most international lawyers, to justify a post-ontological disinterest in the pedigree of *jus cogens* thanks to all sorts of pedigree avoidance-techniques.

4.1.2 The Argument: A Social Construction Without Pedigree

Against this backdrop, this chapter spells out the irresistible multi-dimensional pull by virtue of which the idea of *jus cogens* has become a powerful social construct. Yet, this chapter simultaneously demonstrates that *jus cogens* remains a construct without pedigree because international lawyers resort to a wide range of pedigree avoidance-techniques. On this point, it is specifically argued here that the above-mentioned foundational nonchalance is made possible by virtue of a whole series of conceptual constructions that set the question of the pedigree of the *jus cogens* mechanism aside.

It is necessary to stress, at this preliminary stage, that the point made here is certainly not to propose any specific understanding of the pedigree of *jus cogens*. It is submitted here that there simply cannot be any right pedigree. This is not only because any consensus among international lawyers seems elusive. It is also because foundationlessness is probably the fate of most fundamental paradigms in most disciplines.[21] What is more, it cannot be excluded that the pedigreelessness of *jus cogens* simply shows that *jus cogens* has grown into one of these central gospels of international law whose mystical origins are self-sufficient. For these reasons, the pedigreelessness of *jus cogens* is, in the eyes of this author, unproblematic. It would be of no avail to seek, in this chapter, to promote any right foundation for that concept. It must be repeated that the purpose here is simply to depict how international lawyers, by virtue of a series of avoidance-techniques, leave one of their most fundamental doctrines ungrounded without feeling any need to anchor them more firmly in the system of thoughts of international law. Whether such a pedigreelessness actually constitutes a sign of maturity of *jus cogens*, an argumentative practice that traditionally operates alongside theological dynamics, or a theoretical ailment is not a question that ought to be discussed here.

[21] It has long been demonstrated that disciplines can thrive—and thus deploy their modes of production of authoritative narratives—in the absence of any well-known and solid premise. In other words, the idea that premises of scientific reasoning must be known for scholarly conclusions to be plausible and authoritative in a given discipline has long been rebutted. It could even be said that foundationlessness is probably the fate of most disciplines, as authoritative and plausible arguments can be produced in the absence of known or shared premises. On this point see Nagel 1961, at 43. See also the comments of Polanyi 1967, at 533–545.

It should also be made clear in this introduction that claiming that *jus cogens* is a social construct without formal lineage does not mean it is a social construct without history. The genesis of the concept is well known.[22] Taking its roots in Roman law,[23] embraced by German thinkers like F.A. von der Heydte and J. Jurt,[24] popularised in international legal thinking in the inter-war period[25] by the dissenting opinion of Judge Schenting in the PCIJ's *Chinn* case[26] and Alfred Verdross' seminal article,[27] the idea made its way into the work of the International Law Commission[28] and was ultimately enshrined in Articles 53 and 64 of the Vienna Convention on the Law of Treaties[29] (VCLT) with the support of small, socialist and third world states.[30] The way in which the concept emerged is thus well known and its historical origins are easily traceable by most international lawyers. The point about the absence of pedigree that is made here is different. The point is that, irrespective of its well-known genesis, *jus cogens* has been accepted as a notion without any agreed embedment into the system of thoughts of international law and that such foundationlessness of *jus cogens* does not seem to disturb the overwhelming majority of international lawyers.

The rest of this chapter is structured as follows. Section 4.2 attempts to shed light on the virtues traditionally associated with *jus cogens* and some of the drivers behind the overwhelming success of this legal construct. In doing so, it seeks to show that *jus cogens* is bound to remain deeply entrenched in the sensitivity and consciousness of international lawyers. Section 4.3 turns to the lack of pedigree of the notion *jus cogens* and provides an overview of the techniques which are used by international lawyers to skirt the question of the foundations of *jus cogens*. Section 4.4 concludes such an inquiry with some epistemological observations on the remarkable ability of international lawyers to comfortably revel in the world of possibilities and impossibilities of *jus cogens* in denial of its pedigreelessness.

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[22] For some historical account of the notion, see Gomez Robledo 1981, at 17–68; Hannikainen 1988, at part I; Suy 1967, at 17; and Criddle and Fox-Decent 2009, at 331. For some historical considerations from a soviet perspective, see Alexidze 1981, at 228–232.

[23] For an account of Roman law origins, see Gomez Robledo 1981, at 17–36; and Stephan 2011, at 1081–1096.

[24] This is mentioned by Simma 1995, at 51; and Zemanek 2011, at 381.

[25] It is probably not coincidence that 'it was first floated' in the inter-war period, that is, at a time where moral progressism was dominant in international legal scholarship, a significant number of international lawyers seeking to smear international law as a voluntaristic and state-centric construction in need of reform. See Collins 2014, at 23–49. See also Kennedy 2000, at 335.

[26] *Oscar Chinn (UK v Belgium),* PCIJ, Merits, Judgment of 12 December 1934.

[27] Verdross 1937, at 571.

[28] On the legislative history, see Gomez Robledo 1981, at 37–68. See also Stephan 2011, at 1081–1096.

[29] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[30] Charlesworth and Chinkin 1993, at 64. See also Dupuy 2005, at 134.

4.2 *Jus Cogens* as a Social Construct: Reasons for a Resounding Success

As was said above, the social success of *jus cogens* in contemporary scholarly debates is resounding. Although they continue to squabble among themselves regarding the identification of such norms and their precise legal effects, international lawyers in their overwhelming majority espouse the idea of *jus cogens*. The deniers only constitute a small and disorganised—albeit occasionally noisy—band of troublemakers in an otherwise uncritical mass of believers. This section reviews the drivers behind the success of the *jus cogens* among international lawyers.

It must be preliminarily pointed out that reviewing the drivers behind the social success of *jus cogens* seems more relevant than providing an empirical account of that success. Indeed, in the eyes of the author, it does not take much to realise that *jus cogens* is considered by most international lawyers to be among those mechanisms that structure the international legal order as a whole and are hence given much importance. Likewise, it does not seem particularly pertinent for the argument developed here to put forward any sophisticated model of what constitutes a social construct. It is true that any finding about the social existence of *jus cogens* is itself the outcome of some cognitive and normative choices as well as a certain view on which practice should be recognised as constitutive of the social existence of *jus cogens*. Such models of social construct and thus the presuppositions they are built on are sometimes discussed in the literature.[31] Disclosing such presuppositions or discussing such theories is not necessary for the argument made here. The purpose of this chapter is not to refine the construction of *jus cogens* as a social fact. The social existence of *jus cogens* is, for the sake of this contribution, presupposed. This normative assumption (and all the choices that lie behind it) are consciously left unexplained. This is why, rather than providing an empirical account of the success of *jus cogens* or embarking on a refinement of current models of cognition of *jus cogens* as a social fact, it has been decided to primarily reflect on the driving forces which have made *jus cogens* such a resounding social success and which have condemned the deniers to constitute, at best, a marginal band of troublemakers.

The drivers behind this social success are unsurprisingly multifold and diverse. Two specific drivers deserve to be mentioned here as they seem to inform most international lawyers. First, *jus cogens* helps international lawyers project a more systemic and organised image of an otherwise rather rambling legal order. Second, *jus cogens* also spawns a representation of a more morally cohesive international

[31] They sometimes seem to oscillate between a veiled consensualism and a disguised social morality. See Hameed 2014. It is noteworthy that this construction seems to be hanging between consensualism and morality. Indeed, by equating law officials to states, it falls back into a veiled form of consensualism (ibid., at 85–89); by making *jus cogens* status depend on social morality, it makes *jus cogens* fall back on naturalism (ibid., at 79).

legal order. In that sense, the resounding social acceptance of *jus cogens* can be explained by its system-enhancing and morally structuring virtues (1). It will then be shown that *jus cogens* simultaneously unleashes unbridled creativity among international lawyers who have found in this concept a tool to make more ambitious demands on international law itself (2).

4.2.1 A More Systemic and Morally Cohesive International Legal Order

Jus cogens comes with systematising virtues for it allows international lawyers to think of international law as a system. For most international lawyers, *jus cogens* introduces not only formal techniques of non-derogation,[32] but also normative hierarchy based on normative, rather than formal, criteria.[33] In this sense, *jus cogens* is construed as systematising international law both formally and substantively.[34] It makes international law more sophisticated, both in the consciousness of international lawyers themselves or in front of third parties, like domestic lawyers or policy-makers. It has even been said that *jus cogens* is a sign of the maturity of the international legal order.[35] In the light of its system-enhancing virtues, it is no coincidence that *jus cogens* has been made one of the central paradigms of those frameworks put forward to describe international law as an emerging constitutional legal system.[36] In the same vein, it is seen as constituting an anti-fragmentation tool[37] or an 'international common law'.[38] International lawyers also consider some rules of *jus cogens* as having a constitutional character in themselves.[39]

Another important driver behind the embrace of the notion lies in its projection of a morally cohesive international legal order.[40] For many international lawyers, by virtue of *jus cogens*, the international legal order seems to positivise some morality and allow the international legal order to rest on shared moral foundations.[41]

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[32] See generally Kolb 2001. For a criticism, see Dupuy 2002, at 281. For a rebuttal of the argument of Dupuy, see Kolb 2015, at esp. introduction.

[33] Dupuy 2002.

[34] It is interesting to note that the disruption of the systemic character of international law is sometimes what leads scholar to reprove the notion. Weil 1983, at 424–428. See also Combacau 1986, at 102. On this argument, see the critical remarks of Dupuy 2002, at 271.

[35] Kolb 2015. Kolb, however, rejects the idea that *jus cogens* amounts to public policy. He argues that it is a consequence thereof.

[36] See generally de Wet 2006a, b; Peters 2012; Cassese 2012, at 123; Peters 2006; and Vidmar 2012. For some critical remarks, see Zemanek 2011, at 398–399.

[37] Paulus 2005, at 322.

[38] Weatherall 2015b.

[39] This is what has been claimed in relation to *pacta sunt servanda*. See Janis 1988, at 362.

[40] For some critical remarks, see Bianchi 2008, at 497.

[41] Verdross 1937, at 572.

In doing so, *jus cogens* helps international lawyers fulfil their moral needs[42] and simultaneously gives them the impression that international law is in a position to make moral demands on the world. Such virtues are particularly treasured by those scholars who see in *jus cogens* an emanation of natural law and morality.[43]

It must be acknowledged that the above-mentioned systemic and moral cohesion found by international lawyers in *jus cogens* has sometimes severely been taken issue with. For instance, it has sometimes been objected that the values the universalisation of which is sought by virtue of *jus cogens* boil down to the values of the prevailing social forces in the international community[44] and can be construed as privileging certain groups.[45] Likewise, it has been claimed that *jus cogens* is a tool at the service of a hegemonic enterprise.[46] In the view of the author, these charges—which probably apply to international law as a whole[47]—are hardly refutable. *Jus cogens* puts in place a world of possibilities and impossibilities that reflect a certain understanding of order. Interestingly, these charges have never precluded the notion from being a resounding social success. Nor have they sufficed to inhibit international lawyers from continuing to find in *jus cogens* a useful systematising and moralising tool.

4.2.2 An Infinite World of Possibilities and Impossibilities: The Creative Pull of Jus Cogens

Claiming that the idea of *jus cogens* is deeply embedded in the consciousness of international lawyers due to its systematising and morally structuring virtues is certainly not very revolutionary. More interesting is probably the unparalleled creativity, which *jus cogens* unlocks among international lawyers, and which makes it

[42] Ruiz Fabri 2012, at 1050.

[43] See, e.g., Janis 1988, at 361–362; Dubois 2009; Onuf and Birney 1974; and O'Connell 2012, at 84. As is well known, the inference of *jus cogens* from natural law already invoked at the Vienna Conference. See, e.g., the statements of the representative of Mexico, Lebanon, Nigeria, Italy, Ecuador, Uruguay, Ivory Coast, Monaco, U.N. Conference on the Law of Treaties, Summary records of the plenary meetings and the Committee of the Whole, 1st session, A/CONF.39/11, 26 March–24 May 1968, at 294, 297, 298, 303, 311, 320, and 324.

[44] Bianchi 2008, at 491 and 507 (citing Levi Strauss 1958, at 227–255 and Bourdieu 1976, at 122).

[45] It has been claimed that the values vindicated through *jus cogens* are not properly universal 'as its development has privileged the experience of men over those of women, and it has provided a protection to men that is not accorded to women'. See Charlesworth and Chinkin 1993, at 65.

[46] Koskenniemi 2005b, at 113–125; and Koskenniemi 2012, at 3–13. See also the objections by Dupuy 2005, at 131.

[47] Because international law seeks the universalisation of certain societal standards and its imposition to the whole community and inevitably suffers from the charge of hegemony, one may wonder whether the charge makes any sense.

even more attractive.[48] Indeed, thanks to *jus cogens*, international lawyers have felt that more could be expected from their systemic and morally cohesive legal order. This is how they have come to find that the traditional legal effects associated with *jus cogens* were too modest and overly limited. By virtue of *jus cogens*, the allegedly systemic and morally cohesive international legal order remains an 'unfinished revolution',[49] leaving international lawyers with an urge to make use of its irresistible power[50] to finish the business. This is what is called here the creative pull of *jus cogens*.

The creative pull of *jus cogens*—which has sometimes sarcastically been called a 'magic'[51] or a 'do-it-all'[52] trick—explains why international lawyers have quickly envisaged a wide variety of new legal effects beyond the traditional non-derogability in the law of treaty[53] or the consequences in the law of state responsibility in case of serious breaches of *jus cogens*.[54] Such a promotion of *jus cogens* beyond the law of treaties or the law of responsibility does not only pertain to the inexistence (or voidness) of customary rules[55] or unilateral acts[56] contradictory to *jus cogens*—an extension that had been anticipated. It is well known that *jus cogens* is nowadays frequently invoked to deny state immunity in case of violations of *jus cogens* obligations.[57] Yet, many other possibilities and impossibilities have been advocated. The range of legal effects associated with *jus cogens* include the bindingness of *jus cogens* norms on all parties to succession,[58] its impact on

[48] On the creativity of international lawyers in relation to *jus cogens*, see generally Linderfalk 2008, at 853–871. See also below section 4.2.2.

[49] Dupuy 2002, at 310 (he speaks of 'révolution inachevée').

[50] Parker and Neylon 1989, at 442.

[51] Bianchi 2008, at 491–508.

[52] This is the idea of 'notion à tout faire' mentioned by Pellet 2006, at 422.

[53] Gaja 1981, at 271–316; Barberis 1970, at 19; Verhoeven 2008b, at 133; Paul 1971, at 19; Sztucki 1974, at 73; and Scheuner 1967, at 520. On *jus cogens* as a non-derogability technique, see Kolb 2001. For a criticism, see Dupuy 2002, at 281. For a rebuttal of the argument of Dupuy, see Kolb forthcoming.

[54] These consequences comprise non-recognition, non-assistance, the obligation to cooperate and the non-applicability of circumstances precluded wrongfulness. Gaja 1981, at 290–301; Scobbie 2002, at 1201–1220; Tams and Asteriti 2013; Wyler and Castellanos-Jankiewicz 2014, at 284–311; Wyler 2003, at 105; Crawford 2010, at 405; and Cassese 2010, at 415. For the effects of *jus cogens* in the law of state responsibility, see Gaja 1981, at 290–316; Hannikainen 1988, at 249 and 301. More specifically on the obligation not to recognise, see Talmon 2006, at 99–126; Christakis 2006; and Pert 2013.

[55] Suy 1967, at 75; and Zemanek 2011, at 393.

[56] Zemanek 2011, at 394–395.

[57] There is abundant scholarship on this question. See, among others, Cannizzaro and Bonafé 2011, at 825–842; Cannizzaro 2011, at 437–440; Cassese 2012, at 161; Giegerich 2006, at 203; Caplan 2003, at 741; Knuchel 2011, at 149. More recently, on the controversy related to the *Germany v Italy* case, see Vidmar 2013; Verhoeven 2014; Talmon 2012; and Espósito 2013.

[58] Conference on the Former Yugoslavia, Arbitration Commission, Opinion No. 1, 1992, 31 ILM 1488, 1495, para 1.

the recognition of states,[59] the duty of judicial notice of a contradiction to *jus cogens* in the absence of invocation by the parties,[60] its consequences on the legality of domestic policies and actions related to a breach of *jus cogens*,[61] the obligations to nullify domestic law manifestly contrary to *jus cogens*,[62] a duty to investigate and prosecute crimes of *jus cogens*,[63] an assumption of universal jurisdiction (for so-called *jus cogens* crimes),[64] an obligation *aut dedere aut iudicare*,[65] the interdiction or invalidity of amnesties,[66] the invalidation of popular initiatives in favour of legislation in contradiction to *jus cogens*,[67] a duty to exercise diplomatic protection,[68] universal bindingness on non-state actors,[69] the invalidity of UN Security Council resolutions contrary to *jus cogens*,[70] the disqualification of a sovereign act,[71] the increased competence of executive bodies of international organisations,[72] or possible new constraints (or argumentative empowerment) in

[59] Conference on the Former Yugoslavia, Arbitration Commission, Opinion No. 3, 4 July 1992, 31 ILM 1521; Cassese 2012, at 161.

[60] Verhoeven 2008a, at 234. This had already been mentioned by Verdross in his seminal article. Verdross 1937, at 577.

[61] *Prosecutor v. Furundzija*, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 157. This could be read as providing an obligation for states to eliminate the consequences of acts performed in reliance of provisions in conflict with peremptory norms. For a discussion of such a possible interpretation of the decision of the Trial Chamber, see de Wet 2004, at 98.

[62] Cassese 2012, at 162.

[63] *Prosecutor v. Gbao*, SCSL, Appeals Chamber, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Case No. SCSL-2004-15-AR72, 25 May 2004, para 10. See also *La Cantuta v Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 162, 29 November 2006, para 157.

[64] Bassiouni 1996, at 63; and Orakhelashvili 2006, at 288–317. See also *Almonacid-Arellano v Chile*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 154, 26 September 2006, para 153; German Bundersverfassungsgericht, 2nd Senate, 1290/99, Order of 12 December 2000, para 17; *Prosecutor v. Furundzija*, paras 155–156.

[65] *Goiburu et al. v Paraguay*, IACtHR, Merits, Reparations and Costs, Series C No. 153, 22 September 2006, para 132.

[66] Orakhelashvili 2006, at 223–238; and Cassese 2012, at 162.

[67] See Article 139(3) of the Swiss Constitution.

[68] See Annemarieke Vermeer-Künzli 2007, at 553–581 (with an emphasis on *erga omnes* obligations). It was considered in *Kaunda case,* South African Constitutional Court, 2004, 136 ILR 463, at 503–504.

[69] Conklin 2012, at 83.

[70] Orakhelashvili 2006, at 413–448.

[71] *Sarei v. Rio Tinto, PLC, Rio Tinto Limited*, US Court of Appeals for the Ninth Circuit, No. 02-5625, Decision of 12 April 2007, at 4147.

[72] Verdross 1937, at 577.

the doctrine of interpretation.[73] Other specific legal effects have been discussed in the law of the sea[74] or in international investment law.[75] Even in its 'breeding areas' like the law of treaties and the law of responsibility, new legal effects have been envisaged, like the provisional non-application of treaty norms that are in contradiction with *jus cogens*,[76] the inadmissibility of treaty reservations contrary to *jus cogens*,[77] a new sort of exception of non-execution,[78] or new aggravated responsibility for violations of human rights of *jus cogens* character beyond the consequences already provided by the Articles on State Responsibility.[79]

The newly designed possibilities and impossibilities associated with *jus cogens* are thus aplenty. It is important to note that such creativity has not only been a scholarly phenomenon. Indeed, domestic and international judges have gladly contributed to the blossom of new legal effects associated with *jus cogens*, the Inter-American Court of Human Rights[80] and international criminal courts[81] as well as the domestic courts of some countries[82] faring high among these creative architects.

Even if some of the above-mentioned 'new' legal effects of *jus cogens* have been spearheaded by some authoritative courts, the extension of *jus cogens* beyond the

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[73] Orakhelashvili 2006, at 164–176. The case-law of the Inter-American Court is very illustrative in this respect. See, e.g., *Juridical Condition of the Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion, Series A No. 18, 17 September 2003.

[74] Imbler 2007, at 747.

[75] Vinuales 2008, at 79.

[76] Conforti 2006, at 166–167 (cited by Focarelli 2008, at 441).

[77] *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), ICJ, Judgment of 20 February 1969, Separate Opinion of Judge Padilla Nervo, at 97; ibid., Dissenting Opinion of Judge Tanaka, at 182; ibid., Dissenting Opinion of Judge Sorensen, at 248; *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v Rwanda*), ICJ, Jurisdiction of the Court and Admissibility of the Case, Judgment of 3 February 2006, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada and Simma, para 29. See also UN Human Rights Committee, General Comment No. 24 1994, para 8; Cassese 2012, at 161. On this debate, see generally Linderfalk 2004, at 213–234.

[78] Cassese 2012, at 161.

[79] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001. See *Myrna Mack Chang v Guatemala*, IACtHR, Merits, Reparations and Costs, Series C No. 101, 25 November 2003, para 139; and *Masacre Plan De Sanchez v Guatemala*, IACtHR, Merits, Series C No. 105, 29 April 2004, para 51; *Juridical Condition of the Rights of the Undocumented Migrants*, para 106. The aggravated consequences have however been deemed limited in the literature. See the remarks of Maia 2009, at 271–311, esp. 303–309. See also Tigroudja 2006, at 638.

[80] Maia 2009, at 271–311; and Alvarez-Rio and Contreras-Garduno 2013, at 167–192.

[81] See, e.g., Bassiouni 1996, at 63.

[82] See, e.g., *Prefecture of Voiotia v. Federal Republic of Germany*, Areios Pagos (Hellenic Supreme Court), Case No. 11/2000, May 4, 2000, 129 ILR 513, at 514, note 54; *Ferrini v. Federal Republic of Germany*, Italian Supreme Court, Decision No. 5044/2004, 11 March 2004, 128 ILR 658, at 660.

law of treaty and the law of responsibility continues to fuel severe controversies. There is obviously no agreement among international legal scholars as to the legal effects, which *jus cogens* should bear, all those extensions beyond the law of treaties and the law of responsibility being championed by more progressive legal scholars and judges. It is noteworthy that even the effects of *jus cogens* that are traditionally recognised within the law of treaties have given rise to disagreement, as is illustrated by the divergence between the Vienna Convention on the Law of Treaties and the International Law Commission Study on the Fragmentation of International Law.[83] In the same vein, the very nature of those effects associated with *jus cogens* have proved a bone of contention, some scholars claiming that such legal effects are themselves peremptory,[84] something highly contested by others.[85]

It will not come as a surprise that, irrespective of such specific disagreements, the creativity that comes with this wide range of new effects has not always been perceived very favourably. This creativity is sometimes bemoaned as being the alarming action of the sorcerer's apprentice[86] opening Pandora's box,[87] creating a 'big bang',[88] or being self-defeating.[89] Similarly, such inventiveness has been ridiculed as the manifestation of international lawyers' venture into magic.[90] Those criticisms do not need to be addressed here. What matters is to highlight that the creative thinking manifested by international lawyers in relation to *jus cogens* is both a driver of the social success for *jus cogens* and an evidence thereof. Indeed, if international lawyers, be they scholars or judges, deploy such creative thinking about the possibilities and impossibilities allowed by *jus cogens*, it is because *jus cogens* is very central to their understanding of international law. Said differently, the progressivity demonstrated by international lawyers in their thinking about the legal effects of *jus cogens* is the result of *jus cogens* being a widespread social construct.

4.3 *Jus Cogens* as a Construct Without Pedigree

Claiming, as was done in the previous section, that *jus cogens* is deeply embedded in the discourses as well as in the consciousness of international lawyers by virtue of its projection of a more systemic and morally cohesive legal order in addition to

[83] This disagreement pertains to the divisibility of treaties found contrary to *jus cogens*. Compare with Article 44(5) VCLT; and Fragmentation of international law, at 155.

[84] Contra Orakhelashvili 2006, at 580; Focarelli 2008, at 445; Cassese 2005, at 205; and Shelton 2006, at 291.

[85] Kolb 2015, at esp. chapter 6; Linderfalk 2011, at 375–376; and Linderfalk 2013, at 369–389.

[86] Weil 1983, at 429–430.

[87] Linderfalk 2008, at 853–871.

[88] The expression is from Kolb 2015, at esp. chapter 6.

[89] See the remarks of Bianchi on this point Bianchi 2008, at 506.

[90] Ibid., at 491–508.

its creative pull is probably not controversial.[91] More contentious is the point made in this section according to which *jus cogens*, while being embraced and used by an overwhelming majority of international lawyers, has remained a social construct without pedigree. Indeed, international lawyers have fallen short of questioning (and reflecting upon) the origins of the notion (and that of its world of possibilities and impossibilities). Said differently, international lawyers have shown little interest in the unraveling of the foundations of this notion and have simply moved on and zeroed in on other *problématiques*. In this sense, the idea of *jus cogens*—and the possibilities and impossibilities that come with it—have been left floating in the discourses and consciousness of international lawyers without any pedigree by virtue of a whole range of pedigree avoidance-techniques. It is argued here that in backing away from foundational debates and embracing a pragmatist position, international lawyers have condemned *jus cogens* to eternally being a construction without any foundation in the system of thoughts of international law.[92]

This section is structured as follows. The argument made here first necessitates that the pedigree of those rules to which a *jus cogens* character is attached be distinguished from the pedigree of the mechanism whereby the legal effects relating to the *jus cogens* character are produced. This is the object of the first sub-section, which sketches out the way in which international lawyers have commonly understood the pedigree of *jus cogens* norms (1). The second sub-section spells out the various ways in which the question of the pedigree of the mechanism of *jus cogens* has been skirted or avoided by international lawyers (2).

4.3.1 The Pedigree of Jus Cogens Norms

A few preliminary jurisprudential considerations are indispensable to clarify the scope of the argument made here. As is well known, primary rules of international law—that is rules of conduct—are commonly anchored in the international legal order by virtue of the doctrine of sources. The doctrine of sources is usually the construction whereby primary rules are given a formal pedigree and a membership to the international legal order.[93] Yet, the necessity to anchor rules into the legal order is, however, not restricted to primary rules. Indeed, international lawyers have always felt the need to anchor secondary rules—i.e. the systemic mechanisms about how primary rules should function—in the system of thoughts of international law and give them, like to primary rules, a membership to the very legal order they help create and function. In other words, it has always been

[91] Hameed 2014, at 55; and Dupuy 2002, at 271.

[92] For a similar finding, see Danilenko 1991, at 43; Simma 1995, at 53; and Saul 2014, at 26–54. See also the account of Focarelli 2008, at 429–459; and Zemanek 2011, at 409.

[93] On this question, see d'Aspremont 2011.

assumed by international lawyers that secondary rules, just like primary rules, must present some legal pedigree. It is well known that the legal pedigree of systemic mechanisms (secondary rules), and their embedding in the legal order that they help create and function, have always constituted one of the most debated questions in jurisprudence and international legal theory is no different in this respect.[94] Yet, whilst the foundations of the most central systemic mechanisms (secondary rules) have been widely debated in international legal scholarship, the pedigree of *jus cogens* has remarkably been neglected by most international lawyers. In contrast to sources or responsibility, the mechanism of *jus cogens* has often been left without any debate on its formal embedding in the international legal order.

To understand the point made here, an additional distinction is necessary. The pedigree of those rules to which a *jus cogens* character is added ought to be distinguished from the pedigree of the very construction whereby some legal effects are attached to their *jus cogens* nature. This distinction between *jus cogens* norms and the mechanism of *jus cogens* itself is not new. In the literature, a wide variety of dichotomies have been put forward to capture the difference between the mechanism of *jus cogens* itself and the rules at the advantage of which such a mechanism produces its legal effects. For instance, distinctions are made between first order rules of *jus cogens* and second order rules of *jus cogens*[95] or between the rules belonging to the public order and the mechanism of public order.[96] Although they are not all strictly identical and some variations in content are observed, all these dichotomies point to the very same distinction: the distinction between the rules to which the very status of *jus cogens* is recognised and the legal effects of *jus cogens* are attributed and the very mechanism of *jus cogens* whereby legal effects attached to *jus cogens* status are produced. In the literature, the distinction between *jus cogens* norms and the mechanism of *jus cogens* is usually made to show that the mechanism of *jus cogens* itself is not necessarily of a *jus cogens* character.[97] For the sake of this chapter, the distinction is made with a view to showing that the pedigree of one has not been approached by international lawyers in the same way as the pedigree of the other.[98]

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[94] The debate has been particularly fierce in connection to the sources of international law. See Cohen 2012, at 1049; Besson 2010, at 163–185; and d'Aspremont 2013, at 103–130.

[95] Linderfalk 2011, at 359–378; Linderfalk 2013, at 369–389.

[96] Verhoeven 2008a, at 231.

[97] On the idea that 2nd order rules are not *jus cogens* but customary rules (as a result customary law can explain the effect of *jus cogens* without a self-explanatory and self-referential detour to *jus cogens* to explain the effect of *jus cogens*), see Linderfalk 2011, at 375–376; and Linderfalk 2013, at 369–389. For the exact opposite position, see Cassese 2005, at 205. See generally Hannikainen 1988; Shelton 2006, at 291; and Focarelli 2008, at 429.

[98] For an exception, see Linderfalk who anchors the *jus cogens* mechanism in the international legal order by virtue of the mechanism of customary international law. Linderfalk 2011, at 375–376; and Linderfalk 2013, at 369–389.

A remark is warranted on what is meant by *jus cogens* mechanism. Despite being reminiscent of similar distinction found in the literature, the notion of *jus cogens* mechanism—by opposition to *jus cogens* norms—is not self-evident. Indeed, all the legal effects of *jus cogens*—as they were outlined above[99]—are usually scattered across various regimes. Even the non-controversial and traditional legal effects of *jus cogens* are found in two distinct regimes, i.e. the law of treaties and the law of responsibility. In this sense, it may seem idiosyncratic to speak of a *jus cogens* mechanism as a self-standing and unitary notion. It is submitted here, however, that the fact that the legal effects are found in several specific 'areas' does not automatically pluralise and fragment the question of the pedigree of *jus cogens* mechanism. It is not because such legal effects are produced under different umbrellas that the whole mechanism of *jus cogens* needs, for the sake of its pedigree, be similarly disaggregated. In that sense, this chapter adopts a holistic concept of the *jus cogens* mechanism whereby it is seen as one single construct in need of the same foundations.[100]

With the distinction between the pedigree of *jus cogens* norms and the pedigree of the *jus cogens* mechanism itself in mind, it is now possible to develop the argument further and formulate a few observations about how international lawyers construe the pedigree of *jus cogens* norms. It will probably not come as a surprise that international lawyers resort to the doctrine of sources to explain the pedigree of those norms benefiting from *jus cogens* status to the international legal order. In other words, and although a special status is recognised to such norms, the legal pedigree of *jus cogens* norms is traditionally established by virtue of the doctrine of sources. This does not mean that no variations are observed. Diverging sources-based constructions have been designed in this respect and must be outlined here.

There is a first group of international lawyers who claim that *jus cogens*-making operates as a distinct source of law.[101] In the same vein, some scholars contend that *jus cogens* norms are made by virtue of a special process where a double consent is expressed,[102] that they depend on *jus cogens*-specific manifestations of consensus,[103] or that they constitute a special type of customary law where *opinio juris* is understood differently[104] or where state practice is downplayed.[105] Such views are sometimes echoed in judicial practice.[106] It is well known that, despite

[99] See Sect. 4.2.2 above.

[100] For a similar point, see Cannizzaro 2011, at 440.

[101] Onuf and Birney 1974, at 195; Christenson 1988, at 592; Monaco 1983, at 606; Vidmar 2012, at 13; Orakhelashvili 2006, at 104–105; and Hernandez 2014, at 218–219.

[102] Gomez Robledo 1981, at 105; de Wet 2013, at 541–561; and de Hoog 1996, at 45–46.

[103] Verdross and Simma 1984, at 324; and Kolb 1998, at 93.

[104] Linderfalk 2008, at 862; and Reuter 1995, at 143.

[105] Henkin 1989, at 60 and 216; Schachter 1988, at 734; Sur 1988, at 128; Orakhelashvili 2006, at 301–302; and Tomuschat 1993, at 307.

[106] *Michael Domingues v United States*, IACsionHR, Merits, Case 12.285, Report No. 62/02, Merits, 22 October 2002, para 5.

the fact that such understanding of *jus cogens*-making did not seem to enjoy much support during the Vienna Conference,[107] it is the possibility of introducing a new form of law-making that would be less dependent on state consent that led some countries like France to reject the Vienna Convention on the Law of Treaties.[108]

The idea that *jus cogens* norms are made through new and specific sources is, however, not the dominant source-based approach to the pedigree of *jus cogens* norms. The great majority of scholars establish the pedigree of *jus cogens* norms through the traditional sources of international law without resorting to the idea of a specific or distinct source. Most of these scholars resort to the doctrine of customary international law,[109] sometimes claiming that *jus cogens* existed by virtue of customary law even before the adoption of the Vienna Convention.[110] It is even said that the insertion of the reference to the acceptance and recognition by the international community of states as a whole was a means to anchor Article 53 VCLT in Article 38 of the Statute of the International Court of Justice[111] and especially in the doctrine of customary international law.[112] Those scholars usually find support for their customary law-based approach in a few decisions of international courts, most notably the International Court of Justice's decision in the case on questions related to the *obligation to prosecute or extradite* (Belgium v. Senegal).[113] Others have found that general principles constitute a better breeding ground for *jus cogens* norms.[114] Eventually, there are scholars who claim that *jus cogens* can be grounded in a variety of sources at the same time.[115] Whatever such variants, grounding *jus cogens* in the existing formal sources seems to have been

[107] Danilenko 1991, at 49.

[108] U.N. Conference on the Law of Treaties, Summary records of the plenary meetings and the Committee of the Whole, 1st session, A/CONF.39/11, 26 March–24 May 1968, at 94.

[109] Restatement (Third) of Foreign Relations of the United States, para 102; Ragazzi 1997, at 53; Paust 1981, at 82; D'Amato 1971, at 111 and 132; Meron 1987, at 350; Linderfalk 2011, at 359; Linderfalk 2013, at 369; Byers 1997, at 220; Dupuy 2002, at 275–276; Verhoeven 2008a, at 231; Sztucki 1974, at 75; Conforti 1988, at 129. For a criticism of this *jus cogens*-based approach, see Janis 1988, at 360; Dubois 2009, at 133 and 175; and Verhoeven 2011, at 305.

[110] Alexidze 1981, at 230–232; Macdonald 1987, at 132.

[111] 1945 Statute of the International Court of Justice, 33 UNTS 993.

[112] This reading of the *travaux* is put forward by Ragazzi 1997, at 53.

[113] See *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), ICJ, Judgment of 20 July 2012, para 99. For Saul, this judgment seems to indicate that *jus cogens* comes from customary law. Saul 2014, at 7. See also *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, XX RSA 119, para 44. For a detailed discussion of the case-law of the ICJ in relation to *jus cogens*, see Hernandez 2014, at 229–236.

[114] H. Lauterpacht, Special Rapporteur, Report on the law of treaties, UN Doc. A/CN.4/63, 24 March 1953, at 155; Reuter 1995, at 145; and Alston and Simma 1988. See also *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, para 44.

[115] Alexidze 1981, at 256; and Kolb 1998, at 69 and 105.

the dominant view during the Vienna Conference,[116] and what the International Law Commission seems to have supported in its subsequent work.[117]

Among all those scholars resorting to the doctrine of sources to anchor *jus cogens* rules in the international legal order, a third group of scholars can also be identified as they adopt a series of blended approaches. According to them, *jus cogens* norms are the result of deductive and inductive processes in that they are deducted from positive values and allegedly validated by formal sources,[118] courts and tribunals being usually given a very prominent role in the verification of such blended criteria.[119] Interestingly, it is this specific blended understanding of the pedigree of *jus cogens* norms that, albeit not being necessarily dominant, had caught the attention of those critical works that have sought to highlight the contradiction at the heart of legal argumentation on *jus cogens*.[120]

It is not necessary, for the argument made here, to dwell any further on the various understandings of the pedigree of *jus cogens* norms found in literature and practice. The point made here is that, while international lawyers have been actively debating conceptualisation of the pedigree of *jus cogens* norms, they have remained silent on the question of the foundation of the *jus cogens* mechanism itself, that is, the mechanism whereby legal effects attached to the *jus cogens* norms are produced.[121]

4.3.2 The Pedigree of the Jus Cogens Mechanism and Avoidance-Techniques

This section depicts the dominant attitudes witnessed in scholarship and case-law about the pedigree of the *jus cogens* mechanism itself, that is, the pedigree of what

[116] This is the opinion of Danilenko 1991, at 49. He cites the statement of Greece, Cuba, Poland, Italy, Ivory Coast, Cyprus, USA, and Bulgaria (U.N. Conference on the Law of Treaties, Summary records of the plenary meetings and the Committee of the Whole, 1st session, A/CONF.39/11, 26 March–24 May 1968, at 295, 297, 302, 311, 321 and 387; and U.N. Conference on the Law of Treaties, Summary records of the plenary meetings and the Committee of the Whole, 2nd session, A/CONF.39/11/Add.1, 9 April–22 May 1969, at 102).

[117] International Law Commission, Report of the International Law Commission on the work of its twenty-eighth session, 28th session, UN Doc. A/31/10, 3 May–23 July 1976, at 86.

[118] Verdross 1937, at 573; Hameed 2014, at 78; Simma 1995, at 34 and 53; Dubois 2009, at 133; H. Lauterpacht, Special Rapporteur, Report on the law of treaties, UN Doc. A/CN.4/63, 24 March 1953, at 154; Ragazzi 1997, at 57; Hannikainen 1988, Part II.

[119] Cassese 2012, at 158 and 164. See the critical remarks of Ruiz Fabri 2012, at 1049.

[120] Simpson writes: 'The scoffing of the voluntarist is never far away when the phrase "common good" is invoked.' Simpson 1991, at 182. See also Koskenniemi 2005a, at 322. Koskenniemi understands *jus cogens* as being built on ascending (consensualist) and descending (non-consensualist) modes of argumentation and inevitably condemned to collapse in either naturalism or voluntarism.

[121] An exception is provided by Linderfalk, who anchors the *jus cogens* mechanism in the international legal order by virtue of the mechanism of customary international law. See Linderfalk 2011, at 375–376; and Linderfalk 2013, at 369.

Linderfalk has called 'second order *jus cogens*'.[122] It specifically sheds light on the various avoidance-techniques that have been embraced by international lawyers when it comes to the embedment in the international legal order of the mechanism whereby legal effects are attached to those norms deemed of a *jus cogens* nature.

Although they do not always rigorously distinguish between the question of the pedigree of *jus cogens* norms and that of the pedigree of the *jus cogens* mechanism and sometimes tend to conflate the two, occasional overviews of such scholarly discussions can be found in the literature.[123] It is, therefore, not necessary to provide an overly detailed comprehensive account here. The sketch provided here limits itself to showing that the distinct attitudes reported here—none of them having really imposed themselves decisively[124]—epitomise an overall inclination of international lawyers to avoid the question of the pedigree of the *jus cogens* mechanism, i.e. that of its formal embodiment in the international legal order. Indeed, as the following paragraph will show, all such theories and constructions constitute a distinct manifestation of the pedigree avoidance-attitude of international lawyers when it comes to the question of the foundations of the *jus cogens* mechanism itself. It should be noted that, albeit grounded in distinct conceptual and methodological moves, those various avoidance-techniques are not always exclusive of one another, for many scholars tend to resort to several justificatory constructions at the same time.[125]

Those avoidance-techniques which set the question of the pedigree of the *jus cogens* mechanism aside can be summarised as follows:

1. Mention must first be made here of the common claim of the pedigree mentioned above—that the question of the pedigree has been clinched once and for all by the extensive use of *jus cogens* by courts and tribunals.[126] In relation to *jus cogens*, such an empiricist posture constitutes the most common pedigree avoidance-technique of international lawyers.[127] Yet, it is important to realise

[122] Linderfalk 2011, at 359; Linderfalk 2013, at 369. As is mentioned above, Linderfalk uses this distinction to anchor. The *jus cogens* mechanism in the international legal order by virtue of the mechanism of customary international law.

[123] For a comprehensive overview of the various approaches found in the literature, see Kolb 1998, at 69 and 105; Kolb 2001, 2015, at esp. chapter 3; Cannizzaro 2014, at 261–270; Zemanek 2011, at 381–410; Hameed 2014, at 52; and Criddle and Fox-Decent, 2009, at 331.

[124] Danilenko 1991, at 64; Linderfalk 2011, at 359; Linderfalk 2012, at 3; Hameed 2014, at 52; Shelton 2006, at 299–302; Cassese 2012, at 158; Cannizzaro 2014, at 270.

[125] See, e.g., Orakhelashvili 2006, at 7–132.

[126] This is not unheard of in relation to other doctrines of international law as well. In relation to customary international law, see, e.g., Sir M. Woods, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, para 4. 'The main materials for seeking guidance on the topic were decisions of international courts and tribunals, in particular the International Court of Justice.'

[127] See e.g. Fragmentation of international law, at 183, para 363 and at 190, para 377; Meron 2003, at 202; O'Connell 2012, at 79. For a discussion of the case-law of the ICJ in relation to *jus cogens*, see Hernandez 2014, at 229–236.

that such a pedigree avoidance-technique rarely operates in isolation. It could even be contended that the refuge in judicial empiricism is made possible by virtue of a series of other pedigree avoidance-techniques. Indeed, if international lawyers can afford their post-ontological nonchalance and a refuge in judicial empiricism it is because they have managed to first push the question of the foundations of the mechanisms aside. It is only once they have circumvented the questions of the pedigree that it becomes possible to espouse the convenient judicial empiricism with a view to focusing on non-foundational debates on the identification of *jus cogens* norms and their legal effects. Those supplementary pedigree avoidance-techniques are described in the following paragraphs.

2. As is well known, there are those scholars for whom *jus cogens* is derived from natural law or universal values.[128] This refuge in natural law constitutes a pedigree avoidance-technique rather than a foundation *per se* for, being grounded in natural law, *jus cogens* comes to constitute a self-justificatory notion that is no longer in need of additional foundation.[129] The question of the foundation is thus played down by virtue of a deductive move based on presupposed universal moral standards or values.[130]
3. The pedigree avoidance-approaches based on natural law are often countered by claims that the mechanism of *jus cogens* was 'positivised' by the 1969 Vienna Convention on the Law of Treaties without any further indication as to the specific means whereby the *jus cogens* mechanism is anchored in the international legal order.[131] These views equally constitute a pedigree avoidance-technique, for Articles 53 and 64 VCLT accordingly suffice to justify the proper embodiment of the mechanism of *jus cogens* in international law.
4. A few scholars have put forward a more structural and organic understanding of *jus cogens*, which equally circumvent the question of the pedigree of the mechanism of *jus cogens* itself. This approach—which rests on similar deductive moves as the natural law approach [132]—elevates *jus cogens* in an inherent element of the legal system and derives it from international law itself.[133] *Jus cogens* is said to be axiomatic[134] and therefore no longer in need of formal

[128] Janis 1988, at 361–362; Dubois 2009; O'Connell 2012, at 84. At the Vienna Conference, the role of natural law was mentioned. See, e.g., the statements of the representative of Mexico, Lebanon, Nigeria, Italy, Ecuador, Uruguay, Ivory Coast, Monaco, U.N. Conference on the Law of Treaties, Summary records of the plenary meetings and the Committee of the Whole, 1st session, A/CONF.39/11, 26 March–24 May 1968, at 294, 297, 298, 303, 311, 320 and 324.

[129] In the same vein, see Danilenko 1991, at 44.

[130] Focarelli 2008, at 444.

[131] Danilenko 1991, at 46; Gomez Robledo 1981, at 105 and 109; Verhoeven 2008a, at 230; and Fragmentation of international law, at 183, para 362.

[132] Compare with Focarelli 2008, at 446 (who sees it as a blend of deductive and inductive constructions).

[133] Orakhelashvili 2006, at 27.

[134] Verhoeven 2011, at 306.

foundations. Accordingly, it is the legal system that naturally produces hierarchy of norms without the need to anchor such mechanism into either natural law or formal sources. This deductive avoidance-technique has enjoyed a relative success among international lawyers. A slightly more elaborated version of such an axiomatic approach holds that *jus cogens* is an anti-fragmentation and anti-derogation 'technique' inherent in the law, rather than a substantive rule or a source of law.[135] If *jus cogens* is so construed as a technique inherent in the law, the question of its foundation is demoted to a secondary issue for it does no longer seem necessary to formally anchor *jus cogens* in the international legal order.

5. A rather popular attitude,[136] which has sometimes been considered the dominant view,[137] consists of construing *jus cogens* as the expression of an international public order[138] or the expression of an international public policy,[139] a view allegedly first put forward by Mosler.[140] This view is often presented as sufficiently explaining the pedigree of the *jus cogens* mechanism itself, thereby allowing international lawyers to circumvent the formal embedment of *jus cogens* in the international legal order. Such an approach has been criticised for it only provides a causal—rather than ontological—explanation of why certain legal effects have been associated with those norms to which a *jus cogens* status is attached.[141]
6. Some scholars satisfy themselves with the finding that, irrespective of its recognition by courts and tribunals, *jus cogens* is a social product of the system[142] that exists by virtue of the beliefs of certain legal officials.[143] For them, the mere fact that *jus cogens* exists in the consciousness of international lawyers is self-sufficient and does not call for any inquiry into its foundations.[144]

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135 Kolb 2001, at 172–173. See also Kolb 2015, at esp. chapter 3.

136 It has not been spared by criticisms. For some criticisms of the indeterminacy and deductive character of such a foundation of *jus cogens*, see Zemanek 2011, at 385–386.

137 Zemanek 2011, at 383; See also Kolb 2015, at esp. chapter 3.

138 Orakhelashvili 2006, at 7–35; Dupuy 2002, at 281.

139 Mosler 1974, at 33–36. See also the statement of Lauterpacht. H. Lauterpacht, Special Rapporteur, Report on the law of treaties, UN Doc. A/CN.4/63, 24 March 1953, at 155.

140 Zemanek 2011, at 383–384.

141 See also Kolb 2015, at esp. chapter 3.

142 Dupuy 2002, at 271.

143 Hameed 2014, at 52. Weatherall 2015a.

144 The social existence of *jus cogens* and its widespread embedding in the consciousness of international lawyers does not, in itself, explain how the concept ought to be formally anchored, from an internal point of view, into international law. In that sense, the social existence of an idea and its pedigree ought to be distinguished. The confusion between social existence and pedigree is confirmed by the occasional oscillation between some veiled consensualism and moral theory. See, e.g., Hameed 2014, at 52. For some severe criticisms of the conflation between source of authority and status to which legal effects are attached and the risk of unravelling the very bindingness of all norms of international law, see de Wet 2013, at 541–556.

7. Another type of pedigree avoidance-technique consists in contending that *jus cogens* is a source of extra authority rather than a quality of a norm to which specific legal effects are attached. This is a rather idiosyncratic approach to *jus cogens*, which obviously departs from its mainstream understanding as it comes to equate bindingness and peremptoriness.[145] Although unorthodox, this approach has been endorsed by a number of scholars[146] and judges,[147] who have found in *jus cogens* a useful way to enhance the authority of certain norms that are deemed fundamental, and hence enhance the authority of the legal arguments based thereon.[148] Such a reduction of *jus cogens* to a source of authority sometimes permeates those approaches informed by natural law.[149] It is not difficult to understand that once transformed into a source of authority rather than a certain quality of a norm to which specific legal effects are attached, the question of the pedigree turns irrelevant.
8. A last avoidance-technique that ought to be mentioned manifests itself in international lawyers' extensive heed for the identification of the standards that benefit from the legal effects attached to the status of *jus cogens*,[150] that is the identification of what has been called first order or substantive rules of *jus cogens*.[151] Such a pragmatic posture is sometimes presented as a 'third way', which avoids the positivistic and naturalistic pitfalls of the debate on the foundations.[152] This attitude usually presupposes that the identification of *jus cogens* can be carried out in a way that is independent from its foundations.[153]

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145 On this distinction, see Dupuy 2002, at 275.

146 Conklin 2012, at 837; de Londras 2007, at 250; and Criddle and Fox-Decent 2009. It is noteworthy, and also bewildering, that Verdross in his seminal piece on 'Forbidden Treaties' also explains *jus cogens* in terms of compulsory character. See Verdross 1937, at 571.

147 This approach to *jus cogens* also infuses the case-law of the Inter-American Court where the invocation of *jus cogens* comes to support some interpretive constructions, without the legal effects being directly attributable to the *jus cogens* character. For a useful overview, see Maia 2009, at 271–311. There however are a few exceptions where a specific legal effect is attached to the *jus cogens* qualification. See, e.g., *Almonacid-Arellano v Chile*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 154, 26 September 2006, para 153. See also *Goiburu et al. v Paraguay*, para 132.

148 This approach to *jus cogens* has insightfully been called the 'promotional role of jus cogens' by Focarelli 2008, at 429.

149 Dubois 2009, at 155 and 161; and O'Connell 2012, at 80.

150 International Law Commission, Report of the International Law Commission, Jus cogens (Mr. D.D. Tladi), 66th session, UN Doc. A/69/10 Annex, 2014; Gomez Robledo 1981, at 167; Alexidze 1981, at 259; Saul 2014; O'Connell 2012, at 79; Mik 2013, at 27; and Cannizzaro 2014, at 270.

151 On such a distinction, see Linderfalk 2011, at 359; Linderfalk 2013, at 369; Dupuy 2002, at 309; and Focarelli 2008, at 451.

152 Cannizzaro 2014, at 270.

153 This presupposition seems to be made by the recent proposal to include the question of the nature and criteria of identification to the agenda of the International Law Commission. See International Law Commission, Report of the International Law Commission, Jus cogens (Mr. D.D. Tladi), 66th session, UN Doc. A/69/10 Annex, 2014.

This is only true to the extent that the identification inquiry is limited to the so-called first order or substantives rules of *jus cogens*.

The specific avoidance-techniques listed above contrast with the engagement of international lawyers with the pedigree of those norms to which a *jus cogens* status is recognised.[154] Although the indifference of international lawyers towards the question of the pedigree of the mechanism of *jus cogens* itself has been bemoaned,[155] it seems that the great majority of lawyers has found it convenient to embrace an empiricist attitude supplemented by one or several of the other pedigree avoidance-techniques mentioned here.

Needless to say, each of the above-mentioned avoidance-techniques embraced by most international lawyers has its own merits. Some of them are remarkably sophisticated and the expression of some refined scholarly thinking. For the argument made here, it is not necessary to evaluate the conceptual merits of each of them. As was stressed in the introduction above, the point made here is certainly not to advocate any specific and right understanding of the pedigree of the *jus cogens* mechanism. The argument supported by the discussion carried out in this section remains a simple and modest one: *jus cogens* is a social construct that is very central in the legal argumentation of international lawyers but which, by virtue of a variety of pedigree avoidance-techniques sketched out above, has been left without any formal lineage, that is, without any serious embedment in the system of thoughts of international law. *Jus cogens* thus appears as a social construct without any pedigree. That international lawyers are able to live comfortably with patterns of argumentative structures having social existence but no systemic foundations can be very indicative of the various facets of contemporary international lawyers themselves. The concluding section of this chapter elaborates on what such a finding tells us about international lawyers themselves.

4.4 Concluding Observations: The Two-Faceted International Lawyer

This chapter has sought to demonstrate that *jus cogens* and its world of possibilities and impossibilities have been enthusiastically embraced by the overwhelming majority of international lawyers. Indeed, international lawyers have found in *jus*

[154] See section 4.2.1.

[155] On the importance of giving it foundations and explaining its coming to existence. See Linderfalk 2011, at 363. See also D'Amato 1990, at 1–6 (for whom the impossibility of providing such a definition invalidates the notion). See also the recent proposal to include the question of the nature to the agenda of the ILC. International Law Commission, Report of the International Law Commission, Jus cogens (Mr. D.D. Tladi), 66th session, UN Doc. A/69/10 Annex, 2014.

cogens a tool to build a more systemic and morally cohesive international legal order and, due to its creative pull, make more demands on international law and the world. At the same time, it has been shown that international lawyers have turned away from the question of the pedigree of *jus cogens* and have left this mechanism—and its world of possibilities and impossibilities—ungrounded in the system of thoughts of international law.

The finding made in this chapter will probably cast a grim light on the making of the foundational doctrines of international law.[156] Indeed, the foregoing can be read as an invitation to look rather cynically at the carelessness with which international lawyers design those features and mechanisms which they deem the most fundamental and conducive to the systemic character of international law.[157] It is true, however, that such a scholarly phenomenon is not unprecedented. Some of the other major doctrines of international law, like sources, statehood, or institutions, have shared a similar fate, for they are usually grounded in the international legal order very hastily and by virtue of dubious constructions—be they a provision on the applicable law of an international court, a decorative provision in an antiquated convention on the rights and duties of states or an international court's advisory opinion re-interpreted as a 'constitutional' moment.[158] What is more, the historical causal link between the authoritative text from which such doctrines are derived and the modes of legal argumentation they put in place is often very fabricated.

The processes whereby such doctrines are shaped and acquire authority in international law is not what one's attention needs to be drawn to here.[159] Instead, it is argued here that international lawyers' disinterest in the pedigree of *jus cogens* is very symptomatic of some of the various traits of the professionals who have made international law their main argumentative practice. More specifically, the discussion above projects the image of a two-faceted international lawyer. On the one hand, as was discussed in Sect. 4.2, international lawyers seem to value a more systemic and morally cohesive international law and cherish the hope that comes with the remarkable creative pull of *jus cogens*. In that sense, the resounding social success of *jus cogens* epitomises the image of a *hopeful* international lawyer who strives for a better international law and continues to believe that progress will come from sophisticated, systematising and morally-structuring constructions like *jus cogens*. On the other hand, the post-ontological indifference of international lawyers towards the question of the pedigree of the *jus cogens*

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156 On the agenda pursued behind some of the foundational doctrines of international law, see d'Aspremont 2015a.

157 For some similar remarks in connection with the making of the 'rules' on state responsibility, see Lusa Bordin 2014, at 535.

158 For some critical remarks on the gospels constructed around each of the main doctrines of international law, see d'Aspremont 2013, at 103; d'Aspremont 2014, at 201; and d'Aspremont 2015b.

159 Ibid.

mechanism, as was discussed in Sect. 4.3, points to another image of the international lawyer, that is, the one of a *mystic* professional who can live in (and live off) a world of unexplained gospels. In that sense, the account of the debate on *jus cogens* that is provided in this chapter projects an image of contemporary international lawyers as being simultaneously hopeful and mystic.

There does not seem to be anything sensational in the claim that contemporary international lawyers are both hopeful and mystic. Somewhat similar contentions are found in the literature.[160] The image of a two-faceted international lawyer, both hopeful and mystic, is also unproblematic. On the contrary it may simply be the manifestation of both an argumentative practice the main structures of which are theological[161] and the widespread belief of international lawyers that international law bears a 'privileged role as a method of practical intervention in the social world'.[162]

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[160] The idea of mysticism has already been heard. Simpson reported that the idea was used by Watson in a presentation at the American Society of International Law (see Simpson 1991, at 180), but the expression did not make its way to the written transcript of the contribution. Bodansky and Watson 1992, at 108). Rather than speaking of mysticism, many critics of scholarly debates on *jus cogens* cynically speak of the 'mystery' shrouding *jus cogens*. Bianchi 2008, at 493; Hameed 2014, at 52; and Cannizzaro 2014, at 270.

[161] The argument is not unheard of. See, e.g., Schlag once wrote that 'legal thought is in part a kind of theological activity'. See also Schlag 1997, at 428.

[162] The expression is from Walker 2008, at 374.

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Chapter 5
Audience and Authority—The Merit of the Doctrine of *Jus Cogens*

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Abstract It seems that, several decades after the 1969 Vienna Convention approved the concept of *jus cogens* and detailed its particular implications as part of positive international law, the debate as to the feasibility of this concept should be over. However, the current debate, while maintaining the adherence to the overall concept of *jus cogens*, questions its particular implications, either because those who take this view ask for extra evidence, or they are not confident that they can sell to the relevant legal audiences the view that the peremptory nature of the rule relates not to its binding force but to its normative implications. This contribution addresses the merit of this debate, and highlights the merit of *jus cogens* in relation to objective treaty obligations, sources of international law and the law of State immunity. Examining all the available evidence, this contribution concludes that the adherence to the 'narrow' version of the *jus cogens* doctrine, notably in cases relating to State immunity, represents not an accurate statement of the legal position, but political and ideological choices made and maintained by national and international courts.

Keywords *Jus cogens* · Objective treaty obligations · Sources of international law · International human rights and humanitarian law · State immunity · Act of state · International law before domestic courts

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5.1 Introduction

Controversies surrounding the nature, sources, scope and effect of peremptory norms of international law[1] (*jus cogens*) have generated a huge amount of discussion in doctrine and practice. As writers address this issue from various doctrinal points of view, the scope of the doctrine of *jus cogens* is at times seen as a matter of opinion and appreciation. The debate at times focuses on what the political ideology underlying *jus cogens* is, what social function it performs,[2] what kind of rhetoric it entails and which audiences it could persuade.[3]

On political and ideological grounds, *jus cogens* is at times opposed, because it could generate the outcomes in national litigation the way that is politically and ideologically unwelcome in some quarters. A narrower, or restrictive, version of *jus cogens* is advanced by several authors, accepting the effects of *jus cogens* in some areas and denying these effects in other areas of international law.[4] The principal

[1] 'Rule' and 'norm' are synonymous. The word 'norm' is used in Article 53 of the Vienna Convention on the Law of Treaties, as well as by the International Court of Justice in cases of *Nicaragua* (note 7 below) and *Legality of the Use of Nuclear Weapons. Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*), ICJ, Merits, Judgment of 27 June 1986, at 100–101; *Legality of the Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, at 227.

[2] See, e.g., Andreas Paulus debating whether *jus cogens* has liberal or Rawlsian conceptual underpinnings. Paulus 2005, at 297.

[3] Bianchi 2013, at 457.

[4] Fox 2011, at 524–525; Aust 2011, at 39–40; Sivakumaran 2009, at 149; Rensmann 2009, at 164–165; Vidmar 2013, at 1.

rationale underlying this position is that, while *jus cogens* is a valid and received category in international legal reasoning, not all legal consequences generated by *jus cogens* are themselves peremptory, which factor then permits states to exercise a greater unilateral or bilateral freedom over the relevant matter after the original breach of *jus cogens* has been committed.

The academic discourse has thus been focused not only on the legal merit of *jus cogens* but also on its ideological and political desirability. This way—and instead of focusing on the actual position under positive law—writers risk becoming mediators between various views held in various audiences. Such writers are eventually not insured against the risk of themselves being placed into a certain analytical category, or contradicted, by another 'mediating' commentator. Such endless chain of relativity may help maintaining a discourse, but it can do little to clarify the contested issues.

This is why I would like to leave the 'mediating' option to others. Instead, I propose to adopt a transparent methodology of positive law, premised on the impartial analysis of the sources of law relating to *jus cogens*, as opposed to treating the scope and effect of *jus cogens* as matters negotiable between various writers and audiences. Audiences may be driven by political and ideological perceptions and preferences. Some audiences may be more receptive towards the idea of promoting accountability for international crimes through the exercise of justice on a transnational plane, while other audiences could view that as a threat to stability of relations between states. Some audiences may be more inclined to favour the effectiveness of the United Nations (UN) Security Council sanctions even at the cost of human rights of affected individuals, while other audiences may view that position with concern. Depending on whichever audience one belongs to, one would be having a different view on *jus cogens*: either one that has broad transparent effects securing greater accountability, or a narrower version of it that eschews any significant judicial intrusion into matters that could be better sorted through high politics and diplomacy, if at all. Purely on conceptual terms, these ideological differences could not be reconciled in any coherent manner.

Moreover, and the way the proponents of the 'narrower' view of *jus cogens* would do well in noticing, the debate as to the ultimate scope, effect and reach of *jus cogens* is not any different from the debate, conducted over several decades, as to whether *jus cogens* as such is desirable or feasible in the first place. The risks that the very concept of *jus cogens* allegedly brought to the stability of inter-State relations have been raised in the writings of Georg Schwarzenberger and Prosper Weil, who opposed the very concept of *jus cogens*.[5] The same factor was acknowledged by Bruno Simma who, on the other hand, was not opposed to the concept of *jus cogens* as such, and emphasised that the concept of *jus cogens* invests norms created in the community interest with the 'destructive capacity' to invalidate conflicting legal acts.[6] That early debate addressed, subconsciously at least, the

[5] Schwarzenberger 1965, at 213–214; Weil 1983, at 421.

[6] Simma 1994, at 285.

distinction between *jus cogens* as part of positive international law, and the ideological desirability of *jus cogens*. The current debate as to the particular effects of *jus cogens* is not any different. Consequently, the proponents of the 'narrower' view of *jus cogens* currently occupy the same doctrinal niche as did the deniers of *jus cogens* decades ago.

Therefore, before querying how a particular legal position would be received by a particular audience, our task should be first to understand what the legal position on *jus cogens* actually is. Audiences may command social influence. They do not command legal authority. If *jus cogens* is part of positive law, the material scope of *jus cogens* rules and the meaning of non-derogability cannot be a matter of political and ideological acceptability that can be negotiated among writers or officials or tailored to a particular political or ideological agenda that wants *jus cogens* to have some implications but not others. For, it is one thing to disagree with the idea of *jus cogens*; it is quite another thing to disagree with positive law.

The following analysis will be structured thus: Sect. 5.2 will explain what the non-derogability of *jus cogens* means and how it impacts the sources and material content of *jus cogens*. The reasoning afterwards will further flesh out the implications of non-derogability in relation to particular areas. Section 5.3 will focus on objective treaty obligations as conventional counterparts of *jus cogens*. Section 5.4 will focus on jurisdictional and liability aspects of *jus cogens* that have been treated as contentious. Section 5.5 will sum up the analysis and offer brief conclusions.

5.2 The Basis and Essence of Non-derogability from *Jus Cogens*

5.2.1 Non-derogability Under the Vienna Convention

Article 53 of the 1969 Vienna Convention on the Law of Treaties[7] (VCLT) provides that

> [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.

A *jus cogens* norm is, therefore, premised on the 'community recognition' and is meant to operate uniformly in relation to all members of that community. Non-derogability means the legal impossibility of opting out from the substantive scope of the rule or from peremptory effects of the same rule, reinforcing the

[7] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

requirement of the continuing uniformity in the application of the relevant norm, even despite the opposite will of mutually agreeing legal entities. The purpose of derogation is to evade the normative force of a *jus cogens* norm in mutual relations of derogating entities while the norm that has been derogated from remains generally in force and unchanged. Such derogation leads to the lack of legal force, namely, invalidity, of derogatory rules which otherwise would form perfectly valid consensually agreed rules of international law.

The uniformity of application, community recognition and non-derogability are separate yet mutually converging and reinforcing implications of the *jus cogens* nature of the relevant legal rule. The community 'acceptance and recognition' of the substantive rule, as one from which no derogation is permitted, places that rule into the pre-determined *general doctrine* of *jus cogens* which enables that rule to apply uniformly and be protected against derogation, and also specifies what is supposed to happen with treaties, acts and rules that derogate from that rule. This reflects the position stated in Article 53 VCLT that a conflict with a *jus cogens* rule amounts to the derogation from that rule. This general doctrine operates on the basis separate from the 'community recognition' of the *individual rule* as one of *jus cogens*.

The proper understanding of non-derogability and figuring out its implications becomes a matter of analytical accuracy and methodological consistency, and by virtue of that also of intellectual honesty.

5.2.2 Non-derogability and the Material Content of Jus Cogens Rules

The non-derogability requirement determines which rules fall within the category of *jus cogens*. In the first place, a candidate norm must be non-bilateralisable in its content and nature so that it could then operate as a non-derogable norm. What needs to be understood is that we speak here of the non-derogability of a norm, not of its material object. For instance, it may be arguable that the rule prohibiting aggression has the bilateralisable normative structure in the sense that its material object is divisible. Aggression could possibly be committed against one state without materially affecting other states but, legally speaking, aggressive war is not only the concern of the victim of the aggression. The prohibition of aggression is regarded as peremptory, in view of its fundamental importance to the international legal system, in the sense that aggressive war is not unlawful because it harms the victim state, but it is as such, objectively, unlawful and thus the concern to the entire international community. Once a norm is non-bilateralisable in its content and nature, it could not operate simply as *jus dispositivum*, but should instead be treated as non-derogable. Secondly, and the way that parallels the above first criterion, the norm should be channelled into the international legal system via the will of the international community as a whole. These requirements are already quite strict, which makes concerns about the uncertainty of *jus cogens* almost unreal.

The prohibition of the use of force is one of the most obvious instances of peremptory law. This was confirmed in 1986 by the International Court of Justice in the *Nicaragua* case.[8] This case, not *DRC v Rwanda* twenty years later, was the first case where the Court endorsed a rule as one having the *jus cogens* character.[9] What the International Court did in *Nicaragua* was to point to the International Law Commission's (ILC) qualification of the prohibition of the use of force as peremptory and then to use this factor as an evidence of the relevant norm's customary law status. Once the Court derived such further normative conclusion from the thesis that the relevant norm is peremptory, it has subscribed to the view that the prohibition of the use of force is part of peremptory law. There is, moreover, hardly anything practical that could be gained from the opposite position, because whether a rule is peremptory does not depend on the first date when an international court mentions it as such.

More contested is the issue of fundamental human rights norms. In principle all fundamental human rights enshrined under customary international law or in treaties such as the International Covenant on Civil and Political Rights[10] (ICCPR) and the European Convention on Human Rights[11] (ECHR) could be valid candidates to the *jus cogens* status, because they all are assumed as unilateral and indivisible pledges protecting individuals as such regardless of their nationality.[12] None of these fundamental rights are premised on reciprocity-based deals between states.

Let us illustrate this through a hypothetical example. In the context of the 1984 Torture Convention, the torture of a Mexican citizen by UK authorities would be a matter in which the Chinese government can have just as legitimate standing and interest in relation to the redress for that act as the Mexican government could have. Similarly, torture of a Mexican citizen by Chinese authorities generates the UK's legal interest and standing no less than it generates Mexico's. In material terms, the issue could be treated as bilateral, because the treatment of a Mexican citizen by the UK authorities produces hardly any material concern to China. However, legally speaking, the Chinese standing in the matter is just as good as the Mexican one. This is an inevitable implication of the fact that the Mexican victim is protected not as a Mexican citizen or as part of UK-Mexican or Mexican-Chinese treaty relations, but as a human being regardless of his nationality, in an objective sense that is opposable to and invocable by all state parties to the treaty, regardless of the vagaries of bilateral relations as between the violating state and the state of nationality. Such bilateral position cannot alter the objectively and

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[8] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*), at 100–101.

[9] Despite doctrinal insistences to the opposite effect, e.g., Shelton 2002, at 843; Simma 2009, at 272.

[10] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

[11] 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5.

[12] This runs into objective treaty obligations, see Sect. 5.3 below.

uniformly operable position under the treaty. In other words, derogation cannot work. All human rights and humanitarian treaty obligations, whether under the ECHR, ICCPR, Convention on the Elimination of Discrimination Against Women[13] (CEDAW) or Convention on the Elimination of Racial Discrimination[14] (CERD), are structured on the identical pattern. This is the principal structural reinforcement of the idea that all human rights have the potential of operating with the effect of *jus cogens*. This position applies similarly to the State's treatment of its own nationals as well as of foreign nationals.

The main doctrinal, and by now stereotypical, objection is that under those very same treaty frameworks (e.g. Article 15 ECHR and Article 4 ICCPR) most rights are derogable in times of emergency and therefore should not be viewed as part of *jus cogens*.[15] But this stereotype does little to clarify the matter,[16] for a simple reason that the emergency derogation and the Article 53 derogation are different categories. A human rights rule unilaterally 'derogable' in emergency situations foreseen under human rights treaties, or otherwise qualified through the margin of appreciation doctrine as used by the European Court of Human Rights (ECtHR), is not necessarily derogable under Article 53 VCLT. The former 'derogation' is about making use of the allowance that the rules regulating the pertinent right provide for the State, and then only for a limited time. The latter derogation is about replacing those very same rules by other rules of the derogating States' mutual choice.

Take, for instance, the content of the right to privacy under Article 8 ECHR, which is 'derogable' under Article 15 ECHR, as well as subject to margin of appreciation under Article 8(2) ECHR. Nevertheless, to the extent that it is qualified by legitimate interference under either of those ECHR provisions, the remaining core of the Article 8 ECHR right could still operate as part of *jus cogens* and be protected from the Article 53 derogation. It is one thing to say that a state can interfere with the pertinent right under Article 8(2) ECHR, the way the ECHR framework itself allows. It is a very different thing to say that, beyond the interference allowed by Article 8(2) ECHR, the same state can conclude a treaty with another state and provide for the exemption of a class of persons from enjoying the remaining core of the right under Article 8 ECHR. That an inter-state agreement dealing with the content of Article 8 ECHR rights has to fit within the margin that is allowed by Article 8(2) ECHR to the unilateral action of any state party to that agreement has also been confirmed by the European Court of Human Rights in *Slivenko v Latvia*.[17]

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[13] 1979 Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13.

[14] 1966 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195.

[15] For an earlier contribution, see Higgins 1976–1977, at 282.

[16] And this view has anyway been since contradicted by the Human Rights Committee, General Comment 29, States of emergency (Article 4), UN Doc. CCPR/21/Rev.1/Add.11, 31 August 2001.

[17] *Slivenko v. Latvia*, ECtHR, No. 48321/99, 9 October 2004, paras 104–109.

On the whole, some *jus cogens* rules can have wide and others can have narrow substantive scope; some may admit substantive limitations and others may not; some may be 'derogable' in emergencies and others not. But none of these factors are essential in clarifying whether the relevant human right, whatever its substantive scope, is derogable under Article 53 VCLT and therefore whether it is part of *jus cogens*.

5.2.3 'Community Recognition' of Jus Cogens, Non-derogability, and the Sources of International Law

As we already saw above, the 'community recognition' requirement under Article 53 VCLT means that a rule is made not through the will of individual states but via the community will, which is already one of the requirements of the *general doctrine* of *jus cogens* that determines how *individual rules* falling within this category should be identified. The Article 53 VCLT requirement of the recognition of the rule by the community of states as a whole 'as a norm from which no derogation is permitted' prompts the question as to whether *jus cogens* is created through the state consent, and also whether any double consent is needed for the content of the rule and then for its peremptory status.

Through the basic sources of international law as listed in Article 38 of the Statute of the International Court of Justice (ICJ Statute),[18] states could agree only the material content of the rule, not the peremptory effect of the rule. To illustrate this at the example of the prohibition of torture:

(a) A rule 'do not commit torture' is a substantive rule of prohibition.
(b) A rule 'do not by your mutual inter-state agreement authorise torture' is not part of the material content of the prohibition of torture, but its consequential normative quality available under the general doctrine of *jus cogens* as determined by Article 53 VCLT.
(c) The same position as in (b) above applies to the rule 'do not by mutual agreement evade legal consequences once torture is committed'.

There is, thus, no rational reason for requiring the state consent in relation to (b) and (c) separately and in addition to (a). If the attribute of non-derogability from a particular *jus cogens* rule had followed from the consent of those very states whom that rule has to prevent from entering into a derogatory deal, then the entire concept of non-derogability under the general doctrine of *jus cogens* would be inoperative. Moreover, it would be open to states to develop one concept of non-derogability in relation to one substantive peremptory rule and another in relation to another. That outcome would defeat both the letter and spirit of Article 53 VCLT which defines non-derogability in relation to *all* peremptory norms.

[18] 1945 Statute of the International Court of Justice, 33 UNTS 993.

A rule can be non-derogable only on grounds separate from the agreement that has been given by states to create that rule. The content and structure of the rule—the way the relevant obligation is assumed and operates[19]—will itself be indicative as to whether the rule is peremptory. If a rule is not susceptible to be split into bilateral relations, it would then be absurd to contend that it should still be derogable just because no additional consent of states has been given to the effect that, besides the existence of the rule, it should also be seen as non-derogable.

To illustrate this even further, it would be absurd to suppose that a state, through the relevant source of international law, assumes an obligation not to detain arbitrarily individuals of any nationality, yet it reserves the prerogative of arriving at bilateral deals with some states as to the arbitrary detention of the derogating states' nationals. Such derogation, despite its consensual basis between the relevant states, would be ineffective altogether, because each party to such deal would still be under the obligation towards the rest of the states-parties to the relevant treaty or customary rule not to detain arbitrarily any individual, including those who are nationals of states that consent to the derogatory deal with the opposite purport. As human rights rules are not bundles of bilateral deals, they can only be consented to by the state as non-derogable rules. It is therefore essential to understand that, while the existence of a substantive rule claiming the status of *jus cogens* might to some extent depend on individual state consent, the non-derogability of that very some rule cannot and will not.

5.2.4 Which Particular Source of Law?

There may be some indication in Article 53 VCLT that the 'acceptance and recognition' of the rule by the international community of states as a whole, even if occurring via the route of ordinary sources of international law, has to rest on patterns and processes qualitatively different from that through which individual states consent to the rules of international law. Otherwise, it becomes impossible to explain how the 'international community of states as a whole' can 'accept and recognise' anything, if the merit and effect of that 'acceptance' will crucially depend on adverse or obstructive position of individual states.

In analytical as well as practical terms, it is not crucially relevant whether we see *jus cogens* as based on a discrete and separate source of international law or as part of customary law.[20] Conceptually either possibility is feasible, but there is little pressing need to make a strict choice to adhere to one option to the exclusion of another, given moreover that with regard to most if not all peremptory norms there is convergence of conventional and customary rules in terms of content, as well as of the indivisible structure of the pertinent rule.

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[19] As discussed above, sub-Sect. 5.2.2 and below Sect. 5.3.

[20] As suggested by Thirlway 2014, at 155–157.

The *Nicaragua* case has sorted this analytical dilemma three decades ago anyway. The International Court of Justice chose to speak of customary rules made via concerted and collective expression of positions of dozens, even hundreds, of states, manifested through their participation in multilateral treaties and the adoption of UN General Assembly resolutions. State practice as an element of customary law was thus collective which can serve as an element of customary lawmaking no less than the practice of individual states could do. Similarly, ICTY and other courts have consistently chosen to speak in terms of customary law as evidenced in, even if not directly derived from, multilateral treaties and UN General Assembly resolutions.[21] Customary law thus conceived is a source of general international law and thus fits, at one time, both within the state practice requirements under Article 38 ICJ Statute, and within Article 53 VCLT requirements of 'community recognition'.[22]

On the outcome, the practical equation is not as much whether the position of 'the international community of states as a whole' should be identified by reference to the incremental process and by counting heads as to exactly how many states gave individual consent to a particular peremptory norm. The real question is whether one or few individual states, through their recalcitrant, ambivalent or oscillating position should be able to subvert the normative status of a rule which enjoys acceptance under the multilaterally based sources of law expressing the position of dozens, possibly of hundreds, of states.

5.3 Objective Treaty Obligations and Their Relation to *Jus Cogens*

5.3.1 A Preliminary Issue: The Nature and Basis of Erga Omnes Obligations

The notion of *erga omnes* obligations is used frequently in doctrine and practice.[23] As Judge Higgins has correctly emphasised, the principal implication of an obligation being owed *erga omnes*, in the sense of *Barcelona Traction*, goes to the jurisdictional issue of standing to invoke that obligation when it is breached.[24] This can happen either via the secondary rules of responsibility under general international law or dispute settlement procedures within the relevant institutionalised framework.

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[21] For a detailed analysis of the practice consisting of decisions of ICJ, ICTY and national courts to this effect, see Orakhelashvili 2006, Chapter 5.

[22] This could also be one of the possible rationalisations of the 1951 dictum on certain treaty obligations being binding even without any conventional obligation. See on detail Sect. 5.3 below.

[23] See generally, de Hoogh 1996; Annacker 1994.

[24] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ, Advisory Opinion, 9 July 2004, Separate Opinion of Judge Higgins, para 37.

As the ICJ also stated in the context of human rights treaties, '[t]he common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party.'[25]

However, the issue of standing is not self-explanatory or a solely procedural issue, but follows from the substantive and structural indivisibility of the violated obligation that makes its violation the business of third states. The nature of an obligation has to do with the nature of the rule it derives from. This way, *erga omnes* is not an independent, self-sustaining or self-explanatory doctrine, but merely an emanation of the substantive nature and structure of the relevant international obligations. Precisely for the reason that the subject-matter of the obligation introduced by the pertinent rule cannot be modified or otherwise disposed of between states-parties on a bilateral plane—and thus the obligation arises under a non-derogable rule—do third states have the standing to raise the issue by way of relying on the *erga omnes* nature of that obligation[26] and, where available, use judicial procedures by way of *actio popularis*.

This way, *erga omnes* obligations cognisable under general international law intrinsically derive from the peremptory nature of the rule that contains a particular requirement or prohibition.

5.3.2 Obligations Erga Omnes and Obligations Erga Omnes Partes

There is difference between obligations *erga omnes* and obligations *erga omnes partes*. In *Belgium v Senegal*, the ICJ spoke of obligations under the 1984 Convention against Torture (CAT) as ones owed, by every state party to the treaty, *erga omnes partes* and in relation to all other state parties. However, when mentioning *erga omnes* obligations first, the ICJ in *Barcelona Traction* fell short of limiting the relevance of *erga omnes* obligations to parties to a treaty and spoke instead of 'all States' having a legal interest in the enforcement of these obligations. If we place this issue in the same context as the 1951 Advisory Opinion, then *erga omnes* obligations thus conceived constitute a matter of general international law alongside with treaty law.

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[25] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), ICJ, Judgment of 20 July 2012, para 69.

[26] As Special Rapporteur Crawford suggests, peremptory norms and *erga omnes* obligations are virtually coextensive. J. Crawford, Special Rapporteur, Third report on state responsibility, 52nd session of the ILC, UN Doc. A/CN.4/507, 2000, para 106. Furthermore, 'if a particular obligation can be set aside or displaced as between two States, it is hard to see how that obligation is owed to the international community as a whole.' Ibid., 46–47.

This approach was not endorsed in *Belgium v Senegal* and 'all States' in *Barcelona Traction* have become

> All the States parties [who] 'have a legal interest' in the protection of the rights involved. These obligations may be defined as 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case.[27]

If we look at the ILC's work both on topics of the law of treaties and the law of state responsibility, humanitarian treaties do not fall into the *erga omnes partes* category (also described as interdependent treaty obligations).[28] Instead, treaties in the area of international human rights law and international humanitarian law contain objective, in Special Rapporteur Fitzmaurice's language, 'integral' and 'self-existent' treaty obligations, assumed 'towards all the world rather than towards particular parties'.[29]

In relation to standing under these both those categories of obligations, Article 48(1) of the ILC's 2001 Articles on state responsibility[30] (ASR) specifies that any state other than an injured state is entitled to invoke the responsibility of another state if

(a) The obligation breached is owed to a group of states including that State, and is established for the protection of a collective interest of the group; or
(b) The obligation breached is owed to the international community as a whole.

There is no express allusion here to the requirement that the state invoking responsibility must be one that is also a party to the relevant treaty. But presumably, interdependent obligations fall within (a) and the integral ones within (b). If so, then in the case of interdependent treaty obligations, only parties to a treaty have standing to invoke responsibility for a breach. But both the law of treaties (especially the differentiation between various treaty obligations under Article 60 VCLT) and the law of state responsibility (Article 42(2) ASR) codifications of the ILC admit these two categories of obligations are separate, albeit sharing some common features as to the structural indivisibility of the relevant obligations.

What are the features genuinely distinguishing the two categories of obligations? The 1951 ICJ Advisory Opinion on *Reservations to the Genocide Convention* specifies, in relation to the Genocide Convention, that:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles

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[27] *Questions relating to the Obligation to Prosecute or Extradite*, para 68.

[28] G.G. Fitzmaurice, Special Rapporteur, Second Report on the Law of Treaties, 9th session of the ILC, UN Doc. A/CN.4/107, 15 March 1957, at 54; G.G. Fitzmaurice, Special Rapporteur, Third Report on the Law of Treaties, 10th session of the ILC, UN Doc. A/CN.4/SER.A/1958/Add.1, 1958, at 44.

[29] G.G. Fitzmaurice, Special Rapporteur, Second Report on the Law of Treaties, 9th session of the ILC, UN Doc. A/CN.4/107, 15 March 1957, at 54.

[30] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001 (ASR).

> of morality. In such a convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.[31]

This implies the indivisibility of the substance of the Convention obligations, the lack of bilateralism and reciprocity, or of exchange of reciprocal burdens and benefits as between states-parties.[32] The Court consequently alludes to the link between the Convention obligations and general international law, the former being binding on states 'even without any conventional obligation'.

The rights and obligations are imposed by humanitarian treaties on states-parties not in relation to each other but in relation to individuals, to all states-parties, and conceivably towards the international community of states as a whole. These are the factors that make obligations under humanitarian and human rights treaties non-derogable and peremptory. Each of these factors distinguish humanitarian treaties from other multilateral treaties in multiple areas ranging from trade to legal cooperation, from investment protection to the law of the sea—treaties that are product of the inter-state bargain alone. The range or number of persons protected under human rights treaties and humanitarian law treaties may be different: the former protect any and every individual (using the term 'everyone') and the latter protect individuals who qualify as 'protected persons'. But the protection accorded to any individual covered by any such treaty is stipulated on objective and normatively indivisible terms. Even if a 'protected person' is not the same as the relevant belligerent State's own national, he or she is still protected on non-derogable terms. The fact that humanitarian law treaties protect X but not Y is not as such indication that the rules protecting X are bilateralisable or stipulated on the condition of the protected person having a particular nationality.

The 1951 Advisory Opinion further emphasises 'the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge"'.[33] The uniformity of the application of Convention obligations thus relates to substantive prohibition of committing genocide, as well as prosecution and liability in relation to genocide that already has taken place.

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[31] *Reservations to the Genocide Convention*, ICJ, Advisory Opinion, 28 May 1951, at 23.

[32] See in general Simma 1989, at 821.

[33] *Reservations to the Genocide Convention*, at 23.

The consequential obligations as to the prosecution of offenders are also of indivisible character.[34] Once the initial violation of the relevant treaty is committed, these consequential duties to prosecute or extradite offenders are not divisible but operate for any state party in relation to all other state parties. It is not possible (not) to prosecute the perpetrator in relation to state party X but not Y: either they are prosecuted or not. If they are not prosecuted, the standing to raise the issue of non-compliance accrues to all state parties, not just to states of the nationality of perpetrator or victim, or one on whose territory the initial breach has taken place.

The European Commission of Human Rights in *Austria v Italy* has elaborated upon a procedural dimension of this issue relating to the *ratione temporis* scope of ECHR obligations. The case involved a situation where the applicant state (Austria) became a party to the Convention subsequently to the occurrence of alleged violations. The respondent state (Italy) contended that the European Commission's competence did not encompass these allegations, since the Convention was not at the relevant time in force between Austria and Italy. However, Italy was a party at the relevant time and that is all that mattered; since it was the case admissible.[35] A state party to the ECHR is objectively bound by the relevant treaty obligation irrespective of whatever another state party is bound to. The procedural dimension reflects the substantive nature of ECHR obligations.

The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Kupreskic* speaks of the prohibition of reprisals in violation of humanitarian law treaties, namely the 1977 I Additional Protocol to 1949 Geneva Conventions. The *tu quoque* defence was flawed in principle because 'it envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations'. Instead, these obligations are unconditional and not based on reciprocity.[36] This further

[34] E.g., duties under Articles 5 and 7 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85; Article 6 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277; Common Articles 49, 50, 129 and 146 of the 1949 Geneva Conventions (1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 75 UNTS 31; 1949 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85; 1949 Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287.

[35] *Austria v. Italy*, ECsionHR, No. 778/70, 11 January 1961, 4 *Yearbook of the European Convention on Human Rights*, at 136–138.

[36] *Prosecutor v. Kupreskic*, Trial Chamber, Judgment, Case No. IT-95-16-T, 14 January 2000, paras 511–517. Some vagueness was introduced by the subsequent ICTY decision in *Martic*. Where the Tribunal does not purport departing from *Kupreskic*, instead repeatedly cites *Kupreskic* in relation to every single finding on reprisals. *Prosecutor v. Martic*, Trial Chamber, Judgment, Case No. IT-95-11-T, 12 June 2007, paras 464–468. Yet, it introduces some degree of relativity when suggesting that, even where lawful, 'reprisals must be exercised, *to the extent possible*, in keeping with the principle of the protection of the civilian population in armed conflict and the general prohibition of targeting civilians'. *Prosecutor v. Martic*, Trial Chamber, Judgment, Case No. IT-95-11-T, 12 June 2007, para 467 (emphasis added). More generally, *Martic* does not discuss as broad ground as *Kupreskic* does, and therefore the latter case is a better indication of the current state of the law in relation to reprisals in the area of humanitarian law.

consolidates on the 1951 Opinion approach on the pertinent rules binding states even without any conventional obligation. The prohibition of reciprocal violation is merely a flipside of the prohibition of reciprocal derogation: a rule is of such character that it cannot be bilaterally handled by states in any manner.

API is not a treaty of mutual exchange of benefits or advantages between states-parties. Therefore, should one state violate the Protocol's provision in relation of another state party, thus depriving it of underlying benefits and advantages, the injured state would not be entitled to respond with the similar action in kind and reciprocate with the similar benefit or advantage denial. At the same time, a reprisal against armed forces or population of one state party will inevitably constitute a violation of API obligations towards all its states-parties even if causing no material harm to them, and will entitle them to claim reparation under Article 48(2) ASR the way the directly injured state itself would be entitled to claim.

These are mutually reinforcing elements, essential to the concept of non-derogability. A rule could not be non-derogable if it merely embodies a reciprocal exchange of advantages and burdens between states, or if it allows for reprisals, or if it cannot bind the state regardless of the conduct of another state.[37] The objective nature of a treaty obligation is merely a reflection of the non-derogable status of the rule to which that treaty obligation corresponds and, similar to *jus cogens* under general international law, operates to prevent the relevant treaty relations being turned into bilateral relations between states-parties.

5.3.3 Handling the Incidences of Erga Omnes Obligations in the ICJ Jurisprudence

In the jurisprudence of the International Court of Justice, two other separate implications of *erga omnes* obligations have been handled. In the judgment at the jurisdictional stage of the *Bosnia v FRY* case, the Court emphasised that

> the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. The Court notes that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention.[38]

Here, the Court must be seen as speaking in the sense that the obligations under the Genocide Convention are assumed in relation to any individual person or group of persons in relation to which the state party may be acting, whether its own or other state's nationals. This is not a territoriality issue *ratione loci* but the lack of territorial limitation on the *ratione personae* scope of the Convention. Persons covered by the treaty are so covered wherever they happen to be acting in breach of that treaty. This is also an implication of obligations under the Genocide

[37] See further on this sub-Sect. 5.3.5 below.

[38] *Application of the Genocide Convention* (*Bosnia and Herzegovina v Serbia and Montenegro*), ICJ, Judgment of 11 July 1996, para 31.

Conventions being assumed by any state party indivisibly, in relation to any person or group, regardless of their nationality or location.

Another important aspect, dealt with in the same case, was the irrelevance of the *ratione temporis* scope of the Convention obligations for the standing to sue for violations of the Convention. This was the case of suing a state party not in the suing state's interest but in pursuance of the Convention's higher goals, and therefore no relevance should be accorded to whether the suing state has ratified the Convention at the relevant point of time. The only question should be whether the Convention has been ratified by the respondent state when the violation was committed.

Article IX of the Genocide Convention deals primarily with *bringing a case* and that can only be done by the state who is a party to the Convention at the time of instituting proceedings. But the scope of proceedings is not supposed to be limited—from the *ratione temporis* perspective—to obligations owed by the respondent state to that suing state specifically.

The Court's finding was also in accordance with the indivisible nature of obligations under the Genocide Convention:

> The Court thus finds that it has jurisdiction in this case to give effect to the Genocide Convention with regard to the relevant facts which have occurred since the beginning of the conflict which took place in Bosnia and Herzegovina. This finding is, moreover, in accordance with the object and purpose of the Convention as defined by the Court in 1951.[39]

The Court's jurisdiction had thus been established to operate as of 27 April 1992 when FRY as the respondent state was deemed to have become a party to the Convention, even though Bosnia, as the applicant State, did not become a party to the Convention before 19 December 1992.

The Genocide Convention is not a bundle of bilateral deals but a set of unilateral engagements that operate objectively. When suing FRY, Bosnia is not seen as asserting its own contractual rights and interests alone, but also as initiating proceedings to enforce the public interest dimension of the matter. Therefore it does not matter whether, strictly speaking, the FRY was bound by the Convention obligations specifically in relation to Bosnia at the material time. That also corresponds to the approach taken in *Austria v Italy*. All states-parties to treaties embodying objective obligations should therefore be able to pursue, via dispute settlement procedures under the relevant treaty, that which is owed to them under the very same treaty on objective and indivisible terms. This way, the pattern of judicial jurisdiction follows the substantive nature of treaty obligations. If treaty obligations are objective in substance, they are not to be treated as bilateral and reciprocal in the process of adjudication.

Therefore, it is rather curious that the Court says in *Belgium v Senegal* that 'the relevant provisions of the Convention against Torture are similar to those of the Convention on the Prevention and Punishment of the Crime of Genocide', yet

[39] Ibid., para 34.

accords here greater weight to the technicalities of ratification status, with the result that the entire matter was recast as one of bilateral relations, and arrives at the result that 'Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal's compliance with its obligation under Article 7, para 1 [CAT].'[40] The *Croatia v Serbia* case, focusing, again, on the jurisdiction of the Court under the Genocide Convention, pledges allegiance to the approach taken in *Belgium v Senegal*.[41]

Under this approach, and the general professing of the Court to the contrary notwithstanding, the Convention against Torture (CAT) is effectively, but counterfactually, treated as a bundle of bilateral treaty relations. Pursuant to the Court's approach, Belgium can demand from Senegal certain things under the Convention not just because Senegal assumes certain obligations under CAT, but because, and in relation to the time period in which, Senegal assumes those obligations in relation to Belgium specifically and those obligations operate as between those two states. This provides for a bilateralist pattern of rights and obligations which is incompatible with the objective nature of obligations under CAT.

5.3.4 The Structure of the Rules and Obligations Under the 1949 Geneva Conventions

The 1949 Geneva Conventions represent a conspicuous and curious case of a treaty trying to define its own normative status; against the background that, ordinarily, the binding force and characteristics of a treaty not defined by the treaty itself but through rules external to it.

Under Common Article 1, '[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' That could, on its face, be seen as absolute and uniform applicability of rules that protect individuals at the time of armed conflicts. A further shift from reciprocity is seen in the Common Article 6/6/6/7, to the effect that '[n]o special agreement shall adversely affect the situation of [protected persons], as defined by the present Convention, nor restrict the rights which it confers upon them.' According to the Common Article 7/7/7/8, protected persons 'may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be.' Then, the Convention stipulates that the reprisals against protected persons are prohibited (e.g. Article 33 IV Geneva Convention).

The protection of individuals under the Geneva Conventions is thus meant to be absolute, and is stipulated on non-derogable conditions. However, the objective

[40] *Questions relating to the Obligation to Prosecute or Extradite*, paras 102–104.

[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*), ICJ, Judgment of 3 February 2015, para 98.

nature of the obligations under the Geneva Conventions is somewhat compromised by their Common Article 2, providing, in the relevant part, that

> [a]lthough one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Thus, the Geneva Convention does not inherently bind states-parties in relation to non-states parties; on strict reading, Article 2 would outlaw the abuse of the party's national but not its ally non-party's national. Moreover, the words 'if the latter accepts and applies the provisions thereof' have a reciprocity-driven connotation: a particular belligerent state's nationals are protected by the Convention only because that state has consented to the treaty to that effect. This differs from the approach that a treaty protects the individual as such, regardless of their nationality, and is not about an exchange of reciprocal burdens and benefits.

The position under the 1949 Conventions is presumably different from the one envisaged in the 'general participation clause' under the 1907 Hague Conventions.[42] The purpose of that clause could be seen as securing the uniform application of the laws of war if that would be made possible by all parties to an armed conflict also being parties to Conventions. But this still is a reciprocity-driven approach, because any state party would be bound by the Hague Conventions in relation to another party just because that another state party would also be bound by it.

The approach taken by Common Article 2 of the Geneva Conventions also subjects to the Geneva Convention the conduct of a state party only in relation to such other parties to the conflict which are also bound by the Convention. Reciprocity is still there. The approaches under the 'general participation clause' under the Hague Conventions and under Common Article 2 of the Geneva Conventions are not, in this respect, greatly different from each other. In either case, treaty obligations are not supposed to operate as unilateral engagements entered into in the public interest. Any state is bound in relation to such states as are also bound in relation to that State specifically.

There is thus, on the face of the text of the Geneva Conventions, a curious coincidence of the applicability of treaty obligations being dependent on bilateral relations in some aspects, yet in other aspects exempted from and immunised against the vagaries of bilateral interest-calculation deals. If so, then there is no reason why reciprocal derogatory deals or reprisals and the *tu quoque* defence should not be allowed. If the initial validity of treaty obligations is driven by reciprocity, why is its continuing relevance not subjected to the same principle? If individuals are protected merely as nationals of the particular state, why could not their protection be handled as a matter of bilateral relations of the relevant states, either in terms

[42] Article 2 of the 1907 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 36 Stat. 2277 provides that '[t]he provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.'

of derogation or reciprocity? As explained above, this dilemma cannot be resolved merely on the basis of what the Geneva Conventions as treaties say.

The ICTY jurisprudence on the IHL treaties culminating with *Kupreskic* states that the Geneva Conventions and API provide for a series of unilateral engagements for the protection of individuals, not for a bundle of bilateral deals between states-parties.[43] The outcome is that, while API shares the same initial conditions of applicability as the Geneva Conventions do pursuant to their Common Article 2, states party to API are still objectively, and on non-derogable terms, bound by its provisions in relation to protecting all individuals, 'who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals' (Article 4, IV Geneva Convention), regardless of whether they have a state party's nationality or whether the non-state party has given a separate consent that the Convention should apply to its nationals. Quite simply, the requirement of not being a particular belligerent State's national and one of being another state party's national (or of the state that additionally consents to the Conventions being applicable) are two different requirements.

This approach goes hand in hand with postulating the *jus cogens* nature of these treaty obligations. In the sense that an individual is protected both regardless of its own state's position on that issue, and regardless of the vagaries of bilateral relations between any two states. A strict reading of reciprocity under Common Article 2 of the Geneva Conventions must, after all, be seen as obsolete.

5.3.5 The Erga Omnes Partes Obligations Proper

Erga omnes partes obligations deriving from interdependent treaty obligations are also non-derogable and uniformly applicable within the membership of a particular treaty, and in relation to the designated particular material object. These are treaty obligations relating, for instance, to the demilitarisation of territory or disarmament. To illustrate, Article 1 of the 1968 Nuclear Non-Proliferation Treaty provides that '[e]ach nuclear-weapon State party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices.' Article 2 of the same treaty provides that '[e]ach non-nuclear-weapon State party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices.'

These treaty obligations have the indivisible material object and effectively constrain states-parties in their dealings with parties and non-parties alike. This pattern is replicated in other treaties, such as ones dealing with chemical weapons or cluster munitions.[44]

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[43] *Kupreskic*, para 518.

[44] Article 1 of the 1992 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1974 UNTS 45; Article 1 of the 2008 Convention on Cluster Munitions, 2688 UNTS 39.

The purpose of these treaties is to eliminate the problem the relevant armament items produce, and in furtherance thereof these treaties are structured the way that does not allow distinguishing between transactions and acts restricted to the membership of the relevant treaty, and those reaching beyond that membership. But while the material scope of the obligation may extend outside the membership of the treaty, the obligation as such operates only in relation to states-parties and is applicable—in this case indivisibly—as between states-parties only.

Being an obligation *erga omnes partes* is merely a consequence of the indivisible structure of the relevant treaty obligation. A 'third party' standing obtains because the rule and obligation in question are structured and arranged the way to make, in an objective sense, the interests protected the business of all states-parties. However there is a distinction from the obligations under humanitarian treaties falling into the category of objective or integral obligations, which also are linked to customary international law pursuant to the ICJ's 1951 dictum. 'Interdependent' treaty obligations enjoy no such link, being instead treaty obligations purely and simply, created by states-parties to the treaty, as it were, anew.

In addition, in relation to objective or 'integral' treaty obligations, that firm material element that characterises obligations under 'interdependent' treaties is lacking. What makes humanitarian and human rights treaty obligations objective and non-derogable are instead their public policy and moral underpinnings, on the basis of the connection with the protection of the individual as such, irrespective of the nationality factor. Therefore the International Court has rather confused the matter by using the expression *erga omnes partes* in relation to obligations arising under the Torture Convention, which does not fall into that category. Instead, CAT obligations are indivisible and objective and their violations generate obligations *erga omnes* proper, not ones *erga omnes partes*, in the sense of *Barcelona Traction* and the 1951 Advisory Opinion.

The above conveys the reasons as to why it is important to realise that *erga omnes* is not a cliché couched in Latin that can be treated in isolation, but merely an implication linked to material factors attendant to the nature of treaty obligations. Both *erga omnes* and *erga omnes partes* obligations are, in their own ways, non-derogable. Yet, it is only treaty obligations producing the former, not the latter that bear the structural connection to *jus cogens*.

5.4 The Application of *Jus Cogens* to Contested Areas

5.4.1 The Effect-Focused Rationale of Jus Cogens

The general doctrine of *jus cogens* has initially been determined in the 1969 Vienna Convention in relation to the law of treaties, and then extended to non-treaty acts, states of affairs and transactions. As Crawford has emphasised, it is

difficult to justify the position that *jus cogens* rules are sacrosanct in one context and freely derogable in another.[45]

In addition, recently the UN International Law Commission (ILC) has proposed to pursue a separate study on *jus cogens*. Rapporteur Dire Tladi suggests that '[n]otwithstanding its inclusion in the Vienna Convention, the contours and legal effects of *jus cogens* remain ill-defined and contentious.'[46]

This view is, quite simply, methodologically unsound. It is true that the ILC's discussion of *jus cogens* comes at the time of bitter ideological divisions as to the utility and reach of *jus cogens*. It is right to say that there are a number of writers and officials who, out of ideological and political considerations, oppose the far-reaching effect that the Vienna Convention accords to *jus cogens*, and even more the extension of those effects to non-treaty areas. However, that is not the same as the Vienna Convention regime being 'ill-defined and contentious', because it still commands the authority of law. Its emphasis on non-derogability and voidness of conflicting transactions, with implications right down the line, are quite clear, even if ideologically unacceptable in some quarters. Even if the ILC addresses the aspects of *jus cogens* broader than those dealt with in VCLT, a proper analysis of *jus cogens* could not be one that does not focus on non-derogability and indivisibility of *jus cogens* rules. Quite simply, the ILC has no authority to design or redesign what non-derogability means and what it entails in relation to conflicting acts and transactions.

Mr Tladi's above statement might be seen as indication of the stage being set for the ILC to subscribe to the 'narrow' approach to *jus cogens*. But the real question here is whether, when dealing this item on its agenda, the Commission should purport revising or redefining the concept of non-derogability as reflected in VCLT and, furthermore, whether that would be within the Commission's authority, in essence amounting to the making of the new law on this subject. The value of the ILC's work on this subject, as one by an organ of law, would depend on the proper understanding of this basic and simple distinction. Whichever route it takes, the ILC obviously knows that it has no authority to introduce new law or reinterpret the existing law. Obviously, the ILC's mandate relates both to the codification and progressive development of international law, but the ILC's views on the latter (*lex ferenda*) would be premised on the acknowledgment of the pertinent position not being part of the existing positive law (*lex lata*). Mr Tladi's report also emphasises the need not to 'cool down' further development of the effects of *jus cogens*,[47] but we should be primarily focusing on effects that are already there.

The effect-focused approach to *jus cogens*, as opposed to the injunction-focused one, is inherent to the general doctrine of *jus cogens* in all pertinent areas. All these areas deal with what happens after the relevant peremptory rule is violated. For, there could be no viable concept of non-derogability without adverse

[45] Crawford 2006, at 102.

[46] International Law Commission, Report of the International Law Commission, Jus cogens (Mr. D.D. Tladi), 66th session, UN Doc. A/69/10 Annex, 2014, at 274.

[47] Ibid., at 282.

legal consequences being attached to acts, rights and situations arising out of and after that initial derogation. Consequently, the non-derogability from a peremptory norm also means the non-derogability from the legal consequences its violation would entail.

Even under the law of treaties, non-derogability is rationalised not just through the initial disapproval of it under Article 53 VCLT, but also via the network of consequential rules under Articles 44, 45 and 71 of the same Convention. The entire framework relates to the effect of *jus cogens* after the initial violation is perpetrated. Non-treaty areas mirror the same approach.

In relation to state recognition and more broadly state responsibility, from 1960s onwards, Sir Robert Jennings, John Dugard and later on the ILC itself, have adopted the same consequential approach: the issues of recognition, waiver and acquiescence in relation to situations produced by the original breach of *jus cogens* are dealt with in the same consequential perspective both in treaty and non-treaty areas.[48] Most notably, Article 41 ASR focuses on situations created by the breach of peremptory norms and requires abstaining from any conduct that may lead to recognising that situation as lawful.[49]

This shows that that the treaty aspect is yet one incidence of the general non-derogability doctrine. In relation to non-treaty acts, derogation is a more diffuse process than one embodied in the written agreement. Derogation may initially start as a unilateral act or conduct, and then meet acceptance, agreement or acquiescence that consolidates it from the bilateral or multilateral perspective.

There is enough practical evidence of *jus cogens* applying and censoring unilateral acts or conduct of states accordingly. The ICTY as well as the Special Court for Sierra-Leone have concluded that amnesties granted to offenders in violation of *jus cogens* have no effect in international law.[50] In *A v Secretary of State*, following *Furundzija*, the UK House of Lords affirmed that the peremptory status of the prohibition of torture 'requires member states to do more than eschew the practice of torture.'[51] This finding was made in relation to the inadmissibility, before English courts, of the evidence obtained by torture abroad, and thus in relation to a breach of *jus cogens* having taken place in the past and elsewhere, not to

[48] Jennings 1965, at 74; Dugard 1987.

[49] For similar consequential approach, see further Articles 41–42, ILC Articles on the Responsibility of International Organisations, applying the same approach to the law of international organisations. 2nd reading, 2011, A/66/10.

[50] *Prosecutor v. Furundzija*, Trial Chamber, Judgment, Case No. IT-95-17/I-T, 10 December 1998, para 155; *Prosecutor v Morris Kallon & Brimma Bazzy Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Cases No SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), 13 March 2004, para 71.

[51] *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)* (2004), House of Lords, [2005] UKHL 71, 8 December 2005.

produce effects here and now. Similar approach was applied by the House of Lords in *Kuwait Air Corp*., in relation to the act of state doctrine.[52] More recent cases of *Belhaj* and *Youssef* have endorsed the same approach.[53]

When trying to judge whether *jus cogens* is relevant in relation to a particular conflicting rule, instrument, act or situation, the first question to ask is whether a derogation from *jus cogens* is involved. Proponents of the narrow or restrictive view on *jus cogens* emphasise the difference between the original prohibitions under *jus cogens* rules and the enforcement of those prohibitions, and contend that the relevant unlawful act remains unlawful on a general plane, but is excused in relation to a particular case or particular class of cases.[54] But this very approach is, contrary to the professed design of those who advance this thesis, precisely a confirmation that a derogation from *jus cogens* is being envisaged. Denying the existence of particular legal consequences of *jus cogens* is not qualitatively different from legitimising its breaches and treating them as lawful, capable of producing rights and obligations in inter-State relations. For, it is only through those legal consequences that *jus cogens*, indeed any legal rule whatsoever, could deal with pertinent violations.

In theoretical as well as practical sense, there is no visible or meaningful distinction between making the relevant peremptory norm unable to produce its legal effects in relation to particular context or particular class of cases, and depriving the same norm of its legal value and applicability in relation to the same context or class of cases. There is only one feature of a rule being a *legal rule* as opposed to being a moral or ethical aspiration—the ability to produce binding effect in relation to its subject-matter and legal consequences when violated. It is the very essence of a derogation that a norm remains generally in force, but in relation to particular specified situations it does not apply as a legal rule. That a norm has not been abolished in a wholesale manner is not a proof that it has not been derogated from.

If the consequential effect of peremptory norms were not to be admitted, and legal effects of peremptory norms were not themselves to be seen as peremptory, repercussions would be severe for various areas. Several VCLT provisions, such as Articles 44, 45 and 71 VCLT, would be rendered practically inoperative. The duty not to recognise illegal territorial changes would not feasibly operate. It would be open to, say, France or the Netherlands, to conclude a treaty with Turkey and recognise TRNC as a sovereign state, and establish full-fledged diplomatic relations with it. The relevant territorial change would be possible to legitimise *inter se*, and on that plane the relevant use of force by Turkey against Cyprus would be treated as lawful. In that situation, it would be difficult to say that the peremptory

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[52] *Kuwait Airways Corporation (Respondents) v. Iraqi Airways Company (Appellants) and Others*, [2002] UKHL 19, 16 May 2002, paras 114 and 117.

[53] *Belhaj v Straw*, Court of Appeal, [2014] EWCA Civ 1394, 30 October 2014, para 116; *Regina (Youssef) v Secretary of State for Foreign and Commonwealth Affairs*, [2013] EWCA Civ 1302, 29 October 2013, paras 54–55.

[54] Fox 2011; Aust 2011; Sivakumaran 2009; Rensmann 2009; Vidmar 2013.

prohibition of the use of force continues to operate. It would be similarly open to states to conclude agreements absolving perpetrators of genocide or war crimes from criminal liability. Two or more states could effectively agree that they will not prosecute each other nationals accused of those crimes. Similarly, amnesties offending against a *jus cogens* rule would be valid and transnationally opposable, in the sense of enabling foreign states to recognise their effect. On a general plane, the relevant criminal act would remain criminal under international law, but that would mean very little in practice. Situations like ones discussed here could not be prevented by alluding to the relevance of certain elements from state practice, such as the 1932 Stimson doctrine which was initially considered as a policy act of the US Government. The normative basis of the effect of *jus cogens* in relation to situations covered by the non-recognition duty cannot be feasibly constructed by reference to episodic evidences that rely on interest-driven policy choices of states. Instead, dealing with such situations through non-recognition is possible only through the general doctrine of *jus cogens* specifying how the consequences of the violations of *jus cogens* ought to be handled.

5.4.2 The Effect of Jus Cogens on the Immunities of States and Their Officials

5.4.2.1 General Aspects

Although in various areas, as explained above, the consequential effect of *jus cogens* is plainly recognised, there is some vehement propagation in academic writings that, in relation to immunities of states and their officials from foreign jurisdiction, *jus cogens* rules are merely rules of substance that outlaw the relevant wrongful act, but not ones that determine its legal consequences, and that state practice has not recognised the effect of *jus cogens* in this area. It is also contended that a specific *jus cogens* exception to immunities has not crystallised in state practice,[55] which was also the ICJ's principal point in *Germany v Italy*, upholding the plea of state immunity for war crimes committed by the Third Reich.[56]

This is, however, analytically and methodologically a false question to ask, for once the overall non-derogability of peremptory norms is acknowledged, it makes little sense to require another, additional, rule of positive law to the effect that the rule generally possessing non-derogable status should apply as non-derogable in relation to the particular area of immunities. In addition, that the non-derogability of the rule should be additionally recognised through those very same rules

[55] Ibid.

[56] *Jurisdictional Immunities of the State* (*Germany v Italy: Greece Intervening*), ICJ, Judgment of 3 February 2012. See also Espósito 2011.

to which the non-derogability of *jus cogens* is supposed to apply and censure is a plainly absurd position to take.

Also it is clear that if *Belhaj* and *A v Secretary of State* are followed, the 'procedural' impact of *jus cogens* is already there, because these cases rely on *jus cogens* to prevent the act of state doctrine from protecting from litigation the breaches of *jus cogens* that have taken place in the past and elsewhere. For, it could also have been said in these two cases that what actually happens is the maintenance of the general validity of the *jus cogens* rule and the denial of its operation in relation to the particular case, but it was not so said. The consequential impact of *jus cogens* was instead admitted, similar to the area of immunities, in relation to the enforcement of the particular peremptory rule before a national court.

Furthermore, that for which some writers require a separate and additional state practice confirmation is anyway obvious on three different separate grounds the discussion of which follows.

5.4.2.2 The Alleged Difference Between Criminal and Civil Proceedings

The UK House of Lords in *Pinochet* recognised the effect of *jus cogens* in relation to immunities in criminal proceedings.[57] Courts granting immunity for torture in civil proceedings try to distinguish between civil and criminal proceedings, suggesting that while immunity can be denied in criminal proceedings, civil cases are arguably different.[58] This may be true empirically in terms of *national law* in the UK where there is statutory regulation in relation to the immunity in civil proceedings (1978 State Immunity Act) not making allowance for *jus cogens* cases, but not in relation to criminal proceedings. But that is hardly indicative of what the position under *international law* is; here the matter is solely of normative conflict and non-derogability. If *jus cogens* prevails over immunities in criminal cases, it does have procedural effect in relation to civil cases as well. There is no reason in asserting that criminal and civil cases are to be treated differently.[59]

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[57] Overall, five Law Lords subscribed to such extra-conventional effect of *jus cogens*: *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet* [1999] UKHL 17 (24 March 1999), Lord Nicholls, paras 939–940, Lord Steyn, paras 945–946, Lord Hutton, paras 165–166, Lord Hope, para 242, and Lord Millett, para 179.

[58] *Al-Adsani v. United Kingdom*, ECtHR, No. 35763/97, 21 November 2001; *Jones v Saudi Arabia*, [2006] UKHL 16, 14 June 2006; *Khurts Bat v Mongolia*, High Court, [2011] EWCH 2029 (Admin), 29 July 2011, para 74.

[59] Furthermore, the 2009 IDI Naples resolution, treating the denial of immunities for the perpetrators of international crimes for the purpose of civil and criminal proceedings alike, was not addressed by the ICJ in *Germany v Italy* at all. Addressing this instrument would have enabled the Court to evenly balance its reasoning and apply its mind to conflicting considerations. See Institut de Droit International, Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, Naples Session, 2009.

5.4.2.3 Derogation from *Jus Cogens* Through the Claiming and Granting of State Immunity

Writers and courts upholding immunities for violations of *jus cogens* emphatically declare that immunities do not derogate from the underlying rules of *jus cogens*, but merely divert the solution of the underlying matters to other fora.[60] In reality, no such diversion happens but the exclusion of the implementation of responsibility follows. Where the victim has no other forum to invoke the rule, the underlying *jus cogens* rule is deprived of any effect it could have. There is a theoretical possibility of diplomatic representations or countermeasures being undertaken against the wrongdoer state, but these are not among the imperative consequences flowing from the general doctrine of *jus cogens*, which is about the implementation of non-derogability alone and right down the line, and also such measures hardly ever occur in practice in such contexts. To illustrate, in *Al-Adsani v UK*, the grant of immunity to Kuwait was approved against the background that the UK Government did not afford the claimant diplomatic protection against Kuwait, and then argued before the Strasbourg court that the proper way of obtaining remedies was diplomatic representation.[61]

Care must be taken to understand that *jus cogens* rules are legal rules, enjoying full-fledged normative force and effect characteristic to all legal rules. They are not moral norms that censor particular activities yet prescribe no particular consequences if the initial injunction is bypassed. Derogation from *jus cogens* can happen not merely via a rule that purports to abolish the relevant *jus cogens* rule and make the act outlawed under it lawful, but also via a rule that abolishes the normativity of that *jus cogens* rule, preventing it from operating as a legal rule and replacing the legal consequences that rule prescribes by those prescribed under another rule, in this case one requiring to grant immunity to a foreign state.

There is also the argument that the *jus cogens* nature of a particular norm, for instance one prohibiting the commission of war crimes, torture or genocide, does not by itself generate a second, consequential norm stipulating the mandatory duty of states to provide remedy and reparation for the victims of the original violation of the first rule.[62] However, owing to the above analysis of the distinction between particular rules of *jus cogens* and general doctrine of *jus cogens*, it makes little sense to expect particular *jus cogens* prohibitions, or for that matter the international legal system as a whole, to stipulate the mandatory duty to provide such remedies in relation to every single peremptory norm. Instead, under the law of state responsibility, there is a general duty to provide remedy and reparation for every single internationally wrongful act and in relation to breaches of *jus cogens*, this general consequential duty itself operates as peremptory. To treat it as not

[60] *Jones v Saudi Arabia*, paras 24 and 44 (both Lords Bingham and Hoffmann referring to Fox); Fox 2011; Aust 2011; Sivakumaran 2009; Rensmann 2009; Vidmar 2013.

[61] *Al-Adsani v. United Kingdom*, paras 19, 50–51.

[62] For a relatively recent discussion, see Boudreault 2012, at 1003.

peremptory would be to approve the derogation from the original *jus cogens* rule by preventing it to properly apply to underlying facts of violation, and also to approve as lawful the situation created by the original breach of *jus cogens*, contrary to the general duty of non-recognition, itself and implication of non-derogability and thus part of the general doctrine of *jus cogens*, as stipulated under Article 41 ASR.

The argument as to the requirement of a discrete and additional mandatory rule requiring remedies to be granted for breaches of *jus cogens*, as a pre-condition of the primacy of *jus cogens* over immunities, is consequently flawed. More generally, the aim of derogation from *jus cogens* is to provide comfort to derogating states by rendering the *jus cogens* framework irrelevant in relation to a particular case and/or in mutual relations of those states. This can be illustrated at the example of what happened in the context of the UK House of Lords decision in *Jones v Saudi Arabia*. The grant by the UK of immunity for torture to Saudi Arabia was, in practical terms, not just about foreclosing a particular judicial venue to claimants; it was also a prospective approval of the correctness and validity of the legal position that victims of torture in Saudi Arabia should get no remedy in the UK. Against this background, even if the prohibition of torture arguably remains generally binding on UK and Saudi Arabia, the bilaterally applicable legal position is that the same prohibition has no legal effect in relation to such violations as may be handled in the bilateral UK–Saudi relations. In other words, the prohibition of torture has been derogated from through the two states' mutual understanding expressed by the Saudi claim of immunity and the UK's approval of that claim.

The ICJ in *Germany v Italy* can be further exposed to have admitted derogation as it attempted to trim down the effect of Article 41 ASR. Contrary to what the Court professes, Article 41 ASR requires non-recognition of situations created after the breach of a peremptory norm. In this case the impunity created through the grant of immunity, the lack of any other remedy for victims and the consequent practical denial of the capacity of the relevant rules of *jus cogens* to operate, clearly amounts to the situation produced and persisting after the initial violation.

A full-fledged derogation is, therefore, clearly involved. Judicial and academic opinions to the opposite effect are misled. Those who tell us that immunities do not derogate from *jus cogens* essentially tell us that they do not abolish *jus cogens* rules. We know that already. The issue here relates to derogation from *jus cogens* which is not about the abolition of the relevant rule, but about preventing the relevant norm to operate in relation to underlying facts.

5.4.2.4 State Practice in Balance

As we saw above, the UK courts' pro-immunity position is mutually inconsistent and cannot feasibly constitute to State practice on international plane. The ICJ *Germany v Italy* examines a limited amount of State practice and, on most material issues, it turns on the Italian concessions rather than deciding on issues properly argued and litigated. After *Germany v Italy* that is regarded by some as

definitive statement of the legal position on this matter, there have been further cases that confirm the lack of immunity for breaches of *jus cogens*, notably in Swiss and American courts.[63] On an empirical plane, state practice on this matter is divided, while ICJ's approach purports to be plain and straightforward. In *Jones v UK* as well, while upholding state immunity for torture, the Strasbourg Court deliberately eschews taking on state practice head on, and expressly states that

> it is not necessary for the court to examine all of these developments in detail since the recent judgment of the International Court of Justice in Germany v Italy … – which must be considered by this court as authoritative as regards the content of customary international law – clearly establishes that, by February 2012, no *jus cogens* exception to state immunity had yet crystallised.[64]

The Court clearly accords priority to a previous judicial decision over the state practice. One wonders here what the basis of the Strasbourg Court's decision on immunities is: customary international law based on state practice, or a law made in the ICJ's judicial decision on the basis qualitatively different from the general doctrine of *jus cogens*? Is the law the Strasbourg Court projects one agreed as between states or one created by courts in the process of adjudication?

The Strasbourg Court declined according probative weight of the US case of *Samantar* as an instance of state practice on the matter, as it was still pending before the Supreme Court. But day before when *Jones v UK* was decided by the Strasbourg Court in 2014, the US Supreme Court decided not to grant certiorari in this case,[65] with the implication that the Court of Appeals decision remains in force as a valid instance of state practice. On the whole the Strasbourg Court has not properly confronted the dissenting state practice. For this reason, its analysis proves nothing as to the state of customary law, or the reach of the general doctrine of *jus cogens*.

5.4.2.5 The Outcome on Immunities

The substance-effect dichotomy in relation to *jus cogens*, as portrayed in immunity cases, is anomalous if compared with the overall relevance of non-derogability in

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[63] *A. v Attorney General of Switzerland*, Swiss Federal Criminal Court, Case No. BB.2011.140, Judgment of 25 July 2012, paras 5.3.5 and 5.4.3; *Bashe Abdi Yousuf v Mohamed Ali Samantar*, No. 11-1479, 2 November 2012, at 23.

[64] *Jones and Others v. The United Kingdom*, ECtHR, Nos. 34356/06 & 40528/06, 14 January 2014, para 198.

[65] On the *Samantar v. Jousuf* case see Supreme Court of the United States Blog, Samantar v. Jousuf, http://www.scotusblog.com/case-files/cases/samantar-v-yousuf-2/. Accessed 10 May 2015. Even if the Executive branch of the US Government was critical of the approach taken by the Court of Appeals, the Court of Appeals decision still remains in force as an element of US State practice. The Executive's position enjoys no primacy over it. There is no reason to assume that the separation of powers doctrine, otherwise applicable under the US Constitution, is irrelevant to determining how the US Government as a whole formulates its views on international legal issues. For the Government's position, see Brief Amicus Curiae of United States, 10 December 2013, at 19 ff.

other areas within which *jus cogens* operates. Once the consequential effect of *jus cogens* is there, immunities should give way. It could not be sensibly contended that there are consequential effects of *jus cogens* in relation to some derogations but not others, nor is any court competent to introduce such qualification, which is entirely a law-making issue and depends on inter-State agreement rather than judicial input and innovation.

There is little sense on insisting on the strict separation between the prohibitions stipulated under substantive *jus cogens* rules and legal consequences arising after those prohibitions are violated, given that all pertinent frameworks in which *jus cogens* is relevant have rejected such separation. What the proponents of the substance-enforcement dichotomy fail to understand is that a legal rule is more than an open-ended requirement, entitlement or prohibition it contains and thus it is more than its substantive subject-matter. A legal rule also presupposes that such substantive requirement, entitlement or prohibition should be given legal effect through its application to facts and remedies when it is violated. If another rule suggests that such effect should not be accorded, then that rule is in conflict with the first rule, either derogating from it or abrogating it.

5.5 Conclusion

Jus cogens raises complex issues and requires the systemic analysis of the position deriving from the underlying sources of law at least as much as it requires the reliance on practical examples. The above analysis shows that the adherents of 'narrow' or 'restrictive' view of *jus cogens* adopt far-reaching conclusions without having conducted such required complex analysis. The proponents of the 'narrower' view do generally accept the concept of *jus cogens* but, contrary to the imperatives of the very same concept, they are keen on protecting bilateral interstate relations from its implications. If we discard the lip service on occasions paid to the concept of *jus cogens*, in all analytical and practical dimensions, the 'narrower' view of *jus cogens*, affirming the concepts and denying its implications, is hardly distinguishable from the original, older, doctrinal views denying the utility of the whole concept of *jus cogens*.

The reasoning that accepts the overall concept of *jus cogens*, yet pretends that it has no specific effects in the particular area under consideration, is premised on substituting ideological preferences for positive law. It also meets the eye that as far as consequential effects are concerned, Mr Tladi's preliminary report to the ILC contains almost only those practical examples that subscribe to the narrow and restrictive view of *jus cogens* (for instance in the area of immunities), and chooses not to mention those practical examples which point to the opposite conclusion.[66] Similarly, there is little effort made in Mr Tladi's report to conceptualise

[66] See, e.g. International Law Commission, Report of the International Law Commission, Jus cogens (Mr. D.D. Tladi), 66th session, UN Doc. A/69/10 Annex, 2014, para 12.

the matter in relation to the overarching legal framework of non-derogability. There is less focus on systemic factors and more focus on casuistry.

At the moment, all that is required from the adherents of the 'narrower' view is a bit more open-minded approach and a query whether, as a matter of proper legal method, it is right to prioritise preconceptions dominating particular audiences over the imperatives of the legal framework under pertinent sources of international law, as well as moral imperatives inevitably involved with the impunity equation in the context of state immunity. Similarly, there are less strict limits on what the ILC can do as an audience, and stricter ones on what it can do in terms of authority.

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Chapter 6
Genesis, Function and Identification of *Jus Cogens* Norms

Stefan Kadelbach

Abstract Against the backdrop of scepticism in legal writings, the purpose of this chapter is to assess which functions *jus cogens* can fulfil. It takes up the genesis of the concept and shows that state and court practice display a rather narrow notion with respect to the functions of the *jus cogens* principle. This is due to the definition and legal consequences laid down in the Vienna Convention on the Law of Treaties and the International Law Commission's codifications, which suggest a legal formalist approach with respect to the identification of peremptory norms. The ways in which *jus cogens* is presented as an argument today are at times contradictory, but do not justify fear of abuse. However, they point at a role, which is more significant than the technical functions of *jus cogens*, namely its symbolic value in that the concept of *jus cogens* denotes basic conditions of collective and individual self-determination, most notably in the area of human rights. In that function, it lends itself for legal policy purposes. Ensuing uncertainties of content are a problem not genuinely linked to *jus cogens*, and they must be addressed with respect to the underlying obligations rather than to the concept itself. However, they advocate in favour of a narrow concept of peremptory norms.

Keywords *Jus cogens* · Human rights · Human rights conventions, derogation clauses · Peremptory norms, function · Peremptory norms, identification · *Erga omnes* obligations

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6.1 Introduction

The notion of peremptory norms (*jus cogens*) in international law has equally invited idealist exaggeration and legal realists' deconstruction. The apparent rooting in morals of the principle of *jus cogens* as well as of the primary norms pertaining to this category and their supposed higher rank in a hierarchy of international law suggest that *jus cogens* can be used as an argument to trump undesirable outcomes. This has increasingly been done beyond its genuine realms in the law of treaties[1] and of state responsibility,[2] be it in specific areas such as human rights law or extradition, be it with respect to institutions of general international law like jurisdiction or state immunity. Thanks to *jus cogens*, it seems as if the guiding force of the international legal order had changed from mere power to intrinsically legal normativity and justice, as it is seemingly also the case with the International Criminal Court and the concept of Responsibility to Protect. Nonetheless, this unique combination of moral rigour and indeterminacy with respect to creation, contents and possible legal consequences has triggered many sceptical reactions among academic observers. The unusually strict terms in which such critique is brought forward indicate that the matter touches upon deeply rooted personal beliefs about the nature of international law itself.[3]

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[1] Articles 53, 64 and 71 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[2] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001 (ARSIWA). On *jus cogens*, see Articles 26, 40, 41, 50(1)d ARSIWA.

[3] See Klabbers 1999, at 171 ('at the expense of the law itself'); cf. D'Amato 1990, at 1 ('protean supernorm'), 4 ('Pac Man') and 5 ('Superman'); Linderfalk 2007, at 853 ('Pandora's box'); Bianchi 2008, at 419 (magic), 492 ('myth of Lohengrin') and 496 ('myth of Janus'); cf. also Koskenniemi 2005, at 122 ('kitsch'); Linderfalk 2013, at 367 ('utterers resort to *jus cogens* because it potentially causes addressees to misunderstand the true nature of any utterer's argument').

Even though the political environment of the debate on peremptory norms has changed over time, its basic positions have not. Historically, *jus cogens* has developed only on occasion of the codification of the law of treaties by the ILC as a ground to invalidity because of unacceptable contents. The guiding force behind, as the *travaux préparatoires* to the Vienna Convention on the Law of Treaties (VCLT) show, was the will to provide a new basis for international order after World War II, just like the Nuremberg principles and the United Nations Charter.[4] For similar historical reasons, but drawing different conclusions, scholars of a classical realist bend like Georg Schwarzenberger or adherents to traditional positivism like Prosper Weil expressed concern about the concept as a threat to the binding character of treaties and of law itself.[5] To many, '*jus cogens*' sounds like a Tû-tû word in Alf Ross' understanding, likewise indicating frightening sanctity, uncertainty of expectations and harshness of sanctions.[6]

If the reason for scepticism is the way *jus cogens* may be used as an argument, it is likewise directed against the uncertainty of how to identify *jus cogens* norms and the automatism in which such an attribution entails far-reaching legal effects. Content and function seem to be open for so many projections that the essential elements of international law like the normativity of treaties, the functioning of the system of state responsibility and a pragmatic approach to the processing of international claims appear to be overloaded with morals and thus to be in danger of becoming dysfunctional.

Against the background of such reservations brought forward in legal writings, this chapter aims to demonstrate which role *jus cogens* plays in international legal practice and to assess which functions it fulfils. It will be shown that the ways in which *jus cogens* is presented as an argument in practice are at times contradictory, but do not justify fear of abuse. For that purpose, it will be reconsidered which role the International Law Commission (ILC) has attributed to *jus cogens*, which shape *jus cogens* norms have assumed in treaties and in which contexts court decisions use the peremptory character of such norms to reinforce their findings. It will be seen that state and court practice follow a rather narrow notion with respect to the functions of the *jus cogens* principle. The codification of *jus cogens* suggests a legal formalist approach with respect to the identification of peremptory norms. More significant than its technical function, however, is its symbolic value, most notably in the area of human rights.

The next section of this chapter recapitulates the genesis and evolution of *jus cogens* in order to collect practice on candidate norms and to point out how a shift in emphasis in terms of function and contents of *jus cogens* has taken place over time (2). The following sections deal with (3) function and (4) identification against this background separately and highlight the interrelations between them; they reveal that the original functions of *jus cogens* serve as a tool of

[4] For documentation, see Kadelbach 1992, at 36–46.

[5] Schwarzenberger 1964/1965, at 455; Weil 1983. See also Sztucki 1974.

[6] Ross 1957, at 812. Ample reference to anthropological classics is found in Bianchi 2008, at 492 ff and 507 ff.

identification, but that the effects mostly lie elsewhere. In the last section, peremptory norms are put in the context of the general problem of claims to universal validity of norms (5).

6.2 Genesis and Present Shape

6.2.1 Jus Cogens as a Theoretical Concept

Even though there is a vast amount of writings on *jus cogens*, surprisingly, there is only little recent literature about its history and theory.[7] To invalidate treaties on moral grounds seems to be a natural law concept,[8] but, efforts to that end notwithstanding,[9] it is not easy to find unequivocal authority for such a notion in classical natural law treatises on international law. The term itself marks a distinction from *jus dispositivum*, from law that is in the books, but can be contracted out at will; it is not of Roman origin as the term would let us assume, but an invention of nineteenth century Pandectism.[10] The idea to transfer the underlying concept to international law and merge it with the notion of contracts *contra bonos mores* began to gain ground in the second half of the nineteenth century, after international law had emancipated itself as a distinct branch of positive law and as a subject taught at universities to which textbooks were devoted.[11] In the same epoch, the abolition of slavery and the establishment of international humanitarian law had become an issue of international conferences and treaties.[12]

It was only after World War I that *jus cogens* was activated for problem-related legal discourse. One of the reasons was widespread dissatisfaction among German-speaking authors with the Paris Peace Treaties who sought to challenge these regimes on grounds of public policy.[13] The Versailles Treaty had itself used such language: its Article 227 declared the German emperor responsible for 'a supreme offence against international morality'.[14] In treaty relations with non-European states, such claims were still discussed at the time under the heading of unequal treaties.[15] In cases in which such questions were raised, status treaties of

[7] Kolb 2001; Criddle and Fox-Decent 2009; Hameed 2014, at 76–85.

[8] Cf. O'Connell 2012, at 93–97.

[9] See Gómez Robledo 1981, at 23 (Vitoria); Schweitzer 1971–1972, at 198 ff (Grotius); Thomann 1972, at XXXII, XLI (Christian Wolff); Verdross 1966, at 56 (Vattel).

[10] Kaser 1971, at 198.

[11] Bluntschli 1868, paras 410–412; Fiore 1909, paras 742 and 755.

[12] See the reference to the Martens clause by Shelton 2006, at 296.

[13] Cf. Verdross 1935, at 294–295; Verdross 1937.

[14] 1919 Peace Treaty of Versailles, Ser 3/XI Martens NRGT, 323.

[15] Peters 2012, at 41–42.

the epoch were invoked, and sometimes held, to embody a public order against which no derogating agreements were admissible.[16]

A general moral turn to *jus cogens* came only after World War II when the ILC began its codification project on the law of treaties. Starting in the 1950s, the acceptance of *jus cogens* in international law textbooks quickly became the prevailing view. The work of the ILC and the adoption of the text of the Vienna Convention in 1969 also inspired the famous reference to obligations *erga omnes* in the *Barcelona Traction* judgment of the International Court of Justice (ICJ).[17] Both found their way into the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[18] The examples mentioned for *jus cogens* and *erga omnes* norms alike describe essentials of human self-determination like the ban on the use of force, the right to self-determination of peoples and a minimum of human rights in war and peace such as the prohibitions of genocide, slavery, torture, wanton killings and serious cases of discrimination, like *apartheid*.[19] It is this connotation to international crimes and to core rights of the individual rather than the category of *jus cogens* itself which triggered the recent debate on an extension of aggravated legal consequences from criminal law in a narrow sense to jurisdiction in tort suits and exceptions to immunity.[20]

6.2.2 State Practice

The theoretical discussion in the course of the ILC codification project was accompanied and followed by various declarations of *opinio juris*. During the negotiations on the two Vienna Conventions on the Law of Treaties,[21] the vast

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[16] *Costa Rica v Nicaragua*, Cent Am Ct J, Judgment of 30 September 1916, 11 AJIL 181, at 228 (conflict of a treaty with an older boundary water regime); *S.S. 'Wimbledon' (UK v Germany)*, PCIJ, Judgment of 17 August 1923, Ser. A, No. 1, p. 25 (Versailles Treaty as of a "general and peremptory character"); *Customs Union between Austria and Germany*, PCIJ, Advisory Opinion, 5 September 1931, Ser. A/B, No. 43, individual opinion of Judge Anzilotti, p. 57 (Paris Treaties were "in the interests of Europe as a whole" and hence non-derogable); *Oscar Chinn (UK v Belgium)*, PCIJ, Judgment of 12 December 1934, Ser. A/B, No. 63, separate opinion of Judge van Eysinga, p. 131 (Berlin Treaty of 1885 not dispositive law); separate opinion of Judge Schücking, p. 148 (mention of immoral treaties).

[17] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, ICJ, Second Phase, Judgment of 5 February 1970, para 33.

[18] On obligations *erga omnes*, see Articles 42 and 48 ARSIWA; see also below, Sect. 3.1.2.

[19] *Barcelona Traction*. Cf. also American Law Institute 1987, § 102 (rep note 6) and § 702; Hannikainen 1988, summary at 716–723; Kadelbach 1992, at 210–315; Orakhelashvili 2006, at 50–65.

[20] Talmon 2012.

[21] The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, UN Doc. A/CONF.129/15, 21 March 1986, has been ratified by 45 parties but not entered into force.

majority of states endorsed their Common Article 53 on the nullifying effect of *jus cogens* on contravening treaties.[22] By spring 2015, 114 States had ratified the 1969 Vienna Convention.

State practice, by contrast, has always been scarce and occurred only after the work of the ILC on the codification of the law of treaties had begun.[23] In the era of the League of Nations, there was one instance in which a treaty was claimed to be in conflict with morals, but the reaction of other states indicated that states would not accept a distinction between binding and immoral obligations.[24] A question of *jus cogens* was raised, apparently for the first time, in a session of the Security Council on the Treaty of Guarantee on Cyprus in 1964; Cyprus, supported by other states, questioned its legality because they found it granted the guarantee powers a right to armed intervention at their discretion and expressly referred to the work of the ILC.[25] After the Soviet intervention in Afghanistan, the United States expressed doubts as to the validity of a treaty of friendship of 1978 between the two states for analogous reasons.[26] Upon the conclusion of the Camp David Accords, several Arabic states complained of a violation of the Palestinian people's right to self-determination having the character of *jus cogens*.[27] In none of these cases, the *jus cogens* argument resulted in a formal declaration of invalidity. One such example, however, can be seen in the fate of the so-called Molotov-Ribbentrop Pact, by which the two dictatorships undertook to divide Eastern Europe up, a school example of a treaty contrary to peremptory law; on 24 December 1989, the Soviet Congress of Peoples' Deputies declared this agreement void *ab initio*.[28]

Scarce as it is, this practice does not reinforce fear of abuse of the *jus cogens* argument. It is rarely used, confined to norms whose peremptory character was widely undisputed (unilateral use of force, right of non-self-governing peoples to self-determination), and it has not yielded the result of nullifying a treaty unless the case was obvious. Rather than appealing directly to international morality, it serves the function of a political argument aimed at delegitimizing contrary positions, which is nothing unusual compared with other legal arguments.

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[22] For statements before the Sixth Committee and on the Vienna Conference, see Kadelbach 1992, at 40–46; for the notable exception of France see the episode reported by Bjorge 2012.

[23] For a good account of the pertinent practice including pleadings before the International Court of Justice, see Gianelli 2011, at 340–347.

[24] In the course of the Leticia conflict, Peru maintained that a cession of territory to Colombia was immoral since it provoked the risk of resorting to war. Société des Nations, Journal Officiel 1933, at 504, 510 and 523. For the statement of France see Kiss 1962, at 100.

[25] UNSC, 19th sess. 1098th mtg, UN Doc S/PV.1098, 27 February 1964, paras 95–105.

[26] R.B. Owen, US Dep. St Legal Adviser, Memorandum to Acting Secretary of State W. Christopher, US Digest 1979, 29 December 1979, at 34.

[27] Giardina 1978–1979, at 23 and 27.

[28] Files of the Congress of the Peoples' Deputies of the USSR and the Supreme Soviet of the USSR, No. 29, 27 December 1979, Article 579, at 833–834, as cited by Mälksoo 2003, at 65 (n 82).

6.2.3 International Courts and Tribunals

6.2.3.1 Judgments Based on General International Law

Court practice developed in parallel to theory. An early example in which the consistency of an agreement with public policy was an issue may be seen in the Suez Canal arbitration of 1864. Britain had intervened *vis-à-vis* the Ottoman Empire with the purpose to prevent the construction of the Suez Canal. One of the reasons brought forward were the inhuman conditions of workers; consequently, the Sublime Port denounced a decree on the employment of indigenous workers. The award by Napoleon III affirmed that the decree formed part of the concession contract, but did not uphold the claim that the parties had agreed to slavery or forced labour.[29] Even though the contract was not an international treaty between states since it had been concluded between the Vice-Roy of Egypt and the Suez Canal Company, the underlying rationale behind the British intervention, at least on its face, was that slavery was immoral and hence a reason to nullify an agreement.

The Permanent Court of International Justice (PCIJ) indicated a notion of peremptory norms that differs from the one in our day. By referring to status treaties, that is to say objective regimes on the status of territories, waterways or resources, which all states were required to respect, it adhered to a positivist stand towards ideas of public order; the concept of an 'objective law' was not compatible with the dogma that states could not be subject to obligations without any express agreement as it had prominently taken shape in the so-called *Lotus* assumption.[30] However, in the wake of World War II, the Krupp trial marked a change in paradigm. One of the indictments in that case was forced employment of French prisoners of war in weapon factories, which was contrary to the Geneva Convention of 1929.[31] Counsel of defendants invoked a treaty between the German Reich and the Vichy government allowing such abuse, but could not prove its existence. The Military Tribunal held that even if such a treaty had existed, it would have been 'manifestly *contra bonos mores* and hence void'.[32]

Afterwards, it took until the famous *Furundžija* judgment of the International Criminal Tribunal of former Yugoslavia (ICTY) that an international court explicitly resorted to *jus cogens*. In a case involving torture of prisoners on a large scale, the Tribunal derived particular consequences of the peremptory prohibition of

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[29] *Vice-Roi d'Egypte v Compagnie universelle du canal maritime de Suez*, Napoleon III Sole Arbitrator, Award of 6 July 1864, Actes Constitutifs de la Compagnie Universelle du Canal de Suez, 1866, at 78. The author is grateful to Jason Yackee, University of Wisconsin, for drawing his attention to this award.

[30] *The SS 'Lotus' (France v Turkey)*, PCIJ, Series A No. 10, Judgment of 7 September 1927, at 18.

[31] 1929 Geneva Convention relative to the Treatment of Prisoners of War, replaced by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135.

[32] *Case No. 58: The Krupp Trial*, US Military Tribunal, Judgment of 31 July 1948, UN War Crimes Commission, Law Reports of Trials of War Criminals X, at 144.

torture in domestic law from the effects of *jus cogens* on the international plane. Accordingly, authorities of the home state of the perpetrator as well as of foreign states were under an obligation 'not to condone torture or absolving the perpetrators through an amnesty law'.[33]

Some years later, after a time when *jus cogens* was only referred to in citations of pleadings or in individual opinions of judges,[34] the ICJ began to do so also in its majority opinions, but did not attach significant consequences to it. In some cases, it avoided recourse to *jus cogens* when a different solution seemed feasible. In the *Nuclear Weapons* opinion, the ICJ alluded to *jus cogens* when referring to fundamental rules of humanitarian law as 'intransgressible principles of international customary law'.[35] The majority opinion in the *Arrest Warrant* case did not mention *jus cogens*, although the question of an exception to state immunity on that ground could well have been discussed, as it was only later done so in the *Jurisdictional Immunities* case.[36] In the *Oil Platforms* case, the question at issue was if the Treaty of Amity between Iran and the US, which should not preclude measures 'necessary to protect… essential security interests' of a party, permitted use of force without prior consent of the other side. The Court did not enter into discussion as to the question of whether the peremptory character of the ban on the use of force militated in favour of a narrower interpretation, but resorted to Article 31(3)(c) VCLT and arrived at the same conclusion against the background of the UN Charter.[37]

Judgments on another set of cases are more explicit when it comes to the attribution of a peremptory character to certain obligations, but are very reluctant with respect to procedural consequences. In the *Armed Activities* case, the Democratic Republic of the Congo had invoked the peremptory character of the prohibition of the Genocide Convention in order to establish jurisdiction on this basis. The Court expressly acknowledged this peremptory character, but since consent of the parties as to the rules applicable to the dispute did not cover this treaty, it dismissed the argument on jurisdiction.[38] Thus, contrary to the intuition that Article 53 VCLT conveys, it was possible to opt out of procedural consequences of *jus cogens*

[33] *Prosecutor v Furundžija*, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 155.

[34] See the account given in Kadelbach 2006, at 31–33.

[35] *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, para 79.

[36] Cf. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ, Judgment of 14 February 2002, paras 58 and 78 and Dissenting Opinion by Judge *Al-Khawasneh*, para 7.

[37] *Oil Platforms (Iran v US)*, ICJ, Judgment of 6 November 2003, paras 32–42.

[38] *Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)*, ICJ, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, paras 64–65 and Separate Opinion by Judge ad hoc Dugard, paras 6–10.

obligations by reservation. The Court recently restated this finding.[39] In *Prosecute or Extradite*, the Court confirmed the peremptory character of the prohibition of torture and referred to instruments as far back as the 1940s to document pertinent *opinio juris* of states. However, the obligation to prosecute or extradite was analysed only within the limits of the UN Convention against Torture which, in the view of the Court, excluded any effect of that obligation for the time prior to its entry into force for the state concerned. Even though criminal law must not be applied retroactively, the obligation at issue did not concern the offence itself, but the circumstances of its procedural implementation, and here *jus cogens* was not ascribed the effect to reach beyond the consent of the parties.[40] It is in this vein that the Court in *Jurisdictional Immunities* rejected the notion of a *jus cogens* exception to state immunity before national courts by simply denying that there was any conflict of norms, which the peremptory character of humanitarian law could resolve.[41] Neither did the Court follow the notion that the customary rules on state immunity might have changed by limiting acceptable state practice to what is conform to substantial *jus cogens* rules, nor did it even expressly accept that the prohibition of war crimes belonged to that body of norms.[42]

Only on one occasion, in the *Kosovo* opinion, did the Court expressly, if *obiter*, attached legal consequences to *jus cogens*. Some states had invoked resolutions of the Security Council condemning declarations of independence such as those by Southern Rhodesia, Northern Cyprus and Republika Srpska. The Court found that it was not the unilateral character of these declarations as such which were deemed illegal, but the fact that 'they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'.[43]

In sum, the ICJ affirmed the peremptory status of a very limited set of norms such as the prohibition of the use of force, of genocide and of torture, and did hardly draw any operational conclusions therefrom. Since the Court strictly separates substance matter from procedural law, the legal consequences remain very limited. In clear contrast to the ICTY, it seems as if the less specific the legal consequences are for the case at hand, the more likely it is that the ICJ will sustain the *jus cogens* character of a rule. Thus for *jus cogens* the function remains to stress

[39] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, ICJ, Judgment of 3 February 2015, paras 87–88.

[40] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment of 20 July 2012, paras 99–100.

[41] *Jurisdictional Immunities of the State (Germany v Italy, Greece intervening)*, ICJ, Judgment of 3 February 2012, paras 92–95.

[42] The phrase used by the Court in the *Jurisdictional Immunities of the State* case, namely 'assuming for this purpose that the rules of the law of armed conflict which prohibit… murder are rules of *jus cogens*', reads awkwardly distanced. Ibid., para 93.

[43] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ, Advisory Opinion, 22 July 2010, para 81.

the abstract importance of certain core obligations within international law. From the cases scrutinized so far, however, the value of this function remains unclear.

6.2.3.2 Judgments Based on Human Rights

Since many of the candidate norms for peremptory law pertain to human rights law, the question of particular interest is whether the pale picture that becomes visible from state practice and ICJ judgments becomes more colourful in the light of the practice of human rights courts.

As far as the European system is concerned, however, the jurisprudence of the European Court of Human Rights (ECtHR) by and large complies with the judgments of the ICJ, as can be seen from three lines of reasoning in the ECtHR's practice. First, there are only a few instances in which the Court attributes peremptory character to particular human rights guarantees, as it did with regard to undisputed candidates like the prohibitions of genocide and of torture.[44]

Secondly, only little is said about legal consequences. With respect to genocide, the Court states that in view of the purpose of the Genocide Convention and the *jus cogens* character of its core obligations, a national court's reasoning that did not exclude exterritorial jurisdiction for acts of genocide abroad 'must be considered reasonable',[45] thus stating that such court practice did not violate the human rights of the accused. A genuine, but not altogether surprising conclusion is drawn with respect to the inadmissibility of evidence obtained by torture. The Court refers to UN Convention against Torture (CAT)[46] and its reflection of the 'clear will of the international community to further entrench the *jus cogens* prohibition on torture'.[47] The tendency to keep legal consequences confined also becomes apparent in the sanctions cases. The EU's General Court, then Court of First Instance, held that resolutions by the Security Council could be measured against international *jus cogens* as embodied in some fundamental human rights guarantees and were inapplicable if they were found to be in conflict with them, but did not find a violation of peremptory human rights.[48] The ECtHR has confirmed a parallel line of

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[44] *Demir and Baykara v Turkey*, ECtHR, No. 34503, 12 November 2008, para 73; *Ould Dah v France*, No. 13113/03, 17 March 2009.

[45] *Jorgic v Germany*, ECtHR, No. 7461/01, 12 July 2007, para 68.

[46] 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85.

[47] *Othman (Abu Qatada) v. UK*, ECtHR, No. 8139/09, 17 January 2012, para 266.

[48] Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR II-3659, paras 226–232; reversed by Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, where the EU's Charter on Fundamental Rights was used as an *ordre public* objection against the implementation of the Security Council's sanctions resolutions. It is interesting to note that the Italian Constitutional Court used the *ordre public* rationale developed in *Kadi* to establish an exception from state immunity and thus departed from the ICJ's judgment in the *Jurisdictional Immunities of the State*, without resorting to *jus cogens*. See Sentenza 238/2014, Corte Costituzionale, 22 October 2014.

reasoning in several cases, without, however, expressly subscribing to the view that UN Security Council resolutions had to be consistent with *jus cogens*.[49]

Thirdly, the Court has repeatedly held that it does not deem it a violation of the Convention to apply the principle of state immunity against a civil law suit for damages in a torture case.[50] As can be seen from the cited case-law, the ICJ and the ECtHR mutually reinforced their jurisprudence, which indicates that there will be no substantial change in the matter in the foreseeable future.

In contrast to its European counterpart, the Inter-American Court of Human Rights (IACtHR) makes extensive use of the *jus cogens* argument. It developed two patterns of reasoning which are of interest here, one concerning the contents and another the legal consequences. As for the subject-matter, it repeatedly stressed the fundamental character of the right to life[51] and of the prohibition of torture, 'both physical and mental', as well as the right to humane treatment and considers these guarantees to be part of international *jus cogens*.[52] Accordingly, there was no exception from them even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and other crimes, state of siege, or a state of emergency, civil commotion or domestic conflict, suspension of fundamental guarantees, domestic political instability or other public emergencies or catastrophes.[53]

It attributed the same significance to the principle of equal protection before the law, irrespective of the criterion of discrimination,[54] stating that the basic princi-

[49] *Al-Jedda v. UK*, ECtHR, No. 27021/08, 7 July 2011; *Nada v. Switzerland*, ECtHR, No. 10593/08, 12 September 2012; *Al-Dulimi and Montana Management Inc. v. Switzerland*, ECtHR, No. 5809/08, 14 April 2013.

[50] *Al-Adsani v. UK*, ECtHR, No. 35763/97, 21 November 2001, para 66; *Stichting Mothers of Srebrenica v. The Netherlands*, ECtHR, No. 65542/12, 11 June 2013, paras 157–158; *Jones et al. v. UK*, ECtHR, No. 34356/06 and 40528/06, 14 January 2014, paras 193–195. See also, *McElhinney v. Ireland*, ECtHR, App. 31253/96, 21 November 2001, Dissenting Opinion of Judge Loucaides.

[51] *Gomez Paquiyauri Brothers v Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 110, Judgment of 8 July 2004, para 128; *Huilca Tecse v Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 121, Judgment of 3 March 2005, para 65.

[52] *Baldeon-Garcia v Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 147, Judgment of 6 April 2006, para 117; *Torres Millacura v. Argentina*, IACtHR, Merits, Reparations and Costs, Series C No. 229, Judgment of 26 August 2011, para 84; *Mendoza v Argentina*, IACtHR, Merits, Reparations and Costs, Series C No. 260, Judgment of 14 May 2013, para 199.

[53] *Castro Prison v Peru*, IACtHR, Merits, Reparations and Costs, Series C No. 160, Judgment of 25 November 2006, para 271; *Bueno-Alves v Argentina*, IACtHR, Merits, Reparations and Costs, Series C No. 164, Judgment of 11 May 2007, para 76.

[54] *Juridical Condition and Rights of Undocumented Migrants*, IACtHR, Advisory Opinion, Series A No. 18, 17 September 2003, para 101. The Court enumerates 'gender, race, colour, language, religion, belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status'.

ples of equality and non-discrimination as they were rooted in the dignity of the individual had entered the domain of *jus cogens*,[55] which means, *inter alia*, that states are under an obligation not to prejudice migrants[56] and also to take positive steps to revert existing discriminatory situations.[57]

Secondly, the IACtHR uses *jus cogens* as an argument to stress the particularly grave character of certain human rights violations and to base on it the conclusion that such violations entail the obligation to prosecute and punish the perpetrators. It held so in cases of widespread and consistent practice of extrajudicial execution, torture, rape, slavery and involuntary servitude[58] as well as, in a large number of decisions, with respect to enforced disappearance.[59] Here, the IACtHR arrived at a similar conclusion as the ICTY in its *Furundžija* judgment.[60] Accordingly, impunity is not only a specific human rights violation, but also contrary to 'customary international and treaty law' in general.[61] Since crimes against humanity 'cannot

[55] *YATAMA v Nicaragua*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 127, Judgment of 23 June 2005, para 184; *Servellon Garcia v Honduras*, IACtHR, Merits, Reparations and Costs, Series C No. 152, Judgment of 21 September 2006, para 94; *Article 55 of the American Convention*, IACtHR, Advisory Opinion, Series A No. 20, 29 September 2009, para 54; *Xakmok Kasek Indigenous Community v Paraguay*, IACtHR, Merits, Reparations and Costs, Series C No. 214, Judgment of 24 August 2010, para 269; *Riffo v Chile*, IACtHR, Merits, Reparations and Costs, Series C No. 239, Judgment of 24 October 2012, para 225.

[56] *Juridical Condition and Rights of Undocumented Migrants*, para 101; *Velez Loor v Panama*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 218, Judgment of 23 November 2010, para 248.

[57] *Mapiripan Massacre v Colombia*, IACtHR, Merits, Reparations and Costs, Series C No. 134, Judgment of 15 September 2005, para 178.

[58] *Ríos Paiva v Venezuela*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 194, Judgment of 28 January 2009, para 283; *Las Dos Erres Massacre v Guatemala*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 211, Judgment of 24 November 2009, para 140; *Rio Negro Massacres v Guatemala*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C 250, Judgment of 4 September 2012, paras 114 and 227.

[59] An account of the case-law which dates back to 1996 is given in Cançado Trindade 2012, at 508–531. For more recent judgments see, e.g., *Goiburu Gimenez v Paraguay*, IACtHR, Merits, Reparations and Costs, Series C No. 153, Judgment of 22 September 2006, paras 93 and 128; *Tiu Tojín v Guatemala*, IACtHR, Merits, Reparations and Costs, Series C No. 190, Judgment of 26 November 2008, para 91; *Anzualdo Castro v Peru*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 202, Judgment of 22 September 2009, para 59; *Radilla-Pacheco v Mexico*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 209, Judgment of 23 November 2009, para 139; *Chitay Nech v Guatemala*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 212, Judgment of 25 May 2010, para 193; *Gomes Lund v Brazil*, IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 219, Judgment of 24 November 2010, paras 105 and 137; *Gelman v Uruguay*, IACtHR, Merits and Reparations, Series C No. 221, Judgment of 24 February 2011, para 183; *Contreras* et al. *v El Salvador*, IACtHR, Merits, Reparations and Costs, Series C No. 232, Judgment of 31 August 2011, para 83; *Alvarez v Guatemala*, IACtHR, Merits, Reparations and Costs, Series C No. 253, Judgment of 20 November 2012, paras 192 and 232.

[60] See also de Wet 2004.

[61] Expressly so stated in *Perozo Cabrices v Venezuela*, IACtHR, 28 January 2009, para 298.

go unpunished', the Court concluded that statutes of limitation may not apply, no matter whether the responsible state had ratified the Convention on the Non-Applicability of Limitations[62] or not.[63] States were also under a duty to cooperate, which may entail the obligation not to grant shelter or asylum to the perpetrators, but must also be read as to mean that the duty to prosecute or extradite applies by virtue of customary law.[64]

The question that arises is how this jurisprudence relates to the ICJ and ECtHR judgments, which upheld state immunity against charges of international crimes. One might argue that, in the ECtHR cases, civil law suits were at issue to which the rationale against impunity would not apply. As for criminal law, one might conclude that the peremptory obligation to prosecute and punish *jus cogens* crimes does not extend to persons who can invoke state immunity. A separation between jurisdiction and subject-matter is a general principle in court proceedings, and a trumping effect of substantive over procedural rules would upset this distinction. Even though the IACtHR has not expressly dealt with the question of state immunity in the cases consulted here, its jurisprudence is hard to reconcile with the judgments of the ICJ and ECtHR in this regard. It seems that the IACtHR does not limit the peremptory character of violations of the duty to respect core human rights, as it is expressed, for instance, in the *non-refoulement* principle which prohibits extradition and expulsion in states where there is a risk to be tortured.[65] This different stance follows from the tendency of the IACtHR to extend *jus cogens* obligations to the dimension of the duty to protect human rights, which would require states to take active measures in the field of legislation, litigation and enforcement.[66]

6.2.3.3 International Criminal Tribunals

Like the IACtHR, international criminal tribunals were not reluctant with reference to peremptory law. One function here is, as it was in the ICJ and human rights cases, to stress the importance of certain offences such as the crime of

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[62] 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 754 UNTS 73.

[63] *Almonacid-Arellano v Chile*, IACtHR, Merits, Reparations and Costs, Series C No. 154, Judgment of 26 September 2006, para 153; *La Cantuta v Peru* IACtHR, Merits, Reparations and Costs, Series C No. 162, Judgment of 29 November 2006, para 225.

[64] Cf. *La Cantuta v Peru*, para 160.

[65] On its peremptory quality, see Hannikainen 2007, at 54–58; Zimmermann and Wennholz 2011, at 1411; Cassese 2012, at 163; *Hirsi Jamaa v. Italy*, ECtHR, No. 27765/09, 23 February 2012, Concurring Opinion of Judge Pinto de Albuquerque.

[66] As to the protective dimension of *jus cogens* human rights, see Oeter 2007, at 515.

genocide, sexual slavery and war crimes.[67] Some of these judgments conclude that the serious gravity of these crimes expressed by their peremptory character entails a duty to prosecute or extradite,[68] and that contravening domestic law needs to be set aside, even retroactively.[69] The ICC went as far as to state that the 'overriding influence of *jus cogens*' took priority over democracy as 'an internal legal norm' that does not have this quality, meaning that the accused could not invoke privileges derived from his status as an elected official.[70] On the other hand, basic guarantees like access to justice,[71] the right of any arrested person to be brought promptly before a judge,[72] the principle of legality (*nulla poena sine lege*),[73] and the right to appeal against a death sentence[74] were included in the group of *jus cogens* norms. The Special Tribunal for Lebanon not only reserved to itself, as the General Court of the European Union in the *Kadi* case had done, the power to measure Security Council resolutions by this standard,[75] but also to declare international treaty law to the contrary as non-self-executing so that it cannot produce any legal effects on the domestic plane.[76]

In other words, this jurisprudence tends to give the weight of *jus cogens* to the norms constituting a criminal offence and the ensuing duty to prosecute as well as to basic guarantees of the accused. Again, 'peremptoriness' serves the purpose to enhance the importance of an argument. The trumping effect attributed to peremptory norms in international criminal law cases aims at collisions with domestic law if it comes to setting aside amnesty laws, statutes of limitation, or, one may infer, superior orders and other grounds precluding wrongfulness.

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[67] For genocide, see *Prosecutor v Trifunovic, Milenko et al.*, War Crimes Section of the State Court of Bosnia and Herzegovina (WCS-BiH) 2nd Inst, Verdict, 9 September 2009. For sexual slavery, see *Prosecutor v Brima et al.*, Special Court for Sierra Leone (SCSL) TCII, Judgment, 20 June 2007, para 705; *Prosecutor v Sesay et al.*, SCSL, Judgment, RUF Case No. SCSL-04/15-T, 2 March 2009, para 157. For war crimes, see *Prosecutor v Nikacevic Miodrag*, WCS-BiH, Verdict, 19 February 2009; *Co-Prosecutors v Ieng Sary*, Extraordinary Chambers in the Courts of Cambodia, ECCT PTC, Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), 15 February 2011, para 118.

[68] *Prosecutor v Pincic Zrinko*, WCS BiH 1st, Verdict, 28 November 2008.

[69] *Co-Prosecutors v Ieng Sary*, para 118.

[70] *Prosecutor v Ruto and Sang,* ICC TC V(a), Decision on Request for Excusal from Continuous Presence at Trial, Case No. ICC-01/09-01/11-777, 18 June 2013, para 90.

[71] *Prosecutor v El Sayed*, Special Tribunal for Lebanon (STL), Order Assigning Matter to the Pre-Trial Judge, Case CH/PRES/2010/01, 15 April 2010, para 29.

[72] *In the Matter of El Sayed (Pre-Trial Judge)*, STL PTJ, Order 15 April 2009, para 14.

[73] *Prosecutor v El Sayed*, STL, Interlocutory Decision on the Applicable Law, Case STL-11-01/I/AC/R176bis, 16 February 2011, para 76.

[74] *Prosecutor v Norman* et al., SCSL, Decision on the applications for a stay of proceedings and a denial of right to appeal, Case SCSL-03-08-PT-108, 4 November 2003, para 19.

[75] Cf. note 46; *Prosecutor v Ayyash*, STL, Decision on the Defence Appeals, Case STL-11-01/PT/AC/AR90, 24 October 2012, para 68.

[76] *Prosecutor v El Sayed*, para 76.

6.2.3.4 Interim Conclusion: Function and Identification of *Jus Cogens* in Court Practice

Whereas the PCIJ upheld a concept of public order basically resting on objective regime treaties, state and court practice accompanying and following the emergence of the VCLT define public order by content and fill the *jus cogens* principle with grave violations of international law, often of a criminal character. *Jus cogens* norms are associated with a higher rank, like constitutional law in its relationship to ordinary state law.[77] However, judging from the case law we have seen so far, there is not much to indicate that *jus cogens* serves the function of the constitution of the international community. Basic human rights catalogues are found in many constitutions, but the body of *jus cogens* recognized by courts so far is too rudimentary to conclude that *jus cogens* builds up the core of an international rule of law.

As for identification, the technique used by courts is not elaborate. In none of the cases did a court identify a norm as peremptory by applying defined criteria. Case-law mostly draws on the importance of the obligation in question, and if authority is quoted, it does not use any criteria either. If the attribution of a peremptory quality to a norm in court practice is for the most part a matter of intuitive plausibility, the question arises whether such plausibility can be confirmed by means of legal methodology. For that purpose, it is necessary to review the criteria usually deployed. These criteria derive from the function *jus cogens* should originally have, namely to invalidate consent of states to treaties and in other cases to uphold the efficacy of norms which serve interests of the community of states as a whole.

6.3 Original and Derivative Functions of *Jus Cogens*

6.3.1 Functions in Positive Law

6.3.1.1 Nullifying Effect

For treaty law, Article 53 VCLT clearly spells out the basic function of peremptory norms to limit state consent: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. As we have seen, such a direct conflict in the sense that a treaty has an illicit subject-matter is a theoretical case. However, indirect collisions are less unlikely,[78] be it that only one of more possible interpretations of a treaty would be contrary to *jus cogens* or that the implementation of an agreement would be detrimental to rights to which

[77] Shelton 2006; Kleinlein 2016.

[78] A classification of possible conflicts is suggested by Cannizzaro 2011, at 427–437.

peremptory quality is ascribed, as it is conceivable in extradition and *refoulement* cases. Then *jus cogens* has an effect on the interpretation or bars the implementation of an agreement. Furthermore, it is plausible to derive from the nullifying effect of peremptory norms the inadmissibility of reservations to core guarantees of human rights treaties, as the Human Rights Committee had found.[79] If the party could not reserve its power to neglect a certain human rights guarantee by bilateral treaty, it cannot opt out of it by unilateral declaration. From this conclusion, it is only one more step to assume that unilateral acts contrary to peremptory law cannot produce any legal effect, as the ICJ had stated with respect to the recognition of states in the *Kosovo* opinion.

6.3.1.2 Enhanced Responsibility and *Erga Omnes* Effects

Some of the effects *jus cogens* has in the law of state responsibility immediately derive from this function to restrict acceptable emanations from free state will. Obviously, consent cannot preclude wrongfulness if such consent is beyond the declaring state's power (Articles 20, 26 ARSIWA). In the same vein, recognition does not help to consolidate situations violating *jus cogens* norms to lawful title. Articles 41 and 40 ARSIWA go further in that they spell out the obligation of states not to recognize such situations, as also the ICJ had found in the *Palestine Wall* opinion.[80]

Besides this extension of an old doctrine on annexation as an unlawful title, there is also another function of *jus cogens* in state responsibility. According to the ILC Articles, it does not only eliminate state consent as a ground precluding wrong, but also self-defence, countermeasures, force majeure, necessity and distress (Article 26 ARSIWA) and thus generally restricts a state's freedom to act. These effects have at times been criticized as logically implausible since they do not follow from the invalidating effect of peremptory law[81]; however, they are in line with Article 53 VCLT according to which a peremptory norm is not defined as one 'accepted and recognized by the state community as a whole' as having a nullifying effect, but 'as a norm from which no derogation is permitted.' 'Derogations' are also possible in a state of necessity, as it is expressly provided for in most human rights treaties, and in other instances of disorder.[82] The binding effect of *jus cogens* norms is therefore supposed to be absolute and to admit only inherent exceptions, like self-defence with respect to the use of force. One aspect

[79] Human Rights Committee, General Comment No. 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Protocols thereto, UN Doc. CCPR/C/21/Rev.1/Add.6, 11 November 1994, para 8.

[80] *Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004, paras 88 and 155–156. The difference is that the ICJ referred to the violated norms of self-determination and humanitarian law not as *jus cogens*, but as obligations *erga omnes*.

[81] Kawasaki 2006, at 35–39.

[82] See also Oeter 2007, at 509–511.

which works out on the law of countermeasures makes a typical effect visible. A countermeasure is no excuse if it is in conflict with peremptory law (Articles 20, 26 ARSIWA), which also extends to measures taken by third states or by the state community as a whole (Articles 48, 50(1)(d) ARSIWA). The *tu quoque* defence does not apply, which indicates, seen together with Article 53 VCLT, that *jus cogens* is an exception to the principle of reciprocity, classically considered as the decisive reason for international law's normativity, and marks the contours of a normative order of an "objective" character.[83]

To stress the fundamental character of an obligation and the seriousness of its breach, ARSIWA also takes up the concept of *erga omnes* norms, even though it does not use the term, but denotes them as obligations 'owed to the international community as a whole' (Article 48(1)(b) ARSIWA). The difference between *erga omnes* obligations and *jus cogens* norms is not so much one of the contents of the respective categories;[84] more important is a difference in function. Whereas *jus cogens* has a bearing on deviating will declared on behalf of a state, *erga omnes* obligations denote a concept of opposability in that they entitle also states other than the injured state to invoke responsibility. In theory, *jus cogens* refers to the subject matter of an obligation, the *erga omnes* effect directs to the right to raise a claim. However, as we will see soon, court practice does not attach any procedural consequences to this conceptual distinction.

6.3.1.3 The Relationship with International Criminal Law

In judgments of the IACtHR and of international tribunals, a close link has been established between international criminal law and *jus cogens*. However, the nature of an offence as a criminal conduct alone does not suffice to conclude that the prohibition breached is peremptory. Even though there is unanimity that the core crimes of customary law covered by the Rome Statute[85] belong to this category, this is not true of all offences under international criminal law, in particular not of those which are merely of a conventional nature, such as counterfeiting of currency, money laundering or corruption. On the other hand, not all violations of peremptory law *per se* amount to an international crime. All that can be said is that there is a *prima facie* assumption that crimes which have crystallized into customary international law pertain to *jus cogens* so that there is a certain overlap. It is therefore not one of the functions of *jus cogens* to define criminal conduct and, considering its disputed certainty, it is not even suitable to that end. Thus, for the purposes of identification of *jus cogens*, the description of a conduct as criminal

[83] Cf. for that change in paradigm Tomuschat 1993, at 222–240; Frowein 1994, at 365; Simma 1994, at 293 and 300.

[84] The two do not necessarily coincide. See Byers 1997; and Czaplinski 1997–1998.

[85] Articles 6–8 of the 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3 (genocide, crimes against humanity and war crimes).

under international law may indicate the absolute character of an obligation, but is in itself not sufficient to establish its peremptory quality.

6.3.1.4 Procedural Law

The review of the ICJ's jurisprudence has shown that the Court, for various reasons, has not ascribed any procedural consequences to *jus cogens* norms. This case-law is in line with earlier judgments and therefore not surprising. As early as in the *Barcelona Traction* judgment, the Court recognized that a core set of fundamental norms exists, which it categorized as *erga omnes* obligations owed to the state community as a whole, but also expressly held that this would not mean that the community had *locus standi* to invoke the violation of such norms before the ICJ.[86] In spite of some critique, the Court later reiterated its rejection of any procedural consequences.[87] Only the state whose interests are directly affected has the right to present a claim and, one might add, it does not have to do so. It is not detrimental to peremptory law if a state which could invoke it does not aim at enforcing it before the court, unless it is obliged to do so, for instance, by international human rights treaties. It is only a consequence of this freedom of the parties to a dispute to decide on the subject of proceedings that the ICJ upheld the validity of a reservation to the jurisdictional clause of the Genocide Convention.[88] This distinction between substantive and procedural law also explains the reluctance by international courts to subscribe to an exception from immunity for violations of *jus cogens* norms. The holding that there could be no collision between substantive *jus cogens* rules and the principle of state immunity may not be convincing, but it means to insist that it is up to the state concerned to waive immunity and thus to decide whether a suit can be brought. It is not the place here to discuss whether such reluctance by the courts is justified. Suffice it to note that both the ICJ and the ECtHR are consistent in stating that *jus cogens* has no function in international procedural law.

6.3.1.5 *Jus Cogens* and Domestic Law

Some judgments of criminal tribunals and of the IACtHR discussed above may be read as to imply that *jus cogens* causes immediate legal effects on municipal law in that they demand that amnesty laws and statutes of limitation must be set aside as a bar to criminal prosecution. However, the pertinent decisions do not seem sufficiently clear in that respect. Since these courts do not have the power to declare

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[86] *Barcelona Traction*, para 91.

[87] *East Timor (Portugal v Australia)*, ICJ, Judgment of 30 June 1995, para 29.

[88] *Armed Activities on the Territory of the Congo*, paras 64–65 and Separate Opinion by Judge ad hoc Dugard, paras 6–10.

domestic law invalid, they should not be understood as to imply that their judgments reach beyond their jurisdiction. Rather, the *jus cogens* argument in these cases serves the function to underline that it would be a serious conflict with the obligation to prosecute upheld by these courts if the responsible states resort to domestic law in order to justify impunity. At the same time, their reasoning makes clear that a state, which opens criminal proceedings against the offenders, would not violate human rights,[89] but comply with an obligation. However, court practice does not yield the conclusion that *jus cogens* had any direct effect on domestic statute law.

6.3.2 The Function of Jus Cogens as a Legal Argument

If we compare court practice with the concept of *jus cogens* as it emerges from the codification of treaty law and the law of state responsibility, it seems as if roles had been swapped. Whereas the expert drafters of the VCLT and the ARSIWA had clear-cut consequences for practice in mind, courts subscribe to a rather abstract notion of peremptory norms without spelling out specific legal effects. Since such effects hardly ever materialize, what is the value in referring to *jus cogens* for present-day international law?

A first suggestion is that *jus cogens* implying, as it appears, a hierarchy between norms embodies a core notion of international constitutionalism. Constitutional law, however, may be expected to pronounce itself as to how law is enacted. Yet, the most *jus cogens* can do is to identify cases in which (treaty) law *cannot* come about; even though restrictions on legislative power are essential elements of constitutional law, they alone do not suffice to form a constitution.[90] For similar reasons, peremptory norms are not suited to preserve the unity of international law against fragmentation,[91] since the norm examples usually mentioned are too elementary so that they leave much room for interpretation and for different understandings as to which components of a norm category share its peremptory character.

The history of the codification projects and the concrete shape *jus cogens* has assumed in their results can best be brought in line with the case-law if both are taken as an expression of core values of the international legal order which are deemed particularly important for the fundamentals of law itself.[92] In embodying

[89] Similarly so far, in the so-called wall sniper cases, *Streletz et al. v Germany*, ECtHR, No. 34044/96, 22 March 2001, paras 90–108.

[90] Cf. Hart 1961, at 70.

[91] But see Kolb 2014, at 26. See also the cautious conclusion in International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006, para 409.

[92] Paulus 2005, at 308–309 and 332; Cassese 2012, at 166.

essential duties of refraining from violence against human life and collective self-determination, it aims at providing protection for preconditions, which must be met in any society if the relations between its subjects are to be governed not by force, but by law. Since the reality of international relations often fails to live up to these demands, there is always both in the *jus cogens* argument, insistence on core obligations and an appeal to remedy an imperfect international order. It is therefore at the same time an argument of positive law and a reference to an ideal type of legal order where peace and human rights rule.[93] The symbolic value of *jus cogens* lies in this appeal to core morals of the international legal order. It is inherent in this symbolic function that peremptory law itself does not necessarily provide tools to enforce. However, since it has at least the potential to be strictly implemented, the question of interest is why exactly the legal consequences discussed so far are attached to the rules recognized as peremptory and how the interplay between function and contents unfolds.

6.4 The Identification of *Jus Cogens* Norms

6.4.1 Method

Its symbolic function and in fact also the way courts use the *jus cogens* argument suggest to deduce the peremptory character of a norm from a value judgment on its importance for community interests like peace, the human fate or the legal order itself, or from the gravity of a violation observed. Such an approach would encounter objections that usually are directed against natural law theories, the most striking of which is the indeterminacy and contingency of the outcomes. This is the reason for the positivist definition given in Article 53 VCLT, with which treatises on *jus cogens* usually start,[94] and which requires two elements to be verified: the general acceptance of the norm and its non-derogatory character. How these elements interrelate, however, is subject to controversy.

The narrowest method is 'purely inductive' in that it suggests to investigate into practice on both norm acceptance and nullifying effect. Since practice is scarce, *jus cogens* would then have only the hortatory value to generate new custom and to develop the law into a desired direction.[95] At the other end of the spectrum is the proposal to establish pertinent *opinio juris*, in order to compensate for the absence of practice, by resorting to general principles.[96] Here again, the natural law-related objections are in the air.

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[93] In that sense, with regard to enforced disappearance Sarkin 2012, at 583; and more generally Cançado Trindade 2012, at 535.

[94] Accordingly, 'a peremptory norm of general international law is a norm accepted and recognized by the state community as a whole as a norm from which no derogation is permitted'.

[95] Focarelli 2008, at 449.

[96] Cf. Simma and Alston 1989, at 103–104.

Most proposals take an intermediate route. Still, practice and *opinio juris* is required with respect to the recognition of the rule itself.[97] However, the non-derogatory character, the *opinio juris cogentis*, can, accordingly, be ascertained by criteria found in treaty law. Methodological critique notwithstanding,[98] this method follows a path generally accepted in the doctrine of customary law. Following the ICJ *North Sea Continental Shelf* judgments, custom can be identified not only by practice of individual states, but also by treaty analysis,[99] which holds the more true if international conventions use similar clauses continuously, in different generations and with varying groups of contracting parties.[100] This method also fits the general perception that *jus cogens* is not a source of its own but found in many if not all sources of international law.[101]

Therefore, there is not much to say against the usual technique to identify *jus cogens* norms by the absolute language in which the underlying obligations are spelled out when formulated in multilateral treaties.[102] Thus, the United Nations Charter, where the use of force, apart from self-defence, is monopolized with the Security Council, advocates in favour of the peremptory character of its prohibition. The same holds true with respect to the elementary guarantees of law in armed conflict because they are enshrined in absolute terms in Common Article 3 of the four 1949 Geneva Conventions.[103] Indicative language referring to legal effects may be specific to the law of treaties, but may also be found where consequences attached to the violation of peremptory norms are provided in the law of state responsibility. Examples are the exclusion of exceptions in emergency clauses of human rights treaties, prohibitions of reservations, restrictions on reprisals as they are embodied in the law of armed conflict or the classification of certain conduct as crimes.[104] The stricter a rule is framed, the stronger is the presumption in favour of its peremptory character. Thus, the examples usually given do not simply appeal to moral intuition, their *jus cogens* quality can be explained by criteria found in positive law. The fact that many of these treaty clauses are older than

[97] Espaliu Berdud 2013, at 214.

[98] Linderfalk 2012.

[99] *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Denmark*; *Federal Republic of Germany/Netherlands*), ICJ, Judgment of 20 February 1969, para 71–77.

[100] So-called Baxter test. See Baxter 1970, at 36–56.

[101] Besson 2010, at 171.

[102] Hannikainen 1988, at 208–292.

[103] 1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 75 UNTS 31; 1949 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85; 1949 Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287. For more criteria found in humanitarian law see Schwelb 1967, at 953–957.

[104] *Torres Millacura v Argentina*, IACtHR, Merits, Reparations and Costs, Series C No. 229, Judgment of 26 August 2011, para 84; Human Rights Committee, General Comment No. 29, States of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 11.

the general recognition of *jus cogens* is not an argument against their indicative character, but shows that the concept fits into a general parallel development and a congruency in value judgments reflected in different instruments.

6.4.2 Examples

Today the question of interest is which rule may have acquired peremptory quality beyond those recognized as such already decades ago.[105] Prominently, the Human Rights Committee stated that it did not consider the list found in the emergency clause of Article 4 of the International Covenant on Civil and Political Rights[106] (ICCPR) exhaustive. This list already includes the prohibition of *ex post facto* laws (*nulla poena sine lege*), the right of recognition as a person before the law, and the freedom of religion.[107] Debatable as some of these examples already are considering their doubtful acceptance as customary international law, General Comment No. 29 adds, apart from humanitarian law core guarantees, the prohibition of arbitrary detention, the right to a fair trial and the presumption of innocence to the list of *jus cogens* norms. Seen against the background that the ECtHR denied the peremptory character of the fair trial guarantees,[108] such suggestions seem to be more of a legal policy character. Even though critique might not impose itself if it comes to improving human rights protection, the question still relevant is which elements in positive law justify such a contention.

Applying the criteria sketched out above, the prohibition of arbitrary arrest or detention might be a comparatively safe candidate; the list of exceptions to this right is exhaustive and their requirements are defined narrowly and, unlike the freedom of religion, it is not subject to limitations to which the doctrine of margin of appreciation applies.[109] The practice of the IACtHR to qualify the prohibition of enforced disappearance is another example. It is in itself a combination of grave human rights violations like arbitrary detention, torture, degrading treatment,

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[105] *Barcelona Traction*. Cf. also American Law Institute 1987, § 102 (rep note 6) and § 702; Hannikainen 1988, summary at 716–723; Kadelbach 1992, at 210–315; Orakhelashvili 2006, at 50–65.

[106] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

[107] Human Rights Committee, General Comment No. 29, States of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 11. See also the proposals in Hannikainen 2007, at 48–50: basic rights of the child, prevention of violence against women, rights of minorities and indigenous peoples.

[108] *Prosecutor v Gbao*, SCSL, Decision on the prosecution motion for immediate protective measures for witnesses and victims and for non-public disclosure, Case SCL-03-09-PT-048, 10 October 2003, para 41. See also jurisprudence by the Swiss Federal Court as cited and confirmed in *Al-Dulimi and Montana Management Inc v. Switzerland*, ECtHR, No. 5809/08, 26 November 2013, para 38.

[109] Oeter 2007, at 513.

denial of justice, and wanton killing; the seriousness of this composite crime is also expressed in absolute terms in the Convention for the Protection of All Persons from Enforced Disappearence (ICED).[110] If committed on a large scale, it is a crime under the Rome Statute.[111]

6.5 *Jus Cogens* and the Problem of Universal Validity

So far, the point has been made that concerns of abuse of the *jus cogens* argument are hardly justified; as far as it appeals to morals, it refers to positive human rights. The reverse side of its symbolic function is that it seems to invite to frame exhortations to better performance in such terms and thus to run the risk to weaken the underlying obligation rather than to strengthen it. Like all norms of such an order, the *jus cogens* argument is 'short and obscure', widely agreed upon, but at the price of unclear contents.[112] However, we have seen that the problem to identify *jus cogens* norms and to demarcate the line between peremptory law and moral assertions can be addressed more specifically than scepticism to the contrary would let us assume.

Thus, the question remains whether there is something about the discourse on peremptory law that advocates for reluctance. Against its function to denote core values of the international community the objection is voiced that it expresses more unity than the heterogeneity of the international community of states admits, by either reducing this essential core to the obvious or by hiding difference behind vague terms.[113] Indeed, even the uncontroversial candidates for a *jus cogens* rank are not undisputed in scope. What exactly is 'use of force' that falls in the ambit of peremptory law? Where is the line between legitimate anticipatory self-defence and armed attack? Does the prohibition of torture also cover inhumane practices of punishment, despite Article 1(1) CAT, which pronounces itself to the opposite? What does the debate on torture in the course of the so-called war against terror tell us about the unanimity of acceptance of *jus cogens* values? Is deficient medical care tantamount to inhuman treatment so that an expulsion of aliens in need of continuous medication to poor countries violates the peremptory core of human rights? When do unacceptable working conditions amount to slavery?

The idea of *jus cogens* as it is at times presented prompts the misleading observation that the basic values of international law are not subject to law-making, but are merely to be 'uncovered' and implemented. The critical debate about

[110] Articles 7 and 8 of the 2006 Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3 ('extreme seriousness').

[111] It is a crime against humanity under Article 7(1)(k) Rome Statute.

[112] '[A]n agreement to disagree further about the detail of the values'. Besson 2010, at 182.

[113] Koskenniemi 2005, at 122.

peremptory norms is therefore on the admissibility of the claim of categorical, universal validity of norms and the limitations on such universality by particular interests and their enforcement. The merit of the *jus cogens* argument as a symbol for fundamental values and an appeal to unconditioned validity then may be to increase the burden of the argument on those who are on the opposing side. The ensuing tension between insistence on the freedom of the sovereign will of states and claims to an 'objective' legal order is inevitable and inherent to the dilemma of *jus cogens*. On the one hand, it can fulfil its role as an argument only if its legal effects have the realistic potential to materialize so that its use must not be excessive, but remains restricted to the very basics as they have taken shape in positive law. On the other hand, the *jus cogens* argument has a critical, if utopian potential as to the state of affairs in international law, which in a way depends on its arsenal of strict legal consequences. Obviously, the fact that a norm is universally accepted does not imply that its meaning is universally agreed upon, and it would mean to miss the problem if *jus cogens* were taken as the reason for this general characteristic of international law, its 'relative universalism', as one might put it. Like all law, the scope of *jus cogens* cannot be but the outcome of legal discourse and negotiation on common ground.

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Chapter 7
Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies

Thomas Kleinlein

Abstract Peremptory norms are often regarded as the only true instances of hierarchy in international law. Many legal arguments derive particular consequences from the special status of *jus cogens* in the legal hierarchy. This prominence of the notion of hierarchy contrasts with conceptual uncertainties. For this reason, the present chapter sets out four different concepts of hierarchy—structural, substantial, logical and axiological hierarchies. In a second step, the aspects that account for the special status of *jus cogens*—invalidity as a consequence of a conflict, non-derogability and derogatory power, a qualified law-making procedure and recognition of moral paramountcy—are analysed within the framework of these four types of hierarchy. Referring also to further attributes defining the special status of *jus cogens*, this part explores whether the various attributes of *jus cogens* can be explained on the basis of a coherent and non-circular concept of hierarchy. The chapter concludes by reflecting on how to increase the effectiveness of morally paramount norms through *jus cogens* arguments and beyond. Ultimately, a more gentle approach that does not view *jus cogens* as a trump card will be not only conceptually more convincing but also make peremptory norms more effective.

Keywords Hierarchy · Invalidity · *Jus cogens* · Moral paramountcy · Non-derogability · Norm conflict

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7.1 Introduction

International lawyers often attribute a number of consequences to the status of *jus cogens* in the legal hierarchy that reach far beyond the nullity of a treaty as ordered by Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT).[1] States are bound to withhold recognition of an entity that has emerged as a result of aggression or is based on systematic denial of the rights of minorities or of human rights.[2] Reservations over a multilateral treaty that are inconsistent with a peremptory norm are considered to be inadmissible.[3] A possible violation of a peremptory norm, for instance, the prohibition of torture, would authorise a state not to comply with an extradition treaty under which it would otherwise be obliged to extradite an individual.[4] Furthermore, peremptory norms set limits to

[1] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[2] As formulated by the Arbitration Commission on Yugoslavia: 'subject … to compliance with the imperatives of general international law'. Arbitration Commission on Yugoslavia, Opinion N. 10, 4 July 1992.

[3] *North Sea Continental Shelf Cases* (*Federal Republic of Germany/Denmark*; *Federal Republic of Germany/Netherlands*), ICJ, Judgment of 20 February 1969, Separate Opinion of Judge Padilla Nervo, at 97; ibid., Dissenting Opinion of Judge Tanaka, at 182; ibid., Dissenting Opinion of Judge Sørensen, at 248; Human Rights Committee, General Comment 24, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para 8; *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, ICJ, Judgment of 3 February 2006, Joint Separate Opinion of Judges Higgins, Koojimans, Elaraby, Owada and Simma, para 29.

[4] According to Cassese this is implied in the resolution of the Institut de droit international, New Problems of Extradition, 60 Annuaire Part II, at 306. Cassese 2005, at 208.

state immunity from the jurisdiction of foreign states.[5] Peremptory norms may also de-legitimise domestic legislative or administrative acts authorising the prohibited conduct. The violation of *jus cogens* by an individual may permit domestic criminal courts to exercise universal jurisdiction upon this individual.[6]

The conventional explanation for all these consequences is that peremptory norms, for some of their characteristics, are at the top of the legal hierarchy. They form the 'highest law', and from this, it follows that some further consequences should be attached to this category of norms. Sometimes, a similar argument comes in 'constitutional disguise', namely that *jus cogens* forms part of international constitutional law, and for this very reason it must have certain consequences beyond the VCLT. One could not deny at the outset that the structure of this argument smacks of *Begriffsjurisprudenz*.[7] Apart from this, the hierarchical status of *jus cogens* has remained conceptually rather vague. International lawyers regard the status of *jus cogens* in the legal hierarchy as 'one of the most impenetrable mysteries'.[8] Arguably, the disquieting uncertainties surrounding the hierarchical status of *jus cogens* are reflected in the fact that it is actually very rare for *jus cogens* to have been successfully invoked in a court to resolve a norm conflict.[9] The reason for this abstinence is definitely not lack of opportunity: *jus cogens* arguments have been considered not only by the International Court of Justice (ICJ),[10] but also by various international judicial institutions, as well as by domestic courts.

This chapter confronts the riddle of the hierarchical status of *jus cogens* and presents four different concepts of hierarchy that can be found in legal theory (Sect. 7.2). In a second step, the aspects that conventionally account for the special status of *jus cogens* are analysed in the framework set up by these four types of hierarchy (Sect. 7.3). Several elements define the special status of *jus cogens*. First, scholars refer to the special effect of a conflict with *jus cogens*. This conflict results in the invalidation of the conflicting norm. Notably, this is not the consequence of a conflict with the UN Charter[11] according to its Article 103.[12] For this

[5] See Cassese 2012, at 161–162, referring to Wald (*Princz v Federal Republic of Germany*, 26 F3d 1166 (US DC Circuit Court of Appeals 1994), Dissenting Opinion of Judge Wald, at 1176–1185); *Ferrini v. Federal Republic of Germany*, Italian Court of Cassation, No. 5044, 11 March 2004, paras 5, 9–10.

[6] For an overview of these and further legal effects of *jus cogens*, see Cassese 2005, at 205–208.

[7] For an analysis, see Kleinlein 2012, at 361–409.

[8] Cannizzaro 2014, at 261.

[9] For an analysis of the case law, see Kleinlein 2012, at 388–397. One of the rare cases seems to be the *Ferrini* case. Still, it is not entirely clear whether *Ferrini* was decided on these grounds. See Bianchi 2008, at 500–501; Milanović 2009, at 71. In *Lozano v. Italy*, the Italian Court of Cassation only said in *obiter dictum* that the immunity *ratione materiae* of a US serviceman could be lifted in the event of an international crime. *Lozano v. Italy*, Italian Court of Cassation, No. 31171, 24 July 2008. Compare with Webb 2012, at 122–123.

[10] For the fate of *jus cogens* at the ICJ, see Gaja 2012, at 57–59; Kadelbach 2016.

[11] 1945 Charter of the United Nations, 1 UNTS XVI.

[12] This is the overwhelming view, see Paulus and Leiß 2012, paras 75–80.

reason, the concept of *jus cogens* is considered to encapsulate 'a rule of hierarchy *senso strictu* [sic], not simply a rule of precedence' (Sect. 7.3.1).[13] Second, the definition of peremptory norms in the second sentence of Article 53 VCLT refers to non-derogability as the decisive element of their special status. Non-derogability or the prohibition against asserting certain rights is a common feature of all *jus cogens* norms (Sect. 7.3.2).[14] Third, some scholars claim that the status of non-derogability fits with the qualified procedure to be followed for establishing a peremptory norm (Sect. 7.3.3). However, the formal criteria of invalidity as an effect of conflict, non-derogability, and qualified procedure alone cannot explain *jus cogens*. Rather, the heart of the matter is the recognition of moral paramountcy of *jus cogens* (Sect. 7.3.4). Finally, Sect. 7.3 also analyses further attributes of *jus cogens*, recognised more recently (Sect. 7.3.5). How can these different aspects be related to the different concepts of hierarchy? Can they be explained on the basis of a coherent and non-circular concept of hierarchy? Does the hierarchical status of *jus cogens* offer a satisfactory explanation for the various special consequences attributed to *jus cogens*? The chapter concludes by reflecting on how to increase effective compliance with morally paramount norms through *jus cogens* arguments and beyond. Ultimately, a more gentle approach that does not view *jus cogens* as a trump card is not only conceptually more convincing but also more effective (Sect. 7.4).

7.2 Concepts of Legal Hierarchy

Legal theorists refer to different types of hierarchical relations between norms.[15] I would like to distinguish four aspects: A *structural* hierarchy exists between norms regulating how law is created and the law actually created on the basis of these norms (Sect. 7.2.1). This is to be distinguished from the *substantial* hierarchy established between two norms when any contradiction between them is positively forbidden (Sect. 7.2.2). Third, a *logical* hierarchy exists between two norms when one refers to the other from a metalinguistic level (Sect. 7.2.3). Finally, an *axiological* hierarchy depends on a value judgment by which superiority is given to one norm over the other (Sect. 7.2.4).

[13] International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006, para 365 (Fragmentation of international law); Milanović 2009, at 74 and 77.

[14] Kadelbach 2005, at 34.

[15] For a concise overview, see Guastini 2013, at 47–48. All these hierarchies refer to relations between legal norms and, as such, are not hierarchies in a broader, political or sociological sense. For a 'sketch', see Koskenniemi 1997.

7.2.1 Structural Hierarchy: Hierarchy According to the Conditions of Law-Making

A first concept of hierarchy is familiar from the Pure Theory of Law (*Reine Rechtslehre*). A 'hierarchy according to the conditions of law-making' or a 'hierarchy of legal conditionality'[16] means that we can distinguish between meta-laws on law creation (*Rechtserzeugungsregel*) and laws established on their basis.[17] Meta-laws on law creation have a particular normative function: they are empowering norms and confer on a certain law-maker the power to posit and apply norms. Non-empowered acts are void.[18] For Kelsen, this is a peculiarity of any law: legal norms determine the way in which other legal norms are created and, to some extent, also define the contents of these norms.[19] Essentially, this constitutes a relationship of dependence (*Abhängigkeitsbeziehung*).[20] Calling one norm superior and the other inferior is just a spatial figure of speech.[21] Strictly speaking, meta-laws on law-making do not directly refer to other legal rules. Rather, they do concern the act of law-making.[22] Legal norms cannot be seen as being either conditioning or conditioned. Rather, they are both at the same time: conditioned by higher norms and conditioning lower norms.[23] Except for the basic norm and acts of physical execution, all legal acts have this double legal appearance (*doppeltes Rechtsantlitz*): they are Janus-faced.[24]

7.2.2 Substantial Hierarchy: Hierarchy According to Derogatory Power

Apart from the structural type of hierarchy, Adolf Julius Merkl refers to derogatory power as establishing a hierarchy between the derogating and the derogated norm. Derogatory power means the ability of a legal norm to abolish or at least confine the validity of another legal norm.[25] A legal norm that has the force to der-

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[16] See Merkl 1931, at 276; Merkl 1968b, at 1340; Walter 1964, at 60–65. The original formulation was: 'Stufenbau nach der rechtlichen Bedingtheit'. Suggestions for translation by Jakab 2007, at 48 ff. cf et seq.; and Kammerhofer 2011, at 181.

[17] Walter 1964, at 61. For the translation, I rely on Kammerhofer 2011, at 181.

[18] Kelsen 1991, at 102; for the German text, see Kelsen 1979, at 82–83. Kelsen refers to the empowerment of individuals as law-makers.

[19] Kelsen 1949, at 125.

[20] Merkl 1931, at 276; Merkl 1968b, at 1340.

[21] Kelsen 1949, at 124; Merkl 1931, at 276.

[22] Guastini 2013, at 52.

[23] Merkl 1931, at 258.

[24] Merkl 1968a.

[25] Öhlinger 1975, at 22. See also Walter 1964, at 57–59.

ogate the validity of another legal norm, whereas this legal norm does not have the force to derogate the first norm, is, for this very reason, of a higher rank and the derogable legal norm is of lower legal rank compared to the derogating legal norm.[26] This type of hierarchy depends on a positive regulation of derogatory power.[27] Strictly speaking, derogation involves three norms. The derogating norm is not one of the two conflicting norms but a third norm which specifies that one of the two conflicting norms loses its validity, or that both norms lose their validity.[28] Accordingly, one could say that only this third norm is genuinely superior while the norm that does not lose its validity but prevails in the situation of norm conflict has a derived status. The derogating norm resolves a conflict between two substantial norms, but it is only due to this third norm that one of the two substantial norms prevails. Since hierarchy according to derogatory power presupposes a substantial conflict of norms, we call the relationship established by the derogating norm between the two conflicting norms a substantial hierarchy. Unlike the structural hierarchy between a law and a meta-law, i.e. the hierarchy according to the conditions of law-making, this substantial hierarchy follows not directly from the relation between two norms. Rather, a conflict between these two norms may—but will not necessarily—be resolved by derogation according to a third norm.[29]

7.2.3 Logical Hierarchy: Hierarchy as Different Levels of Language

A third concept of hierarchy distinguishes between primary and secondary rules and thereby establishes a logical or linguistic hierarchy. Secondary rules are on a different level of language than primary rules. They are a sort of metalanguage, while primary rules are the object language, the metalanguage being the language used to talk about the object language. According to HLA Hart's famous distinction, secondary rules may be said to be on a different level from the primary rules, for they are all 'about such rules'. Primary rules are concerned with the actions that individuals must or must not do. Secondary rules, by contrast, are concerned with the primary rules themselves. They specify the ways in which the primary

[26] Merkl 1931, at 276. Kelsen never adopted this hierarchy according to derogatory power. For possible reasons, see Behrend 1977, at 42; Jakab 2007, at 56.

[27] Öhlinger 1975, at 18–19.

[28] Kelsen 1991, at 125. For the German text, see Kelsen 1979, at 101.

[29] Kelsen 1991, at 125.

rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.[30]

Structural and substantial hierarchies can be found in any legal order, domestic and international. By contrast, in Hart's view, international law did not form a hierarchy between primary and secondary rules and simply consisted of a set of primary rules of obligation without a rule of recognition, each primary rule being recognised individually as a legal norm.[31] Hart's assessment of international law was published in 1961 and may not reflect the current state of international law.[32] However, it is crucial not to strip Hart's distinction of most of its meaning when transferring it to international law. Secondary rules are the remedies for the three main defects Hart perceives in primitive legal orders (which consist of primary rules only). Primitive orders are uncertain, static and inefficient.[33] If secondary rules are the means that serve to dispel doubts about the existence, scope and operation of primary rules, they must be determinate. For Hart, this is a necessary and crucial condition of law's unity as a system.[34] Furthermore, the secondary rules must be internalised by the legal system's officials. Accordingly, applying the logical hierarchy between primary and secondary rules to international law needs to confront uncertainties in international law-making and in the doctrine of sources.[35]

7.2.4 Axiological Hierarchy: Hierarchy Based on the Importance of Contents

A further notion of hierarchy refers to the contents of legal norms—or, more precisely, to the perception of these contents. Axiological hierarchies stem from the relative value of norms, or their relative importance. For a narrow formalist positivism, this kind of hierarchy does not exist between legal norms. Positivists claim that a graduation of normativity based only on the importance of content would not be feasible. This critique does not concern the higher status of some norms as

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[30] Hart 1961, at 92. The distinction between primary and secondary rules is rather common. However, there are various meanings to the distinction. See Bobbio 1970, at 175–177. In international law, a narrower understanding of secondary rules seems to prevail. It resembles more Alf Ross's, who distinguishes 'substantive or primary law' and 'a second part, which we may call the law of sanction, or secondary law'. Ross 1959, at 209–210. Since the International Law Commission (ILC) introduced the distinction in the law of state responsibility, the prevailing distinction in international law seems to be a distinction between rules about conduct and rules on sanctions in case of a violation. See Crawford 2002, at 14.

[31] Hart 1961, at 226–231.

[32] For a reassessment, see Payandeh 2011.

[33] Hart 1961, at 89–91.

[34] Ibid., at 92, 147–148.

[35] Prost 2012, at 91–105.

such but the absence of formal or organic criteria.[36] Against this, it has been demonstrated convincingly that even a positivist concept of international law's normativity is necessarily relative.[37] Yet, even natural law approaches[38] face a problem here: Natural law may found the moral content of a norm with an ethical underpinning, but it does not suffice to found its overriding nature. Norms *jure naturali* are, in general, understood as factors that should inspire the decisions of a given legislator, but, due to their high level of abstraction, they are less directly controlling in legal terms.[39]

7.3 The Special Status of *Jus Cogens*

7.3.1 Jus Cogens and the Distinction Between Primary and Secondary Rules

The types of hierarchy discussed so far are not independent from each other. Referring to a logical hierarchy is a different way to look at structural and substantial hierarchies. Rules on the creation of law are rules about rules. They are both, structurally and logically, on a different level than the law created according to these rules. Furthermore, as we have seen, it is a third norm that defines and establishes a substantial hierarchy between two norms. This third norm is also a secondary norm. This secondary norm is logically or linguistically on a different level than the two conflicting substantive (primary) norms. The derogating norm is a sort of rule of conflict, a rule about rules.

It has been argued that peremptory norms are parallel to HLA Hart's secondary norms of recognition and change.[40] Scholars refer to the secondary norms of *jus cogens* as 'second order rules'[41] or the '*jus cogens* principle' in order to emphasise that they are not conduct-related.[42] Indeed, on a first level, international law governs the direct conduct of states and other subjects of international law in their mutual relations. Legal norms like the prohibition of slavery, aggression, torture or genocide—generally accepted as *jus cogens*—are on this primary level. They are superior in the sense of an axiological hierarchy because they are, as such,

[36] Weil 1983, at 424–429.

[37] Fastenrath 1993.

[38] For natural law approaches to *jus cogens*, see Janis 1988, at 361; Dubois 2009 (from the perspective of the 'new natural law' of Germain Grisez, John Finnis and Robert George); Orakhelashvili 2006, at 8; O'Connell 2012, at 78 ('category of higher ethical norms').

[39] Kadelbach 1992, at 130; Kolb 1998, at 77–79.

[40] Christenson 1988, at 594–595, referring to Hart 1961, at 208–231. Hart himself, by contrast, did not believe that international law had yet developed secondary norms.

[41] Linderfalk 2009, at 963–964; Linderfalk 2011b, at 361; Linderfalk 2013, at 375.

[42] Kadelbach 1992, at 176.

regarded as morally paramount. Their status as *jus cogens*, however, is relevant on a different, second level. The legal effect of *jus cogens* operates not directly upon *conduct*, but upon 'ordinary' international *law*. The first sentence of Article 53 VCLT refers to a treaty being void under certain circumstances. This norm is not conduct-related, but refers to a treaty as ordinary law. The same holds true for those norms that provide for the other effects attributed to *jus cogens*. They all refer to conduct only indirectly. Therefore, it seems adequate to conceive *jus cogens* as a combination of a bundle of primary norms and a whole cluster of secondary norms. The initial secondary rule was part of a more complex rule of recognition in international law that ordered a treaty contradicting these primary norms to be 'void'. In the meantime, this secondary rule has been supplemented by further norms of the secondary type, broadening the effect of *jus cogens* beyond the law of treaties.[43]

Since the very abstract distinction between primary and secondary rules only seems to be the lowest common denominator, we should now explore in detail the explanatory value of all four concepts of hierarchy for the special status of *jus cogens*.

7.3.2 Invalidity

7.3.2.1 Invalidity of Treaties and the Concepts of Hierarchy

In order to find out whether there is a coherent concept of hierarchy behind the special status of *jus cogens*, we must first analyse how we can explain the well-recognised special attributes of peremptory norms, and first of all, the invalidity of conflicting treaties. In the VCLT, we can find indications for *jus cogens* as a phenomenon of both structural and substantial hierarchies. The first sentence of Article 53 VCLT determines that a 'treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. This reference to the conclusion of a treaty places Article 53 VCLT within the context of law-making. The position of the provision points in the same direction. Article 53 VCLT is bundled in part V, section 2 of the VCLT together with provisions on the competence to conclude treaties, the authority to express consent, error, fraud, corruption and coercion (Articles 46 to 51 VCLT). In this framework, peremptory norms limit treaty-making power. Thus understood, the special status of peremptory norms actually means that they belong to the reason of validity[44] or condition other (lower) norms of international treaty law. They are part of the *Rechtserzeugungsregel* of international law.

[43] On the 'metamorphosis' of *jus cogens*, see Zemanek 2011. For an early analysis of *jus cogens* 'beyond the Vienna Convention', see Gaja 1981.

[44] Kelsen 1949, at 124.

This explanation of invalidity as an effect of a structural hierarchy is not entirely convincing. A structural hierarchy only means that the rule stating that treaties in conflict with *jus cogens* are void is structurally superior to the treaties concluded on the basis of the rules on treaty-making. This is a status that the respective rule shares with other rules on treaty-making in the VCLT and beyond.[45] The structural hierarchy does not illuminate two distinctive features of *jus cogens*. It neither explains a dichotomous division of international law between peremptory and ordinary norms, nor does it explain a possible status of *jus cogens* as the *highest* law in the system. Peremptory norms are both conditioning and conditioned norms. The meta-rule on the creation of *jus cogens*—to which the second sentence of Article 53 VCLT hints—is, structurally speaking, on a higher level than *jus cogens*. A further problem of explaining *jus cogens* as part of a *Rechtserzeugungsregel* is that *jus cogens* only forms a small part of a complex meta-law on international law-making (of which Article 38 of the Statute of the International Court of Justice[46] also constitutes an important component).[47]

The VCLT also allows us to portray invalidity as a phenomenon of hierarchy according to derogatory power, as an effect of substantial hierarchy between *jus cogens* and a conflicting treaty. We can find positive regulation of derogatory power in Articles 53 and 64 VCLT. The second sentence of Article 53 VCLT defines, at least for the purposes of the VCLT, a peremptory norm of general international law 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'. Article 64 VCLT declares that '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. Accordingly, *jus cogens* is non-derogable, but has the capacity to derogate other norms. The notion 'derogation' is not used in Article 64 VCLT,[48] but we can understand the provision to the effect that a new peremptory norm has the capacity to derogate a conflicting treaty rule that already exists, ending the effects of the treaty *ex nunc*.[49] Derogation is the repeal of the validity of an already valid norm by another norm.[50] In the theory of *jus cogens*, some scholars see the distinct feature of peremptory norms in their capacity to derogate

[45] See Gaja 2012, at 46–47.

[46] 1945 Statute of the International Court of Justice, 33 UNTS 993.

[47] Kadelbach and Kleinlein 2006, at 253–254.

[48] The phrase 'becomes void and terminates' in Article 64 VCLT is somehow inconclusive due to a standoff in the debates of the International Law Commission. The discussions in the ILC concerned the question whether the provision that is now Article 64 VCLT referred to a ground for invalidity and belonged in the section on the invalidity of treaties—like Article 53 VCLT—or whether it was a ground for the termination of a treaty. Article 64 VCLT finally ended up in the section on the termination and suspension of the operation of treaties. Its wording, however, somehow unsatisfactorily tries to fuse the views preferring invalidity and termination. See Lagerwall 2011, at 1477.

[49] Sinclair 1984, at 225.

[50] Kelsen 1962, at 339; Kelsen 1991, at 106; for the German text, see Kelsen 1979, at 85.

other norms of international law while they are non-derogable. They stress the 'destructive capacity'[51] of *jus cogens* and therefore seem to refer to derogatory power instead of the limits of law-making. According to this concept, *jus cogens* is primarily *jus non dispositivum*.[52]

Based on the analysis of the concepts of hierarchies, the text of Article 53 VCLT could possibly support the view that the invalidity of treaties according to Articles 53 and 64 VLCT is based on a substantial, not structural hierarchy. The text of Articles 53, 64 and 71 VCLT refers to a conflict with *jus cogens*. Strictly speaking, however, there is no conflict in place in a structural hierarchy. A conflict cannot exist between a norm determining the creation of another norm and that other norm, because this norm's validity derives from the higher norm.[53] Accordingly, some scholars have questioned whether *jus cogens* establishes a hierarchy of norms at all.[54] In the International Law Commission (ILC), Special Rapporteur Waldock held the view that, where a treaty was invalid for conflict with *jus cogens*, the treaty 'was not a treaty for legal purposes'. Since no conflict between two treaties arose, he did not list *jus cogens* in what is now Article 30 VCLT.[55] Article 30 VCLT does not use the notion of conflict and rather speaks of 'successive treaties relating to the same subject-matter'. Still, Waldock's approach obviously did not imply further consequences with regard to the text of what is now Article 53 VLCT. Based on the text of Articles 53 and 64 VCLT, we must regard these provisions as raising a problem of a 'conflict' of norms. On the other hand, even if we were inclined to conclude from this that Articles 53 and 64 VCLT are about a substantial, not structural, hierarchy, we would have to confront the argument that in case of derogation a conflict exists only at the outset. This conflict disappears through the very exercise of derogatory power. Thus understood, invalidity as a result of a substantial hierarchy is a '*consequence of conflict*', even if this consequence of conflict means that the conflict disappears.[56]

Unfortunately, the question of what constitutes a norm conflict in international law is not undisputed. Incompatibilities can be defined in a broader and a narrower sense. Norm conflicts can be *prima facie* or genuine.[57] The ILC study group on

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[51] Simma 1994, at 285.

[52] Meron 1986, at 14; Frowein 2012, paras 1 and 3. Kolb defines *jus cogens* as a judicial technique that commands a special effect of certain norms with regard to their derogability. According to him, *jus cogens* is neither substantive law nor a source of law. Rather, it is an attribute inherent in certain norms which determines their special consequences in certain respect, namely that of derogation. Kolb 2001, at 172–173.

[53] Kelsen 1991, at 257; for the German text, see Kelsen 1979, at 207.

[54] Matz 2005, at 245.

[55] International Law Commission, Summary records of sixteenth session, UN Doc. A/CN.4/SER.A/1964, 1964, at 121.

[56] Pauwelyn 2003, at 279 (italics in original). See also Kelsen 1991, at 225; for the German text, see Kelsen 1979, at 170.

[57] A corresponding distinction refers to divergences, on the one hand, and to conflicts, on the other, see Jenks 1964, at 425–426.

fragmentation refers to a normative conflict as the situation in which relevant treaties seem to point to different directions in their application by a party,[58] or a situation where two rules or principles suggest different ways of dealing with a problem.[59] Broad conflicts of this kind can often be resolved through harmonious interpretation or balancing. The most adequate notion of a norm conflict in a narrow sense seems to be the test suggested by Ewald Wiederin. According to this test, two rules are in conflict to the extent that conduct in conformity with one rule implies a violation of the other rule.[60] Broader definitions of legal conflicts[61] include 'indirect' conflicts that occur whenever a norm somehow impedes the operation of *jus cogens*, for example in situations in which the rules of state immunity would lead to the undesired result of impunity for violations of peremptory norms by individuals, in particular war crimes, genocide or torture. This notion of conflict responds to the perceived need for effective enforcement of the values underpinning *jus cogens* norms.[62] It is, in the end, an *effet utile* argument.[63] Yet, a somehow odd consequence of this understanding would be that the three rules that exist in customary international law for the resolution of normative conflict would refer to different notions of conflict. The *effet-utile*-oriented test would apply only in case of the *lex superior*, but not if *lex specialis* and *lex posterior* are at stake.[64] Even more importantly, an *effet utile* argument could eventually 'turn the international legal order into an irresolvable mess'.[65] Any procedural rule, however reasonable as such, would be undermined simply because it limits the reach of *jus cogens*. Even on the basis of a narrow understanding of a conflict, the problem remains that peremptory norms are often rather broad principles like the prohibition of force, which require specifying the conditions of their application before the sanction of nullity is applied.[66]

Close scrutiny of the text of the VCLT leads to a further argument against Article 53 VCLT establishing a structural hierarchy. While Articles 46 to 51 VCLT refer to the invalidity of the 'consent to be bound', Articles 52 and 53 VCLT are directly concerned with the invalidity of the 'treaty'. As has been correctly observed, this difference does not seem relevant in practice, since both statements lead to the same

[58] Fragmentation of international law, para 23.

[59] Ibid., para 25.

[60] Wiederin 1990, at 318–325. See already Kelsen 1991, at 123; for the German text, see Kelsen 1979, at 99. For an application of this definition to international law, see Vranes 2006; and Pulkowski 2014, at 149.

[61] Orakhelashvili 2006, at 136–139. He does not rely on legal theory for defining what constitutes a conflict, but on the *Oxford English Dictionary*.

[62] Cf. Cannizzaro 2011, at 441.

[63] Ibid., at 440; de Wet 2013, at 549.

[64] Linderfalk 2009, at 972.

[65] Vidmar 2013, at 21.

[66] Mik 2013, at 34.

result.[67] In theory, however, we know that hierarchies according to the conditions of law-making refer to the act of positing the norm, whereas hierarchies according to derogatory power concern the validity of a norm.[68] Thus, if we take the VCLT at its word, we could argue that only Articles 46 to 51 VCLT refer to the act of positing the norm—the consent to be bound—and thus refer to structural hierarchy. Articles 52 and 53 VCLT, by contrast, referring directly to the invalidity of the treaty, deal with an issue of substantial hierarchy. In any case, a substantial hierarchy has its place in the relationship between treaties under the VCLT and peremptory norms because *jus cogens superveniens* can be explained only as an exercise of derogatory power.

7.3.2.2 *Jus Cogens* and Resolutions of the Security Council of the United Nations

As far as the VCLT is concerned, invalidity as an effect of *jus cogens* is restricted to treaties. In practice, the relevance of the rules of Articles 53 and 64 VCLT in modern treaty law is rather limited. Nowadays, treaties actually incompatible with *jus cogens* seem to be mostly an 'hypothèse d'école'.[69] The state practice of more than three decades since the VCLT entered into force in 1980 demonstrates that states obviously do not conclude treaties contrary to *jus cogens*. Remarkably, Prosper Weil already stated in 1983 that if the consequences of 'supernormativity' had remained within these bounds, there would be little 'cause for alarm'. However, the assignment of a norm to the upper category, 'like the actions of the sorcerer's apprentice, seems to provoke a chain reaction that may get out of control'.[70] This explains why the effects of *jus cogens* beyond the law of treaties are such a debated issue. Many authors argue that the nullifying effect of *jus cogens* should be extended to all possible juridical acts.[71]

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[67] Schröder 2012, para 4.

[68] Kelsen 1991, at 107; for the German text, see Kelsen 1979, at 85.

[69] Rousseau 1944, at 342; Minagawa 1968, at 17. See also Bianchi 2008, at 495–496.

[70] Weil 1983, at 429–430.

[71] For an early statement to that effect, see Suy 1967, at 75. For Cançado Trindade this is even an 'ineluctable consequence of the affirmation and the very existence of *peremptory* norms'. Cançado Trindade 2011, at 30. With regard to the effects of *jus cogens* in domestic law, the judgment of the ICTY in the *Furundzija* case famously claimed that national law authorising or condoning *jus cogens* violations such as torture had no legal effect. *Prosecutor v. Furundžija*, ICTY, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 155. See also the Order of the Criminal Chamber of the Spanish Audiencia Nacional affirming Spain's jurisdiction, order of 5 November 1998 (Pinochet), legal ground no. 8; Simon, Julio, Del Cerro Juan Antonio, Argentina, Federal Judge Gabriel R. Cavallo, case No. 8686/2000, judgment of 6 March 2001, at 64–104. These statements, however, remained exceptions. On the basis of *jus cogens* as a structural hierarchy, this argument would depend on the premise that international and domestic law form one system. On the basis of a dualist approach, the argument simply would not work. In terms of a substantial hierarchy, we should look for an international order that demands from states to invalidate conflicting domestic law. This is a special form of derogatory power which depends on involving an authority that decides the issue.

It seems to be generally accepted that binding legal acts of international organisations like resolutions of the Security Council of the United Nations as a 'secondary source' of obligation[72] based on a treaty are also void if they are in conflict with *jus cogens*.[73] Indeed, as Judge *ad hoc* Elihu Lauterpacht stated in the *Bosnia Genocide* case, 'one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its unacceptability to be apparent'. Elihu Lauterpacht argued that the relief that Article 103 UN Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation could not extend to a conflict between a Security Council resolution and *jus cogens*. This would be a matter of 'simple hierarchy of norms'.[74]

As we have seen, we can understand hierarchy in various ways. Thinking in terms of a structural hierarchy, we realise that the UN Charter belongs to both conditioning and conditioned rules. In deciding on the validity of a Security Council resolution on the basis of a structural hierarchy, we can only ask whether the law-making rules for Security Council resolutions would be met. Under Article 24(2) UN Charter, the Security Council, in discharging its duties, 'shall act in accordance with the Purposes and Principles of the United Nations'. Based on an interpretation of the Charter, we can assume that this includes observance of peremptory norms.[75] Thus, resolutions of the Security Council have a binding effect only if they at least observe *jus cogens*. Otherwise they would be *ultra vires*. Some peremptory norms are reflected in the purposes and principles of the UN.[76] We should note that this *ultra vires* argument is not necessarily limited to *jus cogens*. Rather, the same argument based on interpretation should apply beyond *jus cogens*, for example to fundamental human rights more generally.[77] Beyond this effect of limiting the obligations of member states under Articles 25 and 103 UN Charter, even the UN organs themselves can be considered to be bound by fundamental rights and other principles and purposes of the UN based on the concept of estoppel.[78] If Security Council resolutions that conflict with *jus cogens* or

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[72] Kawasaki 2006, at 34.

[73] Fragmentation of international law, para 367.

[74] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))*, ICJ, Request for the Indication of Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge ad hoc Lauterpacht, para 100.

[75] T-306/01, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, [2005] ECR II-3533, paras 280–281; T-315/01, *Kadi v Council and Commission*, [2005] ECR II-3649, paras 229–230. See also Fassbender 1998, at 590–591.

[76] Doehring 1997, at 98; Orakhelashvili 2005, at 67; Orakhelashvili 2006, at 429–431.

[77] *Nabil Sayadi and Patricia Vinck v. Belgium*, Human Rights Committee, Communication No. 1472/2006, U.N. Doc. CCPR/C/94/D/1472/2006, 29 December 2008; Ibid, Individual opinion of Committee member Sir Nigel Rodley (concurring), at 36; *Al-Jedda v. The United Kingdom*, ECtHR, No. 27021/08, 7 July 2011, paras 101–102.

[78] de Wet 2004, at 195–204.

even with a broader set of fundamental human rights are invalid for reasons of structural hierarchy between the UN Charter and legal acts of UN organs under the Charter, there is, as we have seen, no need to approach the problem of substantial hierarchies. Thus, there is no room for a 'direct and autonomous' effect of *jus cogens* with regard to Security Council resolutions,[79] for a simple reason: if a norm does not conform to the conditions for its creation, derogation will not be necessary since no norm was created in the first place.[80]

7.3.2.3 *Jus Cogens* and the Invalidity of Customary International Law

It is also generally taken for granted that conflict with *jus cogens* renders a rule of customary international law invalid.[81] This assertion is practically relevant in cases of a perceived conflict between the customary rules on state immunity and *jus cogens*. In this context, the Joint Dissenting Opinion in the ECtHR's *Al-Adsani* case is based on the argument that *jus cogens* 'as a source of law in the now vertical international legal system … overrides any other rule which does not have the same status'.[82] However, this undifferentiated hierarchical view unduly simplifies the relationship between *jus cogens* and customary international law. A distinction should be made between customary rules of regional or local ambit and general international law, i.e. customary international law and general principles of a universal ambit.

Regional or local customary rules resemble in many respects particular agreements, in particular if we conceive of them as tacit understandings between a number of states. Therefore, it is a relatively straightforward case to perceive a structural hierarchy between *jus cogens* and regional or local customary rules.[83] A 'veritable hierarchy' defines the relationship between peremptory norms of general international law and norms of international law of a particular, regional, local or

[79] But see Orakhelashvili 2005, at 69–70; Orakhelashvili 2006, at 437–438. He distinguishes three different ways in which peremptory norms apply to acts of the Security Council without clarifying the relationship between these three modes of interaction: '[T]hey are embodied in the UN Charter; they apply to the Council as a treaty-based organ through the law of treaties; and they have a direct, or autonomous, effect on the Council's decisions.'

[80] Barberis 1970, at 43–44; Kammerhofer 2011, at 187.

[81] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, ICJ, Request for the Indication of Provisional Measures, 13 September 1993, Separate Opinion of Judge ad hoc Lauterpacht, para 100; *Prosecutor v. Furundžija*, ICTY, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 153; *Al-Adsani v. The United Kingdom*, ECtHR, No. 35763/97, 21 November 2001, Joint Dissenting Opinion of Judges Rozakis et al., para 3; Shelton 2002, at 329; Fragmentation of international law, para 367. See also Restatement (Third) of the Foreign Relations Law of the United States, § 102 Comment k; Zemanek 2011, at 394–396.

[82] *Al-Adsani v. The United Kingdom*, Joint Dissenting Opinion of Judges Rozakis et al., para 1.

[83] Rozakis 1976, at 22.

bilateral character.[84] Of course, the caveats concerning the structural hierarchy between *jus cogens* and treaties mentioned above are also relevant with regard to regional or local customary rules. By contrast, a structural hierarchy does not seem to exist between peremptory norms and the rest of general international law. *Jus cogens* and non-peremptory norms of general international law, i.e. *jus dispositivum*, coexist 'side by side'.[85] The opposite view that engages with these statements seems to miss the point when arguing that *jus cogens* was structurally different, of universal and objective nature, whereas ordinary law was subjective and dispositive and, accordingly, *jus cogens* enjoyed priority because of its universal and normative content.[86] These claims refer to the axiological status of peremptory norms and not to a structural hierarchy. It would be odd to perceive a structural hierarchy between *jus cogens* and *jus dispositivum* in general international law. Rather, *jus cogens* generally arises out of *jus dispositivum* if norms of general international law develop the distinct qualities that create their peremptory status.

In terms of structural hierarchy, *jus cogens* would then only be part of the conditioning rules for treaty law and local or regional custom, but not for general international law. Actually, with regard to general international law, and in particular with regard to a jus-cogens-related exception to state immunity, a conflict would mostly be an issue of *jus cogens superveniens*.[87] The relationship between general customary international law and *jus cogens* would thus be an issue of substantial hierarchy. An actual conflict between a rule of general customary international law and existing *jus cogens* is rather improbable in practice. Generally, the existence of a peremptory norm will already deter the emergence of customary obligations to violate them. General state practice will normally not follow a path that leads to patterns contradicting ideas of moral paramountcy. For example, in the so-called 'ticking bomb scenario', an authorisation or even an obligation to torture a suspect in order to save lives cannot develop, as the prohibition of torture is absolute and is not allowed under any circumstances. Since a peremptory norm occupies the field, a contrary obligation cannot develop under another norm.[88] In other words, peremptory norms have a strong resistance to desuetude.[89] Therefore, the most likely scenario is that the alleged customary law that would conflict with pre-existing *jus cogens* simply does not exist in reality.[90] These considerations are

[84] Virally 1966, at 18.

[85] Ibid., at 18; Rozakis 1976, at 22.

[86] Cf. Matz 2005, at 245.

[87] For problems ensuing from the uncertain date of the entry into force of customary rules, see Zemanek 2011, at 394–395.

[88] Vidmar 2013, at 15.

[89] See Mik 2013, at 42. But for the problems of a recent norm change with regard to the prohibition on the use of force and the right of self-defence, see Linderfalk 2008, at 859–863.

[90] Kawasaki 2006, at 31.

not only valid with regard to *jus cogens*, but also apply to other norms of moral paramountcy. If certain beliefs of what is morally paramount are shared in the international community of states, it is rather improbable that a general customary international law will develop which contradicts these beliefs.

To sum up, it is not always convincing to explain the invalidity of norms that conflict with *jus cogens* as the effect of structural hierarchies between *jus cogens* and these other norms. By contrast, it is always possible to speak of a substantial hierarchy based on the derogatory power of *jus cogens*. Substantial hierarchies, however, are not an inherent characteristic of the relationship between two norms but depend on positive regulation by a third norm. Thus, explaining invalidity as an effect of derogatory power restates the evident.

7.3.3 Non-derogability

7.3.3.1 Non-derogability and Exceptions

According to the second sentence of Article 53 VCLT, non-derogability is a further element of the special status of peremptory norms. As we have already seen, derogation is the repeal of the validity of an already valid norm by another norm.[91] The validity of peremptory norms cannot be repealed by another norm unless this norm is a norm of general international law that is also *jus cogens* (see second sentence of Article 53 VCLT). This special status of peremptory norms as non-derogable norms needs to be distinguished from other forms of non-derogability. Certain norms are mandatory and imperative at all times and, in this sense, non-derogable. Human rights conventions contain core guarantees, which state parties may not suspend under any circumstances—not even temporarily or partially, and not even in situations of public emergency—, such as the right to life and the ban on torture, arbitrary detention, slavery and forced labour.[92] Many articles of the 1949 Geneva Conventions prohibit any derogations from those articles in absolute

[91] Kelsen 1962, at 339; Kelsen 1991, at 106. For the German text, see Kelsen 1979, at 85.

[92] See Article 4 of the 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171; Article 15(2) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222; Article 27(2) of the 1969 American Convention on Human Rights, 1144 UNTS 123; Article 2 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85; Article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture, OASTS No. 67, 25 ILM 519. For compilations cf. Hannikainen 1988, at 429–434; Kadelbach 1992, at 284–315; and Kadelbach 2005, at 30.

terms. Parties to these conventions are under obligation to respect and to ensure respect for certain rights 'under all circumstances'.[93]

It is a common argument that this non-derogability of certain human rights obligations in international treaties is closely related to their status of *jus cogens*.[94] Indeed, provisions in quasi-universal or otherwise representative instruments and statements concerning the unlawfulness of derogation from a given norm of general international law can be taken as a first indication of the peremptory status of the norm.[95] Yet, there can also be other reasons for the prohibition of derogation even in states of emergency.[96] As the Human Rights Committee (HRC) put it in General Comment No. 29, non-derogability according to Article 4 of the International Covenant on Civil and Political Rights (ICCPR) is related to, but not identical with the peremptory status of a human rights norm.[97] The HRC regards the non-derogability of the right to life (Article 6 ICCPR) and the prohibition of torture and of cruel, inhuman or degrading treatment or punishment (Article 7 ICCPR) as a consequence of their peremptory nature. Other human rights, like the freedom from imprisonment for inability to fulfil a contractual obligation (Article 11 ICCPR) or the freedom of thought, conscience and religion (Article 18 ICCPR), are included in the list of Article 4 ICCPR for a different reason. It simply can never become necessary to derogate from these rights during a state of emergency. Conversely, the HRC does not regard the list of Article 4 ICCPR as

[93] See Common Article 1 of the four 1949 Geneva Conventions (1949 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 75 UNTS 31; 1949 Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85; 1949 Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287). Common Article 3 spells out core guarantees which no party may dispense with, such as the obligation to treat persons taking no active part in the hostilities humanely, or the prohibitions against wanton killing, torture, taking of hostages, degrading treatment of all kinds and summary executions without fair trial. See also Article 75(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS.3; and Article 4(2) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609. Cf. Kadelbach 2005, at 30–31.

[94] See, e.g. Meron 1986, at 93. Meron criticises the US Third Restatement for identifying the prohibition of prolonged arbitrary detention as a *jus cogens* rule. His argument is that the prohibition is not mentioned among the non-derogable rights in Article 4 ICCPR.

[95] *Michael Domingues v. United States*, Inter-American Commission on Human Rights, Case 12.285, Report No. 62/02, 22 October 2002, para 49 ('reliable starting point'); Shelton 2002; Shelton 2006, at 314; *Nada v Staatssekretariat für Wirtschaft*, Swiss Federal Tribunal, 14 November 2007, IA 45/2007; DTF 133 II 450, para 7.1 ('Indizien').

[96] Hannikainen 1988, at 263–364; Kadelbach 2005, at 30–31.

[97] See, also, Hameed 2014, at 70-72. In his view non-derogability 'is not sufficiently determinative of *jus cogens* status *per se*'.

comprising all human rights that have a peremptory status.[98] Along those lines, it has also been argued that limiting human rights with *jus cogens* status to those human rights guarantees that are declared as non-derogable in international human rights treaties might be too narrow. From the viewpoint of received fundamental values, for example it is tempting to count the prohibition of arbitrary deprivations of liberty as *jus cogens*.[99]

If a norm of international law is peremptory, state parties are not allowed to contract out of these obligations *inter se*. Provisions like Article 4 ICCPR, by contrast, allow states *unilaterally* to derogate temporarily from a part of their treaty obligations. Derogation in the human rights treaty context typically refers to certain factual situations. By contrast, the prohibition of derogation in the second sentence of Article 53 VCLT is generally understood to refer to legal acts or rules that depart partially or fully from the requirements of a rule that is to be regarded as *jus cogens*.[100]

7.3.3.2 Non-derogability, *Jus Cogens* and Obligations *Erga Omnes*

The definition of peremptory norms in the second sentence of Article 53 VCLT refers to non-derogability as a distinct quality of *jus cogens*.[101] The structural reason for this is that strict compliance with peremptory norms is in the interest of the international community as a whole.[102] Therefore, a limited number of states would not be allowed to contract out of peremptory norms *inter se*. As community interest norms, peremptory norms are not left to reciprocal state interaction. They transcend the 'bilateralist paradigm'[103] and reciprocity in international law.

The text of Article 53 VCLT ('accepted and recognized') makes it clear that this non-derogability is not a quasi-natural feature of certain norms. Likewise, the quality of certain norms that are non-reciprocal or non-bilateralisable or represent a community interest is not necessarily a natural property. There is no method generally accepted or even established in positive law for identifying community interests.[104] Yet, for our purposes, it is sufficient to define community interest as a

> consensus according to which respect for certain fundamental values is not to be left to the free disposition of states individually or *inter se*, but is recognized and sanctioned by international law as a matter of concern to all States.[105]

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[98] Human Rights Committee, General Comment No. 29: States of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 11.

[99] Oeter 2007, at 509–510.

[100] Hameed 2014, at 70.

[101] Kadelbach 2005, at 325. In his view, non-derogability can be seen as the 'common denominator' of all *jus cogens* norms.

[102] See Gaja 2012, at 48.

[103] Simma 1994, *passim*.

[104] Annacker 1994a, at 324.

[105] Simma 1994, at 233; adopted by Wolfrum 2011, at 1132. See also Annacker 1994b, at 135–137; Seiderman 2001, at 128–129, 276; Crawford 2011, at 229.

Some community interests are 'common goods', like world peace and security. In the case of common goods, the community interest is related to possible transboundary effects of harm in case the relevant prohibition—in our example, the prohibition of the use of force—is violated. They are interests of the community of states as such.[106] This factual basis of the common interest is absent in the case of 'common values' like international human rights. In human rights law, the interests of individuals are detached from the interests of states and elevated to the international community to protect individuals against their states of nationality.[107] Here, the international community has made the implementation and enforcement of rights of individuals or of particular groups the concern of the international community.[108]

If norms of general international law are non-bilateralisable, this implies that states cannot derogate from them *inter se*. Accordingly, this non-derogability is a quality that peremptory norms share with other norms of general law, i.e. norms creating obligations *erga omnes* or obligations 'owed to the international community as a whole' (the formulation used in Article 48(1)(b) of the Articles on State Responsibility[109] (ASR) in order to avoid the confusion around the notion of obligations *erga omnes*).[110] To be clear, the distinct feature of obligations *erga omnes* is not that they are owed to all states, but that, in case of a breach of such an obligation, the corresponding rights of protection are in possession of each and every state or of the international community as such.[111] It is not simply the primary obligation that is owed 'to all others' or *erga omnes*. If this was the case, norms of general international law would be obligations *erga omnes*. The notion *erga omnes* refers to the specific features of the secondary rules governing the invocation of responsibility for violations.[112] Still, states *inter se* cannot contract out of obligations owed to the international community as a whole. In this sense, norms creating obligations *erga omnes* are also non-derogable. Non-derogability, understood as transcending bilateralism, is a necessary but not a sufficient criterion for peremptory norms and norms creating obligations *erga omnes*.

Substantially, norms creating obligations *erga omnes* are 'virtually coextensive' with peremptory norms.[113] Yet, not every norm that involves an obligation *erga*

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[106] Wolfrum 2011, at 1435.

[107] Feichtner 2012, paras 15, 19, 22 and 41.

[108] Wolfrum 2011, at 1436.

[109] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001 (ASR).

[110] Tams 2005, at 134–135 insists that obligations *erga omnes* only belong to the first category and, for this reason, rejects a structural approach to the identification of obligations *erga omnes*.

[111] Ago 1989, at 237; Gaja 1989, at 154. See also de Hoogh 1996, at 53 ('misnomer'); Crawford 2011, at 226–227.

[112] Tams 2005, at 102.

[113] See J Crawford, Special Rapporteur, Third report on state responsibility, U.N. Doc. A/CN.4/507 and Add. 1–4, para 106. See also Byers 1997.

omnes necessarily has the power to invalidate conflicting treaties, which is the distinct capacity of peremptory norms.[114] Articles 53 and 64 VCLT provide for a special sanction by ordering the invalidity either of the whole treaty (Article 53 VCLT) or of the respective treaty provision that deviates from a peremptory norm (Article 64 VCLT). This special sanction of invalidity is exactly the reason why *jus cogens* is generally regarded as hierarchically superior, whilst obligations *erga omnes* are not considered to 'translate' importance into a hierarchical superiority.[115] As we have seen, bilateral treaties or treaties amongst a limited number of states do not have the capacity to derogate norms of general international law creating obligations *erga omnes*. In this respect, norms creating obligations *erga omnes* are also 'non-derogable'. Vice versa, however, norms creating obligations *erga omnes* are not endowed with the derogatory power to put out of force the respective treaty or even define a priority of application. If an obligation *erga omnes* is breached, this results in state responsibility for that breach towards the international community of states. Therefore, obligations *erga omnes* other than *jus cogens* do not establish a substantial hierarchy, which is, as we have seen, defined as a situation in which a legal norm has the force to derogate another legal norm, whereas this legal norm does not have the force to derogate the first norm. In terms of derogatory power, norms creating obligations *erga omnes* do not differ from other norms of general international law.

7.3.3.3 Non-derogability, *Jus Cogens* and the UN Charter

This is different with regard to the UN Charter. Non-derogability can establish at least a 'rudimentary hierarchy'[116] between *jus cogens*, the UN Charter and the rest of international law. *Jus cogens* is absolutely non-derogable and, at least for practical purposes, derogates any other norm of international law that actually is in conflict with it. Accordingly, peremptory norms should be the highest norms in the substantial hierarchy. Obligations under the UN Charter would be immediately below them. Article 103 of the UN Charter claims 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'. By virtue of Article 25, 'obligations … under the Charter' include the obligation to comply with Security Council decisions. Beyond the text of Article 103 UN Charter, the Charter is generally considered to prevail also over conflicting customary international law.[117] In terms of derogatory power, 'below' *jus cogens*, the UN Charter would follow due to the conflict clause in Article 103 UN Charter, as recognised in Article 30 VCLT.

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[114] Gaja 2012, at 55–56.

[115] Fragmentation of international law, para 380.

[116] Tzanakopolous 2012, at 49.

[117] Paulus and Leiß 2012, para 68.

The bottom of the pyramid would be formed by all other international obligations of whatever source below UN Charter obligations. We can see here the special kind of non-derogability attached to peremptory norms. According to the ILC, it would not be correct to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void. Such a stipulation may be inserted in any treaty with regard to any subject matter for any reasons that may seem good to the parties. If a party concludes a later treaty derogating from such a stipulation, this may engage its responsibility for a breach of the earlier treaty. However, the breach of the stipulation does not, simply as such, render the treaty void.[118] This is not the effect of clauses like Article 103 UN Charter.[119]

7.3.4 Qualified Law-Making Procedure for Jus Cogens

One of the characteristics of *jus cogens* that make it difficult to conceptualise legal hierarchies in international law becomes obvious as soon as we compare international law and domestic legal systems.[120] The crucial difference seems to be that in domestic legal systems relatively clear views exist on a distinct category of norms which are of a constitutional nature and hierarchically superior to 'ordinary' ones. These constitutional norms are usually summarised in a written constitutional document. Hierarchies of this kind are source-based: Certain norms have constitutional status and are afforded precedence because they are derived from a particular 'source'.[121] In international law, by contrast, there is no source-based constitution of this kind. Neither is *jus cogens* a distinct source in international law nor are there institutionalised law-making procedures that would have acquired a higher law-making capacity.[122] For this reason, it has been claimed that international law would, at best, be a semi-vertical system.[123]

These 'deficiencies' of international law notwithstanding, *jus cogens*, although not determined by a source-based hierarchy, can possibly claim a special status because of the qualified procedure in which it is created. Generally, we can assume a certain correlation between the hierarchy according to derogatory power and the requirements of the law-making procedure. If an additional step in the

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[118] International Law Commission, Report of the International Law Commission on the work of the second part of its seventeenth session, 17th session of the ILC, A/6309/Rev.l, 1966, at 248.

[119] Or Common Article 6/6/6/7 of the Geneva Conventions.

[120] This is how discussions of hierarchies in international law very often begin. See, e.g. de Wet and Vidmar 2012, at 1; Mik 2013, at 27–28.

[121] Shelton 2006, at 291; Shelton 2014, at 137.

[122] The exception may be the Security Council's law-making activity in the field of international peace and security.

[123] Rozakis 1976, at 24.

process is needed to set a certain norm, this norm cannot be derogated by a norm that came about in a simpler law-making procedure. In terms of substantial hierarchy, it is therefore superior to the norm that can be set in a more simple way.[124] If *jus cogens* is created in a qualified procedure, this counts for a substantial hierarchy between peremptory norms and ordinary norms of international law. Some scholars, however, paint a picture that seems too bright. They claim that the difference between the creation of *jus cogens* and of other norms of general international law resembles a higher quorum for the creation of constitutional norms.[125] For this proposition, they rely on the wording of Article 53 VCLT. The second sentence of Article 53 VCLT requires that a peremptory norm of general international law be 'accepted and recognised by the international community of States *as a whole*'. These requirements can be contrasted with the creation of ordinary customary international law. Customary international law, even universal customary international law, does not require that the states *as a whole* support practice by their *opinio juris*.

This picture is not fully coherent, as scrutiny based on the distinction between primary and secondary norms reveals.[126] According to the wording of the VCLT, a peremptory norm must first become general international law, i.e. customary law or general principles of law pursuant to Article 38(1) ICJ Statute. In a second step, it can be elevated to *jus cogens* by the international community. We can distinguish between an ordinary *opinio juris* referring to the primary norms and an *opinio juris cogentis* that is necessary for establishing the special character of peremptory norms, i.e. the secondary norms that apply.[127] The primary norm comes into existence in the same way as any 'ordinary' norm of general international law. No qualified procedure applies. What is more, even the higher hierarchical status of *jus cogens* norms does not require a higher threshold for achieving that rank as opposed to the creation of 'ordinary' international rules.[128] Statements at the Vienna Conference make it clear that acceptance by a very large majority of states would suffice to establish the peremptory character of a norm.[129] The wording of Article 53 VCLT and the understanding of state parties at the time seems to reflect an unstable compromise. Therefore, some uncertainty persists with regard to the emergence of *jus cogens*. The supposedly most important norms are based on the

[124] Walter 1964, at 59.

[125] Janis 1988, at 362; Kammerhofer 2011, at 176–177.

[126] Gaja 2012, at 56 ('not without ambiguity').

[127] Czapliński 2005, at 91–92; also, see Kawasaki 2006, at 30; Vidmar 2012, at 25–56.

[128] Paulus 2005, at 302–303.

[129] United Nations Conference on the Law of Treaties, Summary records of meetings of the Committee of the Whole, 1st session, UN Doc. A/CONF.39/11, 1968, at 472, para 12. Also, consider the statement by US delegate Kearney, who referred to the 'absence of dissent by any important element of the international community' (United Nations Conference on the Law of Treaties, Summary records of meetings of the Committee of the Whole, 2nd session, UN Doc. A/CONF.39/11/Add.1, at 102, para 22). See Gaja 2012, at 56–57.

most uncertain norm-creating mechanism.[130] The idea that peremptoriness is a quality that an already existent norm of general international law develops in a second step provides a further puzzle. An individual state will be able to desist from accepting a rule of ordinary customary law and elude its binding force as a 'persistent objector'. Such a state, however, would nonetheless become bound if the rule were to become peremptory. Stated differently, while state consent is normally required for a state to be bound by ordinary rules, such consent is not necessary in respect of peremptory rules. The stronger the normative force, the less the need for state consent.[131]

It has also been argued that the strong ethical underpinning of peremptory norms may be able to compensate for deficiencies in universal acceptance of these norms, either at the level of normative content or at the level of peremptory character.[132] Therefore, it does not look as if the threshold for the emergence of peremptory norms would be simply 'higher' than the threshold for 'ordinary' norms.

A further aspect is the seeming irrelevance of state practice for establishing the peremptory status of a certain norm. The second sentence of Article 53 VCLT defines a peremptory norm of general international law as

> 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.[133]

Different from the creation of customary international law in general, the creation of the special status of a norm as *jus cogens* obviously does not depend on a consistent state practice but only on an *opinio juris cogentis*. In this regard, the logical hierarchy between primary and secondary rules presented above points to a particularity in the creation of the peremptory status of a norm. As we have seen, the whole set of secondary norms that make up the peremptory status of a norm are not directly conduct-related. This is also relevant for the identification of *jus cogens*. Considering that the peremptory status of certain primary norms is defined by a bundle of, not directly conduct-related, secondary norms, it is only consequent that state practice is not mentioned in the second sentence of Article 53 VCLT.

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[130] Paulus 2005, at 325.

[131] Seiderman 2001, at 53. This is a contested issue. For an overview, see Payandeh 2010, at 345–347.

[132] Vidmar 2012, at 26.

[133] Emphasis added.

7.3.5 Recognition of Moral Paramountcy

7.3.5.1 The Problem of Defining a Threshold

For most scholars, *jus cogens* represents norms that are of paramount importance for the international community.[134] At the heart, *jus cogens* is a matter of substance, not of source.[135] This view already dominated both in the ILC and at the Vienna Conference on the Law of Treaties. *Jus cogens* status is not derived from 'the form of a general rule of international law', but from 'the particular nature of the subject-matter with which it deals'.[136] More recently, the Study Group on Fragmentation of the ILC referred to a peremptory norm as a rule of international law that is 'superior to other rules on account of the importance of its content as well as the universal acceptance of its superiority'.[137]

In its commentaries on the Articles on State Responsibility (ASR), the ILC listed the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination as peremptory norms that are clearly accepted and recognised.[138] The ICJ recently found that the prohibition of genocide and the prohibition of torture are peremptory norms.[139] More inclusive lists also refer to war crimes and the basic principles of international humanitarian law. Less safe candidates are the basic rights of the human person in

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[134] Hameed 2014, at 69. Some regard it as an international constitution (Breau 2008, at 550); other authors refer to *jus cogens* as 'international *ordre public*' (Orakhelashvili 2006, at 7–35). Cf. Linderfalk 2012, at 10.

[135] Kolb 1998, at 76–77 and 80.

[136] International Law Commission, Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, UN Doc. A/6309/Rev.1, 3-28 January 1966, at 261. It can be traced back to the beginning of the International Law Commission's works on *jus cogens* and the second rapporteur, Sir Hersch Lauterpacht (Mr. H. Lauterpacht, Special Rapporteur, Report on the law of treaties, UN Doc. A/CN.4/63, 24 March 1953, at 155). Lauterpacht's successors pursued this approach (for the view of Fitzmaurice, third rapporteur, see G.G. Fitzmaurice, Special Rapporteur, Third report on the law of treaties, UN Doc.A/CN.4/115, 18 March 1958, at 45). While the solution adopted in the end, inspired by Sir Humphrey Waldock (International Law Commission, Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, UN Doc. A/6309/Rev.1, 3-28 January 1966, at 261), leans towards the effects of a peremptory norm, it nevertheless shows no intent to depart from the notion put forward by his predecessors. Kadelbach 1992, at 39 (text and n. 30); Kolb 1998, at 92–93.

[137] Fragmentation of International Law, at 182.

[138] Commentary on Article 26 of International Law Commission, Draft articles on the responsibility of states for internationally wrongful acts, with commentaries, 53rd session of the ILC, UN Doc. A/56/10, 2001, para 5; Crawford 2002, at 188.

[139] *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, ICJ, Judgment of 3 February 2006, para 64; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v Serbia*), ICJ Judgment of 3 February 2015, para 87; *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), ICJ, Judgment of 20 July 2012, para 99.

general and basic principles of environmental law.[140] All these norms, due to their subject matter, carry a particular normative weight. This normative weight establishes a '*material* hierarchy of norms'.[141]

Yet, *jus cogens* is defined not just by its weight, but also by the reasons for its weightiness.[142] Peremptory norms enjoy a special status because they are 'believed to be morally paramount'.[143] Scholarly treatment of *jus cogens* norms generally assumes that part of the rationale for their distinctiveness is that states have recognised that they reflect important moral positions.[144] *Jus cogens* can therefore be seen as a minimum of moral obligations in international law.[145] In particular, before the concept of *jus cogens* was introduced in the VCLT, structural principles of international law, which are indispensable, but do not share this moral status, often counted as *jus cogens*. By contrast, the overwhelming view today would not consider them to be *jus cogens*. Instead, they could be subsumed under a wider category of international public order.[146]

We can understand the recognition of moral paramountcy and the axiological hierarchy it involves to provide the background justification for the invalidity of conflicting norms.[147] It has been, to my view convincingly, pointed out that the qualification of a norm as *jus cogens* can be explained neither as simply consent-based nor objectively content-based. Rather, it is based on the *recognition* of their moral paramountcy or on a *moral belief* that goes to the weight of the relevant rule.[148] At least in abstract terms, this recognition of moral paramountcy 'neatly explains' the non-derogability of *jus cogens*.[149] The more difficult question, however, is how exactly a perception of moral paramountcy 'translates'[150] into a hierarchical superiority. In practice, it is difficult to draw an exact line between *jus cogens* and ordinary law based on normative weight. Generally, states will agree that some international legal norms carry more weight than others. In the absence of explicit statements to this effect, however, it is difficult to establish beliefs. Furthermore, when it comes to concrete norms that should be *jus cogens*, views

[140] See, e.g. Paulus 2005, at 306. For a table that summarises the proposals of the ILC and determinations of various international bodies, see Mik 2013, at 56–57.

[141] Besson 2010, at 171 and 183.

[142] Hameed 2014, at 94.

[143] Ibid., at 92. See also Thirlway 2014, at 162 ('the idea of *jus cogens* contains an ineradicable moral element').

[144] Ratner 2015, at 21.

[145] Kadelbach 1992, at 167.

[146] Mosler 1968; Mosler 1974, at 35; O'Connell 2012, at 84. Cf. Hoffmeister and Kleinlein 2012.

[147] Gaja 2012, at 54.

[148] Hameed 2014, relying on Raz 1979a; and Raz 1979b.

[149] For this view, see Hameed 2014, at 93. Hameed here also relies on Raz, who, however, simply says that 'the weight or strength of legal reasons … do for the most part provide enough indications as to how resolve conflicts of legal reasons.' Raz 1979b, at 74.

[150] Cf. Fragmentation of international law, para 380.

will diverge.[151] Importance, and also moral importance is a gradual quality: legal norms are of more or less (moral) importance. In contrast to this gradual importance, the distinction between *jus cogens* and ordinary international law is dichotomist. Therefore, the neat explanation does not tell us where to draw the line and define a threshold of moral paramountcy sufficient for *jus cogens*.

7.3.5.2 In Search of Indications for Recognised Moral Paramountcy

In order to measure and gradate normative weight as such, leaving aside the specifically moral dimension of norm contents, scholars analyse the practice of international and domestic courts in prioritising some norms over others in the case of a conflict. This kind of test has been used to establish a superior status of certain human rights guarantees, independently of *jus cogens* status. If there is a continued practice of courts preferring one sort of obligations over another, one might draw the conclusion that this practice reveals or constitutes the superior hierarchical level of the first category.[152] Normative preferences that point to an axiological hierarchy become apparent when one norm prevails over another irrespective of considerations of *lex posterior* or *lex specialis* in case of genuine norm conflicts. Normative preferences can also influence the outcome of systemic or harmonious interpretations and of balancing one norm against the other. If one norm dominates the outcome of the balancing process, it might be considered to be of more normative weight. By contrast, the more even-handed the balancing act of the court is, the less likely it would be that the court regarded any one of the norms in question as hierarchically superior to the others.[153]

Still, scholarly analyses of this kind need to take into account that preferences for one norm over a conflicting norm do not necessarily reflect their relative normative weights in the abstract. Rather, the outcome will also be influenced by an assessment of other factors such as factual probabilities and the consequences of various courses of action for the goals behind these norms, i.e. by comparing the good and harm done to the values protected by the respective norms in every case or type of case.[154] A particular solution may be discarded because it is particularly harmful to a certain goal, not because this goal is more important than another goal. In any case, in order to demonstrate inductively that a norm is absolutely non-derogable and derogates all other norms, we would have to study all possible

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[151] Linderfalk 2011a, at 9.

[152] Tzanakopolous 2012, at 69. For Tzanakopoulos, this is at least a possible argument for the claim that certain human rights guarantees occupy 'a superior hierarchical level than the rest of international law, whether they can be argued to partake in the status of *jus cogens* or to establish an immediate hierarchical category between *jus cogens* and *jus dispositivum*'.

[153] de Wet and Vidmar 2013, at 202.

[154] Raz 1972, at 833–834. It is possible to say that conflicts between legal principles are decided only on the basis of their abstract weights, whereas in case of conflicting rules we look at the specific circumstances. However, this is not a necessary distinction.

norm collisions and establish that this norm always prevails—in fact, an impossible task. At best, we will be able to demonstrate that a certain norm prevails relatively often. On this basis, it will be difficult to draw the line between *jus cogens* and ordinary international law.[155] Furthermore, the inductive analysis of case law in search of normative preferences must confront the issue of jurisdictional biases. The jurisdiction of a judicial institution of a human rights instrument, for instance, will typically be limited to adjudicate claims of a breach of the respective human rights guarantees. If a state party runs into state responsibility under a conflicting treaty, say, an extradition treaty, this is not directly relevant in the proceedings under the human rights instrument. Accordingly, human rights courts will not only be factually or institutionally biased towards human rights,[156] but also legally. In domestic courts, the status of international law as defined by the domestic constitution will be of crucial importance.

However viable this strategy is, it argues that non-derogability, as defined above, is an indicator for fundamental importance. Interestingly, the reverse argument has also been made, namely that a norm is of fundamental importance and must therefore be non-derogable or *jus cogens*.[157] The ICJ, in its *Nicaragua* judgment,[158] may be interpreted as suggesting that certain rules of fundamental importance for the international community are non-derogable because of their fundamental importance.[159] These mutual references from non-derogability to substantial importance and *vice versa* reveal a certain degree of uncertainty.

7.3.5.3 Axiological Hierarchy, *Jus Cogens*, Obligations *Erga Omnes* and the UN Charter

These difficulties notwithstanding, some scholars refer to axiological hierarchies and distinguish several 'layers' of the 'international value system'. According to this model of an axiological hierarchy, the first layer consists of *jus cogens* norms, the second of obligations *erga omnes* and the third of emerging obligations *erga omnes*.[160] Indeed, as we have seen above, peremptory norms are a subset of the norms that create obligations *erga omnes*. But does this mean that we can grade

[155] Linderfalk 2012, at 15–18.

[156] For the 'structural biases' of international institutions, see Koskenniemi 2009, at 9–12.

[157] *Siderman de Blake v. Republic of Argentina*, United States Court of Appeals for the Ninth Circuit, 965 F. 2d 699, at 715; *Furundžija*, para 153.

[158] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ, Merits, Judgment of 27 June 1986, para 190. In *Nicaragua*, however, the Court did not embrace the concept of *jus cogens*. For a different interpretation, see Orakhelashvili 2006, at 41–42.

[159] Cannizzaro 2014, at 268.

[160] See, e.g. de Wet 2006, at 61–62. See also Kirchner 2004.

jus cogens, obligations *erga omnes*, emerging obligations *erga omnes* and 'ordinary' international law according to the importance of their substantive content?[161] Are peremptory norms more important or of a higher value than obligations *erga omnes*? Both obligations *erga omnes* and *jus cogens* share a special ethical character,[162] are exemplary reflections of the international value system and manifest a strong sense of international community. Their violations not only concern a potentially injured state, but the international community as a whole. What qualifies *jus cogens* in comparison to obligations *erga omnes* is the severe sanction attached to it. Invalidity of treaties is generally considered as obviously more serious than the aggravated state responsibility attached to violations of obligations *erga omnes*. Therefore, peremptory norms may be seen as at least the "minimum threshold of the international value system."[163] Again, this explanation barely assists us in drawing the lines between the categories.

While peremptory norms are an uncontested case of an axiological hierarchy, it has been argued that Article 103 UN Charter presents a source-based hierarchy rather than a value- or substance-based one. Article 103 UN Charter attributes precedence to obligations arising under the Charter on the basis of their origin.[164] However, a plausible argument can also be made that Article 103 UN Charter does represent a value-based hierarchy, since it is directed at giving effect to the enforcement of the purposes of the United Nations, notably the maintenance of international peace and security.[165] Article 103 UN Charter then also reflects an axiological hierarchy. The problem of this view is that certainly not every norm of the UN Charter is of equal importance. As we have seen, some Charter norms even reflect *jus cogens*. Other provisions, by contrast, are of minor importance. This is a problem we need not confront with regard to *jus cogens*. There simply is no 'trivial' *jus cogens*.[166] According to another view, Article 103 UN Charter does not establish any hierarchy at all, but was included in the treaty framework of the Charter as a conflict rule. It does not intend to elevate all obligations under the Charter to a hierarchically superior position. Instead, it merely attaches a trumping effect to those obligations arising within the treaty framework of the Charter and which conflict with specific obligations arising from treaties or customary international law.[167] If we try to bring this view into line with the four concepts of hierarchy, we see that one can indeed claim that Article 103 UN Charter does not reflect a general axiological superiority of the Charter. Still, Article 103 UN Charter establishes a substantial and logical hierarchy. A substantial hierarchy must not

[161] For the problems of the so-called 'material approach' to the identification of obligations *erga omnes*, see Tams 2005, at 136–157; Linderfalk 2011a, at 9–10.

[162] With regard to obligations *erga omnes*, see Ragazzi 2001, at 183.

[163] Vidmar 2012, at 26.

[164] Milanović 2009, at 78–79; Chinkin 2006, at 63.

[165] Shelton 2014, at 157.

[166] Hameed 2014, at 68.

[167] Fragmentation of international law, para 178; Tzanakopolous 2012, at 66.

necessarily result in the invalidity of the derogated norm, but can also be limited to a priority of application.[168]

Eventually, it does not seem possible to establish a clear-cut axiological hierarchy based on broad categories of norms like peremptory norms, obligations *erga omnes*, Charter norms and ordinary norms that would get us out of the calamities of the inductive approach. The problems are twofold: First, how can we discern axiological hierarchies 'inductively', relying on certain indicators for the recognition of moral paramountcy of certain norms in international law and, second, how to define the threshold where recognition of moral paramountcy translates into *jus cogens*?

7.3.6 Further Attributes Defining the Special Status of Jus Cogens

So far, we have seen that the concepts of structural and, in particular, substantial hierarchies are of some explanatory value with regard to some distinct features of *jus cogens*, the invalidation of norms that conflict with *jus cogens*, the non-derogability and derogatory power of *jus cogens* and also the qualified law-making procedure for *jus cogens*. By contrast, not all the effects attached to *jus cogens* can be explained on the basis of structural or substantial hierarchies, nor do they refer to situations of a *norm conflict*. They seem to rely merely on an axiological hierarchy, i.e. because of the moral paramountcy of certain norms, special rules should apply in case of a *breach*. Theoretically, these arguments generally do not depend on the special status of *jus cogens*, but can also apply to other norms that may not be recognised as morally paramount, but still of enhanced importance for the international community. In practice, however, the law has in some cases been developed in such a way that these special rules apply exclusively with regard to *jus cogens* and thus broaden the set of secondary rules that are attached to (primary) peremptory norms.

In the law of state responsibility, Article 26 ASR can be explained with the non-derogable status of *jus cogens* rules.[169] Article 26 ASR makes it plain that the circumstances precluding wrongfulness listed in the ASR do not authorise or excuse any derogation from a peremptory norm of general international law.[170] However, Article 26 ASR refers to circumstances precluding wrongfulness—consent, self-defence, countermeasures, force majeure, distress and necessity—and not to a conflicting norm. Consequently, there is no norm hierarchy at stake. According to Article 40 ASR, a special regime of aggravated responsibility (Part Two, Chapter

[168] Jakab 2007, at 57–58.

[169] Kadelbach 2005, at 34; Gaja 2012, at 53.

[170] International Law Commission, Draft articles on the responsibility of states for internationally wrongful acts, with commentaries, 53rd session of the ILC, UN Doc. A/56/10, 2001, para 4; Crawford 2002, at 188.

II of the Articles) applies to the international responsibility which is entailed by a serious breach by a state of an obligation arising under a peremptory norm of general international law. Article 41 ASR spells out the specific consequences involved: states shall cooperate to bring to an end through lawful means any serious breach of this kind (Article 41(1) ASR) and no state shall recognise as lawful a situation created by a serious breach (Article 41(2) ASR). Both duties apply in the absence of a norm conflict[171] and relate to a legal fact, not an act.[172] Accordingly, they are not related to invalidity or non-derogability or to structural or substantial hierarchies.

In the law of treaties, the inadmissibility and separability of a reservation to a treaty provision reflecting a peremptory norm cannot simply be explained as invalidity and an automatic consequence of a norm hierarchy on the basis that a reservation establishes a contractual relationship between the parties.[173] This assumption would be based on the postulates of the so-called opposability school, which meets some serious objections and is difficult to square with the relevant provisions of the VCLT.[174] In any case, making a reservation to a treaty provision that reflects *jus cogens* is not equivalent to contracting out of the existing peremptory obligation.[175] If it were admissible, it would only mean that there would be no parallel treaty obligation and treaty mechanisms would not apply, but the underlying *jus cogens* obligation would remain intact. However, due attention should always be paid to the question whether a reservation to a treaty provision that reflects peremptory norms or hinders the effective enforcement of peremptory norms is compatible with the object and purpose of the respective treaty (Article 19(c) VCLT).[176] This is not really an argument depending on *jus cogens* status.[177] Indeed, the Human Rights Committee in its General Comment No. 24, after establishing that reservations that offend peremptory norms would not be compatible with the object and purpose of the ICCPR, added a second argument.[178] In its view, since human rights treaties are not just reciprocal multilateral treaties

[171] Vidmar 2012, at 31.

[172] Kawasaki 2006, at 41–42. Article 41(2) ASR does not state that the act of recognition would be void but establishes a duty not to recognise.

[173] This is, however, the view of Reuter 1989, at 360. For further references, see Guide to Practice on Reservations to Treaties. International Law Commission, Guide to Practice on Reservations to Treaties, 63rd session of the ILC, UN Doc. A/66/10, 2011, at 374. For problems of a direct application of Article 53 VCLT, see Zemanek 2011, at 392.

[174] A. Pellet, Special Rapporteur, First report on the law and practice relating of reservations to treaties UN Doc. A/CN.4/470, 30 May 1995, paras 100–105.

[175] Gaja 2012, at 50–51.

[176] For the ICCPR: Human Rights Committee, General Comment 24, General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para 8.

[177] Zemanek 2011, at 392 ('stopgap argument').

[178] Human Rights Committee, General Comment 24, para 8.

between states, but work for the benefit of persons within their jurisdiction, states are not allowed to modify *inter se* human rights of general international law. According to the HRC, this argument applies only *a fortiori* as far as customary human rights law represents *jus cogens*.

In the law of state immunity, an exception to state immunity in case of a breach of a violation of a peremptory norm does not refer either to genuine norm conflicts or to structural and substantial hierarchies. Customary international law on state immunity is not in direct conflict with *jus cogens*. In order to establish a genuine conflict and a substantial hierarchy between *jus cogens* and state immunity, a peremptory norm would need to create a positive obligation, for instance, to put torturers on trial or to compensate torture victims.[179] However, this would need to be demonstrated.[180] It should not be taken for granted that *jus cogens* demands 'affirmative action'.[181] Even if positive obligations to enforce the prohibition existed, it could be questioned whether they share the peremptory status.[182] Rather, the peremptory character may be limited to the so-called negative obligations of states.[183] To put it differently, using the concept of logical hierarchies, exceptions to state immunity that ensure effective enforcement of peremptory prohibitions are on the level of secondary norms, while peremptory prohibitions like the prohibition of torture are on the level of primary norms. Their peremptory status is defined by the very applicability of a set of secondary norms in the law of treaties and beyond. Conceptually, it is a big step to ascribe a peremptory character to some of these secondary rules themselves. This is clarified by the very distinction between primary and secondary rules.

To sum up, the consequences of a breach of *jus cogens* discussed in this section do not seem to have a 'direct or logical connection' with the original effect of *jus cogens* as embodied in Article 53 VCLT.[184] They merely reflect the recognition of a moral paramountcy of *jus cogens* norms and provide for additional secondary

[179] Vidmar 2012, at 29. See *Case Concerning Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v Rwanda)*, ICJ, Jurisdiction and Admissibility, Judgment of 3 February 2006, para 64; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ, Judgment of 14 February 2002, para 58; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ, Judgment of 3 February 2012, para 95; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, ICJ, Judgment of 3 February 2015, paras 87–88; *Jones* v. *Saudi Arabia*, House of Lords, (2007) 1 AC 270, ILR, Vol. 129, at 629).

[180] By contrast, Orakhelashvili 2007, at 968–969 assumes that the peremptory prohibition of torture and the existence of jurisdiction in the particular case already imply that there is an obligation incumbent on the forum to enforce that prohibition.

[181] O'Connell 2012, at 80.

[182] See *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, ICJ, Judgment of 3 February 2012, para 94. 'The duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected.'

[183] Vidmar 2012, at 33.

[184] Kawasaki 2006, at 40.

norms, thus increasing the significance of a logical hierarchy between primary and secondary norms.

7.4 Conclusion

Ultimately, we cannot explain all the diverse special effects attributed to *jus cogens* on the basis of a structural or substantial hierarchy. Yet, they all reflect a shared belief that peremptory norms are morally paramount. This involves an axiological hierarchy, from which, however, none of the consequences discussed follow automatically as a consequence of the hierarchical status of *jus cogens* as 'highest law'. *Jus cogens* is not simply a universally applicable trump card. Scholars who advocate a strong model of *jus cogens* claim that an extensive set of secondary rules applies if a norm has passed the axiological threshold of *jus cogens*. This is a categorical approach. Even on the basis of such an approach, the legal consequences that are attributed to the special status of *jus cogens* must be accepted and recognised by the international community. Axiological hierarchies, however, can also have a more sophisticated effect on the development of international law. Certain consequences like the invalidity of Security Council resolutions or the inadmissibility of reservations, arguably, apply categorically, irrespectively of a peremptory status. With regard to the way forward, the big question is how we want to accommodate special consequences in case of a breach of morally paramount norms in order to increase the effectiveness of these norms. The decision we need to make is the following: do we want to restrict all the special attributes of morally paramount norms exclusively to *jus cogens*, or should we prefer a more flexible approach and develop norm-specific secondary rules in order to render important norms, be they peremptory or not, more effective?

The advantage of the first approach is that *jus cogens*, in the meantime, even in the absence of a generally accepted abstract definition of the concept, is a relatively clearly defined category of norms.[185] Accordingly, it seems to be a convincing strategy to think about and eventually broaden the specific set of secondary rules that apply. So far, however, the strategy to attach all kinds of consequences to this distinct norm category was not very successful in actual practice. The reluctance of courts to rely on *jus cogens* arguments is often due to the fact that arguments of this kind seem to open floodgates. If an exception to state immunity is accepted on the basis of a peremptory norm having been violated, this would have a huge impact. This explains why *jus cogens* is in most cases relied upon only '*ad abundantiam*'[186] and argues in favour of the more flexible approach. Focusing exclusively on a set of special secondary rules for peremptory norms also has a limiting effect because it prevents us from reflecting on the efficient enforcement

[185] Vidmar 2012; Hameed 2014; Orakhelashvili 2006; Linderfalk 2012.

[186] Focarelli 2008, at 454.

of fundamental norms below the threshold of *jus cogens*. In any case, when extending the impact of *jus cogens* beyond the law of treaties, we should not lose sight of the original main purpose of Article 53 VCLT. It was conceived as a tool in the hands of poor, underdeveloped and neglected states to avoid being trapped by a formal consent extorted from them by more powerful states, to a treaty contrary to the fundamental basis of the contemporary international society.[187] In short, thinking outside the *jus cogens* box could be preferable to opening Pandora's Box that once contained the *jus cogens* concept.[188]

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[187] Pellet 2006, at 83–84.

[188] Linderfalk 2008, at 856.

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Chapter 8
In Quest of the Practical Value of *Jus Cogens* Norms

Elizabeth Santalla Vargas

Abstract While recognition of *jus cogens* norms is nowadays largely undisputed it remains a question surrounded by ambiguities and uncertainties. Nonetheless, one can assert that it is part of customary law. In fact, its customary status predates its incorporation in the Vienna Convention on the Law of Treaties with respect to both *jus cogens* and *jus cogens superveniens*. Its customary nature fosters the applicability of *jus cogens* beyond the purview of treaty law. While the notion has gradually permeated international case law, its rhetorical force has not yet translated into solving a legal dispute at the inter-state international responsibility system. Developments in the fields of human rights and international criminal law suggest that the time is ripe to move onto such a stage: *jus cogens* inherent force may serve as means for compelling respect for the commands and prohibitions of international law beyond the traditional state-centred system. Dispelling some unfounded assumptions about potential disrupting effects in international relations that would ensue from developing the legal effects of *jus cogens* and *jus cogens superveniens*, in tandem with judicial interpretation of crucial questions that may arise (e.g. intertemporality and separability of treaty provisions) may advance such an endeavour. It is further argued that *jus cogens* and *jus cogens superveniens* can have a sound impact beyond the realm of treaty law, where its contours and effects still require further development in international case law. Reparations for breaches of *jus cogens* or for violations of international

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obligations involving underlying compliance with *jus cogens* may contribute to further the notion's practical value.

Keywords *Jus cogens* · *Jus cogens superveniens* · Customary international law · Treaty law · Intertemporality · Separability · Conduct beyond treaty law · State responsibility · Unilateral acts · Passage of time · Reparations

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8.1 Introduction

This chapter will explore the role of *jus cogens* in the quest for making international law more effective, that is, of devising a means of compelling respect for its commands and prohibitions. In doing so, it will analyse the legal consequences derived thus far from *jus cogens* norms in international adjudication with a focus on the case law of the International Court of Justice (ICJ) in tandem with some of the cases of the Inter-American Court of Human Rights (IACHR) and of the International Criminal Tribunal for the former Yugoslavia (ICTY), that in the author's view are relevant to the discussion advanced in this contribution.

The relevance of the enquiry lies, *inter alia,* in the growing acceptance and recognition of the existence of superior norms in international law that may theoretically resemble a constitutional framework. As is well known, the ICJ has explicitly recognised the *jus cogens* character of various norms in its case law. Since 2006 [1] this trend has gained terrain in its jurisprudence. In recent judgments the *jus cogens* character of the prohibition of torture[2] and genocide[3] has been explicitly

[1] *Armed Activities on Territory of the Congo (Democratic Republic of the Congo v Rwanda),* ICJ, Jurisdiction and Admissibility, Judgment of 3 February 2006, Separate Opinion of Judge Dugard, para 2 (in relation to para 64 of the judgment).

[2] In *Belgium v Senegal*, the ICJ stated that the prohibition of torture is not only embedded in customary law but has also a *jus cogens* character. *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), ICJ, Merits, Judgment of 20 July 2012, para 99.

[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*), ICJ, Merits, Judgment of 3 February 2015, para 87.

acknowledged, while the *jus cogens* character of other norms, notably the prohibition on the use of force, found its way in reference to the interpretation advanced by other institutional actors much earlier.[4] This chapter will argue that a stronger impact could be attained by a further development of the contours and practical implications of *jus cogens* in international litigation.

The chapter also argues that resorting to *jus cogens* may reduce the margin for argumentative manoeuvring as the discussion vanishes by its invocation. While this may prove relevant to various scenarios, it may have particular implications in light of the absence of a hierarchy amongst primary sources of international law. Delving into the customary law underpinnings of the notion bears on its application beyond the confines of treaty law. An analytical overview of the consequences thus far recognised in such scenarios is also undertaken. Particular consideration is paid to the notion of *jus cogens superveniens*[5] so as to explain its potential for dispelling any reticence towards the application and utility of *jus cogens*. Intertemporality[6] and separability[7] of treaty provisions are accordingly also considered in correlation.

By drawing on the aforesaid elements of analysis, and mindful of the existence of divergent views, it is further posited that the ultimate international responsibility for breaches of *jus cogens* at the inter-state level could impact on the notion's evolving construction and so contribute to vest it with a more meaningful practical value.

8.2 On the Customary Law Nature of *Jus Cogens*

'By adopting Article 53 VCLT, State Parties seized the widely academic notion of *jus cogens* in international law, imparted legal essence to legal theory and introduced the outcome into positive international law for the first time.'[8] At present

[4] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v USA*), ICJ, Merits, Judgment of 27 June 1986, para 190 (with reference to the work of the International Law Commission that considered the prohibition on the use of force as a conspicuous example of a *jus cogens* norm).

[5] The notion refers to new peremptory norms that emerge in the course of a continuing legal situation bearing legal effects on the rights and obligations arising out of the said legal situation to the extent they become in conflict with the new norm of peremptory character. As such, the notion entails the recognition of the progress and development of international and 'international morality', see, e.g., Jimenez de Aréchaga 1978, at 67.

[6] According to the principle of intertemporality rights may 'cease in certain cases to be effective as the result of the development of new rules of law attaching conditions of the continued validity of these rights.' Bjorge 2014, at 143 (referencing Lauterpacht).

[7] Separability aims at 'preventing the treaty to come to an end due to the invalidity, termination or suspension of individual treaty provisions which do not constitute the main subject of consent.' Odendahl 2012, at 754.

[8] Dörr and Schmalenbach 2012, at 898. Magallona 1976, at 521 and 523.

not only the validity of the notion in international law[9] but also its customary nature is widely accepted albeit scant practical recognition is given in terms of seeking accountability.[10] It is further acknowledged that at the time of its insertion in the Vienna Convention on the Law of Treaties (Vienna Convention or VCLT), *jus cogens* had already attained customary law status long before the VCLT entered into force.[11] This was recognised by the International Law Commission in its commentary on Article 50—that later became Article 53 VCLT—where it was acknowledged that at the time of codification of the law of treaties, the recognition as to the existence of peremptory norms that trump any treaty arrangement running counter such norms had gained consensus and thus merited its codification.[12]

Denoting its natural law origins, the development of *jus cogens* norms, which, as mentioned above, remarkably predated the preparatory work leading to the Vienna Convention, has been intrinsically linked to the human rights paradigm.[13] It can accordingly be asserted that by its nature the notion of *jus cogens* departs from a state-law-centred conception. In the words of Verdross, '[t]he criterion for these rules consists in the fact that they do not exist to satisfy the need of the individual states but the higher interests of the whole international community.'[14] This view, in tandem with the consideration that *jus cogens* derives from customary law and general principles of international law,[15] reinforces a broader approach, actually recognised long ago.[16]

In early cases before the Permanent Court of International Justice, where the question of compatibility of treaties—or treaty provisions—was raised in connection

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[9] Brownlie highlighted that 'more authority exists for the category of *jus cogens* than exists for its particular content'. Brownlie 2003, at 490.

[10] For highlighting such scant practice, see Yarwood 2011, at 62. On the customary nature and stressing the fact that it has been seldom invoked in state practice, see Dörr and Schmalenbach 2012, at 898.

[11] It is further acknowledged that the notion of *jus cogens* can be traced back to Roman Law. While the term (*jus cogens*) was coined later on, the notion's underlying rationale may be found in the *ius publicum* of Roman Law from which no derogation was accepted, giving place, *inter alia,* to the nullity sanction of agreements running counter to fundamental rules and the so-called *bonnes moeurs*. See Gómez Robledo 1981, at 17 and 19. The influence of *ius naturale* in the notion of *jus cogens* can be observed in the works from Vitoria to Vattel. See Gómez Robledo 1981, at 23–24 (pointing out the main similarities and differences between both, *ius naturale* and *jus cogens*). The interrelationship between both notions has been eloquently depicted by Vattel's opinion. See, e.g., Barberis 1970, at 32–33 (highlighting Vattel's view of a *droit de gens nécessaire* that was considered to be binding upon states by virtue of natural law). See also Gómez Robledo 1981, at 28–29.

[12] International Law Commission, Draft Articles on the Law of Treaties with commentaries, 18th session, 1966, UN Doc. A/6309/Rev.l, at 247.

[13] Bianchi 2008, at 492.

[14] Verdross 1966, at 58.

[15] In this vein, Barberis 1970, at 45. Along the same view, see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, Separate Opinion of Judge Cançado Trindade, n. 212.

[16] Espósito 2011, at 161 ff. (with further references).

with general principles of international law, one finds some judicial considerations close to the notion of *jus cogens*. For instance, in the *Oscar Chinn* case,[17] Judge Schüking's dissenting opinion regarded the treaty in question (the Treaty of Saint-Germain) as null and void, one of the reasons[18] being that the treaty was in conflict with an 'essential principle of international law'.[19] It is interesting to note further aspects of the opinion (issued in 1934) that nowadays also seem valid. Indeed, the criticism posed by the opinion as to the lack of development concerning the contours of international law when it comes to acts which are automatically null and void is arguably still applicable nowadays.[20] In fact, the automatic effect of any act found to violate a *jus cogens* norm has received scant attention since then, when Judge Schücking opined that as a matter of international public policy, the Court could not rely upon a convention, even if adduced by the parties, that happened to be automatically null and void.[21]

It is further interesting to note, as observed in previous research, that the Nuremberg Trial offers some insights, which can be regarded as a 'valid precedent with regard to *jus cogens.*'[22] For instance, the defence's argument that compelling prisoners of war to work in manufacturing weapons was justified under treaty law (referring to an agreement between the Reich and Vichy governments) was set aside under the consideration that such a treaty would be 'contra bonos mores'[23] and therefore null and void.[24]

It has been further asserted that the early case law of the ICJ, while not explicitly endorsing the notion of *jus cogens*,[25] recognised it to a certain extent even

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[17] *Oscar Chinn (UK v Belgium),* PCIJ, Merits, Judgment of 12 December 1934. The parties held different views as to the validity of the Treaty of St Germain de Près (1919) in the light of the 1885 Berlin Treaty. For further background of the case, see Williams 2000, at 546.

[18] The other reason was the inconsistency with treaty law *per se*.

[19] *Oscar Chinn*, Separate/Dissenting Opinion of Judge Schücking, at 149. The expression had been used in ibid., Dissenting Opinion of Judge van Eysinga, at 134.

[20] Ibid., Separate/Dissenting Opinion of Judge Schücking, at 148.

[21] Ibid., at 150. A similar reasoning was adopted by the IACHR in *Aloeboetoe and others v. Suriname,* IACtHR, Reparations and Costs, Series C No. 15, Judgment of 10 September 1993. See Sect. 8.5.

[22] Williams 2000, at 548.

[23] Against good or proper moral (a notion familiar to contract law). This was advanced by German literature produced in between both world wars aiming at leaving without effect the Peace Treaties of 1919, see Barberis 1970, at 33.

[24] Williams 2000, at 548 (referring to the trial of Alfred Krupp).

[25] Amongst others, Williams points out that the ICJ cautiously avoided an explicit reference to the term in various occasions. Williams 2000, at 543. Bianchi provides further examples where the ICJ slightly circumvented the explicit reference to *jus cogens*, for instance in its advisory opinion on the *Legality of Use or Threat of Use of Nuclear Weapons*, where it referred to the elementary considerations of humanity as 'intransgressible principles *of international customary law*'. *Legality of Use or Threat of Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para 79 (emphasis added). Pointing out the marginal role that *jus cogens* had until then in the jurisprudence of the ICJ, see Ruffert 2006, at 297 (referring to Tomuschat's work).

before the adoption of the VCLT.[26] Strikingly, it appears that such a trend has somehow returned[27] with some exceptions concerning the instances where the explicit reference to *jus cogens* has been made for the purpose of discarding the purported effects advanced by the claimants[28] or in a rather rhetorical stance.[29] Moreover, the case law and some advisory opinions evince the assimilation drawn

[26] Williams 2000, at 548.

[27] For instance, in *Diallo,* a ground breaking case where the ICJ ruled in favour of compensation for material and non-material injury, as a form of reparation, upon finding that violations of international obligations pertaining to the realm of human rights—in addition to the right to information on consular assistance—had resulted in injurious consequences *for an individual*, made no reference to *jus cogens.* Judge Cançado Trindade's separate opinion emphasised that the realisation of justice—the right of access to justice *lato* sensu—as an imperative of *jus cogens* constitutes in itself a form of reparation. *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, ICJ, Judgment of 30 November 2010, Separate Opinion of Judge Cançado Trindade, paras 81 and 95. In *Armed Activities on the Territory of The Congo,* where the proceedings have been reinstated by Order of 1 July 2015 with respect to the question of reparations that failed to be settled by negotiation between the parties for almost a decade, the ICJ has entertained a dispute involving grave violations of human rights law and of international humanitarian law in tandem with the *jus cogens* prohibition of the use of force—whose *jus cogens* character was acknowledged by the ICJ in *Nicaragua v USA* by drawing attention to the qualification that had been advanced by the International Law Commission—and the principle of non-intervention. In effect, the judgment of 19 December 2005 ordered reparations to be made by Uganda to Congo for the injury caused by Uganda's violation of the aforementioned principles, as well as obligations incumbent upon it under international human rights and international humanitarian law and other obligations arising out of international law (Congo was also found to be bound to make reparation to Uganda by the injury caused for violations of the Vienna Convention of Diplomatic Relations). It may be noted, however, that neither the Order of 2015 nor the Judgment of 2005 have made reference to the *jus cogens* character of some of those principles and norms. Perhaps it was deemed premature to do so in the Order and it may come up in the eventual Judgment on reparations. It may be recalled that the Judgment of 2005 referred to the prohibitions on the use of force and on intervention as principles of international law whose violation was found to be of a grave character. See *Armed Activities on the Territory of the Congo*, paras 165 and 163.

[28] This was the case in *Congo v Rwanda* and more recently in *Croatia v Serbia,* as commented under Sect. 8.3.

[29] *Belgium v Senegal* may be deemed a case in point, where the *jus cogens* nature of the prohibition of torture—and its customary status—was affirmed by the ICJ. See *Questions Related to the Obligation to Prosecute or Extradite*, para 99. In view of the fact that such a significant assertion was made in the section addressing the temporal scope of the *aut dedere aut judicare* obligation under Article 7(1) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (CAT), one may infer that given that jurisdiction was *only* founded on the basis of the compromissory clause of the Convention (Article 30(1) CAT) the Court sought to underline its inability, in line with its holding in *Congo v Rwanda,* of considering allegations falling beyond the temporal scope of the Convention, even where compliance with *aut dedere aut judicare* entailed the observance of and respect for a *jus cogens* norm (such as the absolute prohibition of torture). For an interesting view posited by Judge Cançado Trindade's as to the consequences of *jus cogens* norms– implying not only obligations of conduct but, more importantly, of due diligence and result–, see, *Questions Related to the Obligation to Prosecute or Extradite,* Separate Opinion of Judge Cançado Trindade, paras 44–51. See also Sect. 8.4.

to customary norms.[30] Thirlway exemplifies this contention by the reference made in some separate opinions to the *jus cogens* norm prohibiting recourse to the use of force in *Military and Paramilitary Activities in and against Nicaragua*, which appeared to suggest the recognition of the customary law origin of such norms.[31] Indeed, in his separate opinion Judge Singh considered that while asserting its jurisdiction on the basis of customary law, the ICJ not only adopted the right approach in relation to the factual background of the case but also contributed 'in emphasizing that the principle of non-use of force belongs to the realm of *jus cogens*'.[32] In fact, the judgment on the merits in arguing the customary law nature of the principle of the prohibition of the use of force recalled that the International Law Commission in its work on the codification of the law of treaties regarded the principle as a 'conspicuous example of a rule in international law having the character of *jus cogens*'[33] and further noted that both parties to the case had explicitly deemed the principle as pertaining to the *jus cogens* sphere.[34]

The importance of recognising the customary law character of the notion of *jus cogens* is intrinsically linked to the non-retroactive character of the VCLT set forth in Article 4. As Article 53 VCLT embodies a provision that is declaratory of customary law,[35] its effects are to be read in conjunction with Article 4 VCLT. The explicit acceptance in Article 4 VCLT of the validity of international law distinct from the Vienna Convention, including therefore customary law, bears on the possibility of applying *jus cogens* by virtue of its customary law nature beyond the temporal constraints underpinning the Vienna Convention pursuant to Article 4 VCLT.[36] In fact, the jurisprudence of the ICJ supports this contention. In *Botswana/Namibia*[37] and in *Indonesia/Malaysia*[38] treaties dating back to 1890 and

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[30] For instance, *Legality of Use or Threat of Use of Nuclear Weapons*, para 79.

[31] Ford 1994, at 152 (citing Thirlway).

[32] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Separate Opinion of Judge Singh, at 153. In more general terms, Judge Sette-Camara pronounced with respect to the *jus cogens* character of the principle of non-intervention. Ibid., Separate Opinion of Judge Sette-Camara, at 199.

[33] Ibid., Judgment on the Merits, para 190.

[34] Ibid., Judgment on the Merits, para 190. While *Nicaragua* did so in its memorial on the merits, the USA referred to the notion in its counter-memorial in the jurisdiction and admissibility phase.

[35] Villiger's commentary considers that such a consideration is plausible. See Villiger 2009, at 676 para 25.

[36] Villiger's commentary stresses the fact that Article 53 embodies a *declaratory* norm of customary law. As opposed to non-declaratory rules, such norms apply independently of the Convention and thus even before its entry into force. Ibid., at 17, para 35 and at 110, para 4.

[37] *Kasikili/Sedudu Island (Botswana/Namibia),* ICJ, Merits, Judgment of 13 December 1999, paras 18 and 20.

[38] *Sovereignity over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia),* ICJ, Merits, Judgment of 17 December 2002, paras 37–38. (The customary law nature of both Articles 31 and 32 was reaffirmed by the Court). As pointed by the ICJ, Indonesia was not even a state party to the Vienna Convention.

1891, respectively, were interpreted by the ICJ in the light of Articles 31 and 32 VCLT (rules of treaty interpretation) by virtue of its customary law character. By the same token, in *Hungary/Slovakia,* Articles 60–62 VCLT (relating to termination and suspension of the operation of a treaty) were deemed to be declaratory of customary law.[39] Although reference by the ICJ to Article 64 VCLT (*jus cogens superveniens)* was made to emphasise the impossibility of considering its scope (as commented in Sect. 5), an argument can be made as to the feasibility of drawing a reasonable inference from the judgment to consider Article 64 VCLT part of the realm of declaratory customary law as reflected by the Vienna Convention. Indeed, the fact that the ICJ stressed the inapplicability of the Vienna Convention with respect to the 1977 Treaty that had entered into force between the Parties before the former, and that the rules embodied in its provisions could only apply by virtue of customary law,[40] militates in favour of such understanding. To put it differently, to the extent that the ICJ found itself precluded from considering *sua sponte* the applicability of Article 64 and its emphasis on the applicability of the rules of the Vienna Convention provided their customary character could be ascertained, provides grounds for considering the customary law character of Article 64 VCLT.

Accordingly, in view of the overarching effects of Article 64 VCLT, as emphasised in Sect. 8.5, the recognition of its customary law underpinnings provides a ready route for its application with respect to treaties having entered into force prior to the Vienna Convention or independently of its application at all.

8.3 On the Use and Misuse of the Normative Value of *Jus Cogens* in International Adjudication

The *jus cogens* nature of the prohibition of genocide has been recently acknowledged in *Croatia v Serbia*,[41] recalling its previous recognition in *Congo v Rwanda* (judgment on jurisdiction and admissibility), where the acknowledgment of the character of a *jus cogens* norm had occurred for the first time in the jurisprudence of the ICJ, as mentioned above.[42] In *Croatia v Serbia* the recognition of the *jus cogens* character of the prohibition of genocide was made in the context of the discussion concerning the jurisdictional reach of the ICJ on the basis of the Genocide Convention's

[39] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* ICJ, Judgment of 25 September 1997, paras 46 and 99.

[40] Ibid., paras 99 and 112.

[41] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*), para 87.

[42] *Armed Activities on the Territory of the Congo,* para 64. In *Nicaragua v USA* the ICJ referred to the *jus cogens* nature of the prohibition of the use of force as recognised by the International Law Commission. *Military and Paramilitary Activities in and against Nicaragua*, para 190. As is well known, in other cases it seemed to have referred to the notion of peremptory norms by resorting to other labels: obligations *erga omnes*, intransgressible principles.

compromissory clause.[43] Accordingly, reliance on its previous holding (in *Congo v Rwanda*), had the same purpose, namely foreclosing any attempt to expand the jurisdiction of the ICJ in a given case to related matters arising under customary law, obligations *erga omnes*,[44] and even *jus cogens* wherever based on a compromissory clause. In *Congo v Rwanda* the ICJ held that *jus cogens* did not provide a jurisdictional basis *per se* even if the dispute would be concerned with the enforcement of peremptory norms.[45] A jurisprudential trend can accordingly be identified which discards any possible impact, either directly or indirectly, as far as the jurisdictional basis of the ICJ is concerned. The fact that the jurisdictional system of the ICJ is construed on the basis of the consent of states seems to render plausible the inapplicability of *jus cogens* and customary norms when determining the jurisdictional reach.[46]

More intriguing questions relating to *jus cogens* arise considering its embeddedness in a structural system composed of substantive and procedural norms and as part of a hierarchical normative structure—also existent—under international law. *Jurisdictional Immunities of the State* is a case in point.

In *Germany v Italy* the distinction between procedural and substantive norms led to discarding any practical role attached to the hierarchical position of a *jus cogens* norm. This argument merits further scrutiny[47] while delving into the *raison d'être* of *jus cogens* norms. A pivotal question relates to the meaning of derogation and its practical implications.[48] Can any action or rule hindering the enforcement of *jus cogens* norms be deemed as falling into the derogation scheme?[49] Would it warrant an evolutionary interpretation bearing in mind that various forms of conduct, as opposed to exclusively formal or informal agreements, as evinced by practice, can run counter to *jus cogens*? Or put differently, if it is accepted that not only agreements—whatever their form—but

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[43] Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

[44] *Congo v Rwanda* recalled the holding in *Portugal v Australia* that reasoned that norms entailing an *erga omnes* character did not provide per se a jurisdictional basis. *Congo v Rwanda,* para 64.

[45] Ibid.

[46] The separate/dissenting opinion of Judge Schucking in the *Oscar Chinn* case (before the Permanent Court of Justice) opined that 'considerations of international public policy' should be controlling, even when jurisdiction is conferred by virtue of a special agreement. *Oscar Chinn*, Separate/Dissenting Opinion of Judge Schucking, at 150.

[47] With a critical view, see Espósito 2011, at 162 ff.

[48] Orakhelashvili considers that '[d]erogation means an attempt to legitimise acts contrary to *jus cogens* and thus to hinder the integral and non-fragmentable operation of a peremptory norm, to aim at a result that is outlawed under a peremptory norm, to allow or oblige states to do what peremptory norms prohibit or abstain from what peremptory norms require.' Orakhelashvili 2005, at 70. Such a view advances a broader understanding in relation to the International Law Commission's commentary to the final draft of 1966 leading to the Vienna Convention on the Law of Treaties, considering that 'by 'derogation' is meant the use of agreement (and presumably acquiescence as a form of agreement) to contract out of rules of general international law'. Brownlie 2003, at 489. It seems that such an understanding influenced the Spanish version of Article 53 VCLT that refers to any contrary agreement.

[49] Advancing a negative answer to this question, see Talmon 2012, at 986.

also any kind of conduct is prohibited or outlawed if running counter to *jus cogens* norms, should a broader interpretation be welcomed with respect to the scope and meaning of derogation underpinning the definition of Article 53 VCLT? The Articles of the International Law Commission on Responsibility of States for International Wrongful Acts (ASR) shed some light on this issue.[50] For instance, Article 26 ASR while addressing the inapplicability of grounds for excluding the wrongfulness when *jus cogens* is at stake do so with respect to any kind of act. By the same token, Article 41(2) ASR provides for the duty not to recognise as lawful *any* situation that may entail a 'serious' breach of peremptory norms.[51] In fact, the ICJ endorsed such an effect although not, at least explicitly, in connection with *jus cogens* norms in its advisory opinion on the *Wall in the Occupied Palestinian Territory*,[52] where it found that states were under the obligation not to recognise as lawful the illegal situation ensuing from the construction of the wall in the occupied Palestinian territory in view of the 'character and importance of the rights and obligations involved'.[53]

The dissenting opinion of Judge Cançado Trindade in *Jurisdictional Immunities of the State* considered that an underlying conflict of norms did exist: between a norm of a customary nature and a *jus cogens* norm.[54] In view of the superior position and thus overriding power of *jus cogens* norms, the norm (or situation) found to be in conflict with *jus cogens* should be displaced. In fact, the majority expressly referred to such legal effect, but found it only applicable with respect to rules having the same character.[55] The argument was construed on the basis of the aforementioned precedent that discarded any effect of *jus cogens vis-à-vis* compromissory clauses.[56] However, such an approach has been deemed problematic in at least two respects, namely on the basis of the difficulties embedded in classifying certain rules as procedural or substantive in

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[50] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001.

[51] UNGA Res 56/83, 12 December 2001.

[52] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004.

[53] Talmon 2006, at 100 (quoting para 159 of the Advisory Opinion).

[54] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening),* ICJ, Judgment of 3 February 2012, Dissenting Opinion of Judge Cançado Trindade, para 296. 'The fact remains that a conflict does exist, and the Court's reasoning leads to what I perceive as a groundless deconstruction of *jus cogens,* depriving this latter of its effects and legal consequences.'.

[55] Ibid., para 95 (in part) and para 93 (in part, while considering the lawfulness of a situation created by the breach of a *jus cogens* norm).

[56] Such a line of argumentation was coined in *Armed Activities on the Territory of the Congo,* paras 64–65, and later followed in the *Arrest Warrant Case,* although in connection with customary law. *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v Belgium*), ICJ, Judgment of 14 February 2002. It has more recently been affirmed in *Croatia v Serbia,* where the scope of the compromissory clause of the Genocide Convention was explicitly curtailed with respect to alleged violations of international law that would trigger discussion beyond the Convention, irrespective of their customary nature or the fact that they may entail violations of *jus cogens* norms. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v Serbia*), ICJ, Merits, Judgment of 3 February 2015.

nature[57] and, more importantly, in view of the dubious relevance of distinguishing between substantive and procedural rules for applying *jus cogens*.[58] Indeed, as opposed to jurisdictional rules, characterising the customary jurisdictional immunity rule as a procedural one is not so clear-cut.[59] Moreover, confining the legal effects of *jus cogens* to rules having the same character poses a significant limitation for the applicability of peremptory norms which seems to run counter to its *raison d'être* and its possible procedural dimensions.[60] In fact, the notion of *jus cogens* was early deemed applicable to both conventional and customary rules without confining its application to rules pertaining to a certain category or nature.[61]It has accordingly been asserted that the effect of *jus cogens* norms 'derives from its normative superiority, rather than from empirical ways of construction.'[62] In the advisory opinion on the *Unilateral Declaration of Independence of Kosovo* (2010), the purported unlawfulness of declarations of independence—declared by Security Council Resolutions—was deemed irrelevant as far as the declaration's nature is concerned. The ICJ stressed that

[57] On this point and considering such doubtful stance with regard to jurisdictional and admissibility rules, see Boudreault 2012, at 1007.

[58] Considering unacceptable such division as to what the effects of *jus cogens* is concerned, see Conforti 2011, at 142. Putting into question the impossibility of considering a conflict of norms of substantive and procedural nature, see Boudreault 2012, at 1007.

[59] Espósito points to the fact that while immunity may serve a procedural purpose in domestic jurisdictions, that was not the case before the ICJ where the question rather posed a substantive debate. See Espósito 2011, at 171. For Boudreault rules on jurisdiction and admissibility do not necessarily entail an exclusive procedural nature. Boudreault 2012, at 1007.

[60] Espósito 2011, at 171 (with further references). The fact that human rights norms have an important procedural bulk is further pointed out by the author. In favour of such distinction, considering that it is embedded in both national and international law and hence not a novelty as to what the immunity rule is concerned, see Talmon 2012, at 983. Advancing some reflections on the potential role for *jus cogens* norms concerning the jurisdiction of the ICJ *vis-à-vis* the current formalistic consensual-based system, see Ruffert 2006, at 300.

[61] For instance, Quadri regarded *jus cogens* force in relation to individual members denoting an international public order: 'c'est à dire d'un ensemble de règles obligatoires *(jus cogens)* qui effacent toute règle contraire soit d'origine coutumière, soit d'origine conventionelle ou pactice.' Quoted by Alexidze 1981, at 243 (with further references concerning the pioneering visions prior to the inclusion of the notion in the Vienna Convention on the Law of Treaties and its historical roots). Judge Lauterpacht's Separate Opinion in *Bosnia and Herzegovina v Serbia and Montenegro*, stressed the hierarchical force of *jus cogens* norms *vis-à-vis* both conventional and customary law rules. He further pointed out that such hierarchical normative force is also applicable with respect to Security Council Resolutions issued under Chapter VII of the UN Charter. See, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ, Further Request for the Indication of Provisional Measures, Judgment of 16 April 1993, Separate Opinion of Judge Lauterpacht, para 100.

[62] Orakhelashvili 2005, at 69. While the argument is made in relation to the applicability of *jus cogens vis-à-vis* Article 103 UN Charter, it is deemed applicable for the purpose of the discussion advanced here as the prevailing obligations under the Charter may be deemed both of a substantive and procedural nature.

such condemnation reflected the view that those declarations 'were or would have been connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens).*'[63]

The relevance of distinguishing between procedural and substantive rules in the application of *jus cogens* has been further scrutinised by resorting to the *Furundžija* judgment.[64] The *obiter dicta* in *Furundžija* reasoned that the potential legal effects of the *jus cogens* prohibition of torture supports, *inter alia,* the entitlement[65] to exercise universal jurisdiction—in the light of the *aut dedere aut judicare* principle—with respect to persons accused of torture who are present in the state's territory or are under its jurisdiction.[66] The universality and the *aut dedere aut judicare* principles may be deemed norms of a procedural character. Such *dictum* is further relevant to the question posed by *Jurisdictional Immunities of the State* concerning the normative relation between *jus cogens* and norms of customary international law. Indeed, *Furundžija* acknowledged that the nullity effects of *jus cogens* apply to both type of rules. It further reasoned that confining the effects of conduct arising out of those sources (conventional and customary law norms) as opposed to, for instance,

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[63] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* para 81. In so reasoning, according to Orakhelashvili, the ICJ affirmed that the involvement of a breach of *jus cogens* can invalidate subsequent acts or actions emanating from state or non-state actors. See Orakhelashvili 2015, at 164.

[64] Bastin 2012, at 5 (pointing to some other authors' opinion).

[65] The underlying debate concerning permissive as opposed to mandatory universal jurisdiction under customary international law with respect to core crimes, as pointed out by Judge Abraham's separate opinion appended to the Judgment in *Belgium v Senegal,* may have prompted the Court's consideration had it not confined its jurisdiction to the Torture Convention ensuing conventional obligations. In his opinion, however, such a question may have elicited a negative response in view of the scarcity of *opinio juris* in that regard. See *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal)*, Separate Opinion of Judge Abraham, paras 31–39. Knorr argues that while permissive universal jurisdiction under customary law is an accepted principle, the *jus cogens* character of the prohibition of genocide in tandem with the *aut dedere aut judicare* obligation, bear on mandatory universal jurisdiction. Drawing upon the *Lotus rationale,* it is further argued that 'a hypothetical norm forbidding the exercise of universal jurisdiction under customary international law would be inherently contrary to the peremptory status of genocide'. Along the view that the prevention obligation—without territorial limit—is part of the *jus cogens* obligation prohibiting genocide, it is further submitted that mandatory universal jurisdiction exists as a matter of customary law for the custodial state. By the same token, the customary law underpinnings of the *jus cogens* prohibition of torture, in tandem with the concomitant *aut dedere aut judicare* obligation, lead to a similar conclusion as to the mandatory character of universal jurisdiction in such cases. Knorr 2011, at 32, 37–39 and 42. Arguing on the prominent role that universal jurisdiction acquires as an avenue to overcome the tension posed by the *aut dedere aut judicare* obligation in connection with the (*jus cogens) non-refoulement* protection in exclusion cases under Article 1F(a) Refugee Convention, see Santalla Vargas 2010, at 289–299, 312–313.

[66] *Prosecutor v. Anto Furundžija,* Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, paras 156–157.

the adoption of national measures running counter to a *jus cogens* norm would render *jus cogens* meaningless.[67] The superior normative effect appears to provide a ready route for interpretation and application, particularly in cases where competing norms of a conventional and customary nature are at stake. As Judge *Yusuf*'s dissenting opinion (in *Jurisdictional Immunities of the State)* also pointed out, the obligation to provide for reparation for violations of international humanitarian law was binding as a matter of conventional law.[68] Such a perspective leads one to conceive a possible conflict of norms of a customary nature on the one hand (e.g. jurisdictional immunity) and of conventional and arguably also of a customary nature on the other (e.g. the obligation to provide for reparation in tandem with the right to an effective remedy). In view of the absence of a hierarchy amongst primary sources of international law, resorting to *jus cogens* may reduce the margin for argumentative manoeuvring as the discussion vanishes by its invocation.

In fact, reparations is one of the matters where there is arguably a potential role to play for *jus cogens*. The judgment in *Diallo,* as stressed by Judge Cançado Trindade,[69] has paved the way for adjudication of international wrongful acts bearing injurious consequences for individuals. Such development entails a departure from the traditional conception where the inter-state paradigm of dispute resolution was centred on the rights and interests merely of states. In this new spectrum, human rights (and humanitarian law) violations encounter a broader venue for protection and enforcement also in the realm of state responsibility. Ascribing to the view that the right of access to justice belongs to the *jus cogens* domain[70] provides a compelling ground for considering reparation claims, in particular when they relate to breaches of *jus cogens* norms. Furthermore, compliance with the duty to make reparations finds a further and stronger line of argumentation.[71] As such, the reparations regime bears a potential for materialising the *jus cogens* effects beyond the purview of treaty law, which will be discussed in the following section.

8.4 *Jus Cogens* Effects Beyond Treaty Law

When considering the legal effects attached to *jus cogens,* nullity and termination of treaties, having been explicitly recognised by the Vienna Convention, have captured the attention. However, the potential effects of *jus cogens* not only expand beyond treaty law but they even appear more significant in situations that are not

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67 Ibid., para 155.

68 Ibid., Dissenting Opinion of Judge Yusuf, paras 13–14 and 28.

69 See *Ahmadou Sadio Diallo*, Separate Opinion of Judge Cançado Trindade, e.g., paras 209 and 212.

70 In this vein, see ibid., paras 81 and 95.

71 In his Separate Opinion Judge Cançado Trindade underscored that no domestic barriers apply for the realisation of the duty to make reparations. Ibid., para 212.

concerned with treaty law.[72] The way such legal effects have thus far been interpreted or applied in these other scenarios is addressed in the following paragraphs.

In this vein, the jurisprudence of the IACHR—where *jus cogens* has permeated the case law mainly involving violations of Articles 4, 5 and 6 of the American Convention on Human Rights, namely the right to life, personal integrity and the prohibition of slavery[73]—and some decisions and judgments of the ICTY,[74] where the notion of *jus cogens* has been approached reaffirming its hierarchical status also *vis-à-vis* customary law[75] beyond[76] and in connection with treaty law, turn relevant. Interestingly, considering that Article 4(2) of Additional Protocol II entails absolute and non-derogable prohibitions, the Trial Chamber in *Martić* held that a prohibition of reprisals against civilians applied in non-international armed conflicts.[77] To the extent belligerent reprisal has not been completely outlawed

[72] This proposition goes in line with the understanding that Article 53 VCLT 'derives from the consensual positivist recognition of the relevance of *jus cogens*'. See Orakhelashvili 2015, at 164. Pointing out that the applicability of *jus cogens* beyond the domain of treaty law has long been recognised, see Espósito 2011, at 161.

[73] A pioneering judgment addressing the *jus cogens* character of the prohibition of slavery was *Aloeboetoe et al. v. Suriname,* a case dating back 1993, commented under Sect. 8.5. For an overview of the IACHR's case law advancing the notion of *jus cogens,* see Cançado Trindade 2008, at 7–26. See also Huertas Díaz et al. 2005, 48–83.

[74] Referring to such contribution of both tribunals, see the Separate Opinion of Judge Cançado Trindade in the Advisory Opinion of the ICJ on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Separate Opinion of Judge Cançado Trindade, n. 212.

[75] In the *Tadić* case the Appeals Chamber considered that the notion of *jus cogens* curtailed the power of the Security Council in defining the crimes falling under the jurisdiction of the ICTY, stressing that in so doing any deviation from customary law encountered its limits at the confluence with peremptory norms. See, *Prosecutor v. Tadić,* Appeals Chamber, Judgment, Case No. IT-94-I-A-T, 15 July 1999, para 296. With a critical view as to the legislative power of the Security Council on the basis of the principle of consent embodied in conventional and customary law, although acknowledging that it is somehow challenged by *jus* cogens norms, see Fremuth and Griebel 2007, at 354.

[76] See in this connection *Prosecutor v. Delalić* et al, Trial Chamber, Judgment, Case No. IT-96.21-T, 16 November 1998, para 454; *Prosecutor v. Kunarać* et al, Trial Chamber, Judgment, Case No. IT-96-23-T, 22 February 2001, para 466 (stressing the fact that despite the prohibition of torture has attained the status of *jus cogens,* the definition of the offence of torture has remained dormant in international law). In *Delalić* et al, the Appeals Chamber, while arguing on the need to depart from the traditional dichotomy of international and non-international armed conflicts for the purpose of determining the criminal consequences of similar conduct, recalled the *jus cogens* character of the prohibition of torture, *Prosecutor v. Delalić* et al, Appeals Chamber, Judgment, Case No. IT-96-21-A, 20 February 2001, para 172, n. 225. The *jus cogens* nature of the prohibition of torture was recalled while emphasising the gravity of the offence of torture in *Prosecutor v. Milan Simić,* Trial Chamber, Sentencing Judgment, Case No. IT-95-9/2-S, 17 October 2002, para 34.

[77] *Prosecutor v. Milan Martić,* Trial Chamber, Decision (on Review of the Indictment), Case No. IT-95-11-R61, 8 March 1996, para 16. Later on, in *Kupreskić* the Trial Chamber resorted to the notion of *jus cogens* attached to core crimes to stress the applicability of the exception provided for in Article 60(5) of the Vienna Convention on the Law of Treaties with respect to the prohibition of reprisals in the event of breaches to international humanitarian law treaties. *Prosecutor v. Kupreskić* et al, Trial Chamber, Judgment, Case No. IT-95-16-T, 14 January 2000, para 520.

under international humanitarian law,[78] applying the notion of *jus cogens* contributes to discourage its application.

Establishing state responsibility on the basis of *jus cogens* may by no means be an easy task, but is arguably feasible[79] and desirable as judicial reckoning may contribute to prevent the watering down of the notion to a nominal concept. In this vein, a central and rather underexplored role of *jus cogens* lies in the realm of reparations. The question then arises as to what impact the breach of a *jus cogens* norm ought to have on the governing principles for assessing and determining the extent and nature of reparations. A case in point that was left in abeyance was *Nicaragua v USA*. In this case, Nicaragua's memorial concerning the form and amount of reparations had resorted to the *jus cogens* (and *erga omnes* obligations) character of those obligations that the USA was found to be in breach in the judgment on the merits (such as the *jus cogens* prohibition on the use of force,[80] the *jus cogens* character of which was explicitly accepted by the USA[81]) in support of the claim of reparation for moral damages.[82] It was further asserted that by doing so (obtaining reparations for breaches of *jus cogens* and *erga omnes* obligations), the notion of public order would turn meaningful.[83] Since the USA opted out of partaking in the proceedings, and upon Nicaragua's request, the ICJ issued an order discontinuing the proceedings and removing the case from its docket.[84] The potential discussion on the nature of the underlying *jus cogens* obligations found in breach and its relevance to the question of reparations have therefore remained unaddressed.[85]

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[78] The ICRC Customary International Humanitarian Law Study points out that while there is a trend in international humanitarian law to outlaw belligerent reprisals, some may still be considered lawful subject to stringent conditions. See, Henckaerts and Doswald-Beck 2005, at 513 (Rule 145, see also Rules 146–148). See also Darcy 2015, at 880.

[79] As pointed out by Ford, '[i]f its judges understand the nature of their difficult task in adjudicating peremptory law, the structure of the Court will empower them to adjudicate *jus cogens* matters submitted for decision.' Ford 1994, at 145.

[80] As emphasised by Judge Singh in his separate opinion. *Military and Paramilitary Activities in and against Nicaragua*, Separate Opinion of Judge Singh, at 153.

[81] See ibid., Counter-Memorial of USA, Questions of Jurisdiction and Admissibility, paras 314–315.

[82] Ibid., Memorial of Nicaragua, Compensation, Pursuant to the Order of 18 November 1987, paras 407–413.

[83] Ibid., para 410.

[84] Ibid., Removal from the List, Order of 26 September 1991.

[85] A similar discussion may arise in *Congo v Uganda* where the proceedings on reparation for grave breaches of international human rights law and of humanitarian law, the prohibition of the use of force and of non-intervention have been reinstated by Order of 1 July 2015. It may be noted, however, that no reference to *jus cogens* was made along the case. *Armed Activities on the Territory of the Congo*, Fixing of time limit: Memorials on the question of reparations, Order of 1 July 2015.

It is further interesting to note that the notion of *jus cogens* exerting effects beyond treaty law seems to have permeated the underlying rationale of some Security Council resolutions—for instance, in resolutions condemning territorial annexations in breach of international law where states were called upon to disregard the unlawful situation.[86] Accordingly, practice evinces a demonstrable implicit acceptance concerning the legal effects and consequences attached to *jus cogens* norms in diverse scenarios, and thus beyond treaty law, regardless of the fact that such a stance may not have necessarily been advanced under the label of *jus cogens*. However, its invocation in such situations may reinforce legitimacy by resorting to an authoritative legal stance whose logic goes beyond state consent. In fact, such a practice was echoed in the Articles on State Responsibility for International Wrongful Acts adopted by the International Law Commission in 2001, with Article 41(2) ASR mandating to regard as unlawful a situation created by the breach of a peremptory norm and render aid or assistance in maintaining the situation.[87] As pointed out by Dawidowicz, 'the obligation of non-recognition is based on customary international law and applies to an unlawful situation resulting from a serious breach of a peremptory norm where that situation results in the assertion of a legal claim by the wrongdoing State.'[88] Furthermore, Article 26 ASR recognises that no justification or excuse applies with respect to breaches of *jus cogens* norms. In turn, this is particularly relevant to prevent the consolidation of *lex specialis* on various fronts that, as pointed out by Orakhelashvili in connection with the question on the *jus ad bellum* requirements, could develop from state practice exempting or deviating from such requirements.[89]

Within such a framework, *jus cogens* effects beyond the realm of treaty law find a potential terrain that merit further exploration. For instance, the way the

[86] For instance, the Security Council condemned the annexation of Kuwait by Iraq and declared it null and void while called upon the international community not to recognise it. UNSC Res 662, 9 August 1990. See also UNSC Res 478, 20 August 1980, which declared null and void the legislative and administrative actions undertaken by Israel as the occupying power with respect to East Jerusalem, and calling upon all states not to recognise such actions. By the same token, the Commission on Human Rights concerning the situation in the occupied Syrian Golan called upon States not to recognise the illegal situation that unfolded by the actions at the legislative and administrative fronts undertaken by Israel as the occupying power. Commission on Human Rights, Resolution 2005/8, 14 April 2005. In its advisory opinion regarding the situation in Namibia, the ICJ affirmed the binding effect of Security Council Resolution 276 of 1970 which declared as illegal the continuing presence of South Africa in Namibia and thus called upon the member (states) to disregard the legal effects of such a situation. See, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970),* ICJ, Advisory Opinion, 21 June 1971, paras 117–118. For addressing the point as to the *jus cogens* binding effect on Security Council resolutions, see Orakhelashvili 2005, at 63–88.

[87] International Law Commission, Draft articles on the responsibility of states for internationally wrongful acts, with commentaries, 53rd session of the ILC, UN Doc. A/56/10, 2001, at 114.

[88] Dawidowicz 2010, at 684.

[89] Orakhelashvili 2015, at 175.

obligation of non-recognition is to be fulfilled, while necessarily encompassing a casuistic analysis,[90] is arguably still in need of clarification.[91] And so is the reach of such obligation in a broader spectrum of *jus cogens* norms recognised since the 1960s in connection with the prohibitions of *apartheid,* racial discrimination, basic principles of international humanitarian law, the denial of the right to self-determination, as well as forcible territorial acquisitions.[92]

An overarching approach of *jus cogens* effects is thus closely interwoven with the fact that the *corpus* of *jus cogens* norms has gradually expanded. For instance, whether the principles of equality and non-discrimination had attained the status of *jus cogens* was discussed in the advisory opinion on the *Juridical Condition and Rights of Undocumented Migrants* (2003) bearing an impact on the assessment and reconsideration of critical migration policies. The fourth component of the question submitted by Mexico prompted the enquiry as to whether the principle of non-discrimination and the right to equal and effective protection amounted to *jus cogens*. If so, what the consequences of such a status were for the OAS member states against the backdrop of ensuring respect and compliance with human rights law as provided for in the OAS Charter, *inter alia,* in recognition of 'the rights of the individual and the principles of universal morality.'[93] Accordingly, would the Inter-American Court confirm the *jus cogens* status of the principle of non-discrimination 'it would form part of the fundamental rights of the human being and of universal morality,'[94] entailing a binding character independently of its conventional nature.

In the Inter-American Court's reasoning such a binding effect is associated with the *erga omnes* character of the obligations arising out of a *jus cogens* norm.[95] Under the rationale that both the principle of non-discrimination and the right to equal and effective protection of the law lie at the core essence of human rights protection, their *jus cogens* status was confirmed.[96] This pronouncement is of no minor importance in light of the context where the question was posed, i.e. discrimination in work-related matters. As the advisory opinion put it, '[t]he problem of discrimination occurs particularly in labor-related matters.'[97] In elaborating on the legal effects ensuing from the consideration of the *jus cogens* nature of the principle of non-discrimination, the IACHR reasoned that it entailed the curtailment of the freedom in determining migration policies of any state and the

[90] Such obligation has been thus far mainly dealt with by the General Assembly and the Security Council in connection with specific situations. See Dawidowicz 2010, at 685.

[91] Ibid., at 686.

[92] Ibid., at 685–686.

[93] Article 17 of the 1948 Charter of the Organisation of American States, 119 UNTS 3.

[94] *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion, Series A No. 18, 17 September 2003, at 34.

[95] Ibid., para 110.

[96] Ibid., para 111.

[97] Ibid., at 36–37.

achievement of the objectives embedded in those policies.[98] Such an interpretation aligns with the overarching effects that a *jus cogens* norm ought to be vested with and its significance beyond treaty law trumping any juridical act.[99] It is thus accepted that in the domestic arena the overriding effects of *jus cogens* allow for the invalidation of any legislative, judicial and administrative measures to the extent that they run counter to a *jus cogens* norm or permit situations of such kind.[100]

Along this view, the reach of *jus cogens* effects in the realm of unilateral acts of states is another spectrum of potential application that has remained unexplored in practice. In fact, the potential of *jus cogens* constraining non-treaty conduct found echo in Article 5 of the International Law Commission Draft Articles on the Invalidity of Unilateral Acts[101] and has also been acknowledged by doctrine.[102] Drawing upon the *obiter dicta* in the Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* it has been asserted that unilateral acts of states 'conflict with *ius cogens* if they directly profit from and perpetuate the *ius cogens* violation'.[103] Such a powerful legal effect has thus far remained dormant, perhaps by the very same *raison d'être* that may purportedly justify its existence implying a departure from an exclusive state-centred international law creation predicated on traditional notions of state sovereign consent.[104] Judge Cançado Trindade's concurring opinion to the IACHR's advisory opinion, as commented above, eloquently depicts this contention. He stressed the fact that the real purpose of *jus cogens* is to occur in other fields distinct to the law of treaties, mainly in the realm of international responsibility where '*jus cogens* reveals its real, wide and profound dimension, encompassing all juridical acts (including the unilateral ones) and having an incidence (including beyond the domain of state responsibility) on the very foundations of an international law truly universal.'[105]

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[98] Ibid., at 32.

[99] Cançado Trindade 2009, at 10.

[100] *Tibi v Ecuador,* IACtHR, Preliminary Objections, Merits, Reparations and Costs, Series C No. 114, Judgment of 7 September 2004, Separate Opinion of Judge Cançado Trindade, para 32 (with reference to de Wet 2004, at 113, which provided domestic examples where the normative overriding power of *jus cogens* has materialised and noting that such power extends beyond the prohibition of torture).

[101] 'A state may invoke the invalidity of a unilateral act: (f) If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law.' V.R. Cedeño, Special Rapporteur, Third report on unilateral acts of states, UN Doc. A/CN.4/505, 17 February 2000, para 167.

[102] Ford 1994, at 145. More recently, Espósito 2011, at 161 ff.

[103] Dörr and Schmalenbach 2012, at 931, para 72.

[104] Recognising such potential of *jus cogens* norms, Ford 1994, at 145.

[105] *Juridical Condition and Rights of Undocumented Migrants,* Concurring opinion of Judge Cançado Trindade, para 70.

The latter scenario of application leads one to reflect on the traditional view that the numerous treaties that were concluded in the aftermath of wars of conquest, which nowadays run arguably counter to the *jus cogens* nature of the prohibition of war and act of aggression and of the crime of aggression are, at least theoretically, so unique as to be out of the reach of *jus cogens (superveniens).* Or put differently, if similar situations today—even on a lesser scale—give rise to the obligation of non-recognition, it is untenable to suggest that those treaties may be beyond any reach of *jus cogens*. A different matter is the underlying existence of policy considerations that are better justified by reference to the so-called 'principle of the stability of boundaries' that, as held in *Libyan Arab Jamahiriya/Chad,* operates independently of the fate of the treaty. In this vein, the continued existence of the boundary is not 'dependent upon the continuing life of the treaty under which the boundary is agreed.'[106] It follows therefore that the legal regime concerning *jus cogens* effects requires a cogent articulation not only with respect to new but also old scenarios bearing continuing consequences. Such an endeavour has been neglected or ignored. Doctrine and in particular international case law, given its authority as sources of international law, could arguably play a pivotal role in that regard.[107]

A further important connotation of *jus cogens,* as pointed out by Judge Cançado Trindade in his Separate Opinion in *Belgium v Senegal*, concerns the binding obligation of attaining results as opposed to mere obligations of conduct that compliance with *jus cogens* entails. To put it in his words: '[i]n the domain of *jus cogens,* such as the absolute prohibition of torture, the State obligations are of due diligence and of result.'[108] Such understanding undoubtedly contributes to provide *jus cogens* with practical effects, leading in turn, in most situations, to address the question of reparations[109] wherever peremptory norms are at stake.

8.5 The Potential of *Jus Cogens Superveniens*

The notion of *jus cogens superveniens* was inserted in Article 64 VCLT in the following terms: '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and

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[106] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad),* ICJ, Judgment of 3 February 1994, paras 72–73. See also *Temple of Preah Vihear (Cambodia v Thailand),* ICJ, Judgment of 15 June 1962, at 34.

[107] Although not specifically referring to *jus cogens,* see *Temple of Preah Vihear,* Request for the Indication of Provisional Measures, Order of 18 July 2011, Judge Cançado Trindade's Separate Opinion, para 115. He stresses the insufficiency of case law and doctrine regarding the practical consequences arising out of the domain of superior values.

[108] *Questions Relating to the Obligation to Prosecute or Extradite*, Separate Opinion of Judge Cançado Trindade, para 44.

[109] Ibid., para 49.

terminates.' Arguably, its applicability also expands beyond the domain of treaty law. Under this approach, the relevance of the notion hinges on the fact that its effects have an impact on already existing juridical acts or legal situations that emerged in conformity with the prevailing law at the time of its emergence. The notion thus entails a significant recognition of the effects of the passage of time[110] that may not be confined to treaty law. Following this logic, it may be regarded as a useful tool for international law to reconcile competing interests inherent in the evolution of international law and the existence of continuing or even permanent legal situations. Its potential invocation in the realm of inter-state responsibility was recognised by the ICJ back in 1997 in *Gabčikovo-Nagymaros Project* where the ICJ found itself precluded from analysing the applicability of Article 64 VCLT in the absence of its invocation by the parties to the case. Such a consideration, however, denotes the potential for *jus cogens superveniens* in international litigation. It is further interesting to note that the ICJ considered the effect that emerging environmental norms exerted on the implementation of the treaty in question and further arrangements that had been made by the parties in that connection. In so doing, the ICJ implicitly recognised that *jus cogens superveniens* encompasses far-reaching effects which go beyond Article 64 VCLT.[111]

Interestingly, some years earlier, in 1993, the pioneering case dealing with the notion of *jus cogens* in the jurisprudence of the IACHR, *Aloeboetoe et al. v. Suriname,* was concerned with the notion of *jus cogens superveniens.* The IACHR resorted to the notion (of *jus cogens superveniens*) to deprive the treaty of 19 September 1762 of any legal effect. This treaty was binding on Surinam by virtue of state succession, which regulated the slavery situation prevailing at that time of the Saramakas, a tribe living in Surinamese territory composed of African slaves who had run away from Dutch owners. The treaty, which allowed the Saramakas to be governed by their internal laws, had been invoked by the Inter-American Commission in support of the Saramakas' autonomy. However, under the treaty the Saramakas undertook to capture slaves and return them to the Surinamese authority that would pay for the slave depending on the distance of its captivity. They were further empowered to sell the prisoners as slaves to the Dutch.[112] Accordingly, the treaty was still deemed to be in force by the time the case was brought by the Inter-American Commission before the IACHR, namely in 1990. Notably, when resorting to *jus cogens superveniens* to consider the treaty null and

[110] For a discussion on the time element in treaty interpretation also in connection with the notion of *jus cogens superveniens,* see Bjorge 2014 (in particular Chapter 4).

[111] *Gabčikovo-Nagymaros Project*, para 112. As pointed out by Cannizzaro, the applicability of *jus cogens* beyond the confines of the Vienna Convention entailing consequences under the law of general state responsibility was recognised by Gaja in the early 1980s and found echo in the articles on state responsibility of the International Law Commission in 2001. Cannizzaro et al. 2011, at 425.

[112] *Aloeboetoe et al. v. Suriname,* paras 56–57.

void[113]—at the time the analysis of the situation was triggered by the judgment—the IACHR did so independently of any consideration to the Vienna Convention (Article 64 VCLT). Nonetheless, the judgment did not elaborate on the nature of the notion under international law. Its silence, however, may be read as denoting the notion's validity and its existence under customary international law. Turning back to the temporality issue, the judgment reflects that the compatibility of a treaty, any other form of agreement and/or legal situation with *jus cogens superveniens,* by its very same *raison d'être,* is triggered when the new norm has acquired the status of *jus cogens* or thereafter, whenever such analysis is prompted by calling into question its continuing validity. Further considerations on the question of inter-temporality are thus in order.

8.5.1 The Inter-temporal Law Doctrine and Jus Cogens Norms

The rule of non-retroactivity may be deemed one of the most crucial and controversial provisions embodied in the Vienna Convention (which also applies to both *jus cogens* provisions: Articles 53 and 64 VCLT).[114] Much of the scepticism attached to the notion of *jus cogens* that perhaps had some bearing on its mainly rhetorical usage thus far, is the false perception of alleged detrimental or undesirable consequences[115] that retrospective effects derived from hierarchical norms, which as opposed to treaty law fall beyond the exclusive province of state law making, may entail. However, such concerns may vanish by considering the real implications of the prohibition of retroactive application with respect to both *jus cogens* provisions, in particular concerning *jus cogens superveniens*.[116] As emphasised by the International Law Commission, the consequences attached to the emergence of a new peremptory norm could not go further than the time of its establishment as a *jus cogens* norm; its legal effects occurring since then onwards.[117] However, this is

[113] Ibid., para 57.

[114] Stressing the customary law function recognised in Article 4 with respect to, *inter alia,* the *jus cogens* provisions, see Dörr and Schmalenbach 2012, at 81 and 84.

[115] Dörr and Schmalenbach highlight that the fear of instability in treaty relations that may ensue from an abuse of *jus cogens* prompted the insertion of the procedural requirements provided for in Arts. 65 and 66 of the Vienna Convention. Dörr and Schmalenbach 2012, para 59. Gaja points out that a central bone of contention in the discussions leading to the adoption of the Vienna Convention was the fact that finding treaties in conflict with peremptory norms was not much amenable to various states which led to a compromise concerning the provision for the settlement of disputes. Gaja 1981, at 302.

[116] The non-retroactive effects of both *jus cogens* provisions was early pointed out by the International Law Commission,in its commentaries to the draft articles on the law of treaties. International Law Commission, Draft Articles on the Law of Treaties with commentaries, 18th session, UN Doc. A/6309/Rev.l, 1966, at 248–249.

[117] Ibid.

by no means uncontroversial as the point in time when a certain norm has attained the *jus cogens* status is usually difficult to determine.[118] Moreover, what this means in practice, particularly with respect to continuing situations is an intriguing and pivotal question that has remained largely unaddressed since the insertion of Article 64 VCLT.

The Commentary on Article 64 VCLT sheds some light in this respect:

> it can be said that Article 64 rejects, in the case of new *ius cogens*, a rigid understanding of the inter-temporal law doctrine according to which all acts and facts have to be exclusively appreciated in the light of the law contemporary to it. Instead, the rule set out in Art 64 reflects the progressive—even though contested—legal opinion of Max Huber on inter-temporal law in the famous *Island of Palmas* case. In the award, the arbitrator differentiates between the creation of a right on the one hand and the continuing existence of the rights on the other hand.[119]

Aloeboetoe et al. v Suriname is a case in point. As mentioned above, the 1762 treaty and the situation it regulated and was applied to was read, in the light of the international law existing at the time such analysis was prompted by the judgment (in the early 1990s). A different outcome may detract from the *raison d'être* of *jus cogens superveniens.*

Such an understanding is particularly relevant as the application of *jus cogens superveniens* embodied in Article 64 VCLT necessarily implies the existence of a continuing situation, namely the application of an *emerging* rule of peremptory character, as opposed to the scenario posed by Article 53 VCLT. Indeed, the emerging character is to be assessed with respect to an ongoing legal situation that becomes modified by the effects of a new emerging norm.

This, in turn, raises additional questions. If the legal effects of emerging peremptory norms only apply from the time such emergence has been established, could a continuing situation that would change along time (by virtue of the emerging norm) entail a breach of the nonretroactivity rule? Put another way, could a legal situation created by a treaty—or any other source of international obligations—that in the course of its performance becomes inconsistent with a new peremptory norm, be assessed only by the features it presents at the time of the emerging norm? A positive answer may prove futile as the assessment of any legal situation cannot be performed in the abstract or in disassociation of its legal roots. This logical understanding finds echo in the Commentary on Article 64 that disapproves a rigid application of the inter-temporality[120] of law doctrine when interpreting and applying *jus cogens superveniens*. Such understanding does not

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[118] Ibid., at 1124.

[119] Ibid., at 1125 (footnotes omitted). The second passage of the arbitrator's opinion referred to reads as follows: 'The same principle which subjects the acts creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law.' *Island of Palmas Case* (*Netherlands/United States*), 2 RIAA 829, 4 April 1928, at 845.

[120] For the origins and scope of the doctrine of inter-temporal law also in connection with customary law, see Elias 1980, 285 ff.

detract from the fact that its legal effects can only be asserted since the establishment of such a norm, precluding therefore any prohibited consideration of retroactivity.

8.5.2 *Jus Cogens* and the Question of Separability of Treaty Provisions

A further bone of contention possibly undermining the practical application of Article 64 VCLT—independently of the jurisdictional complexities that may arise, particularly in connection with the compromissory clause inserted in Article 66 VCLT[121]—lingers on the question of separability of treaty provisions. As pointed out by the commentary on Article 64 VCLT, two issues emerged as dominant during the drafting discussions of the Vienna Convention when considering the legal effects of *jus cogens superveniens,* namely the question of non-retroactivity and the question of separability of treaty provisions. While the latter was attempted to be solved with specific provisions that had been tabled during the drafting discussions, the solution reached by the Vienna Conference finally opted for resorting to the general rule on separability of treaty provisions enshrined in Article 44 VCLT.[122] It thus follows that *jus cogens superveniens* can trigger specific conflicting provisions as it does not impinge upon the validity of the other treaty provisions not in conflict with the emerging peremptory norm—provided that such provisions meet the criteria of separability set forth in Article 44(3) VCLT.[123] This interpretation is of paramount importance for dispelling concerns as to alleged detrimental or undesirable effects in the realm of international relations, as the scenario where the entire treaty or existing legal situation may terminate (in its entirety) is largely unrealistic.

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[121] As opposed to Articles 53 and 64 VCLT, which can be deemed as forming part of the bulk of customary law that was codified by the Vienna Convention, Article 66 VCLT is not declaratory of customary law, as pointed out by the ICJ in *Armed Activities on the Territory of the Congo*, para 125. This consideration implies that the application of Article 66 VCLT is trumped by the non-retroactivity of the Vienna Convention enshrined in Article 4 VCLT (with respect to treaties concluded prior to the entry into force of the Vienna Convention for the states at stake). It goes without saying that Article 66 VCLT is concerned with a specific effect of *jus cogens* norms, namely that ascribed to the realm of treaty law. Within such domain, however, the language of Article 66(a) VCLT encompasses any dispute related to the interpretation or application of Articles 53 and 64 VCLT. *Cf.* Rwanda's view that not any dispute regarding contravention with *jus cogens* falls within the purview of Article 66 VCLT. See, *Armed Activities on the Territory of the Congo*, Judgment on Jurisdiction and Admissibility, para 123.

[122] Draft Articles on the Law of Treaties with commentaries, at 1122–1123.

[123] Ibid.

The question of separability lies at the heart of the traditional concern of treaty stability[124] and the underlying goals that such purported stability serves for international relations. In the words of Dörr and Schmalenbach,

> [t]he law of treaties forms the backbone of the international legal order. There would be no international law without the principle *pacta sunt servanda,* no legal security in international relations without the strict definition of grounds for the invalidity of treaties, no effective dispute settlement without universally accepted rules of treaty interpretation.[125]

The theoretical paradigm posed by the *jus cogens* scheme raises concerns as to the legal and political consequences that a blanket application of termination of treaties, or agreements in a broader sense, by virtue of the emergence of peremptory norms during the course of its validity may entail. Despite its apparent illusory dimension, the prohibition of an act of aggression and the crime of aggression, with its corollary concerning the lawfulness of territorial annexations, is a prescient example.[126]

It is accepted, however, that in situations entailing a conflict with peremptory norms stability yields to the enforcement of the underlying values embedded in *jus cogens* norms and its *raison d'être.*[127] In this connection, a dynamic interpretation regarding the question of separability of treaty provisions in tandem with the question of intertemporality as addressed above, could also serve to dispel concerns regarding treaty stability and its repercussions in the realm of international relations. Indeed, a blanket goal of treaty stability is outweighed by countervailing considerations inherent to the notion of *jus cogens*. Against this backdrop, legal certainty in international relations is purportedly advanced by a dynamic practice aiming at the progressive development of international law rather than at its avoidance or stagnation.

Critique has been advanced with respect to the prohibition of separability of treaty provisions provided for in Article 44(5) VCLT in connection with *jus cogens* violations (Article 53 VCLT).[128] As mentioned above, cases entailing the potential application of *jus cogens superveniens* are out of the reach of Article 44(5) VCLT which does not trigger Article 64 VCLT, as chances are that an entire treaty may

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[124] Binder 2008, at 333. Addressing early sceptical concerns revolving around the principle of consent underlying treaty law *vis-à-vis jus cogens,* see Verdross 1966, at 60 ff. (in relation to Schwarzenberger and others position).

[125] Dörr and Schmalenbach 2012, at v (pointing out the relevance of drawing an integral interpretation which combines the elements of treaty law and traditional views in tandem with dynamic practice fostering the development of the law).

[126] Refering to such an exemplary case, see Ventura 2015, at 344.

[127] Binder 2008, at 333.

[128] It may be noted that the first proposal of SR Waldock in 1963 within the framework of the work of the International Law Commission leading to the drafting of the Vienna Convention, provided for separability of treaty provisions even in the event of breaches of *jus cogens.* See, Odendahl 2012, at 762, para 26, n. 73. Villiger also points out that the International Law Commission originally envisaged the applicability of the separability regime in connection with Article 53 VCLT. See Villiger 2009, at 569, n. 56.

not necessarily run into conflict with a new peremptory norm,[129] but only its specific provisions. It is accordingly accepted that separability is not only legally possible but also welcomed as a matter of policy in such cases.[130] Treaty stability, assuming for the sake of the argument to be a justifiable goal in itself, is better served if separability is not only allowed,[131] but rather fostered. Practice and judicial interpretation may contribute to develop the law in this regard taking into account that Article 44 VCLT did not codify customary law,[132] and so may be regarded as an innovation in the law of treaties,[133] having purportedly attained customary character.[134] Given the inherent limitations in the reach and applicability of the Vienna Convention, consolidating and furthering customary law in this regard becomes relevant.

As illustrated in *Aloeboetoe* et al. *v Suriname,* the applicability of *jus cogens superveniens* is likely to occur independently of the Vienna Convention, and thus rather by virtue of its customary law character. Moreover, the entire treaty in question was found to be null and void by virtue of its incompatibility with contemporary peremptory norms (the prohibition of slavery and its corollaries), even when some of its provisions (concerning the autonomy in administration) were regarded as valid. This finding seems to evoke the exception set forth in Article 44(3)(c) VCLT as to the continuing performance of the treaty provided its continuity does not render unjust. The legal effects of *jus cogens superveniens* are therefore broader by allowing separability but also the termination of the treaty, particularly in situations where its continuing performance would render unjust, independently of the application of the Vienna Convention. Articulating such treaty rules out of treaty law, and even in that context, may contribute to delineate the contours of the notion. At the same time, this approach might allow for changing interests of contracting parties through time to counter any assumptions or concerns as to overarching or potential detrimental effects ensuing from the application of *jus cogens*. The potential relationship between Article 44(3) VCLT and *jus cogens* effects poses further intriguing questions as the passage of time is a factual element

[129] It may be recalled that this was the case in *Aloeboetoe* et al. *v. Suriname,* where the entire treaty was deemed to be in conflict with *jus cogens superveniens. Aloeboetoe* et al. *v. Suriname*, para 57. As opposed to very old treaties like the one involved in the case, which dated back to 1762, it is perhaps more likely to encounter scenarios of treaties embracing a relative conflict with *jus cogens superveniens.*

[130] Binder 2008, at 333 (with further references as to the critique posed with respect to the overreaching interpretation concerning treaty invalidity).

[131] Ibid.

[132] Odendahl 2012, at 756, para 9.

[133] Ibid., at 755, para 6.

[134] Odendahl, at 756, para 9, n. 27 (referring to Villiger).

underpinning both the changing of interests[135] arising out of a legal situation[136] (distinct from the *rebuc sic stantibus* clause), and the changing of governing principles and rules.

8.6 Concluding Remarks

The understanding that 'compliance depends to a large degree upon the moral authority with which international law speaks',[137] in tandem with the superior status of *jus cogens* norms should play a pivotal role in fostering compliance in international law. The way the notion of *jus cogens* has been applied thus far in international adjudication is not eloquent of such understanding, however, with notable exceptions.

The need to conceive compliance and respect for international law beyond the inter-state paradigm militates in favour of articulating further legal consequences for violations of *jus cogens* norms. Such a goal finds its roots in early critique of enforcement in international law.[138] This proposition is further supported if one regards the system of enforcement in international law as 'defined and shaped by the particularities of norms themselves'.[139] What particular legal consequences derive from breaches of *jus cogens* norms or of international obligations involving compliance with *jus cogens* is thus a crucial question still to be developed in international adjudication. As Judge Yusuf's put it in his dissenting opinion in *Jurisdictional Immunities of the State,* albeit not in connection with *jus cogens,* '[a]s the principal judicial organ of the United Nations, the Court has an important role to play to provide guidance on rules of international law and to clarify them, particularly where the law is uncertain or unsettled'.[140] The elucidation and articulation of

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[135] The proposal had been tabled and supported by the US Delegation, see Odendahl 2012, at 760, para 19.

[136] The Report on Fragmentation and Diversification in International Law acknowledged, although in the context of the discussion on intertemporality, that 'no legal relationship can remain unaffected by time.' See International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006, para 476.

[137] Robinson and Ahmed Haque 2011, at 143.

[138] As pointed out by Kritsiotis, Vattel admitted the need to conceive the enforcement of international law beyond the bilateral state relations structure. Kritsiotis 2012, at 247.

[139] Kritsiotis 2012, at 267.

[140] *Jurisdictional Immunities of the State,* Dissenting Opinion of Judge Yusuf, para 58. Hernández points out that international jurisprudence 'possesses a *centrifugal* normative force' as it captures not only a wider spectrum of attention but also adherence mainly due to the particular position of international judiciary within the legal system which distinguishes international jurisprudence from other forms of interpretative activity. The author poses a further caveat as to the effectiveness of interpretative authority which relies on persuasive argumentation capable of reaching a wider audience of international society. See Hernández 2015, at 166, 168 and 180.

the legal consequences of *jus cogens* (and *jus cogens superveniens)* in both treaty law and beyond treaty law, undoubtedly qualifies in this regard. Various questions posed along this contribution in both scenarios in tandem with scattered practice and judicial pronouncements may provide insight for such an elaboration.

Perhaps the fact that instances where *jus cogens* has been invoked in international adjudication have not been very successful,[141] is not encouraging for bringing a case based essentially on its tenets. However, this chapter has shown that some relevant precedents exist and interpretations advanced by the jurisdictions considered for the purpose of this chapter, namely the IACHR, the ICTY and also the ICJ provide grounds for furthering the effects of *jus cogens.* Such a goal may prove even more relevant beyond the limited purview of treaty law. Following Judge Dugard's observation in *Congo v Rwanda* there seems to be a role to play for *jus cogens* in international litigation.[142] The time is ripe to further more audacious practice[143] in this regard and for the judiciary to seize the opportunity to pronounce on various aspects where the legal effects of *jus cogens* have remained unexplored or uncertain,[144] as discussed in this contribution. Perhaps when the nature or subject matter of a dispute related or concerned with *jus cogens* proves in practice to entail a more compelling case, the practical value of *jus cogens* may emerge. Reparations[145] for breaches of *jus cogens* or for violations of international obligations involving its compliance appear as an avenue with particular potential for attaining such an endeavour.

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[141] Along the same line, Bianchi refers to the rhetoric of *jus cogens* and the difficulty of relying on the notion for sweeping away lower conflicting norms. Bianchi 2008, at 501.

[142] *Armed Activities in the Territory of the Congo*, Separate opinion of Judge ad hoc John Dugard, para 2.

[143] Cançado Trindade draws attention to the fact that the ICJ has to limit itself to settle the dispute by addressing only what the parties what put before it. Cançado Trindade 2014, at 18.

[144] Cançado Trindade further points out that in interpretation itself or even in the search of the applicable law there is space for judicial creativity, independently of the arguments advanced by the contending parties. Ibid., 2014, at 18. Also advocating for the development of a more reflexive judicial practice aiming at fostering the enforcement of *jus cogens* norms and the consequences of its breach, see Mik 2014, at 92.

[145] Cançado Trindade stresses the pressing need of further jurisprudential developments in the matter of reparation and provisional measures. Cançado Trindade 2014, at 30.

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Chapter 9
Constitutional Conversations in the Anthropocene: In Search of Environmental *Jus Cogens* Norms

Louis J. Kotzé

Abstract This chapter investigates the existence of environmental *jus cogens* norms and the possibility of extending peremptory norms into the environmental domain. For this purpose, the chapter briefly describes the trite manifestation and use of *jus cogens* in international law. It then surveys the current doctrinal state of the art to determine to what extent it could be said that certain norms may or may not have attained the status of *jus cogens* in the international environmental law (IEL) domain. The latter analysis is then extended to present the reasons for and possible obstacles currently countering, from a theoretical and practical point of view, the adoption of environmental *jus cogens* norms. The final part of the chapter follows a re-imaginary approach to determine which IEL norms could in future qualify for *jus cogens* status through the lens of the informally proposed Anthropocene geological epoch.

Keywords *Jus cogens* · Peremptory norms · International environmental law · Sustainable development · Anthropocene · Constitution · Pollution · Normative hierarchy · Environmental rights

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9.1 Introduction

The concept of *jus cogens* (or 'compelling law') that embodies a notion of universal peremptory norms has been a critical aspect of international law and its discourse for almost 50 years. *Jus cogens* has been positivized almost half a century ago through the Vienna Convention of the Law of Treaties, 1969 (VCLT).[1] Article 53 VCLT famously provides:

> 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.

Article 64 VCLT adds that '[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

At its most basic, *jus cogens* is understood as universally imperative, compelling and obligatory law (or *jus strictum*) that sharply contrasts with *jus dispositivum* (voluntary law which yields to the will of the parties).[2] *Jus cogens* norms are compelling to the extent that they are mandatory, do not permit derogation, and

[1] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

[2] South West Africa (*Ethiopia v South Africa and Liberia v South Africa*), ICJ, Second Phase, Judgment of 18 July 1966, Dissenting opinion of Judge Tanaka.

can be modified only by general international norms of equivalent authority (i.e. other *jus cogens* norms).[3] They are universal in that they are seen to have *erga omnes* effect, meaning that they apply to all members of the international community of states, even if a state does not consent to a *jus cogens* rule's mandatory application.[4] They are obligatory to the extent that they create negative obligations on states to refrain from doing something.[5] Collectively, these characteristics confirm that there is something inherently constitutional about *jus cogens* norms to the extent that they are considered apex norms of a normative hierarchy in international law.[6]

Neither Article 53 nor Article 64 VCLT sets out which norms specifically are considered to have peremptory status. The VCLT also does not contain any criteria to apply in an effort to determine the existence of *jus cogens* norms. In fact, the VCLT is entirely silent on any theory of legal obligation, be it natural law, state consent or public order, which could be used to identify specific *jus cogens* norms.[7] It is also of no help that Article 38(1) of the Statute of the International Court of Justice[8] (ICJ) itself is entirely silent on the existence of a normative hierarchy in international law or the existence of specific *jus cogens* norms. As a result, 'it remains controversial what qualities elevate a norm to a hierarchically superior level and how this superiority is manifested in situations of conflict with hierarchically inferior norms.'[9]

Consequent upon a lack of guidance in the relevant treaty provisions, the identification and elaboration of specific *jus cogens* norms has been left to states, courts, bodies such as the International Law Commission (ILC), and the academe. Although there is no universal agreement on this, the rules of international law that are currently accepted as having *jus cogens* status include, among others: the prohibition of the threat or use of force against the territorial integrity or political independence of any state; the prohibition of genocide; the prohibition of torture; crimes against humanity; the prohibition of slavery and slave trade; the prohibition of piracy; the prohibition of racial discrimination and apartheid; and the prohibition of hostilities or force directed at a civilian population.[10] Notably, the majority

[3] Criddle, Fox-Decent 2009, at 332.

[4] A point that was confirmed by the International Court of Justice (ICJ) in *Barcelona Traction, Light and Power Company Ltd* (*Belgium v Spain*) ICJ, Second Phase, Judgment of 5 February 1970. See de Wet 2006, at 61. The author, however, at the same time points out that not all *erga omnes* obligations necessarily have *jus cogens* status.

[5] *Jus cogens* norms do not create positive obligations that compel states to do something, for example, to make good human rights abuses. They only compel states not to embark on human rights abuses. This is often seen as one of the greatest drawbacks of *jus cogens* rules. Vidmar 2012, at 33.

[6] See, generally, de Wet and Vidmar 2012.

[7] Criddle and Fox-Decent 2009, at 338.

[8] 1945 Statute of the International Court of Justice, 33 UNTS 993.

[9] Vidmar 2012, at 13–14.

[10] de Wet 2015, at 543.

of these norms are directly or indirectly related to human rights concerns (some even suggest they are pure human rights norms).[11] This is not a closed list, and what is perceived to be *jus cogens* rules today may very well change in future, thus providing the opportunity to expand the repertoire of peremptory norms.[12] Whiteman reminds us in this respect that:

> A listing, that is to say, identification in a general way of certain peremptory norms of rules of international law (*jus cogens*) existing at any period of time cannot be done with complete precision, enveloped as such rules of *jus cogens* or peremptory norms are bound to be in word symbols definable by more precise interpretations with the passage of time. Also, because of changes and developments as civilization moves on, such listing can never be completely invariable or exhaustive.[13]

In the light of this background, it remains unclear if explicit environment-related *jus cogens* norms exist and/or if future peremptory norms could emerge in international environmental law (IEL). It is evident that no directly related IEL norm of any kind figures in the generally accepted list of *jus cogens* norms stipulated above. There is, for example, no norm that prohibits severe and widespread pollution; or a norm that prohibits states from transgressing a minimum threshold of sustainability; or a norm that prohibits states from changing the climate through greenhouse gas emissions. The extension of *jus cogens* norms into the environmental law domain also does not seem to have been a particularly fertile ground for scholarly exploration, as we shall see below. The notable paucity in the IEL and general international law literature to grapple with the existence or emergence of environmental *jus cogens* norms suggests some reluctance on the part of international and environmental lawyers to fully engage with the complex issue of extending the reach of *jus cogens* into the environmental domain.

If we were serious about protecting socio-ecological security through juridical constructs,[14] then we should also look to protect the very source of all these entitlements through the most universally imperative, compelling and obligatory law that we are able to devise. We arguably need to start thinking about extending the *jus cogens* debate, as an aspect of global constitutional conversations, to the environmental domain as well.[15]

In this chapter, I seek to provide a more comprehensive (but hardly definitive) account of the current existence of *jus cogens* norms in IEL, and more importantly, the potential to extend *jus cogens* into the environmental domain. For this purpose, the introductory discussion in the second part of the chapter briefly describes the

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[11] de Wet 2006, at 58–59.

[12] A point well illustrated by the distinct American view that is based on the Restatement (Third) of Foreign Relations of the United States, that *jus cogens* norms include, in addition to those mentioned here: murder or disappearance of individuals and prolonged arbitrary detention. See also Criddle and Fox-Decent 2009, at 331–332.

[13] Whiteman 1977, at 625.

[14] More generally, on the changing concept of security and aspects of socio-ecological security, see Ebbesson et al. 2014.

[15] More generally, on global environmental constitutionalism see Kotzé 2012, at 199–233.

trite manifestation and use of *jus cogens* in international law. As this is an aspect that is also covered in greater detail by other chapters in this volume, the discussion here only focuses on issues that are relevant to make a case for extending *jus cogens* into the environmental law domain in subsequent parts of this chapter.

The third part of the chapter surveys the current doctrinal state of the art to determine to what extent it could be said that certain norms may or may not have attained the status of *jus cogens* in the IEL domain. The latter analysis is then extended into part four that presents several obstacles currently countering, from a theoretical and practical point of view, the adoption of environmental *jus cogens* norms.

Part five of the chapter follows a re-imaginary approach to determine which IEL norms could in the future qualify for *jus cogens* status. The purpose of this analysis is to create an epistemic space of normative developmental potentialities that could contribute to thinking about future environment-related rules of *jus cogens*. For the purpose of this part of the analysis, in an effort to overcome the traction of existing assumptions and/or closures in parochially limited international (environmental) law, I provide a different cognitive framework to approach the enquiry through the lens of the informally proposed Anthropocene geological epoch, which is a term of art attempting to describe and understand the devastating global impact of humans on the Earth and its systems.[16]

Emphasizing the central role of mankind in geo-ecological systems, the term 'Anthropocene' suggests that the Earth is rapidly moving into a critically unstable state, with Earth systems becoming less predictable, non-stationary and less harmonious as a result of the global human imprint on the biosphere. While the Anthropocene is not a normative concept (it currently only acts as a cognitive frame within which to interrogate norms), I will argue that it has normative implications by creating a novel justificatory framework for the possible adoption of *jus cogens* norms in the environmental domain.[17] The argument is carried by the hypothesis that 'as threats to sustainability increase [as they do in the Anthropocene], norms for behavior toward the global environment are also likely to become part of the *jus cogens* set.'[18] Thus, the methodological and analytical assumption that will guide my analysis throughout is one in support of the existence or eventual creation of environmental *jus cogens* norms with a view to providing a greater degree of environmental care in the Anthropocene. Having said that, I fully accept that the mere fact of elevating environmental norms to the *jus cogens* level will not be a panacea for all the ills that plague global environmental law and governance. The development of environmental *jus cogens* norms would be only one small part of a much larger process that must endeavour to give clearer content and meaning to all the rules of international (environmental) law, including greater consensus among states about the core content of these rules, and a more deliberate undertaking by states to improve the enforcement of these rules.

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16 Crutzen and Stoermer 2000, at 17–18.

17 I have followed a similar approach in Kotzé 2014a, b.

18 Walker et al. 2009, at 1346.

9.2 The Potential Value of *Jus Cogens* Norms: A Brief Appraisal

The most obvious function of *jus cogens* norms lies in their ability to resolve norm conflicts. Article 53 VCLT is titled '[t]reaties conflicting with a peremptory norm of general international law' and is included under section 2 of the VCLT which, in turn, carries the general heading '[i]nvalidity of treaties'. This wording suggests that *jus cogens* has to do with those instances where treaties, including the conclusion of treaties and treaty-related acts, could be declared invalid if they conflict with a peremptory norm. As far as a possibility might arise where two or more *jus cogens* norms conflict with one another, the ILC Study Group on the Fragmentation of International Law concluded that '[a]t this stage, it cannot be presumed that the doctrine of *jus cogens* could itself resolve such conflicts: there is no hierarchy between *jus cogens* norms *inter se*'.[19]

Because the occasion has not yet arisen for them to explicitly do so, no international court has declared invalid a treaty that allegedly transgressed a peremptory norm.[20] Importantly though, this neither means that international courts have not engaged with *jus cogens*, nor that they have been hesitant to identify certain norms as having *jus cogens* status. For example, in judgments such as *Democratic Republic of Congo v Rwanda*[21] (the prohibition against genocide), *Prosecutor v Anto Furundzija,*[22] and *Al Adsani v UK*[23] (both dealing with the prohibition against torture), the relevant international courts were so convinced by their convictions to afford these norms *jus cogens* status, that they did not make any systematic reference to state practice (*usus*) and/or *opinio juris* to support their conclusions that the norm in question actually amounted to a peremptory norm.[24]

More recently, in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*,[25] the ICJ found that Italy violated its obligation to respect Germany's sovereign immunity when it allowed civil claims against Germany for wartime atrocities to proceed before Italian courts. Italy claimed *in casu* that the acts which gave rise to the claims before its domestic courts contravened

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[19] International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006, para 367.

[20] Czapliński 2006, at 89.

[21] *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v Rwanda*), ICJ, Jurisdiction of the Court and Admissibility, Judgment of 3 February 2006.

[22] *Prosecutor v. Furundzija,* Trial Chamber, Judgment, IT-95-17/1-T, 10 December 1998.

[23] *Al-Adsani v. United Kingdom*, ECtHR, No. 35763/97, 21 November 2001.

[24] de Wet 2015, at 544.

[25] *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), ICJ, Judgment of 3 February 2012.

peremptory norms.[26] On this matter, the ICJ believed that rules of immunity are procedural in character and they only relate to jurisdiction, not to the substantive *jus cogens*-related question whether the conduct in the jurisdiction was lawful or unlawful. The Court found (not altogether uncontroversially)[27] that it could therefore not be said that any *jus cogens* norms have been transgressed.

Outside of the treaty-based normative conflict zone, as 'an important element of [a] certain moral order in international relations',[28] *jus cogens* plays an important role to the extent that it creates a non-derogable universal standard against which to measure state conduct and even non-treaty related acts of states.[29] To this end, *jus cogens* possesses, what Linderfalk calls, a 'normative functionality' through which it 'provoke[s] reactions … to convince addressees of the correctness of any utterer's arguments',[30] and supposedly to provide weight to arguments that allege one or the other transgression of some minimum standard in international law. Where peremptory norms that protect the interest of the international community of states are transgressed, certain qualified legal effects arise which seek to rectify the transgression.[31]

By this reading, *jus cogens* norms are perceived to create a normative hierarchy in international law to the extent that certain peremptory norms are seen to have a quasi-constitutional character that are elevated above all other norms (custom, treaties and soft law) in the international law domain;[32] it has a 'layered texture'[33] which renders international law constitutional to some extent and at once instils some degree of normative hierarchy among its norms.[34] In the words of the International Criminal Tribunal for the former Yugoslavia, *jus cogens*:

> enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.[35]

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[26] Ibid., para 80 ff.

[27] Orakhelashvili, for example, states that: '[g]ranting immunity to foreign states in situations involving *jus cogens* violations, especially when no other remedy is forthcoming, prevents *jus cogens* norms from operating as rules, from taking effect in relation to underlying facts, and from determining legal consequences including remedies. The relevant *jus cogens* rules are thus completely excluded from the legal picture.' Orakhelashvili 2012, at 615.

[28] Czapliński 2006, at 97.

[29] Kornicker Uhlmann 1998, at 101.

[30] Linderfalk 2013, at 351–383.

[31] See Article 71 VCLT.

[32] Criddle and Fox-Decent 2009, at 332.

[33] de Wet 2006, at 62.

[34] Shelton 2006, at 291–323. Arguments have also been made that *jus cogens* norms are so hierarchically superior that they trump Chapter VII resolutions made by the Security Council under the Charter of the United Nations. Vidmar 2012, at 20.

[35] *Prosecutor v. Furundžija*.

In tandem with suggesting that a certain normative hierarchy in international law exists, the prevalence of *jus cogens* norms at the top of this hierarchy also presupposes the existence of an international community of states with shared values, along with the idea that international law embraces the concept of an international value system that sets a bench mark or minimum universal standard for state conduct.[36]

9.3 Environmental *Jus Cogens*: Where Are We at?

To what extent are *jus cogens* norms explicitly or impliedly present in the environmental domain, and if they are, how do they manifest when measured against the general description above?

9.3.1 Normative Superiority and Conflict Resolution

According to Birnie, Boyle and Redgwell,

> [w]hat cannot be supposed is that environmental rules have any inherent priority over others save in the exceptional case of *ius cogens* norms … No such norms of international environmental law have yet been convincingly identified, nor is there an obvious case for treating them in this way.[37]

Singleton-Cambage agreeing with this, explains that:

> Currently, environmental rights and responsibilities are not recognized as having this legal status [of *jus cogens*], despite the fact that global environmental preservation represents an essential interest of all individuals within the entire international society. Sufficient time has not yet passed to enable environmental issues to evolve to this status of international law. The establishment of peremptory norms must develop from a specific practice for an extended period of time by the general majority of states.[38]

While conflict does arise in the environmental law and governance domain as a result of the inherently opposing goals of socio-economic development, on the one hand, and the concomitant need for environmental protection, on the other (aptly expressed by the principle of sustainable development in IEL), such conflicts 'have not led international courts to employ the concept of *ius cogens* or to give human rights, environmental protection or economic development automatic priority'.[39]

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[36] Vidmar 2012, at 14.

[37] Birnie et al. 2009, at 109–110.

[38] Singleton-Cambage 1995, at 185.

[39] Birnie et al. 2009, at 115.

Indeed, to date, no multilateral environmental agreement (MEA) has been declared *ab initio* invalid as a result of its or one of its provisions conflicting with a generally accepted *jus cogens* norm as per Articles 53 and 64 VCLT. Neither has a treaty or one of its provisions been declared invalid because it contradicted a *jus cogens* norm on environmental grounds. Admittedly, a situation that might provoke the need to declare an MEA invalid is unlikely to arise: for the same reason states will not easily and deliberately conclude a treaty that provides measures for genocide, states will arguably also not conclude a treaty that establishes measures for environmental destruction (although it is likely that environmental damage may result from incidental activities that states agree on in a treaty, such as the use of nuclear weapons).

9.3.2 *Environmental Damage, Overexploitation and International Crimes*

More recently, Beyerlin and Marauhn have also expressed their doubts about the recognition of environmental *jus cogens* norms. With reference to Article 19 of the 1980 Draft Articles on State Responsibility,[40] which introduced the notion of an international crime that is seen as a violation of *jus cogens*, they argue that environmental pollution cannot at this stage be considered an international crime.[41] The authors conclude that 'only very few rules can actually be considered as peremptory norms and that hardly any of them is part of international environmental law.'[42]

While Kadelbach believes that 'the protection of the environment from severe and lasting degradation'[43] is one of the examples usually given of an instance where a norm is qualified both as an *erga omnes* and a *jus cogen*s norm, he does not indicate which environmental protection measures this could include (for example, prohibition against pollution or transgression of environmental rights?); what the threshold of severity is (e.g. what is understood to be 'severe' and 'lasting'?); and to which environment the supposed *jus cogens* rules would geographically apply (i.e. to domestic territories, to the global commons and/or to transboundary resources?).

In an equally abbreviated and vague account, Whiteman offers a projected list of peremptory norms, which she believes is required to be 'outlawed by world consensus under international law'.[44] Her (at times exotic) list includes environmental issues such as dispersion of germs with a view to harming or extinguishing human

[40] International Law Commission, Report of the International Law Commission on the work of its 32nd session, UN Doc. A/35/10, 5 May-25 July 1980, at 32.

[41] Beyerlin and Marauhn 2011, at 287.

[42] Ibid., at 362.

[43] Kadelbach 2006, at 27.

[44] Whiteman 1977, at 625–626.

life; contamination of the air, sea, or land with a view to making it harmful or useless to mankind; and hostile modification of weather (which would presumably then exclude non-hostile industrial greenhouse gas emissions that cause climate change).

In his treatise on *jus cogens,* Hannikainen commits a brief section to the environment, entitled 'Prohibition of Causing Widespread, Long-term and Severe Damage to the Natural Environment'.[45] He only focuses on the marine environment and approaches his analysis through the lens of the law of armed conflict, seemingly oddly assuming that this is the only instance where the (marine) environment, by implication and through its association with armed conflict (the prohibition of aggressive use of force is a generally accepted *jus cogens* norms), could justifiably be harmed. (After all, harm to the marine environment can also occur as a result of climate change, and not only through armed conflict. Environmental degradation more generally could also occur on land and in the atmosphere, as transboundary air pollution suggests). Hannikainen nevertheless believes that

> one should not … draw the conclusion that no peremptory prohibition of widespread, long term and severe pollution of the marine environment exists. Such pollution would run seriously counter to the interests of the international community of States. But the existence of such a peremptory prohibition has to be examined under the criteria of the law of armed conflicts, since the use of nuclear weapons, and of many other weapons of mass destruction, has not been prohibited in clear terms in international law—and it is the use of those very weapons which would cause the severest contamination of the marine environment.[46]

He concludes rather unconvincingly that 'there are at most only elementary peremptory obligations to refrain from pollution under the criteria of the law of armed conflicts' and that it would be virtually impossible, yet imminently desirable, to extend these 'elementary peremptory obligations',[47] whatever they might be, to a general prohibition against the overexploitation of marine resources.

9.3.3 Common Interest of the International Community

Hypothesizing that the 'concept of "common interest"' is the frame of reference for an international law meeting the challenges of the future', Brunnée argues in an early work that 'emerging, shared or coinciding [environmental] interests are of such intensity that their realization commands action on the international level'.[48] Four 'binding rules of international environmental law' have emerged as an expression of this common interest, namely prohibition of transfrontier pollution causing serious damage; the principle of equitable utilization; the duty to provide another state with early information in emergency situations and if there is a risk

[45] Hannikainen 1988, at 688–695.

[46] Ibid., at 525.

[47] Ibid., at 526.

[48] Brunnée 1989, at 792 and 794.

of serious damage; and the duty to consult with another state if the conduct of the acting state creates a serious risk of damage.[49] Brunnée believes that it is specifically the aspect of a *jus cogens* norm protecting the overriding interest of the international community of states that elevates certain environmental norms to the peremptory level. She concludes that the first three of her stated 'binding rules of international environmental law' are intimately intertwined with the common interest of the international state community and because they seek to protect this interest, they have attained peremptory status.[50]

9.3.4 Judicial Development of Environmental Jus Cogens

Reflecting the paucity in the literature, courts have been equally reluctant to identify and develop environmental *jus cogens* norms.[51] One of the (arguably few) instances where a domestic court has been willing to explicitly elevate environmental protection to *jus cogens* status is the German Constitutional Court's decision on 24 October 2004 concerning the exportation of property during the Second World War and its consequent restitution.[52] The Court found that *jus cogens* norms include those norms that aim to protect international peace, states' right to self-determination, and 'fundamental human rights such as core norms to protect the environment.'[53] But Talmon's view that this dictum refers to 'basic rules for the protection of the environment' in a general sense is somewhat overdrawn.[54] The Court did not venture an explanation of what it deems included in these 'core norms to protect the environment', and a plain reading of its judgment suggests that the Court only confined *jus cogens* status to environmental protection measures *as expressed through human rights*, thereby arguably including rights-based measures for environmental protection while excluding some general collection of 'basic rules' related to environmental protection.[55] In other words, the judgment

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[49] Ibid., at 795.

[50] Ibid., at 805–807.

[51] Shelton confirms that '[*j*]*us cogens* has played no role in judicial decisions on the environment and human rights; nor have courts resorted to conflict rules like *lex posterior* or *lex specialis*.' Shelton 2012, at 207.

[52] Order of the German Federal Constitutional Court, 2 BvR 955/00, 26 October 2004, Deutsches Verwaltungsblatt 2005, at 178 para 1(c).

[53] Ibid., at 178 para 1(c).

[54] Talmon 2006, at 100.

[55] The Court stated that: '*Dabei handelt es sich um die in der Rechtsüberzeugung der Staatengemeinschaft fest verwurzelten Rechtssätze, die für den Bestand des Völkerrechts unerlässlich sind und deren Beachtung alle Mitglieder der Staatengemeinschaft verlangen können … Dies betrifft insbesondere Normen über die internationale Friedenssicherung, das Selbstbestimmungsrecht …* [und] grundlegende Menschenrechte sowie Kernnormen zum Schutz der Umwelt.' (Emphasis added.) Order of the German Federal Constitutional Court, 2 BvR 955/00, 26 October 2004, Deutsches Verwaltungsblatt 2005, at 178 para 1(c).

suggests that norms in the environmental domain arguably only have peremptory status if they are somehow connected with rights, and more specifically, if they violate rights-related environmental interests.

To date no international court or tribunal has explicitly identified any norm that has, or that could in future gain, peremptory status in the environmental domain; nor has any international court or tribunal invoked Articles 53 and 64 VCLT in practice to settle an environment-related treaty dispute. The closest that the ICJ came in doing so was in its *Gabčikovo-Nagymaros* judgment where it accepted by implication Slovakia's contention that none of the norms on which Hungary relied was of a peremptory nature.[56] The Court, however, did not rule out the possibility that environmental norms may develop in future and that whenever they do, they must be considered by the parties.[57] Whether the ICJ actually meant to include *jus cogens* norms specifically under 'newly developed norms of environmental law', or more general environmental norms, which could include customary norms, is unclear.

Equally unclear are Justice Weeramantry's preliminary remarks in his dissenting opinion in the *Nuclear Weapons* Advisory Opinion where he seems to accept without detailed engagement, that certain environmental *jus cogens* norms exist:

> To use the words of a well-known text on international environmental law: 'The global environment constitutes a huge, intricate, delicate and interconnected web in which a touch here or palpitation there sends tremors throughout the whole system. Obligations *erga omnes*, rules *jus cogens*, and international crimes respond to this state of affairs by permitting environmental wrongs to be guarded against by all nations.'[58]

Collectively the foregoing state of the doctrinal art analysis leans towards a belief that, on balance, no norm directly related to environmental concerns currently qualifies for *jus cogens* status.

9.4 Conceptual and Practical Obstacles to the Emergence of Environmental *Jus Cogens* Norms

There are several related explanations for the absence of *jus cogens* norms in IEL, which at the same time manifest themselves as conceptual and practical obstacles to the emergence of such norms. First, compared to humanitarian issues or concerns related to armed conflict that arose in the aftermath of the Second World War

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[56] *Gabčikovo-Nagymaros Project* (*Hungary/Slovakia*), ICJ, Judgment of 25 September 1997, para 97.

[57] Ibid., para 112.

[58] *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, Dissenting Opinion of Judge Weeramantry. In her own assessment, Kornicker Uhlmann incorrectly states that this statement derives from Judge Weeramantry's 'dissenting opinion to the World Court's Advisory Opinion to the WHO's request on the legality of nuclear weapons'. The statement was clearly only part of initial and preliminary remarks and not part of his final dissenting opinion.

and that sparked the development of existing *jus cogens* norms, concern for the global environment is a recent phenomenon that has only gained universal traction in the international political and normative space following the United Nations Conference on the Human Environment in 1972 (Stockholm Conference). This also explains why, relative to other fields in international law, IEL is considered to be a 'young' discipline and with the notable exception of its burgeoning MEA regime, it is normatively underdeveloped with respect to rules of customary international law and *jus cogens*. As a result, its collection of norms has not had the opportunity (yet) to attain customary and *jus cogens* status in the way that other established norms of international law have done over a more protracted period of time. Reflecting on this fact and the potential of and need for environmental law to evolve, Judge Weeramantry suggested in his separate opinion in *Gabčikovo-Nagymaros* that '[e]nvironmental law is now in a formative stage, not unlike international law in its early stages'.[59]

Second, none of the traditional *jus cogens* rules belong in any explicit way to the focus area of IEL. It is significant that the generally accepted *jus cogens* norms of international law are associated with, and are overwhelmingly couched in, humanitarian and rights terms related to security of the state and the person. Collectively, they relate to the historically traditional concerns of international law such as prohibition of warfare, crimes against humanity, and protection of human rights. IEL and its norms do not straightforwardly fit within such an overwhelmingly state-centric and anthropocentric juridical narrative.[60] This much alone is evident from the concerns that IEL typically addresses including, for example, protection of biodiversity and species; prevention and remediation of pollution; and regulation of chemicals, the ozone, air quality, climate change, freshwater resources, the oceans and marine resources. 'Green' issues have neither historically been considered a predominant aspect of the long-standing agenda of international law; nor have they been explicitly invoked as *jus cogens* rules in a general international law context as we have seen above.

Third, state sovereignty, in many ways the backbone of the international legal order, entails, among others, that states are only limited by international law with their consent. That *jus cogens* norms could be perceived as being a threat to state sovereignty is evident: they potentially limit the freedom of states to conduct their international affairs to the extent that states are only allowed to create binding obligations through treaties within the framework of peremptory norms that restrict the absolute sovereignty of states.[61] While I am not suggesting that state sovereignty is not a significant concern to other regulatory issues in the realm of international law as well, its implications are particularly evident in the domain of global environmental relations where state sovereignty has been and

[59] *Gabčikovo-Nagymaros Project*, Separate Opinion of Vice-President Weeramantry, at 93.

[60] For a critical reflection on the Eurocentric, anthropocentric and masculinist ontological orientation of law, see Grear 2015, at 1–26.

[61] Johnson 2014, at 127.

continues to be a deeply contentious issue, often hampering the effective achievement of cooperative global environmental law and governance goals.[62] The continued failure of negotiating more stringent greenhouse gas emission reduction targets under the climate change regime and the disappointingly empty promises that are clothed in palliative terms such as 'sustainable development' at consecutive global climate negotiation events, is an example of self-interested states that fall back on their sovereign interests to oppose any sacrifice of unbridled economic growth for a developmental trajectory that instead should respect the ecological limits of Earth and its systems.[63] Thus considered, it is possible to imagine why states are reluctant to develop environment-related *jus cogens* rules to restrict in any way aspects related to their sovereignty over their natural resources.

Fourth, there is the difficulty of regulatory scope and focus associated with *jus cogens* norms. People are the exclusive regulatory objects of *jus cogens* norms, and it is easier to identify specific states that transgress these norms. But the regulatory object of IEL is 'the environment' which not only includes people, but also non-human living and non-living entities whose interests, as global climate change suggests, could be harmed or affected by many states which makes it difficult to apportion responsibility. In a similar vein, the regulatory issues that arise from a broadly conceived 'environment' are numerous and difficult to circumscribe.

> The boundaries of what constitutes an 'environmental' issue have already become blurred… our understanding of what constitutes an environmental issue must grow to encompass economic, social, and trade policy. Indeed, if, as some claim, everything is interconnected, then everything becomes an environmental problem.[64]

Jensen suggests in this respect that

> [d]espite the inability of the international legal community to agree on a useful definition of environment, it is clear that the trend in the international community is to view the environment as a very broad and inclusive entity. In fact, the lack of definitional precision seems to be a result of not wanting to narrow the scope of legal coverage for the environment.[65]

While the realities of globalization demand a broad regulatory conception of the environment, such a broad view creates various regulatory difficulties, also in the context of *jus cogens*: what is an 'environmental' *jus cogens* norm; what or whom does it seek to protect; and against whom is it enforceable? These are complex questions that only further entrench the difficulties in the search for environmental *jus cogens* norms.

Fifth, it was illustrated above that *jus cogens* norms imply a negative obligation, i.e. they prohibit states to torture, to commit genocide and to impose

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62 Scholtz 2www008, at 324 and 331–333.

63 See, among others, Ong 2010, at 450–470.

64 Bodansky 2010, at 10–11.

65 Jensen 2005, at 152.

apartheid laws and policies. The *jus cogens* dimension does not (yet) encompass positive obligations such as the obligation to prevent, prosecute or to compensate. In the environmental context this means that *jus cogens* rules, if they were to exist, would only impose negative obligations on states not to cause severe and widespread pollution, for example. While this would be in line with the no-harm principle in IEL, *jus cogens* will be unable to impose positive obligations on states to make good, through remediation and restoration, any environmental harm that has resulted from their actions. Thus, as far as the continued preservation of Earth system integrity is concerned, *jus cogens* will possibly only play a limited preventative and not a restorative role, which could very well negate the whole purpose of designing environmental *jus cogens* norms in the first place. After all, while prevention of environmental harm is paramount, ecological restoration is equally important to maintaining Earth system integrity.[66]

Sixth, even though it is admittedly an extreme and unlikely eventuality, if environmental *jus cogens* norms were to be developed, they have the potential of conflicting with some of the established *jus cogens* norms. With reference to the example of genocide, if a peremptory norm were to come about that prohibits transgression of sustainable development, states could, arguably, seek to reduce their socio-economic impact on the environment by restricting demands on resources through population control as a means to achieve a sustainable balance.[67] This could be seen to deliberately impose 'measures intended to prevent births'[68] among its population that would be in direct contravention of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, as well as the peremptory norm prohibiting genocide.

Finally, *jus cogens* norms traditionally impose negative obligations on *states*. Yet today, as a result of globalization and the deeply entrenched global neo-liberal capitalist economic mindset, considerable environmental harm is caused not by states, but by non-state entities such as multinational corporations, especially those involved in the extractive industries.[69] Morrow suggests that:

> corporations as currently constituted and as legal subjects, far from being the servants of humanity, have effectively become the masters of the vast majority, exerting too much power and influence for our good, that of the wider environment, or indeed, in the long term, their own sustainability … While commercial undertakings have long fully exploited the benefits accruing from their legal personality, controversially extending their efforts to colonizing human rights regimes, they seem at the same time to have been very successful in avoiding the imposition of reciprocal obligations.[70]

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[66] See, among others, Nellemann and Corcoran 2010.

[67] For some perspectives on this highly controversial ethical debate, see Ehrlich and Birch 1967, at 97–101; and Ehrlich et al. 1993, at 1–32.

[68] Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

[69] See, among others, Zerk 2006.

[70] Morrow 2012, at 1. More generally, see also Grear 2010.

Despite encouraging soft law developments, such as the 2001 report of the United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (John Ruggie) entitled 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework',[71] multinational corporations still do not incur any direct obligations when breaching human rights obligations, including those related to the environment. The 2001 ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts[72] does not clarify this significant liability gap either since international wrongful acts are attributed to a state, while conduct of private persons is not as such attributable to the state. Indeed, it remains 'relatively difficult on the basis of the 2001 Draft Articles to conclude that a state may … be responsible for the effects of the conduct of private parties [such as multinational corporations], if it failed to take the necessary measures to prevent those effects.'[73] Thus, even if environmental *jus cogens* norms were to be developed, they will only have limited impact if their aim is primarily to halt global environmental degradation in a world where non-state entities are playing an increasingly dominant role in ecological destruction.

9.5 Thinking into the Future: Potentialities for Imagining Environmental *Jus Cogens* Norms

On the foregoing account, the possibility of some rules of IEL currently having *jus cogens* status seems slim. Even if they were to develop they might only have a limited role to play in ensuring greater environmental care. The normative implications of this are likely to be lamentable because it potentially mutes the prospects of creating apex peremptory norms at the top of international law's normative hierarchy. Are there ways of thinking about future potentialities as far as the development of environmental *jus cogens* norms are concerned outside of the parochial epistemological confines of international law? I believe that there are, if one considers the future development of environmental *jus cogens* norms through the lens of the Anthropocene.

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[71] United Nations Office of the High Commissioner for Human Rights, Guiding principles on business and human rights: implementing the United Nations 'protect, respect and remedy' framework, HR/PUB/11/04, 2011.

[72] International Law Commission, Draft articles on the responsibility of states for internationally wrongful acts, with commentaries, 53rd session of the ILC, UN Doc. A/56/10, 2001.

[73] Beyerlin and Marauhn 2011, at 361.

9.5.1 The Anthropocene as a Cognitive Framework

As was pointed out above, scientists believe we now (unofficially still)[74] live in a new geological epoch that has been created not by volcanoes or meteorites, but by people. This epoch is called the Anthropocene. According to Steffen, Crutzen and McNeill,

> [t]he term *Anthropocene* … suggests that the Earth has now left its natural geological epoch, the present interglacial state called the Holocene. Human activities have become so pervasive and profound that they rival the great forces of Nature and are pushing the Earth into planetary *terra incognita*. The Earth is rapidly moving into a less biologically diverse, less forested, much warmer, and probably wetter and stormier state.[75]

For Lövbrand, Stripple and Wiman, it is the human imprint that is now according to the Anthropocene logic, so pervasive and profound in its consequences that it is influencing the Earth's dynamics and functions.[76]

Within this narrative it is now generally accepted that global-scale forcing mechanisms exist that might lead to state shifts in or critical transitions of Earth's biosphere.[77] The type and degree of socio-ecological change in the Anthropocene that are caused by human forcing mechanisms is similar to the type and degree of Earth system changes that have resulted from earlier 'natural' forces such as meteors and volcanoes that have caused earlier mass extinctions on Earth.[78] As a result of these forcing mechanisms, we are crossing planetary boundaries that represent the dynamic biophysical 'space' of the Earth System within which humanity has to date evolved and thrived.[79] These planetary boundaries 'respect Earth's "rules of the game" or, as it were, define the "planetary playing field" for the human enterprise'.[80] The forcing mechanisms are broadly divided into human population growth and resource consumption (the two main drivers underlying all other drivers); habitat transformation and fragmentation; energy production and consumption; and climate change. Scientific evidence shows that these are all increasing exponentially and that they are negatively impacting Earth system integrity.[81]

The Anthropocene's imagery suggests that we have reached a point in geological time where we could again see the occurrence of events that are capable of

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[74] Preparatory work is currently underway to propose the formal acceptance of the Anthropocene to the International Commission on Stratigraphy as a new epoch with an expected target date of 2016. See Subcommission on Quaternary Stratigraphy. Working Group on the 'Anthropocene'. http://quaternary.stratigraphy.org/workinggroups/anthropocene/. Accessed 25 August 2015.

[75] Steffen et al. 2007, at 614.

[76] Lövbrand et al. 2009, at 10.

[77] Barnosky et al. 2012, at 52.

[78] Hodson and Marvin 2010, at 299–313; and Barnosky et al. 2001, at 51.

[79] Rockström et al. 2009, at 1–35.

[80] Ibid., at 7.

[81] Barnosky et al. 2001, at 53.

causing a mass extinction similar to the previous five known mass extinctions.[82] It further implies that socio-ecological security in a possible new epoch, more than anything else, is a global concern that revolves around ways to continue life on Earth as we know it: the projected Earth system changes of the Anthropocene will affect all states everywhere, regardless of levels of socio-economic development and the level of rule of law that prevails in any one jurisdiction.

Thus, the maintenance, improvement and safeguarding of socio-ecological security in the Anthropocene is arguably becoming an issue that concerns the 'international community of States as a whole'—to borrow from Article 53 VCLT. The international community is not only the sum of its parts, but also a sense of a community of states where, as Kritsiotis suggests, '[t]he idea is to conceive the community beyond its discursive incarnation towards a system of shared ideals, policies, values',[83] which must also be expressed through the constitutional elements of the shared legal systems, such as international law and its apex peremptory norms that govern the global polity.

The gradual Anthropocene-induced epistemological shift is redirecting our attention away from territorially limited and individual state-bound environmental concerns to a more globally collective conception of Earth system changes, their impacts on the international community of states, and the collective responsibility of states in this respect. The ICJ, in the *Nuclear Weapons* Advisory Opinion, has made tentative steps in a direction to more directly connect *jus cogens*, *erga omnes* obligations and the common heritage of mankind in the context of a globalized community of states that should be seeking collective responses to shared environmental problems. The Court notes that we are witnessing

> the gradual substitution of an international law of co-operation for the traditional law of co-existence, the emergence of the concept of 'international community' and its sometimes successful attempts at subjectivization. A token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rules of *jus cogens*, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the [twentieth] century has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of states organized as a community.[84]

Or even more pertinent, in the words of Judge Weeramantry in his separate opinion in *Gabčikovo-Nagymaros*:

> When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International

[82] Ibid., at 51.

[83] Kritsiotis 2002, at 980.

[84] *Legality of the Threat or Use of Nuclear Weapons*, at 270–271.

> environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.[85]

That certain global environmental issues such as protection of biological diversity and climate change have already been recognized as issues of common concern is clear from MEAs such as the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 1992 Convention on Biological Diversity (CBD). Their preambular statements, respectively, note that 'change in the Earth's climate and its adverse effects are a common concern of humankind' and that the 'conservation of biological diversity is a common concern of humankind'; a point which was reiterated more recently by the International Law Association's New Delhi Declaration of Principles of International Law Relating to Sustainable Development.[86]

The epistemological shift concerning the way we conceive the international community of states and the global reach of Earth system change should spark conversations about the specific environmental norms that might be raised to the *jus cogens* level. Through the Anthropocene lens, this would mean that the environment is being elevated as a common concern of mankind in a far more profound manner than has been the case since the formal birth of IEL following the United Nations Conference on the Human Environment (Stockholm Conference) in the early 1970s. The urgency of the Anthropocene debate, together with its concomitant expansion of the global regulatory focus is akin to a global constitutional moment that is being instigated by the Anthropocene:[87] 'the emergence of the Anthropocene concept can be read as a constitutional moment in the constellation of powers', where 'rights, powers and responsibilities are openly or (more often) tacitly re-negotiated';[88] a suggestion that aptly fits to the *jus cogens* debate which itself is a constitutional conversation reflecting on the emergence of higher order global constitutional norms in the hierarchy of international law.

What are the possible implications of such a realization for a future vision of *jus cogens*? In addition to the general IEL framework lacking peremptory global constitutional norms

> neither territorial control, on the one hand, nor the international regulation of areas beyond territorial control, on the other, is capable of providing an effective structure for the global regulation of environmental problems. In other words, the very structure of the international legal order is found to be wanting and consequently alternatives, however inchoate, must be considered.[89]

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[85] *Gabčikovo-Nagymaros Project*, Separate Opinion of Vice-President Weeramantry, at 118.

[86] The Declaration provides in its Preamble that 'sustainable development is a matter of common concern both to developing and industrialized countries'; and later in Priniciple 1.3 that '[t]he protection, preservation and enhancement of the natural environment, particularly the proper management of climate system, biological diversity and fauna and flora of the Earth, are the common concern of humankind.'.

[87] For an extensive discussion, see Kotzé forthcoming.

[88] Mahony 2013. Also see Biermann et al. 2012, at 1307; and Kanie et al. 2012, at 292–304.

[89] French forthcoming.

The 'alternatives' that the Anthropocene's constitutional moment will require is a 'fundamental reorientation and restructuring of national and international [law and governance] institutions toward more effective Earth system governance and planetary stewardship'.[90] Plainly, our legal institutions must play a crucial role in changing the type and severity of human behavior that is leading to the present and predicted encroachments on the Earth system. This would entail a dramatic rethink of international (environmental) law's composition, purpose and scope. Thus, if *jus cogens* is accepted to constitute the minimum threshold of an international value system that belongs to the international community of states, as it very well might be,[91] then this international value system will arguably have to be expanded to include notions of environmental care that are also situated at the apex of international law's hierarchy, if we were to contribute juridically to countering Anthropocene exigencies.

The expansion of this value system as a result of the Anthropocene's constitutional moment will probably not be a singular radical event that 'rips up the old rules and writes new ones'[92] in the way that constitutional moments usually do (such as the constitutional moment of the Charter of the United Nations and the Universal Declaration of Human Rights); i.e. we will not see a sudden wholesale adoption of comprehensive 'pure' environmental *jus cogens* norms. The emergence of peremptory environmental norms will arguably be a far more gradual and tentative process that builds on the existing set of *jus cogens* norms.

Considering the prevailing conceptual and practical obstacles to the emergence of environmental *jus cogens* norms as outlined above, the following sections reflect on the possibility of (a) extending the reach of established *jus cogens* norms to the environmental domain or vice versa to incorporate environmental concerns into the existing *jus cogens* set; and (b) developing new environmental *jus cogens* norms from existing customary international environmental law.

9.5.2 Extending Existing Jus Cogens *Norms into the Environmental Domain*

The first possible way to 'create' environmental *jus cogens* norms, as it were, is by extending the reach of the existing catalogue of *jus cogens* norms to encapsulate environmental concerns by accepting that certain of the existing *jus cogens* norms are capable of also protecting environmental concerns. This would obviate the need to create explicit environmental *jus cogens* norms by simply using the available, and generally recognized, peremptory norms.

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[90] Biermann et al. 2012, at 1306; and, more generally, Kanie et al. 2012, at 292–304.

[91] In the sense used by Vidmar 2012, at 38.

[92] Stevens 2013.

One possibility is where states use force to deliberately destroy the environmental resources of a country in support of their invasion, that such an action could violate the *jus cogens* prohibition of aggressive use of force. An evident example in this respect is the United States' use of Agent Orange (a powerful mixture of chemical defoliants) during the Vietnam War to deliberately destroy forest cover for North Vietnamese and Viet Cong troops, and to eradicate crops that could have provided food to enemy troops.[93] The subsequent adoption of the Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques in 1977 bolsters the argument that there is increasing support by states 'not to engage in military or any other hostile use of environmental modification techniques having widespread, long lasting or severe effects as the means of destruction, damage or injury to any other State Party.'[94] In these examples, the environment is the object or victim of hostile activities that are conducted with a view to harming people. But it is also possible that the environment could be an instrument or 'weapon', as it were, that is used in conjunction with aggressive force. Jensen, for one, believes that '[t]he resilience of the environment over time ought not to excuse from international accountability military leaders who intentionally target the environment as a method of warfare.'[95] If it is therefore accepted that the environment could be either a victim of or a method to conduct aggressive use of force, riparian states could arguably be violating the peremptory norm that prohibits the use of force when they deliberately dam a transboundary river during a period of warfare as a means to killing civilian populations in downstream riparian states by cutting off their water supply. In this instance the peremptory prohibition against the use of force could be violated if states either deliberately target the environment during warfare, or where the environment is used as an instrument of force against a civilian population. If the general prohibition against use of force is breached in such a way, states could thus arguably be held liable, not only for the human rights consequences resulting from their activities, but also for accompanying environmental consequences.

A second, but less likely possibility is to extend the peremptory prohibition against genocide to include environmental concerns under, what scholars have termed, 'ecocide' or 'geocide'.[96] Proponents of such an approach argue that states

> should begin to move toward a comprehensive international environmental legal dispensation that recognizes the unity of the planet as a single, fragile ecosystem. That dispensation should revolve around the creation of the crime of geocide, literally a killing of the earth, the environmental counterpart of genocide.[97]

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[93] For an insightful discussion, see Schmitt 1996.

[94] Article 1.1 of the 1977 Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques, 1108 UNTS 17119.

[95] Jensen 2005, at 149.

[96] Berat 1993, at 327–348; and Gray 1996, at 215–271.

[97] Ibid., at 328.

Berat defines geocide as

> the intentional destruction, in whole or in part, of any or portion of the global ecosystem, via killing members of a species; causing serious bodily or mental harm to members of the species; inflicting on the species conditions of life that bring about its physical destruction in whole or in part; and imposing measures that prevent births within the group or lead to birth defects.[98]

Ecocide has been defined as 'the commission of a significant act or series of acts, or omission to act in a significant instance or series of instances, which causes or permits ecological damage' that is 'serious', 'threaten[s] significant interests and values of the global community, including life, health and resources vital to both', and is 'wasteful'.[99] While it is unlikely that a specific peremptory norm prohibiting ecocide or geocide will come about, it could arguably be possible to state the violation of a peremptory prohibition against genocide where it is not people who are specifically targeted by a state with the intention of effecting mass killings of a population, but the environmental conditions that sustain their life. Such an act could be seen as 'deliberately imposing conditions of life to physically destroy' a group of people as per Article II of the Convention on the Prevention and Punishment of the Crime of Genocide.

Thirdly, broadening *jus cogens* norms into the environmental domain can also be accomplished through human rights. If one accepts (a) the broader contention that existing *jus cogens* norms have a strong human rights underpinning as they do; and (b) that human rights concerns in the environmental domain significantly overlap with other human rights issues, as is the case, it could be possible to argue that the remit of 'traditional' *jus cogens* norms related to, for example, the prohibition against apartheid (which per implication covers human rights issues such as the right to life, dignity and equality) should be expanded to include environmental considerations as well. According to the United Nation's Special Rapporteur on Human Rights and the Environment, John Knox, '[h]uman rights are grounded in respect for fundamental human attributes such as dignity, equality and liberty. The realization of these attributes depends on an environment that allows them to flourish'.[100] Judge Weeramantry also made this point on the inter-relatedness of rights in his separate opinion in the *Gabčikovo-Nagymaros* judgment by explaining that

> [t]he protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.[101]

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[98] Ibid., at 343.

[99] Gray 1996, at 217–218.

[100] UNGA, Human Rights Council, Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/22/43, 24 December 2012, at 4.

[101] *Gabčikovo-Nagymaros Project*, Separate Opinion of Vice-President Weeramantry, at 91–92.

A classic environmental justice example illustrating the deeply intertwined relationship between the environment and other human rights concerns is a situation where disenfranchised societies living in poverty with restricted access to housing, water and food as a result of racial and/or gender discriminatory policies of a country, often bear the brunt of environmental impacts which could affect their dignity and livelihoods. Apartheid South Africa is a case in point where a deeply racist minority government deliberately marginalized the majority of the country's citizens for many years by, among others, restricting their access to life sustaining resources such as water. South Africa's Second National Water Resources Strategy adopted in 2012 recognizes that, as a result of apartheid and its perversely inhumane policies and laws,

> there are very different experiences of water scarcity for different groups in South Africa. In particular, water scarcity is experienced on a daily basis by the rural poor, many of whom still do not have access to potable water supply, and who also do not have access to reliable water supply for productive purposes. These communities are also the most vulnerable to droughts and floods.[102]

By depriving people of material conditions that are necessary to sustain their well-being, apartheid has succeeded in also impacting on their human dignity, equality and quality of life itself. In an effort to counter these socio-economic and environmental injustices, the 1996 Constitution of the Republic of South Africa provides for a right to access to water.[103] This right is focused on human demands for personal nourishment, sanitation, general household use and food production, which are typically socio-economic considerations that must secure basic conditions for human welfare.[104] The right to access to water can, however, only be realized if water of a sufficient quantity and quality is available;[105] an aspect that usually falls under the purview of the right to a healthy environment,[106] which has been entrenched in approximately three quarters of the world's constitutions[107]

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[102] Department of Water Affairs 2012.

[103] Section 27 of the 1996 Constitution of the Republic of South Africa provides that '[e]veryone has the right to have access to … sufficient food and water.'

[104] In July 2010, the United Nations recognized the right to safe and clean drinking water and sanitation as a human right. UNGA Res 64/292, 28 July 2010. The United Nations Human Rights Council has subsequently adopted a resolution on the right to water. United Nations Human Rights Council, Human rights and access to safe drinking water and sanitation, UN Doc. A/HRC/RES/15/9, 30 September 2010.

[105] For a critical discussion of the intersection between the right of access to water and the right to a healthy environment, see Kotzé 2010, at 135–160.

[106] Section 24 of the 1996 Constitution of the Republic of South Africa provides that '[e]veryone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

[107] More generally, see Boyd 2012; and May and Daly 2015.

(even though no globally recognized environmental right exists (yet)).[108] This almost intuitive link between an entire range of rights considerations such as health, life, dignity and the environment is globally exemplified by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides that each person has a right to the 'highest attainable standard of physical and mental health'.[109] The Committee on Economic, Social and Cultural Rights in 2000 even extended, through its General Comment No. 14, the right to health to 'the determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, [and] healthy occupational and environmental conditions.'[110]

The foregoing integrated rights approach would suggest that the environment could be indirectly protected through the application of, for example, the prohibition of racial discrimination and apartheid where such discrimination has a direct correlation to environmental aspects, and vice versa, that concomitant human rights entitlements, such as the right to life, could be protected through environment-related rights entitlements. Thus, for example, if people suffer undue environmental injustice as a result of apartheid laws and practices, such laws and practices would be violating a *jus cogens* norm (prohibition against racial discrimination and apartheid). Conversely, where the environment is harmed to promote racial discriminatory practices, or where the environment is used as a tool to marginalize a community on racial grounds, such a practice could also be in potential violation of the aforementioned peremptory norm.

More generally, it could also mean that international courts might increasingly rely on environmental considerations to determine whether other human rights guarantees that are directly or indirectly related to the existing set of *jus cogens* norms have been breached or not. An example of where this has already occurred is the *SERAC* communication[111] of 2001 before the African Commission on Human and Peoples' Rights (ACHR), which was the first ever decision by an international court to pronounce on a supra-national (in this case, regional) environmental right. The communication was brought to the ACHR as an *actio popularis* by the Social and Economic Rights Action Center (SERAC) and the Centre for Economic and Social Rights (CESR). According to the communication, the military government of Nigeria had been directly involved in oil production through the state-owned Nigerian National Petroleum Company (NNPC), and these operations have caused environmental degradation and health problems among the

[108] Generally, see Turner 2014.

[109] Article 12 of the 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

[110] Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, UN Doc. E/C.12/2000/4, 11 August 2000, para 11.

[111] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 2001.

Ogoni people resulting from environmental contamination.[112] In its judgment, the ACHR held that the African Charter imposes on African governments positive (working towards purposive obligations to realize) and negative (working protectively against infringements and towards the limitation of government power) obligations to respect, protect, promote and fulfil the entire range of human rights contained in the Charter.[113] The communication alleged the violation of, among others, Articles 16 (right to health),[114] 21 (right to free disposal of wealth and resources),[115] and 24 (environmental right)[116] of the African Charter.[117] Recognizing the overlap between the environmental right and other related rights, such as the right to health, the ACHR found that collectively viewed, the rights in question are closely linked to other economic and social rights in so far as the environment affects the quality of life and safety of the individual.[118] The environmental right, more specifically, 'imposes clear obligations upon a government. It requires the state to take reasonable [sic] and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.'[119] But in addition to these positive obligations, more interestingly for the *jus cogens* debate, the environmental right also, in a negative way, obliges governments to desist from directly threatening the health and environment of their citizens, and it asks of governments to respect the environmental right through non-interventionist conduct. It further obliges governments not to condone practices, policies or legal measures that violate individual integrity.[120]

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112 Ibid., para 10.

113 Ibid., paras 43–48.

114 Article 16 African Charter states, inter alia, '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health … States Parties … shall take the necessary measures to protect the health of their people'. 1981 African Charter on Human and Peoples' Rights, 1520 UNTS 217.

115 Article 21 African Charter provides that '[a]ll peoples shall freely dispose of their wealth and natural resources … States parties … shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources'.

116 Article 24 African Charter states that '[a]ll peoples shall have the right to a general satisfactory environment, favourable to their development'.

117 The others were Articles 2 (non-discrimination), 4 (respect of life and personal integrity), 14 (property right) and 18 (rights of the family).

118 *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, para 51.

119 Ibid., para 52. Arguably, the ACHR probably meant to use the phrase 'reasonable *legislative* and other measures'; a more common formulation as is exemplified by s 24 of the 1996 Constitution of the Republic of South Africa.

120 Ibid., para 52.

9.5.3 From Customary International Law to Environmental Jus Cogens?

The second way to expand the repertory of environmental *jus cogens* norms is through the existing set of customary environmental norms. De Wet suggests that Article 53 VCLT provides states sufficient freedom to determine themselves what are peremptory norms and what are not.[121] In practice this would occur through a process that first identifies a norm as customary international law and then an agreement on whether derogation is permitted from that customary norm or not. This form of 'double acceptance' thus not only requires proof of *usus* and *opinio juris* (the first stage of acceptance); but also acceptance of the special character of the norm in question (the second stage) that is seen to be embedded in the 'universally accepted strong ethical underpinning of these norms'[122] that affords them their peremptory character. Considering the deep controversy that surrounds the burgeoning debate on which IEL norms have or have not attained customary status,[123] I focus for present purposes on the one IEL rule that has unequivocally been recognized as customary environmental law, namely the no-harm rule (or *sic utere tuo ut alienum non laedas)* that imposes a negative obligation on states (as *jus cogens* norms typically do) not to cause environmental harm to another state.

The principle was first recognized by an international court in the *Trail Smelter* arbitration, which settled an environmental utilization conflict between Canada and the United States. The arbitral tribunal stated that

> under the principles of international law … no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.[124]

In 1972, the no-harm principle was included as Principle 21 in the Stockholm Declaration as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their

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121 de Wet 2015, at 542.

122 Vidmar 2012, at 26.

123 While the principle of sustainable development, the polluter pays principle, the precautionary principle, and environmental rights, among others, frequently surface in debates as possible contenders for achieving customary status in IEL, there is little agreement among international courts and scholars alike whether in fact they have achieved customary status. While the element of *usus* is usually easier to prove and mostly present, it is far more difficult to show that *opinio juris* is sufficiently present to conclusively state the customary status of these principles. For a general discussion, see Beyerlin and Marauhn 2011, at 47–84.

124 *Trail Smelter Arbitration* (1949) 3 RIAA 1903.

> jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[125]

In this guise and presently, the principle is understood to reach even beyond the environmental integrity of other states to also include the global commons (or 'areas beyond the limits of national jurisdiction').[126] The ICJ has endorsed the principle in its *Nuclear Weapons* Advisory Opinion, and specifically emphasized the *erga omnes* obligations that flow from it:

> The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.[127]

Although there are no hard and fast rules in this respect, it is now generally accepted that the harm that occurs as a result of activities in a particular state must be 'serious' and must be at least more than *de minimis*.[128] A state causing harm does not need to do so with the intent to injure. The duty not to cause harm is rather associated with a duty to exercise due diligence, which incidentally does not detract from the nature of the obligation imposed by the norm, i.e. a negative one.[129]

Today the no-harm principle 'has been so widely accepted in international treaty practice, numerous declarations of international organizations, the codification work of the ILC, and in the jurisprudence of the ICJ that it can be considered to be a customary substantive rule at the universal level.'[130] It should thus easily satisfy the VCLT peremptory requirement of being 'a norm accepted and recognized by the international community of States as a whole' (the first stage of acceptance).[131] Whether it has attained the status of a norm 'from which no derogation is permitted'[132] (the second stage of acceptance) is, however, debatable. It is still unlikely that states have universally accepted any 'strong ethical [ecological] underpinning'[133] that should be associated with the no-harm principle. Yet, because of its customary status, the fact that it applies at an inter-state level to environmental resources within state territories *as well as* to the global environmental commons, and that it imposes negative obligations, suggest that at least

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125 The principle was later reaffirmed in Principle 2 of the Rio Declaration on Environment and Development in similar terms. UNGA, Report of the United Nations conference on environment and development, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26, 3-14 June 1992.

126 Beyerlin and Marauhn 2011, at 39.

127 *Legality of the Threat or Use of Nuclear Weapons*, para 29.

128 Beyerlin and Marauhn 2011, at 41.

129 Ibid., at 42.

130 Ibid., at 44.

131 Article 53 VCLT.

132 Ibid.

133 Vidmar 2012, at 26.

theoretically, it has the potential to become a peremptory norm in future. Moreover, considered in the light of the Anthropocene and the implicit ethical implications of its imagery to desist from causing irreversible ecological harm, there is increasing motivation auguring support for universal recognition of the no-harm rule's potential strong ethical underpinning in support of enhanced global ecological care.[134]

9.6 Conclusion

The current state of the Earth system and the potential of *jus cogens* playing a role (regardless of how minimal this role might be within the larger global environmental regulatory scope of things) in achieving the type of environmental care that would be required for maintaining peace, security and ecological well-being in the Anthropocene is too strong to discount as peripheral concerns. The ominous emergence of terms such as the Anthropocene underscores the urgency of commencing, in more deliberate, systematic and comprehensive ways, constitutional conversations about peremptory environmental norms. These conversations are both timely and useful and would allow an opening, as it were, of existing closures in the law and of the legal discourse more generally. At the same time, these conversations have the potential to problematize the assumed world order that the law seeks to maintain—confronting law's deep assumptions with more novel understandings of global environmental change (such as through the lens of the Anthropocene) and presenting ways to mediate this change; in this instance through a re-envisioned context for IEL and the possible emergence of environmental *jus cogens* norms.

While my suggestions in this chapter have inevitably been tentative and speculative, I do hope that they might provide a point of departure to commence conversations that must ultimately push against the parochial closures obscuring the possible contours of the elements of a re-imagined global environmental regulatory order which should include within its remit peremptory environmental norms as well.

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[134] See, for example, Kim and Bosselmann who forcefully argue for the recognition and global adoption of 'ecological integrity' as a global environmental ethic for the Anthropocene. Kim and Bosselmann 2013, at 285–309.

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Chapter 10
Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test

Cathryn Costello and Michelle Foster

Abstract The norm of *non-refoulement* is at the heart of the international protection of refugees yet there remains a lack of consensus as to its status. In this contribution, we examine the question whether it has attained the status of a *jus cogens* norm. Adopting the methodology of 'custom plus' we first examine whether *non-refoulement* has attained the status of custom, concluding that widespread state practice and *opinio juris* underpin the view that it is clearly a norm of customary international law. Moreover, much of this evidence also leads to the conclusion that it is ripe for recognition as a norm of *jus cogens*, due to its universal, non-derogatory character. In other words, it is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted. The chapter then examines the consequences for its

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recognition as *jus cogens*, exploring some of the many ways in which *jus cogens* status may have meaningful implications for the norm of *non-refoulement*.

Keywords *Jus cogens* · International refugee law · *Non-refoulement* · Torture · Customary international law · Implications of *jus cogens*

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10.1 Introduction

When refugees flee, their immediate need is protection from being returned. *Non-refoulement* is the central norm of the refugee regime—without it, other protections are meaningless. As Jean-Francois Durieux has written, 'the principle of *non-refoulement* is not the foundation of the [Refugee] Convention, but its cornerstone: the protection Convention (and other) refugees are owed would be illusory if it did not include protection against forcible return.'[1] *Non-refoulement* (in its focal sense) is rooted in a negative duty not to return, while duties to refugees also include a range of positive duties of assistance. Notably too, the refugee regime also envisages international responsibility sharing,[2] but those obligations are owned by the international community generally, and often difficult to allocate and enforce.

[1] Durieux 2013, at 167.

[2] Preamble of the 1951 Convention Relating to the Status of Refugees, 189 UNTS 137 (Refugee Convention).

UNHCR has stated repeatedly that the numbers of displaced people are at the highest level since the end of the Second World War. Notably that figure comprises around 40 million internally displaced persons, and 20 million refugees, of whom around 4 million are displaced from Syria. The vast majority of those Syrian refugees are in four countries: Lebanon, Turkey, Jordan and Iraq.[3] That refugees tend to cluster in the neighbouring countries is not unusual. This tends to place great responsibility for refugee protection on states in the immediate vicinity of persecution and conflict. This is particularly the case when other potential countries of asylum, particularly the rich ones, have developed a range of policies and practices to prevent asylum-seekers and refugees from reaching their territory.[4] Countries facing a mass influx may wish to close borders, while those further away may employ practices to prevent people fleeing further on. The norm of *non-refoulement* is pertinent in both contexts.

Evidently, legal protections for refugees are elusive in many contexts. In the absence of legal routes to seek protection, over 1 million people crossed the Mediterranean Sea irregularly in 2015, and over 3700 died or went missing in the attempt.[5] As people seeking refuge move onwards across Europe, several states have closed borders and made transit difficult. Once again, 'safe zones' inside refugee-producing countries are under discussion.[6] Other states engage in non-arrival practices of dubious legality. Australia's maritime push-backs are notorious,[7] but the border practices of other states also imperil refugee protection. In 2015, a sharp increase in the number of stateless Rohingya, Bangladeshis and other asylum-seekers travelling by boat across the Indian Ocean in search of protection led to Indonesia, Malaysia and Thailand 'pushing back' boats with the consequence that thousands were left stranded at sea.[8]

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[3] UNHCR, Syria regional refugee response, 2015. http://data.unhcr.org/syrianrefugees/regional.php. Accessed 20 September 2015.

[4] Gammeltoft-Hansen 2013, at 15; and Gammeltoft-Hansen and Hathaway 2015, at 236–237.

[5] UNHCR, Refugees/Migrants emergency response—Mediterranean, 2015. http://data.unhcr.org/mediterranean/regional.php. Accessed 30 December 2015.

[6] For a discussion of the practice of 'safe-zones', see Long 2012; and Orchard 2014.

[7] 'Operation Sovereign Borders' has been the most visible manifestation of the push back policy, and this was further supported in 2014 by the passage of the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.

[8] See Joint Statement by UNHCR, OHCHR, IOM and SRSG for Migration and Development: Search and rescue at sea, disembarkation, and protection of the human rights of refugees and migrants now imperative to save lives in the Bay of Bengal and Andaman Sea, 19 May 2015. http://www.unhcr.org/555aee739.html. Accessed 17 December 2015.

Given its limited but crucial function, it is therefore timely to consider the legal status of *non-refoulement*. This chapter addresses the key question as to whether the norm of *non-refoulement* has attained the status of a *jus cogens* norm and if so what that would mean in practice for the protection of refugees.[9]

In Sect. 10.2, we sketch our approach to the contested question of how to understand the concept of *jus cogens*, and how to identify it. We endorse the 'custom plus' approach, a demanding approach to the identification of *jus cogens*, in part as we wish to put *non-refoulement* to the test. By 'custom plus' we mean a method for identifying *jus cogens* that draws on the standard methods of identifying norms of customary international law, with the additional requirement of adequate *opinio juris* as to the *jus cogens* status of the norm in question. Our use of this method does not rule out other routes to *jus cogens*, but we use it as it is both orthodox and stringent.

Section 10.3 then addresses the question whether *non-refoulement* has attained the status of a norm of customary international law. In Sect. 10.4, we turn to the question whether the customary norm of *non-refoulement* has attained the status of a *jus cogens* norm. In Sect. 10.5, we consider the consequences of a finding that *non-refoulement* has attained the status of a *jus cogens* norm. While some scholars have questioned whether it makes much difference to refugee protection, in fact the consequences may be significant. For instance, a treaty or treaty provision is void if it conflicts with a peremptory norm (as set out in Article 53 of the Vienna Convention on the Law of Treaties). We consider the implications of this rule given that Article 33(2) of the 1951 Convention relating to the Status of Refugees[10] (Refugee Convention) sets out an exception to *non-refoulement*. Section 10.6 briefly considers whether the *jus cogens* status of certain prohibitions (apartheid, torture for instance) necessitates particular *non-refoulement* obligations.

10.2 Understanding and Identifying *Jus Cogens*

According to the Vienna Convention on the law of Treaties (VCLT), 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'.[11]

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[9] We observe that the concept of *jus cogens* may be relevant to other aspects of refugee status. For example, in determining which violations of human rights are sufficiently serious to constitute persecution, it has sometimes been suggested that if this is understood as involving a hierarchical analysis, then the *jus cogens* nature of certain violations may be relevant. However, as explained by Foster, reliance on *jus cogens* in this context has limited pertinence given the narrow range of violations widely accepted to have attained the status of a *jus cogens* norm. Foster 2007b. By contrast, a wide range of potential human rights violations are understood to be encompassed within the meaning of persecution. See Hathaway and Foster 2014, at 208–287.

[10] Article 33(2) Refugee Convention.

[11] Article 53 of the 1969 Vienna Convention on the law of Treaties, 1155 UNTS 331 (VCLT).

Reflecting the innovative character of the introduction of the notion into the law of treaties, the drafters assumed that over time, the content would develop. However, the settled content of *jus cogens* has emerged via stipulation, with the methodology remaining obscure. The ILC states that 'those peremptory norms that are clearly accepted and recognised include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.'[12] Stipulation by definition provides no explanation, and the precise method for identifying *jus cogens* remains elusive. As Koskenniemi has deftly characterised, the text of Article 53 VCLT reflects a compromise between the consensualist view that norms of *jus cogens* arise out of agreement, and the descending or non-consensualist view, whereby they emerge out of some superior normative commitments.[13]

The consensualist view, based on the notions of *acceptance* and *recognition*, suggests that the Vienna Convention 'conceptualises *jus cogens* as a norm of positive law, founded on consent'.[14] Yet, the genealogy of the VCLT provision is generally traced back to the natural law thinking of Verdross.[15] Since then, different schools of thought on *jus cogens* have developed. Indeed, debates about *jus cogens* are rooted in different conceptions of international law, indeed, as Linderfalk has suggested, of law itself.[16] Positivist conceptions of international law tend to support a view of *jus cogens* as a species of custom, whereas more expansive notions are often rooted in broader conceptions of legality, or even natural law. Saul has identified three competing approaches in the literature: natural law, public order and customary international law.[17]

Some conceptions of *jus cogens* have a genealogy in natural law thinking, and evoke the fundamental values of the international community as the source of *jus cogens*. For example, amongst the conceptions that are redolent of natural law is that of the Inter-American Court of Human Rights, which describes *jus cogens* as deriving 'directly from the oneness of the human family'[18] heavily influenced by Judge Antônio Augusto Cançado Trindade.[19] The Inter-American Commission in

[12] UNGA, Report of the International Law Commission, 53rd session of the ILC, UN Doc. A/56/10, 2001, at 208.

[13] Koskenniemi 1989.

[14] UNGA, Report of the International Law Commission, 66th session of the ILC, UN Doc. A/69/10, 2014, at 280.

[15] Verdross 1937, 1966.

[16] Linderfalk 2015, at 3. '[M]any assumptions that discussants bring to bear on their contributions to the *jus cogens* debate eventually turn on their definition of law.'

[17] Saul 2014, at 2.

[18] *Juridical Condition and Rights of Undocumented Migrants*, IACtHR, Advisory Opinion, No. OC-18/03, 17 September 2003, paras 99–100.

[19] Cançado Trindade 2005, 2008, 2013.

contrast tends to adopt a customary law approach in many cases.[20] Cassesse refers to the notion that '[t]he fundamental values of the world society are those enshrined in that core of rules that constitute the international *jus cogens,* a set of peremptory norms that may not be derogated from.'[21] This move then raises a methodological problem as to who is to identify *jus cogens* and by what means in the context of the decentralised global legal order. Tomuschat suggests that 'generally, rules of *jus cogens* will evolve from the common value fund cherished by all nations. To establish them is therefore less a constitutive than a declaratory process.'[22] Nonetheless, he suggests that as well as the deductions 'from the constitutional foundations of the international community', the 'regular criteria of customary law keep an important evidentiary function. The deductive method can never be used to oppose and disregard the actual will of the international community.'[23]

A further expansive conception invokes the notion of 'public order of the international community,' and is usually traced back to Moser's General Course at the Hague Academy in 1974.[24] Moser defined the international *ordre public* as the principles and rules of 'such vital importance to the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force'. For Zemanek, the move from natural law to *ordre public* is a 'paradigmatic change,'[25] in that while natural law connotes immutable values, public order invites a shifting body of values.[26]

In our view, the additional *opinio juris* required to confer *jus cogens* status on a norm will generally be related to the importance of the norm, reflected in the notion that it embodies a 'fundamental value'. That fundamentality is reflected in its non-derogability, so there is no need to reach for theories of universal morality. Our approach, focusing on custom, does not exclude other routes to *jus cogens*. For instance, if a Treaty was universally ratified endorsing the view that a particular provision was non-derogable, that too could be taken as an indication of *jus cogens* character.

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[20] *Michael Domingues v United States*, IACsionHR, Case No. 12.285, Report No. 62/02, 22 October 2002, para 50. The Commission (citing scholarly work) explained that: 'while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole. This can occur where there is acceptance and recognition by a large majority of states, even if over dissent by a small number of states.'

[21] Cassese 2012, at 139.

[22] Tomuschat 1993, at 386.

[23] Ibid.

[24] Ibid.

[25] Zemanek 2001, at 383.

[26] Ibid., at 384. 'Instead of reflecting the firm, for some immutable, commands of natural law, *jus cogens* became the expression of fundamental values shared by the international community of states at a certain time and it is, therefore, not absolutely free of contradictions.'

10.2.1 'Custom Plus'

The expansive views of *jus cogens* pose normative and methodological problems, so in this contribution we take the view that *jus cogens* status may be inferred from the same evidence that supports a finding that a norm is one of customary international law, with an added requirement of *opinio juris* as to the character of the norm. This view is orthodox. It is supported by the International Court of Justice, (ICJ) which refers to some *jus cogens* norms as 'intransgressible principles of international customary law.'[27] Thus, at least some *jus cogens* norms are particularly compelling norms of customary international law.

Under this approach, *jus cogens* is identified via similar methodology to customary international law, although this should not be mistaken for conflation of the two sorts of norms. For example, in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, the ICJ found that, 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.[28] In explaining this conclusion, the Court observed that the 'prohibition is grounded in a widespread international practice and on the *opinio juris* of States', citing numerous international instruments 'of universal application,'[29] including the Universal Declaration of Human Rights, the 1949 Geneva Conventions for the protection of war victims, the ICCPR, and General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading treatment.[30] In addition the Court relied on the fact that the prohibition has 'been introduced into the domestic law of almost all States',[31] and that 'acts of torture are regularly denounced within national and international fora'.[32]

The two key elements mentioned by the ICJ in this case in connection with establishing *jus cogens*, namely, practice and *opinio juris*, are also the fundamental tenets of a claim of customary international law. Again, this does not mean that only custom may become *jus cogens*, but rather that the evidence that supports

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[27] *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion, 8 July 1996, para 79. See also the dissent of Judge Weeramantry, who was clearer on this point. 'The rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect.' Ibid., Dissenting Opinion of Judge Weeramantry, at 496. See also ibid., Declaration of President Bedjaoui. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004, para 157.

[28] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, ICJ, Judgment, 20 July 2012, para 99.

[29] Ibid.

[30] Ibid.

[31] Ibid.

[32] Ibid. Importantly there is no evidence cited by the ICJ in relation either to domestic implementation of the norm or the point about regular denunciation.

identification of custom may also support a conclusion of a norm's *jus cogens* character.

Some commentators accept that *jus cogens* is a form of customary international law, but insist that its identification requires adaptation of the methodology used to identify customary international law.[33] This 'custom minus' view finds some support in the 1986 *Nicaragua* judgment of the ICJ.[34] This reflects the fact that by definition, *jus cogens* is not subject to persistent objection, so the state practice required to support it does not need the degree of consistency as that of general custom. For instance, South Africa's objection to the prohibition of apartheid was no impediment to that prohibition's *jus cogens* character. In this way, some norms become *jus cogens* even when that objection would hinder their recognition as custom. Our view does not rule out these scenarios, but simply notes that there is a context-dependent assessment as to whether a particular norm is recognised as having the requisite degree of universality and non-derogability in order to be *jus cogens*.

10.2.2 Understanding Non-derogability

While non-derogability is a defining feature of *jus cogens*, it is a necessary but insufficient one. In *Jurisdictional Immunities of the State* (*Germany v Italy*), the ICJ confirmed the basic idea that '[a] *jus cogens* rule is one from which no derogation is permitted.'[35] However, not all non-derogable norms of customary international law may be assumed to be *jus cogens*. Accordingly, we agree with de Wet, that 'non-derogability is a factor to be taken into account, but is not in itself decisive.' This is in keeping with the idea behind the ILC Commentary to Draft Article 50 of the Draft Articles on the Law of Treaties.[36] In particular for human rights norms, the Inter-American Commission on Human Rights suggests non-derogability is a 'starting point' for the identification of *jus cogens*.[37]

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[33] We note also that some scholars, notably Cassese, challenges the view that *jus cogens* are a sub-set of customary norms. Cassese 2012. For a persuasive critique, see Tasioulas 2016, at 13–14.

[34] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ, Merits, Judgment of 27 June 1986. See further Orakhelashvili 2006, at 119.

[35] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, ICJ, Judgment, 3 February 2012, para 95.

[36] The ILC states that it would be incorrect 'to say that a provision in a treaty possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with it would be void.' International Law Commission, Draft Articles on the Law of Treaties with commentaries, 18th session, UN Doc. A/6309/Rev.l, 1966, Article 50, para 2.

[37] *Victims of Tugboat '13 de Marzo' v Cuba,* IACHR, Report No.47/96, Case 11.436, 16 October 1996, para 79 (cited in de Wet 2015, at 544).

The prohibitions on torture and slavery, for instance, are evidently non-derogable, and treated as such under the International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR) and American Convention on Human Rights (ACHR).[38] However, the list of non-derogable rights varies across human rights treaties, although they have in common the stipulation that the following rights are non-derogable: the right to life, the prohibition of slavery, prohibition of torture or cruel, inhuman or degrading treatment or punishment and prohibition of retroactive penal measures.

The Human Rights Committee (HRC) in General Comment 29 has drawn on 'other obligations in international law' to expand the scope of non-derogability.[39] It adds genocide and crimes against humanity as defined by the Rome Statute of the International Criminal Court. Notably also, the HRC expands non-derogability to certain procedural obligations, including the right to an effective remedy, on the basis that it is 'inherent in the Covenant as a whole'.

In this contribution, we are keen to put *non-refoulement* as a candidate for *jus cogens* status to the most suitable test for *jus cogens* in this context, so we adopt the method of 'customary international law plus', namely that to be *jus cogens*, a norm must meet the normal requirements of customary international law (with the exception that the get-out for persistent objectors is no longer relevant), and furthermore have that additional widespread endorsement as to its non-derogability and peremptory character.

In adopting this approach, importantly, we do not rule out the possibility that there are other routes to *jus cogens* status, in particular for human rights norms. We note attempts to ground human rights' *jus cogens* status in general principles of law, for instance.[40] The Opinion of the Inter-American Court of Human Rights on the *Juridical Conditions and the Rights of Undocumented Migrants* is a striking example of a human rights court taking a broad view of *jus cogens*, to lead to a legally innovative conclusion. To support its view that the principle of non-discrimination was customary international law (in contrast to specific prohibitions of discrimination on say, grounds of race) it cited several treaties and declarations.[41] However, in making the claim that this general norm of non-discrimination was

[38] Article 4 of the 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR); Article 15 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms European Convention on Human Rights, 213 UNTS 222 (ECHR); Article 27 of the 1969 American Convention of Human Rights, 1144 UNTS 123 (ACHR). Note, there is no derogation clause in the 1981 African Charter of Human and Peoples' Rights, 1520 UNTS 217.

[39] UN Human Rights Committee, General Comment No. 29: Derogations during a state of emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 9. For a discussion, see Joseph 2002, at 91.

[40] Simma and Alston 1988–1989.

[41] *Juridical Condition and Rights of the Undocumented Migrants*, para 86.

also *jus cogens*, its reasoning was somewhat opaque.[42] As Chetail notes, 'while the fundamental principle of non-discrimination is not contested as such, its implications for non-nationals are still difficult to grasp with certainty.'[43] Shelton suggests that the issue of *jus cogens* was raised in order to anticipate possible US objections that it was not bound by the relevant international norms.[44] While the content of the Opinion is hard to square with orthodox legal principles, it is part of a project to develop human rights protections that protect the *human*, rather than permit restrictions on the migrant.[45] Of course, the IACtHR can develop this approach by interpreting the Inter-American Convention, but its reliance on *jus cogens* gave an added normative dimension to the decision.

10.3 *Non-refoulement* as Customary International Law

The overwhelming majority of scholarly opinion favours the view that *non-refoulement* constitutes a customary norm,[46] although there continues to be some debate on this question.[47] In particular protagonists argue about the application of the two crucial elements, and especially the significance of state practice in contravention of the customary norm.

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[42] See ibid., para 100. 'The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals.'

[43] Chetail 2012, at 81.

[44] Shelton 2006, at 309.

[45] See generally Dembour 2015.

[46] See Goodwin-Gill and McAdam 2007, at 354. Goodwin-Gill has recently gone further to argue that the customary international law norm is one of temporary refuge/protection. 'Temporary refuge, nonetheless, is a matter of obligation'. Goodwin-Gill 2014, at 441. For further support, see Kälin et al. 2001, at 1342–1346; Chetail 2012, at 76; and Wallace 2014, at 435. Wallace indicates that 'there would appear to be general consensus that the principle of *non-refoulement* as expressed in Article 33(1) is a principle of customary international law'. See also Messineo 2013, at 142. He argues that '[t]here is near universal acceptance of the legal binding nature of *non-refoulement*, or *opinio juris* … most commentators and- more decisively- states agree on the customary nature of *non-refoulement*'. See also Gilbert 2004, at 966; Duffy 2008, at 383 and 389; Trevisanut 2009; Giuffre 2013, at 718; Perluss and Hartman 1985–1986; Chan 2006, at 232–235; and Vang 2014, at 371.

[47] Unquestionably, the most prominent scholar who argues against *non-refoulement* as custom is Hathaway although Hailbronner has historically been a prominent protagonist as well. Hathaway 2010; Hailbronner 1986. Messineo recently concluded that 'history seems to have proved the wishful thinker right,' and that arguments 'against the customary international law nature of *non-refoulement* of refugees seems slightly anachronistic'. Messineo 2013, at 142.

10.3.1 Non-refoulement in Contemporary Treaty Law

It is well accepted that a treaty-based norm can generate a customary rule of international law,[48] however it is first necessary that such a treaty rule or provision 'be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'.[49] There is no question that such requirement is satisfied in the case of *non-refoulement*.[50]

The principle of *non-refoulement* is set out explicitly in many treaties, most notably the 1951 Refugee Convention, but also the Convention Against Torture[51] and the International Convention for the Protection of all Persons against Enforced Disappearance.[52] In addition, human rights treaties are generally interpreted as prohibiting *refoulement*. This holds under, for example, the ICCPR, and regional human rights treaties. In other words, as part of the positive obligations inherent in the obligation to protect against human rights violations, states are obliged to conduct a risk assessment and not to return people where they would face serious human rights violations on return. In addition, it has been persuasively argued that international humanitarian law also contains such an obligation, based on the duty in Common Article 1 of the Geneva Conventions.[53] Finally, as Lauterpacht and Bethlehem observe, *non-refoulement* is also explicitly protected in standard-setting conventions concerned with extradition.[54]

Turning to the process as to how a conventional rule passes 'into the general corpus of international law,'[55] Lauterpacht and Bethlehem undertook a comprehensive analysis of state ratification of relevant treaties in 2003 in order to assess whether there is 'widespread and representative participation in the conventions said to embody the putative customary rule'.[56] In terms of ratification Lauterpacht and Bethlehem found that when all relevant instruments were considered, 170 of the 189 members of the United Nations, or around 90 % of the membership, are party to one or more conventions which include *non-refoulement* as an essential

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[48] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, ICJ, Judgment of 20 February 1969, paras 70–71.

[49] Ibid., para 43.

[50] Lauterpacht and Bethlehem 2003, 143–146; and Messineo 2013, at 142. See also *C and others v. Director of Immigration and another*, Hong Kong Court of Appeal, Civil Appeals, No. 132–137 of 2008, 21 July 2011, para 47. 'In the present case, there is no dispute over the first element [the concept must be of such a character and its formulation of sufficient precision as to be capable of creating a general rule'].

[51] 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (Convention against Torture).

[52] Article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, 2715 UNTS 3 (Convention against Enforced Disappearance).

[53] Ziegler 2014.

[54] Lauterpacht and Bethlehem 2003, at 93.

[55] *North Sea Continental Shelf Cases*, para 71.

[56] Lauterpacht and Bethlehem 2003, at 146.

component.[57] This figure has increased since that time.[58] They therefore concluded that participation in 'some or other conventional arrangement embodying *non-refoulement* is more than simply 'widespread and representative'. It 'is near universal'.[59]

While this analysis has subsequently been cited extensively with approval, it has been called into question by one prominent scholar on the basis that the various treaties cited are not identical.[60] However, it is not necessary that such provisions be identical; the International Law Commission suggests that 'the repetition *of similar* or identical provisions in a large number of bilateral treaties may give rise to a rule of customary international law or attest to its existence.'[61]

The principle of *non-refoulement* embodied in a wide range of treaties has the same fundamental core, albeit expressed in slightly different terms across different instruments. The Refugee Convention prohibits *refoulement* where a refugee's 'life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,' with regional instruments containing similar prohibitions.[62] The CAT prohibits *refoulement* 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' and the Convention on Enforced Disappearances prohibits *refoulement* 'where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance'.[63] The ICCPR is interpreted as prohibiting return where there 'are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life]

[57] Ibid., at 147. In 2015, there were only 13 UN member states that have not signed any of the Refugee Convention or Protocol, the ICCPR or the Convention against Torture. They are as follows: Bhutan, Brunei Darussalam, Cook Islands, Kiribati, Malaysia, Marshall Islands, Micronesia (Federated States of), Myanmar, Niue, Oman, Singapore, Solomon Islands, and Tonga.

[58] For example, there have been two new states party to the Refugee Convention since then.

[59] Lauterpacht and Bethlehem 2003, at 147.

[60] Hathaway 2010, at 509.

[61] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 29, para 42.

[62] Article II(3) of the 1969 Organisation of African Unity, Convention Governing Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45(OAU Convention). 'No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paras 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously disturbing public order].' Article 22(8) ACHR reads: 'In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.'.

[63] Article 16(1) Convention against Torture.

and 7 [right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment]'.[64] Under the ECHR, while in the main *non-refoulement* concerns return to face real risks of treatment contrary to Article 3 ECHR (torture, inhuman and degrading treatment), flagrant denials or breaches of other rights may also trigger *non-refoulement*.[65] The ECtHR has explicitly recognised this possibility as regards Articles 4,[66] 5,[67] 6,[68] 7,[69] 8,[70] and 9.[71]

Although the texts differ in terms of the focal harms, the duty of *non-refoulement* is similar in all cases. It prohibits return to serious human rights violations, unless the risk in question is not sufficiently 'real'.

In any event, a treaty text 'cannot serve as conclusive evidence of the existence or content of the rules of customary international law'[72]; rather the argument that a rule set forth in a treaty has codified, led to the crystallisation of, or generated a new rule of customary international law, must be substantiated by evidence of both *opinio juris* and state practice in support of the rule.[73]

Hence, since widespread ratification of a norm 'may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law',[74] the twin elements of state practice and *opinio juris* remain ultimately determinative. In an oft-repeated passage, the ICJ explained in the context of custom that 'not only

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[64] UN Human Rights Committee, General Comment 31, Nature of the general legal obligation on states parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para 12.

[65] See McAdam 2007, at 136–172.

[66] *Ould Barar v Sweden,* ECtHR, No. 42367/98, 19 January 1999. The case illustrates that the ECtHR is open to claims under Article 4 ECHR, but found no risk of treatment contrary to Article 4 ECHR on return in the particular case.

[67] *Tomic v. UK,* ECtHR, No. 17387/03, 14 October 2003.

[68] *Soering v. United Kingdom*, ECtHR, No. 14038/88, 7 July 1989; *Drozd and Janousek v. France and Spain* and, ECtHR, No. 12747/87, 26 June 1992; *Mamatkulov Askarov v. Turkey*, ECtHR, No. 46827/99 and 46951/99, 4 February 2005; *Einhorn v. France*, ECtHR, No. 71555/01, 16 October 2001; *Al-Moayad v. Germany*, ECtHR, No. 35865/03, 30 February 2007; *Stapleton v. Ireland*, ECtHR, No. 56588/07, 4 May 2010; *Othman (Abu Qatada) v. United Kingdom,* ECtHR, No. 8139/09, 17 January 2012.

[69] *Gabarri Moreno v. Spain,* ECtHR, No. 68066/01, 22 July 2003.

[70] *F v. UK*, ECtHR, No. 17341/03, 22 June 2004.

[71] *Z and T v. UK*, ECtHR, No. 27034/05, 28 February 2006.

[72] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 18, para 34.

[73] This appears to explain a key source of the disagreement between Hathaway and Lauterpacht and Bethlehem. Hathaway summarises the 'essence of the … claim' as follows: 'because an express or implied duty of *non-refoulement* is recognized in the various treaties…it is now the case that all states—whether bound by a relevant treaty or not- are legally obligated to honour the duty of *non-refoulement*.' Hathaway 2010, at 507. Yet Lauterpacht and Bethlehem consider other evidence of practice as well as *opinio juris*. Lauterpacht and Bethlehem 2003, at 146–149.

[74] International Law Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, at 3.

must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it'.[75] The 'two-element' approach is widely supported and well-entrenched.[76] However, while the existence of the two requisite elements is uncontroversial,[77] their precise meaning and application, particularly in the context of human rights treaties, can nonetheless be controversial.

In our view, the evidence points overwhelmingly to the establishment of *non-refoulement* as a norm of customary international law.

10.3.2 Opinio Juris

It is well accepted that evidence of *opinio juris* may take a wide range of forms including, according to the ILC,

> Public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organisation or at an intergovernmental conference.[78]

While there is insistence that the two elements are distinct and that they need to be substantiated separately, there is of course overlap in the types of evidence that may be relevant to establishing each element, particularly as the ILC concedes that practice may be constituted by both physical *and* verbal conduct.[79] The ILC Special Rapporteur on identification of customary international law has observed

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[75] *North Sea Continental Shelf Cases*, para 77.

[76] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, para 17.

[77] In *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* Lord Bingham commented that: 'the conditions to be satisfied before a rule may properly be recognised as one of customary international law have been somewhat differently expressed by different authorities, but are not in themselves problematical.' *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55, Lord Bingham, para 23.

[78] International Law Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, at 3.

[79] While the ILC maintains that 'each element is to be separately ascertained' it adds that 'This generally requires an assessment of specific evidence for each element.' M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, The report suggests amendment to Draft Conclusion 3[4]. International Law Commission, Identification of customary international law. Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, at 1. The word 'generally' was inserted following discussion of the flexibility needed depending on the area of law.

that resolutions adopted by states within international organisations and at international conferences 'are accorded considerable importance'.[80]

10.3.2.1 General Assembly Resolutions and the Recognition of Non-refoulement

The ICJ has long recognised that General Assembly resolutions, although not technically binding, may have 'normative value'[81] and can 'provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris.*'[82] The Court has indicated that it is necessary to consider, in relation to a General Assembly Resolution, both the content and conditions of the adoption, and to 'see whether an *opinio juris* exists as to its normative character'.[83] The Court further explained that a series of resolutions 'may show the gradual evolution of the *opinio juris* required for the establishment of the rule'.[84]

In the context of the use of nuclear weapons, the ICJ found that the language used in the relevant General Assembly resolutions referred to their use as being 'a direct violation of the Charter of the United Nations' and also that such use 'should be prohibited'.[85] It regarded such language as insufficiently indicative of *opinio juris*, presumably because the principle was not expressed as having been established independent of the Charter. In addition, several of the resolutions had been adopted with 'substantial numbers of negative votes and abstentions'[86]; hence, while the Court accepted that there was 'nascent *opinio juris*',[87] it fell short of 'establishing the existence of an *opinio juris* on the illegality of the use of such weapons'.[88]

By contrast in *Nicaragua*, the Court relied on several General Assembly resolutions and declarations that embodied the principle of non-intervention and concluded that such resolutions indicated sufficient *opinio juris*. It is worth noting that in none of the cited resolutions was the relevant principle explicitly described as customary international law; rather the language of 'principles' and 'basic principles' was used.[89]

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[80] Wood M, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 31, para 45.

[81] *Legality of the Threat or Use of Nuclear Weapons*, para 70.

[82] Ibid.

[83] Ibid. See also UNGA, Report of the International Law Commission, 67th session of the ILC, UN Doc. A/70/10, 24 August 2015, para 69. '[T]he particular wording used in a given resolution was of critical importance, as were the circumstances surrounding the adoption of the resolution in question.'

[84] *Legality of the Threat or Use of Nuclear Weapons*, para 70.

[85] Ibid., para 71.

[86] Ibid.

[87] Ibid., para 73.

[88] Ibid.

[89] See declarations referred to in *Case concerning Military and Paramilitary Activities in and against Nicaragua*, paras 203–204.

Turning to the principle of *non-refoulement*, the General Assembly has passed forty resolutions since 1977 to the present-day in which it has consistently recognised and affirmed the principle of *non-refoulement.*[90] Importantly such recognition has *not* been tied solely to relevant treaties but has been expressed as a more general stand-alone principle. In these resolutions, reference is typically made to the importance of increasing accessions to, and effective implementation of, the 1951 Convention and Protocol, before a distinct and further call is made for states to 'scrupulously observ[e] the principle of *non-refoulement*.'[91] In 1989 the General Assembly strengthened the language by invoking the phrase 'fundamental prohibitions' against 'the return or expulsion of refugees and asylum-seekers'[92] a form of words repeated in subsequent resolutions that have called on states 'to respect scrupulously the fundamental principle of *non-refoulement'*.[93]

The consistency of this affirmation and the clarity and lack of ambiguity with which it has been expressed provide very compelling evidence of *opinio juris* as to the customary nature of the principle of *non-refoulement*.[94] Such indications were further strengthened by the passage of *Resolution 57/187 (2001)* in which the General Assembly welcomed the Declaration adopted at the Ministerial Meeting of States Parties to the Convention and/or its Protocol.[95] This Declaration includes the following statement,

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[90] UNGA Res. 57/187, 18 December 2002; UNGA Res. 32/67, 8 December 1977; UNGA Res. 33/26, 29 November 1978; UNGA Res. 34/60, 29 November 1979; UNGA Res. 35/41, 25 November 1980; UNGA Res. 36/125, 14 December 1981; UNGA Res. 37/195, 18 December 1982; UNGA Res. 38/121, 16 December 1983; UNGA Res. 39/140, 14 December 1984; UNGA Res. 40/118, 13 December 1985; UNGA Res. 41/124, 4 December 1986; UNGA Res. 42/109, 7 December 1985; UNGA Res. 43/117, 8 December 1988; UNGA Res. 44/137, 15 December 1989; UNGA Res. 46/106, 16 December 1991; UNGA Res. 47/105, 16 December 1992; UNGA Res. 48/116, 20 December 1993; UNGA Res. 49/169, 23 December 1994; UNGA Res. 50/152, 21 December 1995; UNGA Res. 51/75, 12 December 1996; UNGA Res. 52/103, 9 February 1998; UNGA Res. 53/125, 12 February 1999; UNGA Res. 54/146, 22 February 2000; UNGA Res. 55/74, 12 February 2001; UNGA Res. 56/137, 19 December 2001; UNGA Res. 57/187, 18 December 2002; UNGA Res. 58/151, 22 December 2003; UNGA Res. 59/170, 20 December 2004; UNGA Res. 60/129, 20 January 2006; UNGA Res. 61/137, 25 January 2007; UNGA Res. 62/124, 24 January 2008; UNGA Res. 63/148, 18 December 2008; UNGA Res. 63/127, 15 January 2009; UNGA Res. 65/194, 28 February 2011; UNGA Res. 64/127, 15 January 2010; UNGA Res. 66/133, 19 March 2012; UNGA Res. 67/149, 6 March 2013; UNGA Res. 68/141, 28 January 2014; UNGA Res. 69/152, 17 February 2015.

[91] UNGA Res. 34/60, 29 November 1979.

[92] UNGA Res. 44/137, 15 December 1989.

[93] UNGA Res. 49/169, 23 December 1994; UNGA Res. 44/137, 15 December 1989; Resolution 46/106, 16 December 1991; Resolution 47/105, 16 December 1992; Resolution 48/116, 20 December 1993; Resolution 49/169, 23 December 1994; Resolution 51/75, 12 December 1996.

[94] For arguments in support of this point, see Goodwin-Gill 2014, Kälin et al. 2011, at 1344–1345.

[95] Kälin et al. 2011, at 1344.

> 4. Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, *whose applicability is embedded in customary international law* …[96]

Although the Declaration was made only by states party to the 1951 Convention and/or 1967 Protocol, its endorsement by the General Assembly ensures that it has the approval and agreement of all members of the United Nations.[97] In our view this provides further compelling evidence that there is *opinio juris* sufficient to solidify *non-refoulement* as a norm of customary international law.

Of course, these developments would be far less significant had there been a pattern of dissent or abstention in relation to the adoption of the relevant resolutions.[98] As Michael Wood, the ILC Special Rapporteur on customary international law has explained, one must consider 'the method employed for adopting the resolution; the voting figures (where applicable); and the reasons provided by States for their position'.[99] A resolution adopted by consensus or by unanimous vote 'will necessarily carry more weight than one supported only by a two-thirds majority of States'.[100] In this regard, it is highly significant that the 40 resolutions that have recognised the principle of *non-refoulement,* including the endorsement of the Declaration that states that *non-refoulement* is 'embedded in customary international law,' have been widely accepted and subject neither to negative votes nor abstentions.[101]

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[96] Emphasis added. We acknowledge that the phrase 'embedded in' is rather curious language from the perspective of international law, because a norm either is or is not a customary norm. However given that 'embedded' is not a term of art nor does it have any specific meaning, the most logical conclusion is that the Declaration provides further compelling evidence of the international community's acceptance of *non-refoulement* as a customary norm.

[97] Kälin et al. 2011, at 1344.

[98] We note that in the past the US government has disputed that *non-refoulement* is a norm of customary international law, yet does not appear to have distanced itself in any way from these GA resolutions. In *Case concerning Military and Paramilitary Activities in and against Nicaragua* the ICJ took into account that the US had not issued statements qualifying its agreement or acceptance of similar resolutions and declarations. *Case concerning Military and Paramilitary Activities in and against Nicaragua*, at 107 [203]-[204].

[99] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, para 49.

[100] Boyle and Chinkin 2007, at 226.

[101] See Article 18 of the 1945 Charter of the United Nations, 1 UNTS XVI (UN Charter); and Rules 82–95 of United Nations, Rules of procedure of the General Assembly, UN Doc. A/520/Rev.17, 2008. These concern voting in the General Assembly. For further discussion of consensus voting in this context, see Goodwin-Gill and McAdam 2007, at 346–347. Importantly Hathaway concedes that these resolutions go 'some distance in support of the claim that there is *opinio juris* for a duty of *non-refoulement* owed to more than just Convention refugees.' Hathaway 2010, at 512.

10.3.2.2 Executive Committee of the UNHCR

While the resolutions passed by the General Assembly are particularly significant given that it is a forum with near universal participation, it is recognised that 'other meetings and conferences of States may be important' in forming and identifying customary international law, including the work of 'organs of international organizations and international conferences with more limited membership'.[102]

In the context of *non-refoulement*, it is instructive to consider the work of the UNHCR Executive Committee which currently consists of 98 members, including a number of states that have ratified neither the 1951 Convention nor 1967 Protocol and yet host very large numbers of refugee populations.[103] The consensus reached by the Executive Committee in the course of its discussions is expressed in the form of Conclusions on International Protection (ExCom Conclusions). These conclusions are adopted by consensus, hence constituting particularly authoritative statements by a large group of states focused on issues of international protection.

It is significant that since 1975 the Executive Committee has repeatedly called for both states and non-states party to the relevant treaties 'scrupulously to observe the principle whereby no refugee should be forcibly returned to a country where he fears persecution'.[104] *Non-refoulement* is variously described as a 'fundamental principle,'[105] a 'fundamental prohibition',[106] a 'cardinal principle',[107] a 'humanitarian legal principle',[108] a 'recognized principle',[109] a principle of 'fundamental

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[102] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, para 46. Here we focus on ExCom, however we note that Goodwin-Gill and McAdam provide examples of other methods by which the United Nations has recognised the importance of the principle of *non-refoulement*. Goodwin-Gill and McAdam 2007, at 213–215.

[103] See below.

[104] UNHCR, Executive Committee Conclusion No 1 (XXVI), 15 October 1975, para (b); UNHCR, Executive Committee Conclusion No 19 (XXXI), 16 October 1980, para (a); UNHCR, Executive Committee Conclusion No 71 (XLIV), 8 October 1993, para (g); UNHCR, Executive Committee Conclusion No 108 (LIZ), 10 October 2008, para (a).

[105] UNHCR, Executive Committee Conclusion No. 16 (XXXI), 9 October 1998, para (e); UNHCR, Executive Committee Conclusion No. 21 (XXXII), 21 October 1981, para (f); UNHCR, Executive Committee Conclusion No. 22 (XXXII), 21 October 1981, para (2); UNHCR, Executive Committee Conclusion No. 33 (XXXV), 18 October 1984, para (c); UNHCR, Executive Committee Conclusion No. 74 (XLV), 7 October 1994, para (g); UNHCR, Executive Committee Conclusion No. 94 (LIII), 8 October 2002, para (c)(i); UNHCR, Executive Committee Conclusion No. 99 (LV), 8 October 2004, para (l); UNHCR, Executive Committee Conclusion No. 80 (XLVII), 11 October 1996, para (e)(iii); UNHCR, Executive Committee Conclusion No. 100 (LV), 8 October 2004, para (i).

[106] UNHCR, Executive Committee Conclusion No. 50 (XXXIX), 10 October 1988, para (g); UNHCR, Executive Committee Conclusion No. 55 (XL), 13 October 1989 para (d).

[107] UNHCR, Executive Committee Conclusion No. 65 (XLII), 11 October 1991, para (c).

[108] UNHCR, Executive Committee Conclusion No. 19 (XXXI), 16 October 1980, para (a).

[109] UNHCR, Executive Committee Conclusion No. 15 (XXX), 16 October 1979, para (b).

importance',[110] with recognition of 'the fundamental character of the generally recognized principle'.[111] As in the case of General Assembly resolutions, the principle of *non-refoulement* is described as distinct and independent of treaty obligations;[112] hence there is no suggestion in any of these resolutions that its application is confined to states party to the 1951 Convention and/or Protocol.[113] Rather, the Executive Committee often calls on '*all States* to abide by their international obligations in this regard'.[114]

10.3.2.3 Contrary Indications?

Despite acknowledging the significance that is appropriately to be placed on the above indicators, particularly relevant General Assembly resolutions,[115] Hathaway argues that these must be weighed against contrary indications, 'in particular those emanating from states not already bound by a treaty-based duty of *non-refoulement*'.[116] In his view, 'the major contraindication is the persistent refusal of most states of Asia and the Middle East to be formally bound by the asserted comprehensive duty of *non-refoulement'*.[117] He argues that the 'persistent reluctance of the majority of states in Asia and the Middle East to embrace a comprehensive legal duty to protect refugees and other against *refoulement'* is especially problematic because particular attention should be given to the views of states 'specially affected' by the phenomenon sought to be regulated.[118] Since most refugees are

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[110] UNHCR, Executive Committee Conclusion No. 79 (XLVII), 11 October 1996, para (j). UNHCR, Executive Committee Conclusion No. 81 (XLVIII), 17 October 1997, para (i).

[111] UNHCR, Executive Committee Conclusion No. 17 (XXXI), 16 October 1980, para (b).

[112] See for example UNHCR, Executive Committee Conclusion No. 103 (LVI), 7 October 2005, para (m). '*Affirms* that relevant international treaty obligations, where applicable, prohibiting *refoulement* represent important protection tools to address the protection needs of persons who are outside their country of origin and who may be of concern to UNHCR but who may not fulfil the refugee definition under the 1951 Convention and/or its 1967 Protocol; and *calls upon* States to respect the fundamental principle of *non-refoulement*.'.

[113] See, for example, UNHCR, Executive Committee Conclusion No. 102 (LVI), 7 October 2005, para (j). '*Recalls* its Conclusions No 6 (XXVII) and 7 (XXVIII), as well as numerous subsequent references made in its other Conclusions to the principle of *non-refoulement*; *expresses* deep concern that refugee protection is seriously jeopardised by expulsion of refugees leading to refoulement; and *calls on* States to refrain from taking such measures and in particular from returning or expelling refugees contrary to the principle of *non-refoulement*.'.

[114] UNHCR, Executive Committee Conclusion No. 50 (XXXIX), 10 October 1988, para (g) (emphasis added).

[115] Hathaway 2010, at 512. He acknowledges that GA resolutions are 'noteworthy and goes some distance in support of the claim that there is *opinio juris* for a duty of *non-refoulement* owed to more than just Convention refugees.'.

[116] Ibid., at 512–513.

[117] Ibid., at 513.

[118] Ibid., at 514.

hosted in these regions,[119] he concludes that the assertion of universal *opinio juris* 'based on General Assembly resolutions is especially fragile.'[120]

In the *North Sea Continental Shelf Case*, the ICJ explained that due regard should be given to the *practice* (not *opinio juris*) of 'States whose interests [are] specially affected.'[121] However, there is some debate surrounding how to measure this criterion, and indeed it has been observed that 'not all areas … allow a clear identification of 'specially affected' states.'[122] Hathaway assumes that identification of such states turns on which countries host the highest numbers of refugees,[123] although it is not clear whether this is to be measured in gross terms, per capita or relative to GDP. More fundamentally it is not clear that the concept of 'specially affected' states turns on such a quantitative assessment, especially given the potential fluidity of this notion in the context of a normative human rights principle.[124]

The notion of 'specially affected states' makes sense in relation to a norm that has particular relevance to some states due to its material or tangible pertinence, for example, the question whether the equidistance principle is the appropriate method for delimiting the continental shelf as between neighbouring countries has limited if any relevance to a land-locked state; hence the notion of states 'specially affected' has some logic in that context.[125] However, as Chetail sensibly points out, the notion of 'specially affected states' is of limited value in 'matters of common interest, such as human rights or international migration'.[126] As he observes, in the context of immigration, every State is affected by the movement of persons, 'whether as a country of emigration, transit or immigration'.[127] In this regard it is notable that the concept was *not* relied upon by the ICJ in either its *Nuclear Weapons Opinion* or *Nicaragua*, cases whose subject matter much more closely aligns with the concept of *non-refoulement* than the question of a delimitation of

[119] Ibid.

[120] Ibid.

[121] *North Sea Continental Shelf Cases*, para 74.

[122] M. Wood, Special Rapporteur, Second report on identification of customary international law, UN Doc. A/CN.4/672, 22 May 2014, para 37 (citing Danilenko 1993, at 95).

[123] Hathaway 2010, at 514. Although note that he is discussing this element in the context of *opinio juris* not practice.

[124] For a very different approach to the idea of specially affected states, see M. Wood, Special Rapporteur, Second report on identification of customary international law, UN Doc. A/CN.4/672, 22 May 2014, n. 167.

[125] *North Sea Continental Shelf Cases.*

[126] Chetail 2012, at 75. See also views of ICJ in *Legality of the Threat or Use of Nuclear Weapons* cited in M. Wood, Special Rapporteur, Second report on identification of customary international law, UN Doc. A/CN.4/672, 22 May 2014, n. 165.

[127] Chetail 2012, at 75.

the continental shelf as between states.[128] Hence as a jurisprudential matter it is simply not clear that it has ever been intended to apply to this normative human rights-based context.

In any event, even if it were an appropriate indicator in the *non-refoulement* context, it is not at all clear that the argument invoking 'specially affected' states detracts from the overwhelming evidence of *opinio juris* outlined above.

First, the core of the argument relies on the supposition that inaction in the form of failure to ratify the Refugee Convention can be taken as a rejection of *opinio juris* in relation to the customary principle of *non-refoulement*.[129] While in some circumstances inaction may be relevant to ascertaining custom, for example, where it may 'serve as evidence of acceptance as law',[130] there is scant judicial authority to support reliance on non-ratification of a treaty in this context[131]; rather this analysis distorts the usual context in which inaction is relevant to establishing custom.[132]

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[128] Indeed, in *Legality of the Threat or Use of Nuclear Weapons*, Judge Weeramantry rejected the argument in relation to 'specially affected states on the basis that 'Every nation in the world is specially affected by nuclear weapons, for when matters of survival are involved, this is a matter of universal concern'. Ibid., Dissenting Opinion of Judge Weeramantry, at 536.

[129] As noted above, Hathaway 2010, at 512–513 relies on the lack of ratification of the Refugee Convention among most states in Asia and the Middle East as 'the major contraindication' to a finding of *opinio juris* based on General Assembly Resolutions.

[130] International Law Commission, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th Session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, para 3. Also see M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 14, para 26.

[131] In the ICJ's judgment in the *Asylum Case*, the Court held that even if Columbia had been able to assert a customary rule as between certain Latin American states, it could not be invoked against Peru because Peru had repudiated the customary rule 'by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a [relevant] rule'. *Asylum Case* (*Columbia v Peru*), ICJ, Judgment, 20 November 1950, para 278. However that decision is now 65 years old and the more recent cases on custom have not invoked this reasoning. On the contrary, in *C and others v Director of Immigration and another* the Director had relied on the fact that Hong Kong, like most jurisdictions in Asia, 'has never recognized any form of legal obligation to adhere to a norm of international custom concerning the refoulement of refugees.' *C and others v Director of Immigration and another*, para 71. Hartmann J regarded this as 'not decisive' because 'a rule of customary international law maintains its independent existence even though the rule has partially or even exactly been codified in a treaty.' *C and others v Director of Immigration and another*, para 72.

[132] See ILC discussion in M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 9–14. Interestingly in *C and others v Director of Immigration and another*, the Hong Kong Court of Appeal questioned the decision of the judge below who had found that the norm of *non-refoulement* equated to CIL but Hong Kong was a persistent objector. In declining to agree with the view on appeal, the Court found that although the Hong Kong government had stated many times that it could remove refugees (similar to some of the evidence relied on by Hathaway 2010), these actions could have been relevant to the 'non-applicability of the RC to Hong Kong'; indeed the Court noted that it had not been referred 'to any clear statements where there has been a disassociation from the process of the development of the concept of *non-refoulement* of refugees into a CIL.' *C and others v Director of Immigration and another*, para 72.

Indeed, there is ample evidence to rebut the assumption that failure to ratify one particular convention embodying *non-refoulement* equates to a rejection of the norm of *non-refoulement*. Most states in Asia and the Middle East *have* assumed formal obligations in relation to *non-refoulement* in the form of ratification of express *non-refoulement* obligations in the *Convention Against Torture* or the International Convention for the Protection of all persons from Enforced Disappearance,[133] or implied *non-refoulement* obligations embodied in the *International Covenant on Civil and Political Rights.*[134] Hence, it is highly questionable whether one can assume that these states categorically reject *non-refoulement* as a legal concept simply because they have not ratified the Refugee Convention and Protocol. Considering that the Refugee Convention embodies a far wider range of obligations than the principle of *non-refoulement* alone, there may be many complex reasons why some states have declined to ratify. It is impossible to assume that a single factor explains the decision not to ratify in every case.

In addition, there are region-specific initiatives that although non-binding, are consistent with, not in contradiction to, the recognition of the fundamental principle of *non-refoulement* in the more populous fora such as the General Assembly. As is the case in other regions including Latin America[135] and Africa,[136] in Asia the principle of *non-refoulement* is recognised in the region-specific *Bangkok Principles on the Status and Treatment of Refugees*, which were developed by the Asian-African Legal Consultative Committee in 1966 and revised in 2001.[137] More recently, member States of the Association of Southeast Asian Nations

[133] Only six states in these regions have thus far ratified this Convention, but some have signed and not yet ratified, and it must be recognized that this treaty only came into force in 2010 and has only 51 parties to date (as at 24 November 2015).

[134] Hathaway acknowledges this. Hathaway 2010, n. 67. While designations 'Asia' and 'Middle East' do not have a precise meaning, our analysis suggests that approximately 41 states who arguably fall within this description have ratified the CAT, 30 have ratified the ICCPR, and 4 have ratified the Convention against Enforced Disappearance.

[135] Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984 (Cartagena Declaration); and more recent Brasilia Declaration on the Protection of Refugees and Stateless Persons in Americas, 11 November 2010 (Brasilia Declaration).

[136] African Union, The Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa, 23 October 2009 (Kampala Declaration), para 6. 'We undertake to deploy all necessary measures to ensure full respect for the fundamental principle of *non-refoulement* as recognised in International Customary Law.'.

[137] Article III(1) of the Bangkok Principles on the Status and Treatment of Refugees (Bangkok Principles) provides that: 'No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion. The provision as outlined above may not however be claimed by a person when there are reasonable grounds to believe the person's presence is a danger to the national security or public order of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.' Asian-African Legal Consultative Organization (AALCO), Bangkok principles on the status and treatment of refugees, 31 December 1966.

(ASEAN),[138] in late 2012 took a vital step towards establishing a 'framework for human rights cooperation in the region' by adopting the ASEAN Human Rights Declaration which provides that '[e]very person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.'[139] In the Middle East, Article 2 of the 1992 Declaration on the Protection of Refugees and Displaced Persons in the Arab World reaffirms 'the importance of the principle prohibiting the return or the expulsion of a refugee to a country where his life or freedom will be in danger and considers this principle as an imperative rule of the international public law',[140] while Article 23 of the 1994 Arab Charter on Human Rights recognises the right to political asylum, stating '[p]olitical refugees shall not be extradited'.[141] Further even states in these regions that are not bound by explicit *non-refoulement* obligations have made commitments to 'respect the principle of *non-refoulement'* in bilateral arrangements,[142] including in Memoranda of Understanding with the UNHCR.[143]

Even more compelling is the fact that non-ratification of the Refugee Convention has not prevented many states, most notably in recent times in the Middle East, from admitting (and not *refouling*) millions of refugees. As explained above, it is Syria's neighbours—Turkey, Lebanon and Jordan—that are currently protecting the overwhelming majority of the 4 million Syrian refugees. And indeed some of these

[138] Namely Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

[139] Association of Southeast Asian Nations (ASEAN), ASEAN human rights declaration, 18 November 2012, Article 16.

[140] Arabic-Islamic States, Declaration on the protection of refugees and displaced persons in the Arab world, 19 November 1992.

[141] League of Arab States, Arab Charter on Human Rights, 15 September 1994.

[142] For example, in the Arrangement between the Government of Australia and the Government of Malaysia on Transfer and Resettlement, 25 July 2011, *non-refoulement* was the only explicit obligation outlined, otherwise reference was made only to the far more vague 'dignity and respect and in accordance with human rights standards'. See *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*M70*') [2011] HCA 32, para 22.

[143] The UNHCR explains that the principle of *non-refoulement* is recognised in its Memorandum of Understanding with Jordan, even though Jordan is not a party to the Refugee Convention. See UNHCR, Global Appeal 2012–2013, Jordan, http://www.unhcr.org/4ec231020.pdf. Accessed 20 September 2015.

states have underpinned this protective stance with legislative support, as in the case of Turkey's 2014 *Law on Foreigners and International Protection* which provides within Sect. 2 entitled '*Non-refoulement'* the following core provision:

> 4 (1) No one within the scope of this Law shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.[144]

This domestic implementation in legally binding form of the principle of *non-refoulement* is powerful evidence that a State regards the principle as one with legal not merely moral implications.

A second reason for rejecting the argument that non-ratification of the Refugee Convention by 'specially affected states' undermines the cogency of the otherwise compelling evidence of *opinio juris* is that none of these so-called 'specially affected' states have dissented or abstained, or indeed subsequently sought to detract or renege on their participation in numerous General Assembly resolutions that have persistently and clearly affirmed the fundamental nature of the duty of *non-refoulement* as a stand-alone norm independent of treaty obligations.

Third, the non-ratification argument ignores the role that states from these regions play as members of the UNHCR Executive Committee, membership being open to non-states party.[145] As explained above, the Executive Committee has consistently emphasised the fundamental nature of the principle of *non-refoulement*, and these conclusions have been passed by consensus with the participation of countries from Asia and the Middle East which host very significant refugee populations notwithstanding a lack of ratification of the 1951 Refugee Convention and/or Protocol.

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[144] See Republic of Turkey, Ministry of Interior, Directorate General of Migration Management, Law on Foreigners and International Protection, 2014 (unofficial translation). http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf. Accessed 20 September 2015. The UNHCR notes that since the new Law on Foreigners and International Protection came into force in April 2014, the Directorate General of Migration Management has become the sole institution responsible for asylum matters. While Turkey still maintains the geographical limitation to the 1951 Convention, the law provides protection and assistance for asylum-seekers and refugees, regardless of their country of origin. See UNHCR, Country operations profile: Turkey, 2015, http://www.unhcr.org/pages/49e48e0fa7f.html. Accessed 20 September 2015.

[145] Indeed Lauterpacht and Bethlehem argue that members of the Executive Committee are 'specially affected states'. Lauterpacht and Bethlehem 2003, at 148. As does Kälin et al. after citing Excom conclusions; they state: 'the prohibition of refoulement can therefore be considered to be universally accepted as a legal obligation by States whose interests are especially affected.' Kälin et al. 2011, at 1344. See also UNHCR, The principle of non-refoulement as a norm of customary international law: response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, at 41.

These include Bangladesh,[146] India,[147] Jordan,[148] Lebanon,[149] Pakistan,[150] Thailand,[151] and Turkey.[152] Indeed, the fact that these states continue to host very large numbers of refugees despite not having ratified the 1951 Convention or Protocol, and at the same time to participate on the Executive Committee of the UNHCR, which consistently affirms the independent status of the norm of *non-refoulement,* is powerful evidence in support of a customary norm.[153]

In short there is no plausible argument to diminish the very powerful *opinio juris* expressed in General Assembly resolutions and the work of the UNHCR Executive Committee.[154]

10.3.3 State Practice

It is well recognised that state practice may take a variety of forms, and includes both physical and verbal acts.[155] As neatly summarised by the ILC,

> Forms of state practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organisation or

[146] As at December 2014, Bangladesh hosted 232.485 refugees and asylum-seekers according to UNHCR. See UNHCR, Sub-regions operations profile, South East Asia: Bangladesh, 2015, http://www.unhcr.org/pages/49e487546.html. Accessed 25 November 2015.

[147] As at December 2014, there were 205.012 refugees and asylum-seekers residing in India according to UNHCR. See UNHCR, Sub-regions operations profile, South Asia: India, 2015, http://www.unhcr.org/pages/49e4876d6.html. Accessed 25 November 2015.

[148] There are currently 633.664 'persons of concern' (refugees and asylum seekers) in Jordan. See UNHCR, Syrian refugee response: Jordan, 2015, http://data.unhcr.org/syrianrefugees/country.php?id=107. Accessed 20 September 2015.

[149] As at 31 October 2015, there are 1.075.637 Syrian refugees in Lebanon. See UNHCR, Syria regional refugee response: Lebanon, 2015, http://data.unhcr.org/syrianrefugees/country.php?id=122. Accessed 25 November 2015.

[150] As at December 2014, 1.5 m refugees and asylum-seekers reside in Pakistan. See UNHCR, Country operations profile: Pakistan, 2015, http://www.unhcr.org/pages/49e487016.html. Accessed 25 November 2015.

[151] As of December 2014 there are 138.169 refugees and asylum-seekers residing in Thailand. See UNHCR, Country operations profile: Thailand, 2015, http://www.unhcr.org/pages/49e489646.html. Accessed 25 November 2015.

[152] This is relevant because of Turkey's geographical reservation. As at 3 November 2015, Turkey hosts 2.181.293 Syrian refugees, see UNHCR, Syria regional refugee response: Turkey, 2015, http://data.unhcr.org/syrianrefugees/country.php?id=224. Accessed 25 November 2015.

[153] See also Mesinneo 2013, at 144.

[154] We agree that when *opinio juris* is so overpowering, it may support the notion that state practice is less important, see, for example, Kirgis 1987 (cited by Messineo 2013, at 143; and Goodwin-Gill 2014, at 444).

[155] International Law Commission, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, para 1. This is particularly important because of Hathaway's very lengthy argument against words as practice.

> at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.[156]

As is evident from this list, some factors are considered relevant *both* to establishing *opinio juris* and state practice, most importantly in this context, 'conduct in connection with resolutions adopted by an international organisation or at an international conference,'[157] a factor analysed in depth above. Since there 'is no predetermined hierarchy among the various forms of practice',[158] there is no legitimate basis on which to minimise the significance of verbal acts over physical acts in assessing state practice.

The key issue in the context of *non-refoulement* has focused on the degree of consistency required, at least in the context of physical conduct. It is clear that state practice must be sufficiently widespread so as to meet the definition of 'general practice' as provided in the ICJ Statute, yet it is well established that the practice need not be universal. In the *Asylum Case* in 1950, the ICJ referred to 'constant and uniform usage' as the relevant test.[159] Yet, as Wood notes, the 'exact number of States required for the "kind of 'head count' analysis of State practice" leading to the recognition of a practice as 'general' cannot be identified in the abstract'.[160]

The ICJ later clarified that while the relevant practice should be consistent, uniformity of practice is not required.[161] As the ICJ stated in *Nicaragua*,

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect … In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[162]

The Court further explained that,

> [i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[163]

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156 Ibid., para 2.

157 Ibid., at 3.

158 Ibid.

159 *Asylum Case*, at 277.

160 M. Wood, Special Rapporteur, Second report on identification of customary international law, UN Doc. A/CN.4/672, 22 May 2014, para 53.

161 It is worth recalling that the rule at issue in the *Asylum Case* was, in the words of the ICJ, 'of an exceptional character' as it 'involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned'. *Asylum Case*, at 275. It is little wonder then that the Court applied a high standard of proof, which was later softened in subsequent decisions.

162 *Case relating to Military and Paramilitary Activities in and against Nicaragua*, at 14.

163 Ibid.

In these passages, the Court appears to be distinguishing between the reactions of other states ('generally have been treated as breaches of that rule') and the reaction of the perpetrator state (a State …) to a relevant breach of a rule of custom.

In terms of domestic implementation of the norm of *non-refoulement*, it is significant that at least 125 states have incorporated the principle of *non-refoulement* in some form into their domestic law.[164] And indeed since the empirical assessment that produced this figure was undertaken, further examples can be cited, including in states that do not have universal *non-refoulement* obligations under the Refugee Convention.[165] Yet, some scholars have attached great weight to the fact that in practice the norm of *non-refoulement* is not always respected in contemporary international relations.[166] Like other human rights-based customary norms, such as torture, practice is not perfectly aligned with the norm. If such compliance were required, however, it would be impossible ever to identify a human rights-based customary norm given that we live in an imperfect world.[167] And yet, it is well recognised that most norms that have attained the status of customary international law and even *jus cogens* are human rights norms.[168] It is to this

[164] Lauterpacht and Bethlehem 2003, at 87; Kälin et al. 2011, at 1344.

[165] See, for example, Turkey, discussed above, which maintains a geographical exception and yet whose domestic law extends to refugees from any region. In addition, as a State Party to the ECHR, it is subject to human rights-based *non-refoulement*.

[166] Hathaway 2010. It should be acknowledged that Hathaway takes a very conservative approach to the identification of customary international law in general, accepting only the prohibition on racial discrimination to be established. Goodwin-Gill is critical of Hathaway's examples of non-compliance with non-*refoulement*, arguing that 'many of his examples involve general interference with the movements of people, rather than the actual return of those in need of protection to situations of persecution or conflict.' Goodwin-Gill 2014, at 451.

[167] Messineo argues that the 'question of state practice is precisely the one over which Hathaway construes an impossibly high threshold'. Messineo 2013, at 143. See also Henckaerts and Doswald-Beck citing *Nicaragua v United States of America* and noting that the ICJ's approach to contrary practice 'is particularly relevant for a number of rules of international humanitarian law where there is overwhelming evidence of verbal State practice supporting a certain rule found alongside repeated violations of that rule.' Henckaerts and Doswald-Beck 2009, at 44. See also Goodwin-Gill 2014, at 453. We note that the ILC has recognised that 'in some cases, a particular form (or particular instances) of practice, or particular evidence of acceptance as law, may be more relevant than in others; in addition, the assessment of the constituent elements needs to take account of the context in which the alleged rule has arisen and is to operate.' M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 7–8. In this context, the work of Thirlway is cited, who argues that the element of practice in the special domain of human rights law 'may be of a different character from that generally required to establish custom.' See M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, note 32.

[168] We note that in the context of state practice as relevant to the interpretation of the Refugee Convention (pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties), Hathaway argues that 'while state practice is often of clear value in the interpretation of bilateral treaties involving purely interstate interests, there are good reasons to read this provision narrowly as a guide to the construction of multilateral treaties in general, and of multilateral human rights in particular'. Hathaway 2005, at 68. While articulated in relation to treaty interpretation rather than the formation of customary international law, it embodies the modern approach to the formation of custom which has been described as a deductive process 'that begins with statements of rules, rather than particular instances of practice.' See Goodwin-Gill 2014, at 446 (citing Roberts 2001).

apparent paradox that the ICJ speaks in *Nicaragua*. As the ICJ's jurisprudence indicates, what is significant in this context is not whether there is state practice that is inconsistent with the putative norm, but rather the reaction of both the international community and the offending state in question to such action.

Significant in this regard is that where the UNHCR has reported instances of *refoulement* to the General Assembly, the General Assembly has repeatedly responded by 'deplor[ing] the *refoulement* and unlawful expulsion of refugees and asylum-seekers.'[169] The UNHCR Executive Committee has reacted in a similar manner. For example, as early as 1979 the Executive Committee recognised that returning refugees to persecution 'constitutes a grave violation of the recognized principle of *non-refoulement'*.[170] In 1988 it 'expressed deep concern that the fundamental prohibitions against expulsion and *refoulement* are often violated by a number of States and appealed to all States to abide by their international obligations in this regard and to cease such practices immediately'.[171] A year later it expressed its 'deep concern' that some states had engaged in *refoulement*, and called on all states to refrain from 'returning or expelling refugees *contrary to fundamental prohibitions against these practices*',[172] and has continued since to 'deplore' violations of the principle.[173] Such statements, which have been repeated in numerous Executive Committee Conclusions, are unambiguous in indicating that *refoulement* is unlawful as a matter of international law.[174]

Turning to the reaction of the 'perpetrator' states, in *Nicaragua*, the Court assessed whether instances of foreign intervention were 'illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State'.[175] Although the Court acknowledged the existence of State conduct 'prima facie inconsistent with the principle of non-intervention',[176] the Court found that such interventions were either justified by the relevant State 'solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack',[177] or justified on a political rather than legal level.[178]

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169 UNGA Res. 64/127, 27 January 2010. See also UNGA Res. 33/26, 29 November 1978.

170 UNHCR, Executive Committee Conclusion No 15 (XXX), 16 October 1979, para (b).

171 UNHCR, Executive Committee Conclusion No 50 (XXXIX), 10 October 1988, para (g).

172 UNHCR, Executive Committee Conclusion No 55 (XL) 13 October 1989, para (d), emphasis added. See also UNHCR, Executive Committee Conclusion No 15 (XXX), 16 October 1979.

173 UNHCR, Executive Committee Conclusion No 85 (XLIX), 9 October 1998, para (q). See also UNHCR, Executive Committee Conclusion No 79 (XLVII), 11 October 1996, para (i).

174 See, for example, as early as 1977 a UNHCR conclusion, where it noted that refugees had been subjected to rights abuses such as physical violence, but in describing non-refoulement used distinctive language, viz, 'measures of forcible return in disregard of the principle of *non-refoulement*'. UNHCR, Executive Committee Conclusion No 3 (XXVIII), 12 October 1977, para (a).

175 *Case relating to Military and Paramilitary Activities in and against Nicaragua,* para 206.

176 Ibid., para 207.

177 Ibid., para 208.

178 Ibid., paras 207–208.

Similarly, it is noteworthy that individual states that engage in *refoulement* in practice tend to justify such action but not on the grounds that the State is entitled as a matter of international law freely to return a refugee to persecution.[179] As explained by Justice Yuen of the Hong Kong Court of Appeal (with whom Cheung CJHC and Lam J agreed),

> [i]n my view what is important is that since the [Refugee Convention] (which is now in its 50th year), no State has explicitly asserted that it is entitled, *solely as a matter of legal right in public international law,* to return genuine refugees to face a well-founded fear of persecution, and has openly done so. Clearly the [Refuge Convention] has had an impact, even on non-signatory States, and has helped to create a CIL of *non-refoulement* of refugees. In conclusion on this issue, I would agree with the learned judge that on balance, the Appellants are correct in asserting that the concept of *non-refoulement* of refugees has developed into a CIL.[180]

States rather tend to explain their action by reference to an exception or justification that supports rather than undermines the customary norm.[181]

One of the factors that has been overlooked in much of the debate surrounding the customary status of *non-refoulement* is the role of the United Nations High Commissioner for Refugees in its capacity as an international organisation independent of the work of its members states. As the ILC has highlighted, while conduct by such non-State actors does not constitute practice for customary international law purposes,[182] in certain cases it 'contributes to the formation, or

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[179] As Chetail explains, no State 'claims to possess an unconditional right to return a refugee to a country of persecution.' Instead, 'they attempt to justify such conduct by invoking exceptions or by alleging that returnees are not refugees.' Chetail 2012, at 76–77.

[180] *C and others v Director of Immigration and another*, at paras 66–67 (emphasis in original).

[181] The UNHCR notes that cases in which a government has stated to UNHCR that it does not recognise any obligations to act in accordance with the principle of *non-refoulement* 'have been extremely rare.' UNHCR, The principle of non-refoulement as a norm of customary international law: response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in cases 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, at 6. In the San Remo declaration on the principle of non-refoulement, San Remo, Italy, September 2001 it is observed: 'The telling point is that, in the last half-century, no State has expelled or returned a refugee to the frontiers of a country where his life or freedom would be in danger—on account of his race, religion, nationality, membership of a particular social group or political opinion—using the argument that refoulement is permissible under contemporary international law. Whenever refoulement occurred, it did so on the grounds that the person concerned was not a refugee (as the term is properly defined) or that a legitimate exception applied.' Indeed, Hathaway acknowledges that 'where an effort to justify refoulement is made, states tend to offer only blunt and unsubstantiated assertion that those seeking protection are not refugees, or that the political cost of protection is too high.' Hathaway 2010, at 518. However, this appears to support the notion that the norm is binding on those states, not the opposite. See also Goodwin-Gill and McAdam 2007 at 353.

[182] See M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 54, para 79.

expression, of rules of customary international law.'[183] For example, the conduct of international organisations 'may serve to catalyse State practice'.[184]

In this regard it is important to note that the UNHCR has consistently argued for decades that the principle of *non–refoulement* has attained the status of customary international law,[185] and this expression of principle has elicited relevant responses from states. As the UNHCR observes, there have been numerous cases in which the High Commissioner has been required to make representations to non-party states, and 'it is here that the Office has necessarily had to rely on the principle of *non-refoulement* irrespective of any treaty obligation'.[186] As the UNHCR explains:

> the Governments approached have almost invariably reacted in a manner indicating that they accept the principle of *non-refoulement* as a guide for their action. They indeed have in numerous instances sought to explain a case of actual or intended refoulement by providing additional clarifications and/or claiming that the person in question was not to be considered a refugee. The fact that States have found it necessary to provide such explanations or justifications can reasonably be regarded as an implicit confirmation of their acceptance of the principle.[187]

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[183] International Law Commission, Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee, 67th session of the ILC, UN Doc. A/CN.4/L.869, 14 July 2015, at 2. Draft conclusion 4(5), adopted in 2014, no change proposed in 2015. See M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 54, para 79.

[184] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 51, para 75.

[185] One of its earliest pronouncements was in the UNHCR's Principle of non-refoulement as a norm of customary law. UNHCR, The principle of non-refoulement as a norm of customary international law: response to the questions posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994. See also UNHCR, Statement on the right to asylum, UNHCR's supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility, 2012, para 2.1.2; UNHCR, Advisory opinion on the extraterritorial application of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 2007, paras 14–16. See also numerous interventions as *amicus* in domestic jurisdictions; for example, *McNary, Commissioner, INS v Haitian Centers Council,* Supreme Court of the United States, October 1992, No. 92-344, Brief *Amicus Curiae* of the Office of the United Nations High Commissioner for Refugees, at 16–21, http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3f336bbc4. Accessed 17 December 2015; *CPCF v Minister for Immigration* [2015] HCA 1, High Court of Australia, Submissions of the Office of the UNHCR, submissions dated 16 September 2014, paras 34–39.

[186] UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal republic of Germany in Cases 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, para 5.

[187] Ibid. See also Goodwin-Gill and McAdam 2007, at 351–352.

10.3.4 Subsidiary Means for the Determination of Customary International Law

Article 38 of the ICJ Statute refers to 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. It is significant that where domestic courts have been required to examine the issue in depth, they have drawn the conclusion that '[t]he prohibition on *refoulement*, contained in Article 33.1 of the Refugee Convention, is generally thought to be part of customary international law'.[188] In Hong Kong, where the courts have been required to grapple most directly and hence in most depth with the question,[189] Justice Hartmann of the Hong Kong High Court concluded:

> I have taken note of the dissenting voices. I have reminded myself of the dangers of legal wishful thinking: considering it right that it should be so and therefore making it so. On balance, however, it seems to me that today it must be recognised that the principle of *non-refoulement* as it applies to refugees has grown beyond the confines of the Refugee Convention and has matured into a universal norm of customary international law.[190]

On appeal, following further comprehensive analysis, the Court affirmed that 'the appellants are correct in asserting that the concept of *non-refoulement* of refugees has developed into a CIL'.[191]

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[188] See, for example, *Zaoui v. Attorney-General (no 2)* [2005] 1 NZLR 690, Glazebrook J, para 34. 'The prohibition on refoulement, contained in Article 33.1 of the Refugee Convention, is generally thought to be part of customary international law, the (unwritten) rules of international law binding on all States, which arise when States follow certain practices generally and consistently out of a sense of legal obligation.' We note that in the Supreme Court the issue was not necessary to resolve, although the Court appears to assume that this is correct by noting that because New Zealand is a party to the Convention 'the customary rule cannot add anything by way of interpretation to the essentially identical treaty provision.' *Attorney-General v. Zaoui* (2006) 1 NZLR 289, para 35. The Israeli Supreme Court sitting as a High Court of Justice has held, referring to Article 33 of the Refugee Convention, '[t]his is a principle of international customary law that is also manifested in domestic Israeli law, according to which the State of Israel does not remove a person to a place where he faces danger to his life or liberty (see *Al-Tai v. Minister of Interior*, *Pisk ei Din* 49(3) 843 (1995)).' HCJ 7146/12, MAA 1192/13, AAP 1247/13 (2013), para 8, unofficial translation, http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5277555e4. Accessed 20 September 2015. See also Ziegler 2015. We are grateful to Ruvi Ziegler for alerting us to this decision. In *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* it was unnecessary for the Court to decide this question; hence Lord Bingham referred to 'that principle, even if one of CIL', not assisting the applicants in that case. See *R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, Lord Bingham, para 26. However, his Lordship did refer to the notion that there was 'general acceptance of the principle' of *non-refoulement*. Ibid.

[189] *C and others v Director of Immigration and another*. This litigation is significant as it represents the first clear exposition, at least at common law, of the customary status of *non-refoulement*. See Jones 2009, at 450.

[190] *C and others v Director of Immigration and another*, para 113.

[191] Ibid., para 67. We note that on appeal to the Final Court of Appeal the issue was not raised. *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong Court of Final Appeal, 25 March 2013.

In terms of international courts, we note that the International Criminal Court has observed:

> The 'non-refoulement' principle is considered to be a norm of customary international law and is an integral part of international human rights protection. All individuals are entitled to enjoy its application by a State.[192]

Article 38 of the ICJ Statute also identifies 'the teachings of the most highly qualified publicists of the various nations' as 'subsidiary means for the determination of rules of law'.[193] As recognised by the ILC, the teachings of publicists is 'potentially relevant in respect of all the formal sources of international law, and this is especially so for customary international law'.[194] The ILC emphasises that in this regard special importance may be attributed to collective works including texts and commentaries emerging from private bodies such as the Institute of International Law, and the International Law Association.[195]

In the context of refugee law, not only is the weight of scholarly opinion overwhelmingly in favour of the recognition of *non-refoulement* as customary international law, but there is strong support from the collective work of experts. For example, in 2001 on the occasion of the 50th anniversary of the Refugee Convention, the International Institute of Humanitarian Law in cooperation with the United Nations High Commissioner for Refugees convened an expert roundtable which ultimately adopted the *San Remo Declaration on the Principle of Non-refoulement* as follows:

> The Principle of *Non-refoulement* of Refugees incorporated in Article 33 of the Convention relating to the Status of Refugees of 28 July 1951 is an integral part of customary international law.[196]

In its accompanying note the Institute explained that this conclusion was reached 'on the basis of the general practice of States supported by a strong *opinio*

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[192] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC, Judgment pursuant to Article 74 of the Statute, No. ICC-01/04-02/12, 18 December 2012; and *Hirsi Jamaa and Ors v. Italy*, ECtHR, No. 27765/09, 23 February 2012, Separate Concurring Opinion of Judge Pinto de Albuquerque, para 68.

[193] Article 38(1)d) of the 1945 Statute of the International Court of Justice, 33 UNTS 993.

[194] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 41, para 55.

[195] Ibid., at 45, para 65.

[196] Council of the International Institute of Humanitarian Law, San Remo Declaration on the principle of non-refoulement, September 2001. The declaration was adopted 'bearing in mind the Institute's long-term interest in and association with the development and codification of international law pertaining to the status of refugees'. See also the Summary Conclusions adopted by an Expert roundtable organised by the UNHCR and the Lauterpacht Research Centre for International Law, University of Cambridge, 9–19 July 2001 in which they concluded that, '*[n]on-refoulement* is a principle of customary international law.' Summary conclusions: the principle of *non-refoulement,* in Feller et al. 2003, at 178–179.

juris.'[197] There is hence no question that the Institute's Declaration reflects its view as to the existing law (*lex lata)* rather than positing the progressive development of the law (*lex ferenda)*.[198]

10.3.5 The Scope of the Customary International Law Norm of Non-refoulement

Having established that there is overwhelming evidence in support of the conclusion that *non-refoulement* has attained the status of a customary international norm, the final issue to clarify is its scope.[199] The key challenge is that there is often no definition of the beneficiary class in the numerous General Assembly resolutions or Executive Committee Conclusions on this point, and many of the sources relied upon above are similarly imprecise. However, this difficulty is more apparent than real, as there is clear consensus on at least a minimum core of the principle. Hence although as in *Nicaragua*, there is a question as to the 'exact content of the principle',[200] this does not detract from the cogency of the claim that at least a minimally defined concept has achieved the status of custom.[201]

In relevant ExCom conclusions the 'principle of *non-refoulement'* has been described as one:

> which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion … or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture …[202]

This in effect encapsulates the beneficiary class defined in the Refugee Convention, which at a minimum, reflects the customary norm given that when states, judges, international organisations and scholars refer to *non-refoulement* of

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[197] Council of the International Institute of Humanitarian Law, San Remo Declaration on the principle of non-refoulement, Explanatory Note, September 2001.

[198] M. Wood, Special Rapporteur, Third report on identification of customary international law, UN Doc. A/CN.4/682, 27 March 2015, at 45, para 65.

[199] We note that there is an additional question of scope involving whether the principle applies to both territorial and extraterritorial state action. While beyond the scope of this article to explore in detail, we observe that there is considerable consensus that the principle applies to any conduct attributed to a State, regardless of territorial connection: see Lauterpacht and Bethlehem 2003, at 149–150; see also 'Summary Conclusions: the principle of *non-refoulement*' in Feller et al. 2003, at 178–179.

[200] *Case relating to Military and Paramilitary Activities in and against Nicaragua*, para 205.

[201] Ibid. '[T]hose aspects of the principle which appear to be relevant to the resolution of the dispute.'

[202] UNHCR, Executive Committee Conclusion No 82 (XLVIII), 17 October 1997, para (d)(i). See also UNHCR, Executive Committee Conclusion No 79 (XLVII), 11 October 1996, para (j).

refugees, they typically explicitly,[203] or at least implicitly, refer to the term of art at international law. The addition of torture—independent of the refugee definition—is also well justified given the uncontroversial nature of both the customary and *jus cogens* nature of the prohibition of torture. As noted by the International Criminal Court:

> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 sets forth a similar rule to that contained in the Geneva Convention of 1951 and, although narrower in scope, has acquired customary status. It prohibits a State from expelling or extraditing a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.[204]

The fact that there remains some debate about whether the customary norm extends also to cruel, inhuman or degrading treatment or punishment[205] does not detract from the core of the normative claim.

10.4 The Customary Norm of *Non-refoulement* as *Jus Cogens*

Having examined in depth the customary basis of the norm of *non-refoulement* we now turn to the question whether this customary norm is recognised as *jus cogens* and what the implications for refugee protection would be should it be recognised as such. As demonstrated above, there is now ample evidence to support the claim that *non-refoulement* is customary international law. Our approach is to work from that premise to see additionally whether it has *jus cogens* status. Our method is 'customary international law plus', looking for the sources of additional authority to support that contention, above and beyond that which supports its customary international law status.

Two questions arise about this body of evidence: Would it be enough if the international community asserted that a customary international law norm was

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[203] See, for example, International Law Association, Resolution 6/2002, Refugee procedures: declaration on international minimum standards for refugee procedures, para 1. 'BEARING IN MIND the fundamental obligation of States not to return (*refouler*) a refugee in any manner whatsoever to a country in which his or her life or freedom may be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or in which he or she may be at risk of torture.' See also Council of the International Institute of Humanitarian Law, San Remo Declaration on the Principle of Non-Refoulement, September 2001, Explanatory Note, in noting that no state has expelled or returned a refugee using the argument that refoulement is permissible refers to returning a refugee 'to the frontiers of a country where his life or freedom would be in danger- on account to his race, religion, nationality, membership of a particular social group or political opinion.'.

[204] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui.*

[205] See Goodwin-Gill and McAdam 2007, at 337–339 and 351; Lauterpacht and Bethlehem 2003, at 1346.

jus cogens, or would there also have to be additional state practice as regards its non-derogable and peremptory character? We contend that under the 'customary international law plus' approach the practice and *opinio juris* that evidences customary international law need only be supplemented by sufficiently widespread *opinio* in order to support the claim that a norm is *jus cogens*.[206]

Secondly, in terms of the *opinio juris*, the question arises whether international statements need to invoke the magic words '*jus cogens*' or 'peremptory norm', or whether other terms will do. Here, we take the view that the nature of the endorsement must indicate that the norm be viewed as (a) universal (b) peremptory and (c) non-derogable. These formal characteristics of the norm can be conveyed in different language. In particular, we note the range of evidence cited by the ICJ in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, discussed above.

Several scholars have argued that *non-refoulement* is indeed *jus cogens*, notably Jean Allain, writing in 2002.[207] Like us, he assumes that *jus cogens* is identifiable if there is sufficient state practice, and if the *opinio juris* recognises the rule not only as one of custom, but of *jus cogens*.[208] Allain assumes that *non-refoulement* has attained the status of customary international law,[209] and examines whether it has been elevated to *jus cogens*. In support of his conclusion that it has indeed reached this status, he cites principally Executive Committee Conclusions, in particular Conclusion No 25 of 1982 which observed that *non-refoulement* was 'progressively acquiring the character of a peremptory rule of international law.'[210] Two later conclusions are also invoked which described *refoulement* respectively as 'contrary to fundamental prohibitions',[211] and 'not subject to derogation'.[212] Allain treats the statement that *non-refoulement* is not open to derogation as embodying a statement that the principle was *jus cogens*. His article both tacitly, and later explicitly,[213] treats non-derogability and *jus cogens* as functional equivalents.[214] This is simply incorrect as a matter of law. As discussed above, while non-derogability is one of the three formal indicia of a *jus cogens* norm (along with universality and peremptory character) that in itself is not sufficient. A statement to the effect that *non-refoulement* is non-derogable is a part of an account of

[206] Agreeing with Tasioulas 2016.

[207] Allain 2002, at 533.

[208] Ibid.

[209] Ibid., at 539, note 19.

[210] Ibid., at 539.

[211] UNHCR, Executive Committee Conclusion No 82 (XL), 13 October 1989 (cited by Allain 2002, at 539, note 22).

[212] UNHCR, Executive Committee Conclusion No 79 (XLVII), 11 October 1996 (cited by Allain 2002, at 539, note 23).

[213] Allain 2002, at 540–541. He states: '[a]s long as there is an insistence on the non-derogable nature of *non-refoulement*, its status is secure.'

[214] Ibid., at 540.

its acknowledgement as *jus cogens*, but not sufficient in itself to confer that character on a norm.

Orakhelashvili too treats *non-refoulement* as *jus cogens*. He states that *non-refoulement* 'which is enshrined both in Article 33 of the 1951 Geneva Convention on the Status of Refugees, as well as in customary law' is a 'firmly established peremptory norm related to the rights of an individual.'[215] His assertion is supported by the principle's 'inseparable link with the observance of basic human rights such as the right to life, freedom from torture and non-discrimination.' He contends that EXCOM Conclusion No. 25 confirms that the principle of *non-refoulement* amounts to a norm of *jus cogens*.[216] However, as we identify above, it did not state that *non-refoulement* was *jus cogens*, but that it was 'progressively acquiring' that character.

Some regional and domestic orders treat *non-refoulement* as *jus cogens*. Both Allain and Orakhelashvili cite the Cartagena Declaration on Refugees which affirms that this principle 'is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*'.[217] More recently Latin American and Caribbean governments have affirmed, in the Brazil Declaration of December 2014, that they 'recognize developments in the jurisprudence and doctrine of the Inter-American Court of Human Rights, regarding … the *jus cogens* character of the principle of *non-refoulement'*.[218]

There are a handful of examples of domestic or regional courts accepting the *jus cogens* status of *non-refoulement*. De Wet cites the example of the domestic declaration of a popular initiative in Switzerland invalid where it potentially violated *non-refoulement* as *jus cogens*.[219] In addition, we can point to the concurring opinion of Judge Pinto de Albuquerque in *Hirsi v Italy,* in which he stated that 'the prohibition of *refoulement* is a principle of customary international law, binding on all States, even those not parties to the UN Refugee Convention or any other treaty for the protection of refugees. In addition, it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted.'[220]

In contrast, other scholars have doubted that conclusion, albeit without subjecting the matter to particularly deep examination. Duffy regards *non-refoulement* as custom, but regards evidence of its *jus cogens* status as 'less than convincing'.[221] Bruin and Wouters examine whether *non-refoulement* may be *jus cogens*, and aside from citing Allain and other works discussed here, do not draw a strong

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215 Orakhelashvili 2006, at 56.

216 Ibid.

217 Ibid.

218 Brazil Declaration and plan of action, 3 December 2014.

219 de Wet 2004, at 101.

220 *Hirsi Jamaa and Ors v. Italy*, at 67 (citing Article 53 of the Vienna Convention on the Law of Treaties and Article 42 § 1 of the Refugee Convention and Article VII § 1 of the 1967 Protocol).

221 Duffy 2008, at 389–390.

conclusion.[222] In his treatise on *non-refoulement*, Wouters does not take a view on whether *non-refoulement* in general is *jus cogens*, but he endorses the view that *non-refoulement* to face torture would have such character.[223] In support, he cites Dugard and van de Wyngaert's claim that due to the *jus cogens* character of the prohibition on torture, 'no requested state should have difficulty in justifying a refusal to extradite a person to a state in which he is likely to be subjected to torture—a course approved by the 1984 Convention against Torture and the UN Model Treaty on Extradition'.[224]

On the basis of the statements reviewed in section 10.3 above, it appears that *non-refoulement* is ripe for recognition as *jus cogens*. The practice and *opinio* demonstrate its virtually universal scope. Non-derogability is also evident in the language, including in relevant General Assembly resolutions.[225] What is perhaps lacking is acknowledgement of its peremptory character *per se*, but here we have to pause and consider the feasibility of demanding specific statements as to a norm's peremptory character. If, as is often asserted, *jus cogens* norms represent 'fundamental values of the international community',[226] it is highly pertinent that the consistent description by the international community (in the form of the General Assembly resolutions and the UNHCR Executive Committee Conclusions) of *non-refoulement* refers to its 'fundamental character,' and its status as a 'cardinal' or 'fundamental principle.'[227] Further, we note that the ICJ in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* interwove the factors that grounded its customary and *jus cogens* status, noting three features of the norm—its acceptance in 'widespread international practice and in the *opinio juris* of States', its appearance in 'numerous international instruments of universal application', and that it had been 'introduced into the domestic law of almost all States' and that 'acts of torture are regularly denounced within national and international fora.' As demonstrated above, these features are shared with *non-refoulement*.

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222 Bruin and Wouters 2003, at 7.

223 Wouters 2009, at 30.

224 Dugard and van den Wyngaert 1998, at 198.

225 UNGA Res. 51/75, 12 February 1997.

226 Chinkin 2010, at 113. 0.

227 UNHCR, Executive Committee Conclusion No 16 (XXXI), 9 October 1998, para (e); UNHCR, Executive Committee Conclusion No 21 (XXXII), 21 October 1981, para (f); UNHCR, Executive Committee Conclusion No 22 (XXXII), 21 October 1981, para (2); UNHCR, Executive Committee Conclusion No 33 (XXXV), 18 October 1984, para (c); UNHCR, Executive Committee Conclusion No 74 (XLV), 7 October 1994, para (g); UNHCR, Executive Committee Conclusion No 94 (LIII), 8 October 2002, para (c)(i); UNHCR, Executive Committee Conclusion No 99 (LV), 8 October 2004, para (l); UNHCR, Executive Committee Conclusion No 80 (XLVII), 11 October 1996, para (e)(iii); UNHCR, Executive Committee Conclusion No 100 (LV), 8 October 2004, para (i); UNHCR, Executive Committee Conclusion No 65 (XLII), 11 October 1991, para (c).

10.5 What Difference Does *Jus Cogens* Character Make?

The absence of settled method to discern the existence of *jus cogens*, or explain its legal character has not, however, thwarted its development. As Zemanek notes, from its roots in the VCLT, the notion of *jus cogens* has evolved, at its most extravagant, to an overarching normatively superior set of rules and principles for the international community.[228] To give an example of the breadth of the consequences attributed to *jus cogens*, consider this statement from the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Furundžija*:

> At the inter-state level, [the *jus cogens* concept] serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture.[229]

In contrast, Goodwin-Gill and McAdam observe that 'little is likely to be achieved' by regarding the principle of *non-refoulement* as peremptory.[230] It may be that in the context of *non-refoulement*, the practical impact of a recognised *jus cogens* status would be muted by the fact that the scope of treaty-based *non-refoulement* is wide, as most states have ratified the ICCPR, CAT and/or the Refugee Convention.[231] Moreover, as we have demonstrated, the customary law prohibition is well established. The question then arises as to what the precise added value is of *jus cogens* status for *non-refoulement*. In this section, we canvass *some* of the many putative consequences that are attributed to *jus cogens* norms.

10.5.1 Non-derogability

An inherent feature of *jus cogens* norms is that they are non-derogable. Non-derogability means that there is no provision to set aside the rule in cases of emergency or where adherence to the rule would be particularly burdensome.[232]

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[228] Zemanek 2001, at 381.

[229] *Prosecutor v. Anto Furundzija*, Trial Chamber, Judgment, Case No. IT-95-17/1-T, 10 December 1998, para 155.

[230] Goodwin-Gill and McAdam 2007, at 346, note 421.

[231] Lauterpacht and Bethlehem 2003, at 147. In 2015, there are only 13 UN member states that have not signed any of the Refugee Convention or Protocol, the ICCPR or the Convention against Torture. They are as follows: Bhutan, Brunei Darussalam, Cook Islands, Kiribati, Malaysia, Marshall Islands, Micronesia (Federated States of), Myanmar, Niue, Oman, Singapore, Solomon Islands, and Tonga.

[232] We note, however, that Tasioulas takes a narrower view of non-derogability, which would not exclude the possibility of treating a norm as non-derogable even if it could be departed from in times of emergency. Tasioulas 2016, at 17.

It differs from the idea of absolute prohibition, which means that a prohibition has no exceptions to it in individual cases. Some *jus cogens* norms may also have that character (like the prohibition on torture), but derogability and exceptions are conceptually distinct. To illustrate, while the prohibition on aggression is *jus cogens*, there are exceptions that define the scope of the prohibition.

The practice and *opinio* outlined above in section 10.3 tend to regard *non-refoulement* as non-derogable. On the other hand, the 1967 Declaration on Territorial Asylum provides that 'exception may be made to the foregoing principle [*non-refoulement*] only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.' While the former limitation on national security concerns is aligned with Article 33(2) of the Refugee Convention, the broader notion of 'mass influx' effectively operates as a derogability clause in that it would permit the blanket suspension of the norm during an emergency-like situation. Accordingly, we conclude that this Declaration is no longer indicative of the general state of international law, if it ever was.

The recognition of the norm of *non-refoulement* as *jus cogens* would solidify this non-derogable status which would mean that even in cases of mass influx, states are required not to *refoule*. Unlike most human rights treaties, the Refugee Convention does not have a clause permitting derogation in times of emergency.[233] Moreover, even when scholars cautiously examine where some derogation from the substantive rights in the Convention should be permitted, as Durieux and McAdam did some time ago, they invariably acknowledge that no derogation from *non-refoulement* could be countenanced.[234] Rather, they envisaged that countries of first asylum would be required to offer temporary protection, and that other states would offer the full protections the Refuge Convention envisaged over time. In large measure, their project was to induce greater responsibility sharing in the refuge regime, by allowing states under particular strain to invoke a state of emergency-type derogation mechanism. Our conclusion shares their overall aim, in that we argue that insisting on the *jus cogens* character of *non-refoulement* can also form the basis for cooperative duties under the law of state responsibility, as discussed below.

[233] We note that Article 9 of the Refugee Convention contemplates provisional measures 'in time of war or other grave and exceptional circumstances' but note that this is not a general derogation clause. As Hathaway notes, the drafters 'considered, but rejected, an all-embracing power of derogation in time of national crisis.' Hathaway 2005, at 261.

[234] Durieux and McAdam 2004. See also Summary Conclusions: the principle of *non-refoulement*, in Feller et al. 2003, at 179. 'The principle of *non-refoulement* applies in situations of mass influx.' In contrast, Edwards has argued that such a derogation should be regarded as part of the current law, as an implied derogation allowing for temporary protection or derogation based on subsequent practice. While the practice of temporary protection is widespread, we do not agree that it evidences a 'derogation' from the Convention. Edwards 2012.

10.5.2 Jus Cogens and the Law of Treaties

10.5.2.1 Treaty-Based Exceptions to Non-refoulement—Article 33(2) of the Refugee Convention

An apparently clear consequence of the recognition of a norm as *jus cogens* is that treaties in violation of *jus cogens* are invalid.[235] However, on closer inspection, as d'Aspremont points out, 'even the effects of *jus cogens* that are traditionally recognized within the law of treaties have given rise to disagreement, as is illustrated by the divergence between the Vienna Convention on the Law of Treaties and the International Law Commission Study on the Fragmentation of International Law.'[236] While the VCLT seems to rule out severability of Treaty provisions in breach of *jus cogens*, the ILC in its Fragmentation work countenanced just this possibility. If a treaty required a violation of *jus cogens*, it would seem appropriate that it should be deemed invalid in toto. However, in other contexts, particularly human rights treaties, severance would seem to be the appropriate response.[237]

Concerning *non-refoulement*, there are questions as to how the compatibility of Article 33(2) Refugee Convention with the peremptory norm ought to be assessed.[238]

First of all, if *non-refoulement* is regarded as a *jus cogens* norm, we still have to determine its precise scope. One fairly predictable consequence of deeming a norm to be *jus cogens*, is that states will urge a narrow view of its scope, in order to avoid precisely these norm conflicts. Accordingly, it might leave the *jus cogens non-refoulement* rule much narrower than the one based in human rights treaties, in order to preserve the validity of Article 33(2) Refugee Convention. This approach is evident in the work of Moore, who treats *non-refoulement* as 'a fundamental entitlement of all refugees who do not threaten the national community in which they seek refuge'.[239] The difficulty with this approach is that it does not reflect the absolute character of the prohibition on return to face torture, rather reading the Article 33(2) Refugee Convention exception into the general norm. In our view this is a wrong move. While there may be arguments as to the outer limits of the *jus cogens* norm, at a minimum the scope of the norm mirrors the core content of

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235 Articles 53 and 64 VCLT.

236 d'Aspremont 2016, at 97 n. 85. 'This disagreement pertains to the divisibility of treaties found contrary to *jus cogens*.'

237 See Shelton 2016, at 37.

238 This was raised by the Hong Kong Court of Appeal in *C and others v Director of Immigration and another*, where the Court stated that if 'the prohibition on refoulement of refugees is not derogable, there would be real difficulties. It will call into question the validity of Article 33(2) of the RC itself, which permits refoulement if the refugee poses a danger to he security of a receiving state.' *C and others v Director of Immigration and another*, para 76.

239 Moore 2014, at 416, n. 11.

the customary norm, namely, a prohibition on 'expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion … or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture.'[240] Accordingly, Article 33(2) Refugee Convention may not be relied upon to return someone to risks of torture and hence an attempted narrowing of the scope of the *jus cogens* norm does not in itself avoid conflict between Article 33(2) Refugee Convention and the *jus cogens* norm.

A second approach would simply treat the invalidity rule as a last resort, requiring reinterpretation of Treaty rules in the first instance to conform with *jus cogens*, and invalidity only in a last resort if reinterpretation is not possible. Such an approach is entirely consistent with the notion of *jus cogens* norms having a hierarchically superior position, or even some sort of constitutional status. In constitutionalised legal orders (like domestic ones or even the EU), invalidity is often avoided by strenuous duties of reinterpretation in order to ensure that the normatively superior rule prevails.[241] However, this approach seems more fitting in contexts where there is a judicial body with a central interpretative role. Otherwise *jus cogens* could become the basis for divergent Treaty interpretation. Moreover, developing a novel rule of Treaty interpretation out of Article 53 VCLT may be hard to sustain. The route of reinterpreting Article 33(2) Refugee Convention seems to be endorsed by Farmer, who relies on the work of Orakhelashvili,[242] to support her view that *non-refoulement* is attaining *jus cogens* status.[243] However, other than then insisting that Article 33(2) is to be interpreted narrowly (which is already the case under orthodox principles of Treaty interpretation), it is unclear what added value *jus cogens* brings.

The third, and in our view preferable approach, is to investigate more deeply the prior question of norm conflict. As Linderfalk has illustrated, understanding *jus cogens* requires an understanding of the complexities of norm conflict and when it occurs.[244] Even in apparently straightforward cases, we need to give meaning to normative conflict. For instance, if Rule 1 says: State A may do X; while Rule 2 states: State A may not do X; Rule 1 is merely facultative, hence Rule 2 prevails. This might be viewed as avoiding norm conflict. Thus if a Treaty appears to allow *refoulement* under certain

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240 UNHCR, Executive Committee Conclusion No 82 (XLVIII), 17 October 1997, para (d)(i).

241 In EU law, national judges are required to reinterpret national law 'so far as possible' to conform with higher EU norms. This duty originates in Case C–106/89, *Marleasing SA v La Comercial Internacionale de Alimentacion SA* [1990] ECR I–4135.

242 Orakhelashvili 2006.

243 Farmer 2008.

244 Linderfalk 2009.

exceptional circumstances, and the *jus cogens* prohibition of refoulement is more expansive, *jus cogens* prevails and there is no norm conflict.[245]

Practically speaking, this potential clash between Article 33(2) Refugee Convention and *jus cogens* is limited. Under Treaty law, some prohibitions on *refoulement* are already absolute—notably that under CAT concerning return to face torture, and that under the ECHR to face any breach of Article 3 ECHR, which prohibits not only torture, but also inhuman and degrading treatment. Many states already find themselves precluded under these treaties from engaging in conduct that Article 33(2) Refugee Convention might otherwise permit.

10.5.2.2 Other Treaties

The recognition of *non-refoulement* as *jus cogens* could have concrete consequences for the validity or at least valid implementation of a range of treaties, particularly bilateral treaties by which persons are transferred between states. For example, extradition treaties, prisoner transfer agreements or readmission agreements pursuant to which persons could be transferred or return to face torture would be subject to challenge on the basis of their conflict with the *jus cogens* norm.

Another set of practices Allain identifies as needing constraint by the *jus cogens* of *non-refoulement* is the practice of deporting individuals who would otherwise be protected against refoulement to 'safe third countries' (STC). These practices may be unilateral, with sending states simply asserting that they may transfer people in this way, as the original European practices did. However, they may also be embodied in formal STC or Readmission Agreements. These agreements usually purport to be compatible with *non-refoulement* and with the Refugee Convention and other human rights obligations.[246] Indeed, under human rights law, the prohibition on indirect *refoulement* has been clarified, as have the duties on states to examine the safety of the country to which return is contemplated, not only in general, but for the individual in question.[247] These constraints have developed with-

[245] This norm harmonisation approach already occurs in refugee law, for example, where domestic jurisdictions recognise that *non-refoulement* applies to extradition treaties. See Goodwin-Gill and McAdam 2007, at 257–262. Another interesting example is provided in Canadian litigation which involved a potential conflict between Canada's obligations under the Refugee Convention and the Hague Convention on the Civil Aspects of International Child Abduction. The Court of Appeal for Ontario resolved the case on the basis that 'harmonious effect can be given to both.' *Issasi v. Rosenzweig*, 2011 ONCA 302, para 8.

[246] Lambert 2012; Foster 2007a; Hurwitz 2009, at 46–66; Government of Canada, Final text of the safe third country agreement, 2009, http://www.cic.gc.ca/english/department/laws-policy/safe-third.asp. Accessed 20 September 2015.

[247] Under the ECHR, the leading cases on returns to ostensibly 'safe' countries include *Tarakhel v. Switzerland,* ECtHR, No. 29217/12, 4 November 2014; and *Hirsi Jamaa and Others v. Italy*. Under the ICCPR, a similar approach has been taken. See *Jasin* et al. *v. Denmark*, Human Rights Committee, Communication No. 2360/2014, UN Doc. CCPR/C/114/D/2370/2014, 4 September 2015.

out recourse to *jus cogens*, drawing in particular on the positive duties to protect against *refoulement* under human rights treaties. If a state that was not a party to any human rights treaty purported to engage in safe third country practices, it would still be bound by customary international law. But if it bound itself by treaty to treat other states as 'safe', then there could be some added value in *non-refoulement qua jus cogens.*

10.5.3 State Responsibility

Another area where the legal implications of *jus cogens* are fairly settled is in the law of state responsibility. The regime of state responsibility makes it impossible to preclude the wrongfulness of a breach of *jus cogens*. The grounds precluding wrongfulness in the ILC Draft Articles on State Responsibility (ASR) may not be used to justify an act that is in breach of a peremptory norm.[248]

Where there is a serious breach of a *jus cogens* norm, there are additional legal consequences set out in Articles 40 and 41 ASR. According to Article 40 ASR, a serious breach of a peremptory norm incurs state responsibility,[249] while Article 41 ASR deals with the situation after the breach. A breach of a peremptory norm creates an obligation for *all states to cooperate* in order to put to an end an unlawful situation created by a breach of a peremptory norm and not to recognise the situations created by such a breach as lawful.[250] As stated in the Commentary to Article 41 ASR, such an obligation is owed *erga omnes*.

Assuming that *non-refoulement* is *jus cogens*, if a state were grossly or systematically to fail to respect this obligation, Article 40 ASR would apply. In that context, other states have positive duties to cooperate to bring that conduct to an end, and have specific negative duties not to render 'aid or assistance' to the state seriously breaching *jus cogens*.

This insight may represent one of the most important ramifications of recognising *non-refoulement* as having *jus cogens* status. It is widely recognised that the efficacy of the international refugee regime is dependent on concepts of solidarity and responsibility sharing, yet infusing these concepts with legal force has proven

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[248] Article 26 of the Articles on the Responsibility of States for Internationally Wrongful Acts. International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, 53rd session of the ILC, UNGA Res 56/83, 12 December 2001 (ASR).

[249] Article 40 ASR.

[250] 'Article 41. Particular consequences of a serious breach of an obligation under this chapter.
1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.'

elusive as it is only in the Preamble to the Refugee Convention—not the Convention itself- that notions of 'international co-operation' are found. Hence, while states currently decry obvious violations of core refugee norms by other states, recognition of the norm of *non refoulement* as *jus cogens* may mean that states are under a legal obligation to work cooperatively to put to an end the violations by others of the cardinal refugee principle of *non-refoulement*. This could in turn be understood to require states to better monitor, observe state practice, and communicate with other states about their compliance with *non-refoulement*. This more solid basis for the norm of cooperation may in turn solidify efforts to develop genuine responsibility sharing arrangements such as are currently being discussed both in regions that already have sophisticated frameworks such as Europe, and those where regional approaches to refugee protection are nascent, such as in the Asia-Pacific region. Even if Article 41 ASR is more 'progressive development of the law' than existing obligation,[251] this points to an area for future development of *jus cogens*, which may have some fruitful and constructive ramifications for international refugee protection.

A related consequence of the above ASR is that if a state violates *non-refoulement* systematically, then other states should not aid or assist in that conduct. This rule against aid and assistance concerns such conduct after the fact. This *general* prohibition on complicity in international law applies equally to *jus cogens* principal violations as it does to ordinary principal violations. For Article 16 ASR, the *jus cogens* nature of the principal wrong does not make a difference.

On the basis of Article 16 and the customary norm it embodies,[252] it has been argued, for instance, that Italy's previous cooperation with Libya in migration control activities meant that Italy was 'aiding and assisting' in Libya's unlawful acts. On this basis too, it could be argued that states that cooperate with Australia's *refoulement* of those seeking protection are also in breach of international law. This claim may be made irrespective of the nature of the *non-refoulement* obligation, and whether it is rooted in custom or treaty.[253] The important legal move is the development of the scope of the notion of 'aid and assistance' to encompass

[251] See discussion of Article 41 ASR in Wyler and Castellanos-Jankiewicz 2014, at 304–305. They note that while the legal status of the duty of cooperation enshrined in Article 41(1) ASR is 'rather indeterminate', there is authority to suggest it is anchored in legal obligation. Wyler and Castellanos-Jankiewicz 2014, at 305. In particular, the ICJ stated in its Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, that '[i]t is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.' *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para 159. See also ibid., para 160.

[252] Jackson 2015, at 107–191; Quigley 1986; Nolte and Helmut 2009, at 7–10; and d'Aspremont 2009, at 432. Cf. Other scholars have remained more cautious, see, e.g. Lowe 2002.

[253] Indeed, Gammeltoft-Hansen and Hathaway point out that states which are not party to the Refugee Convention often have 'cognate' *non-refoulement* obligations under other treaties such as the ICCPR and CAT. Unsurprisingly, they do not rely on the customary status of non-refoulement. Gammeltoft-Hansen and Hathaway 2015, at 282.

acts which would not in themselves entail an exercise of jurisdiction under human rights treaties, as Hathaway and Gammeltoft-Hansen have demonstrated.[254]

10.5.4 Constraining the UN Security Council

There is broad agreement that the Security Council is bound by *jus cogens* norms.[255] In practice, the significance in this context depends on whether that institution is likely to endorse *refoulement*. Christian Tomuschat has suggested that violations of *jus cogens* by the Security Council largely 'belong to the imaginary sphere of academic hypothesis rather than political reality.'[256] Nonetheless, as the Security Council has become an active legislator, the impact of its actions on human rights and possibly *jus cogens* norms has become all too real.

The UN Security Council has been criticised for facilitating the containment of refugee flows, potentially undermining the right to leave and seek asylum.[257] And, as Long has demonstrated, UNHCR has found itself being requested to provide humanitarian assistance in the context of safe haven practices where the norm of *non-refoulement* is certainly being undermined, if not directly violated. Notwithstanding the practical impact of these practices, it is important to note that Security Council resolutions have never permitted *refoulement*.[258] Admittedly, they may appear to tacitly endorse border closures in situations where potential refugees may have otherwise attempted to leave their home countries. Until those fleeing cross an international frontier, they are not refugees. It may be argued that safe havens prompt neighbouring states to close borders under certain circumstances. And those border closures *may* offend *non-refoulement*[259] depending on the context. However, those closures are difficult to attribute legally to the Security Council.

More recently, the UN Security Council has adopted a Resolution taking a different view of refugee flows, namely focusing on the role of smugglers. In Resolution 2240 (2015), the Security Council calls on member states to assist Libya to 'secure its borders and to prevent, investigate and prosecute acts of smuggling of migrants and human trafficking through its territory and in its territorial

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254 Ibid., at 276.

255 Akande 1997; Krisch 2012; and White 1999.

256 Tomuschat 2007 (cited in Michaelsen 2014, at 37).

257 See, for example, Allain 2002.

258 In legal terms, on their face as Jaquemet has analysed, the criticised UN Security Council resolutions generally endorse the prohibition of *refoulement*. Jaquemet 2014.

259 'Safe haven practices' are forever haunted by Srebrenica. The ECtHR ruling in *Stichting Mothers of Srebrenica and Others v. The Netherlands*, discussed below, is just one of the many attempts of relatives of the victims to find redress. *Stichting Mothers of Srebrenica and Others v. The Netherlands*, ECtHR, No. 65542/12, 11 June 2013. See further Long 2012; and Orchard 2014.

sea.'[260] It authorises exceptional measures for a period of one year including, under certain conditions, the ability of member states to inspect vessels on the high seas,[261] to seize such vessels,[262] and to 'use all measures commensurate to the specific circumstances in confronting migrant smugglers or human traffickers in carrying out' such activities.[263] In practice in Europe, it is unlikely that the Resolution could be interpreted as tacitly or indirectly authorising *refoulement,* in particular in light of the decision of the ECtHR in *Hirsi*.[264] However, while the Resolution demands respect for international refugee law,[265] it also uses typically broad empowering measures, allowing states to take action 'commensurate to the specific circumstances'. Reaffirming the *jus cogens* status of *non-refoulement* is particularly important if the underlying premise in the resolution were to be exported to regional contexts where Treaty-based *non-refoulement* protections have less institutional protection.

Ultimately, a practical difficulty is that no international court is empowered to review the validity of the acts of the Security Council directly. An assessment of the complex concerns surrounding the moves to ensure legal accountability of the Security Council whilst preserving the authority of its actions goes beyond the scope of this contribution.[266] However we note that the institutional gap in legal accountability of the Security Council remains even if *jus cogens* is agreed to constrain the Security Council. Into that institutional gap have come some audacious regional courts.[267] Notably, the Court of First Instance of the EU held in *Kadi* that the whole body of international human rights law had *jus cogens* status, using that reasoning to review indirectly whether UN Security Council resolutions led to breaches of the right to property and fair trial. *Jus cogens* was defined 'as a body of higher rules of public international law binding all subjects of international law, including the bodies of the United Nations [sic], and from which no derogation is possible'.[268] The Court of Justice did not engage with this aspect of the CFI's reasoning, but rather undertook its review on the basis of EU principles alone. It appears that since *Kadi*, litigants have avoided *jus cogens*. For instance, in a recent case where self-determination was at issue, *Frente Polisario*,[269] the applicants framed their arguments in pure EU law terms, rather than invoking *jus cogens*.[270]

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[260] UNSC Res. S/RES/2240, 9 October 2015, at 3, para 2.

[261] Ibid., para 7.

[262] Ibid., para 8.

[263] Ibid., para 10.

[264] *Hirsi Jamaa and Ors v. Italy.*

[265] UNSC Res. S/RES/2240, 9 October 2015, paras 12, 13 and 15.

[266] Tzanakopoulous 2011.

[267] *Juridical Condition and Rights of the Undocumented Migrants*.

[268] Case T-315/01, *Yassin Abdullah Kadi v Council and Commission* [2005] ECR–3649, para 226.

[269] Case T-512/12, *Front Polisario v. Council of the European Union*, General Court of the European Union, 10 December 2015.

[270] Vigigal 2015.

These judicial moves lead to criticism. The Court of First Instance in *Kadi* is after all challenging the authority of international obligations based on its own idiosyncratic conception of *jus cogens*. For instance, de Wet argues that

> [t]he vague natural law arguments of [these] courts, combined with their scant reliance on state practice, arguably pose some of the biggest threats to the credibility of peremptory norms as representing the core values of the international community as a whole.[271]

However, the outcome of the *Kadi* saga, and other challenges to UN Security Council practices of targeted sanctions, led to an improvement of due process within that institution. Without the extravagant judicial invocation of *jus cogens*, the rule of law and protection of human rights would have been weakened. In this respect, we concur with Chinkin that *jus cogens* offers some glimpses of protection for those marginalised by the hegemonic structures of international law. The powerful rely on the importance of coherence to avoid challenge.[272]

In the context of *non-refoulement*, as has been noted, while the UN Security Council has adopted measures that tacitly limit the right to leave and seek asylum, it has not directly violated *non-refoulement*, or permitted its violation by states. Nonetheless, a reminder of the *jus cogens* status of *non-refoulement* does provide a normative, if not an institutional, constraint on the Security Council, at a time when powerful actors contend not only that refugee outflows, but also the crime of human smuggling, are a threat to international peace and security.[273] A reminder that the Security Council may not endorse breaches of *non-refoulement* is important and timely in this context. And the CFI ruling in *Kadi* serves as a reminder that states that act on the basis of Security Council resolutions may not do so in complete comfort that their acts are insulated from legal scrutiny. While that position may seem to some to undermine the authority of international law, on the other hand without that shadow of legal accountability, the Security Council can all too easily become the venue for actions which would otherwise be deemed unlawful as breaching human rights and refugee protection.

10.6 Does a Risk of a *Jus Cogens* Violation Create an Obligation of Non-refoulement?

One of the surprising features about judicial pronouncements and scholarship on *jus cogens* is that while it is clear that *jus cogens* entails prohibitions of certain conduct, its implications beyond those negative duties are less clear. In this section, we review some of the issues surrounding the positive duties, and then consider in particular whether there is a distinctive obligation of *non-refoulement* in cases where there is a risk of violation of *jus cogens.*

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271 de Wet 2015, at 544 (citing Shelton 2006, at 313).

272 Chinkin 2008.

273 Mananashvilli 2015.

10.6.1 Jus Cogens and Positive Duties—Hierarchy Without Consequences

Often *jus cogens* is invoked in order to trump other rules of international law, which are seen to undermine the efficacy of the prohibitions in question. In the main, courts have tended to reject these arguments, limiting the consequences of the normatively superior position of *jus cogens*. For instance, in *Questions Relating to the Obligation to Prosecute or Extradite*, while accepting that the prohibition on torture was *jus cogens*, the ICJ noted that the obligation to prosecute was rooted in the CAT, and so bound states only after they had ratified that convention. Similarly, in other instances while accepting the *jus cogens* nature of particular prohibitions, the ICJ did not view states'[274] reservations against judicial adjudication as in conflict with those prohibitions. In order words, *jus cogens* status was confined to the prohibition, and did not automatically extend to any ancillary norms that would have rendered it more effective.

This position also applies most notably with regard to immunity, where the ICJ[275] (and indeed the ECtHR[276]) have rebuffed the invitation to temper state and UN immunity in order to grant *jus cogens* prohibitions greater effectiveness.[277] In particular, the ICJ in *Jurisdictional Immunities of the State (Germany v Italy)* drew a distinction between substantive and procedural norms. Only rules of substance would cede to *jus cogens* superiority, while those of procedure would not. This issue is hardly settled once and for all, in particular as litigation at the national and regional level continues. The dissenting judgement in *Al-Adsani* is thus worth recalling:

> The acceptance … of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions…Due to the interplay of the *jus cogens* rule on the prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect.[278]

The orthodox position, which rejects this view, is not a rejection of *jus cogens*, but rather a steadfast refusal to expand its scope beyond the prohibitions in question.

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[274] See, for example, *Armed Activities on the Territory of the Congo* (New Application: 2002) (*Dem. Rep. Congo v Rwanda*), ICJ, Jurisdiction and Admissibility, 3 February 2006.

[275] *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*. Note the dissenting opinion of Judge Cancado Trindade, who was the sole dissenting judge on the question of whether *jus cogens* overrode state immunity. Ibid., Dissenting Opinion of Judge Cancado Trindade.

[276] *Al-Adsani v. United Kingdom*, ECtHR, No. 35763/97, 21 November 2001, para 61. Cf. ibid., Joint Dissenting Opinions of Judges Rozakis, Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic.

[277] de Wet 2004.

[278] *Al-Adsani v. United Kingdom*, Joint Dissenting Opinions of Judges Rozakis, Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para 3.

To a human rights lawyer, it seems odd that other *jus cogens* norms do not entail, *ipso facto*, such a duty to prevent, or at least some notion of *effet utile*. After all, human rights treaty-based *non-refoulement*, while it entails a clear negative duty not to return an individual to face particular risks, contingent on a positive duty of effort to examine the degree of risk. However, reading in positive duties is not apt for *jus cogens* norms. Notably, not all *jus cogens* norms are human rights norms. Out of the multifaceted character of *jus cogens*, comes an inhibition from reading in capacious positive duties.

10.6.2 Jus Cogens Prohibitions and the Duty of Non-refoulement—A Brief Investigation

The focus of this contribution has been on *non-refoulement per se*. However, in this section we turn to a related but distinct question. Given that there is some settled content to *jus cogens*, does that have any implications for how we understand the scope of *non-refoulement*? In particular, if certain conduct is prohibited as a breach of *jus cogens*, is returning someone to face conduct in breach of *jus cogens* also prohibited *due to* the *jus cogens* nature of the prohibition? In other words, irrespective of whether *non-refoulement* itself has *jus cogens* status or not, does the *jus cogens* character of the prohibition of certain conduct invest those prohibitions with specific *non-refoulement* obligations? And relatedly, is that ancillary *non-refoulement* obligation (if it exists) also of *jus cogens* character?

Of course, there will be situations when returning someone to face a *jus cogens* violation will amount to complicity in that wrong, as discussed above. But complicity presupposes the wrongfulness of the conduct of the receiving state. In this way, complicity grounds a narrower obligation than *non-refoulement*, which is in essence a protective obligation, not to expose someone to a *risk* of ill-treatment. *Non-refoulement*, unlike complicity, does not depend on the materialisation of the wrong in question.[279] Rather, it protects against a risk of harm occurring.

10.6.2.1 Return to Face Torture

Certainly it is the case that as the law stands, returning someone to face torture is prohibited, both under human rights treaties (explicitly under CAT, and by interpretation under global and regional human rights treaties) and customary international law. It is a non-derogable obligation. The question then arises whether the duty of *non-refoulement* is explained by the *jus cogens* status of the prohibition of torture. This view is supported by Menendez, who states that ‘[i]t follows that the principle of *non-refoulement* is also a peremptory norm of international law when

[279] See discussion in Greenman 2015.

compliance with it is necessary to prevent torture or, in my view, a violation of the other already mentioned rights included in the non-derogable minimum standard of international human rights law.'[280] His claim rests on the notion that if there is a *jus cogens* prohibition, then the duty to prevent breaches of that prohibition should also be regarded as *jus cogens*. However, our central argument about the scope of *non-refoulement* does not derive the prohibition from the *jus cogens* character of the prohibition on torture.

10.6.2.2 Return to Face Genocidal Violence

As regards genocide, the prohibition of which is undoubtedly *jus cogens*, the duty to prevent genocide has also been regarded as of *jus cogens* character. The 2013 ECtHR ruling in *Stichting Mothers of Srebrenica and Others v. The Netherlands* concerned not the commission of genocide, but the alleged failure to prevent it. The national courts and the ECtHR held the orthodox position that *jus cogens* does not override state (and UN) immunity, albeit using the language of proportionality.[281] Nonetheless, as Ventura and Akande note,[282] it was simply assumed that as the obligation *not to commit genocide* was a rule of *jus cogens*, the obligation *to prevent* genocide is also a norm of *jus cogens*.[283] While under the Genocide Convention, there is a clear duty to prevent genocide, whether that duty is even one of customary international law or indeed *jus cogens* requires detailed examination. If the duty to prevent genocide is *jus cogens*, then the much less demanding positive obligation not to expose individuals to the risk of genocidal violence would seem to be much easier to ground. Moreover, it may also be the basis for arguing for stronger positive duties in the context of genocide—not only duties of *non-refoulement*, but also to evacuate or intervene. This clearly raises questions well beyond the scope of this contribution.

Accordingly, we conclude that while there is currently no firmly settled view on this question, there is an argument for recognising associated positive duties connected with the recognition of a norm as having *jus cogens* status, in particular if that norm is a human rights one. But perhaps a better view is that the *non-refoulement* obligation arises out of the seriousness of the human rights violation of which there is a risk, rather than the *jus cogens* character of the prohibition itself. This is not to suggest that *jus cogens* norms are confined to pure prohibitions, but simply to note that there is lack of clarity as to the positive duties arising out of *jus cogens*. Given the multifaceted and diverse nature of the norms of

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[280] Menendez 2015.

[281] See *Stichting Mothers of Srebrenica and Others v. The Netherlands*, para 169. '[T]he grant of immunity to the UN served a legitimate purpose and was not disproportionate.'

[282] Ventura and Akande 2013.

[283] See *Stichting Mothers of Srebrenica and Others v. The Netherlands*, para 157. 'The Court has recognised the prohibition of genocide as a rule of *jus cogens*.'

jus cogens, it would be difficult to imagine a uniform set of positive duties, except at an extremely high level of generality.

Nonetheless, concerning those elements of *jus cogens* that are human rights based, it would be ill-fitting not to include some positive obligations to protect the rights in question. Human rights law is now well-settled in regarding all rights as entailing both negative and positive duties. Contemporary understandings of human rights treat them as giving rise to obligations to respect, protect and fulfil. This approach has become a standard feature of the interpretation of human rights treaties, and grounds the general duties of *non-refoulement* we find under them. For instance, the HRC in regard to the right to life, which is not universally perceived to be a norm of a peremptory character, grounds a duty of *non-refoulement* as a matter of human rights protection. In *Judge v Canada*, the HRC stated:

> For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.[284]

10.7 Conclusions

This chapter has demonstrated that *non-refoulement* is a norm of customary international law. This conclusion is shared by most other refugee law scholars, and so is unsurprising in many ways. However, we are more surprised at the conclusion that on the basis of the evidence reviewed, and applying a rigorous 'customary international law plus' approach to identification of *jus cogens* norms, it is also ripe for recognition as a norm of *jus cogens*. The crucial question however is whether there is any added utility in ascribing a *jus cogens* status to the norm of *non-refoulement*. On one view, there is not. For example, de Wet argues that '[f]ocusing on the customary nature of the rights and obligations in question rather than their *jus cogens* character could therefore be equally if not more effective.'[285] On the other hand, as our analysis in Sect. 10.5 suggests, there is genuine potential for the progressive development of international law concerning *jus cogens* norms to contribute in fruitful ways to refugee protection, particularly in the context of international cooperation and responsibility sharing. These are issues at the heart of the challenge to international protection today.

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[284] *Judge v. Canada*, Human Rights Committee, Communication No. 829/1998, UN. Doc. CCPR/C/78/D/829/1998, 20 October 2003, para 10.4.

[285] de Wet 2004, at 97–121 and 114.

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Chapter 11
Improving Compliance: *Jus Cogens* and International Economic Law

Thomas Cottier

Abstract The relationship of *jus cogens* and international economic law has largely remained unexplored, despite close linkages at the inception of *jus cogens* when slave trade and slavery was banned. The paper expounds the potential of international economic law for the realisation and enforcement of *jus cogens*, in particular of core labour standards and basic human rights. The right to protect *ordre public* values in international trade and investment law by means of import restrictions and conditioning investment by host states, respectively, provides an important basis to enforce values protected by jus cogens. However, recourse to process and production methods (PPMs) and conditionalities does not reach *jus cogens* in a comprehensive manner, and additional remedies need to be developed in international economic law, in particular relating to corporate social responsibility and finance and monetary affairs. Questioning the fundamental civil law distinction of *jus cogens* and *jus dispositivum*, the paper submits to conceive *jus cogens* as a matter of Common Concern of Humankind and to conceptualise protection and enforcement under this emerging doctrine, obliging states to cooperate but also take unilateral action if necessary.

Keywords *Jus cogens* · Peremptory norms · International economic law · Constitutionalisation · WTO · Production and process methods (PPMs) · Core labour standards · Human rights · Corporate social responsibility · Responsibility to protect · Common concern of humankind

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11.1 Introduction

Jus cogens is a major intellectual achievement in international law. It transcends positivism and translates fundamental ethical concerns and values into principles to be respected universally and to be enforced *erga omnes*, independently of the whims of governments. It provides the foundations of emerging structures of constitutionalism in international law. It brings about the inception of a much-needed hierarchy in law as an organising principle next to Article 103 of the Charter of the United Nations (UN Charter).[1] The concept recognises peremptory norms and obligates states to take these into account in international relations and in domestic law, and to refrain from acting against its principles. International and domestic courts are bound to respect *jus cogens ex officio*, irrespective of claims made by parties to a dispute.[2] Wide acceptance that a number of very basic normative propositions are peremptory and binding and are not at the disposition of states epitomises the essence of pre-statal natural law, rooted in rationality.[3] It is an important antidote to state failures.

Essentially, *jus cogens* extends to the prohibition of slavery and forced labour, including excessive child labour, and human trafficking, the prohibition of torture, racial segregation (apartheid), prohibition of use of force, aggression and genocide, and the principle of non-refoulement of persons otherwise under threat of losing their lives and suffering severe degradation.[4] The scope and boundaries of

[1] 1945 Charter of the United Nations, 557 UNTS 143.

[2] Müller and Wildhaber 2001 at 104–105. They state that *jus cogens* amounts to an expression of protecting international order public and fundamental human rights.

[3] Shaw 2014, at 88 ff; Shelton 2006, at 291, 297–298 and 302 ff.

[4] de Schutter 2014, at 87 ff.

jus cogens, however, remain controversial and contested in a decentralised legal order, in particular in relation to core labour standards and humanitarian law. Authors writing on the subject generally refrain from identifying a closed list, and prefer working with examples.[5]

The recognition of *jus cogens* in Articles 53, 64 and 65 of the Vienna Convention on the Law of Treaties (VCLT), and thus today by 122 states, was a major step.[6] Treaties incompatible with *jus cogens* are deemed null and void and thus invalid ab initio. No claims can be made or compensation awarded contrary to peremptory norms. *Jus cogens* thus amounts to the very heart of fundamental legal principles and human rights protection, which otherwise, to a large extent, has remained subject to explicit consent, and thus *jus dispositivum*, with the rest of public international law, mainly based upon treaty law today. Beyond the VCLT, the concept of *jus cogens* also applies as a matter of customary law to unilateral acts of states. They are bound to respect it as a matter of *ordre public* and unwritten fundamental human rights in international relations irrespective of existing treaty obligations.

The reality of *jus cogens*, however, and its operation in international law and relations are a different matter. Some even consider it an imaginary and mystical concept.[7] *Jus cogens* faces the classical Austinian objection of lacking appropriate enforcement and thus the quality of law, let alone its peremptory nature. In terms of enforcement and compliance, it has remained an idealist construct. High aspirations are difficult to realise and enforce in an environment shaped by power and human opportunism, in particular on the part of global players, economic actors and politicians. Governments often refrain from taking action against other states despite apparent violations on their part of *jus cogens*.[8]

Jus cogens exerts its strongest effects before domestic courts of law where its principles and rules can be effectively enforced. Judges are bound *ex officio* to take peremptory rules into account, irrespective of claims made by the parties. Perhaps the most important implications of *jus cogens* today can be found in the relationship between public international law and domestic law. While countries are free under international law to operate different constitutional doctrines (monism, dualism, mixed systems), *jus cogens* entails and imposes an obligation to comply with international law in domestic affairs. Domestic authorities and courts, irrespective of constitutional law, are bound to respect *jus cogens* in decisions taken and rulings made.[9] No decision is allowed to violate, for example, the prohibition of slavery, torture and racial segregation or, in my view, the obligation to respect the

[5] Nieto-Navia 2001, at 8–9, 15 ff and 20–21; Frowein 2009, at 443 ff.

[6] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331. See also Crawford 2012, at 591 ff; Shelton 2006, at 298 ff.

[7] d'Aspremont 2016.

[8] Nieto-Navia 2001, at 9 ff and 15 ff; Stephan 2011, at 1077–1078, 1096 ff and 1104.

[9] Frowein 2009, at 443–444.

principle of non-refoulement.[10] Authorities and courts may deny the direct effect of international treaties and thus override domestic law in a manner that is inconsistent with these obligations. When *jus cogens* is affected, courts are obliged to grant direct effect and suspend the operation of a domestic norm contrary to it. These obligations are inherent to international law.[11]

Jus cogens obligations are also recognised in domestic constitutional law. For example, Article 5(4) of the Swiss Constitution obliges authorities to respect international law, which, *afortiori,* includes peremptory norms. In addition, Article 139(2) of the same Constitution provides that constitutional amendments, submitted with at least 100,000 signatures, must not be inconsistent with peremptory norms of international law and shall in such a case be declared void by Parliament. It sets important boundaries to constitutional change in domestic law.[12] The Constitution recognises that constitutional amendments may be contrary to existing dispositive obligations in public international law, in particular international agreements. Upon adoption of such provisions, treaties may need to be rescinded.[13] Yet, this option does not apply whenever peremptory norms are affected. They are to be respected by domestic law, and constitutional amendments that contravene them are unlawful and must not be adopted.

In international law and relations, however, *jus cogens* is not accompanied by comparably strong enforcement mechanisms. Paradoxically, no specific instruments are in place in general public international law in response to violations of *jus cogens*. The commitment to *jus cogens* largely remains an empty shell. The prohibition of use of force—forming part of *jus cogens* itself—essentially limits

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[10] Marceau 2002, at 799; but see Costello and Foster 2016.

[11] Shaw 2014, at 88 ff; de Schutter 2014, at 91; Nieto-Navia 2001, at 1, 18 and 20 ff.

[12] The Swiss Constitution bars popular initiatives violating peremptory norms of public international law. Article 139(3) of the Constitution stipulates the following: '3. If the initiative fails to comply with the requirements of consistency of form, and of subject matter, or if it infringes mandatory provisions of international law, the Federal Assembly shall declare it to be invalid in whole or in part.'
In a populist initiative launched in 2015 by the national-conservative Peoples' Party (SVP/UDC) seeking to redefine the relationship between international law and domestic law away from monism to dualism, the respect of mandatory norms of international law is not questioned. The Initiative is called 'Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)', to be translated into 'Swiss Law instead of Foreign Judges (Self-determination Initiative)'. Volksinitiative 'Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)'. www.svp.ch/kampagnen/uebersicht/selbstbestimmungsinitiative/um-was-geht-es/. Accessed 10 June 2015. This is particularly relevant in relation to the principle of non-refoulement in the law of refugees and penal extradition. There is controversy as to whether Article 139 entails a notion of *jus cogens* in constitutional law which may deviate from international law, or whether it refers to public international law. The absence of a catalogue and qualification of peremptory norms in the Constitution means that reference is made to international law. The provision is further informed by the obligation to respect international law, and thus clearly respect minimal standards in international law. The constitution may adopt a more expansive list of what is considered *jus cogens* for the purpose of constitutional law.

[13] Nieto-Navia 2001, at 18 ff.

instruments to measures adopted by the UN Security Council, in particular to retorsion and economic countermeasures. It is understood that states under general public international law are entitled to act, but are not obliged to respond to violations of peremptory norms beyond general obligations to cooperate and to refrain from accepting the lawfulness of such conduct as stipulated under Article 41 of the ILC Draft Articles on State Responsibility.[14] No cases before the International Court of Justice (ICJ) or arbitral tribunals so far have been brought for the very purpose of enforcing peremptory norms. These norms were merely taken into account in the context of disputes relating to *jus dispositivum* or domestic law.[15]

Against this backdrop, it is interesting to turn more specifically to the role of international economic law and its potential to enhance and improve compliance with *jus cogens* in international relations. In fact, mechanisms of law enforcement and implementation today are stronger and more commonly applied in the field of international economic law than in general public international law, even though the former is merely considered to be part of *jus dispositivum*.[16]

First, trade rules can be enforced internationally by means of mandatory judicial dispute settlement and appropriate countermeasures in case of non-compliance. Parties are entitled to adopt appropriate measures upon authorisation in case of nullification and impairment of benefits in World Trade Organization (WTO) law. Second, trade measures adopted by states may in result exert extraterritorial effects. Unilateral measures implementing domestic policies may condition imports and thus affect and determine conditions of production abroad.[17] Trade measures may be taken in response to violations of *jus cogens*. Importantly, however, unilateral measures are not limited to those enforcing *jus cogens* norms but may include standards which are unilaterally defined.

This paper opines that international economic law can and should be used to increase compliance with *jus cogens* in international relations. It describes the conditions and the extent to which this is legally feasible under existing rules. It argues that countries today are entitled to take countermeasures against practices violating unilaterally defined perceptions of morality and *ordre public*, thus transgressing, but including, *a fortiori* shared disciplines of *jus cogens*. States are entitled to take unilateral trade measures in response to practices relating to imported goods and services produced abroad under the public interest and public order clauses of international agreements. Vice versa, governments are able to take measures *vis-à-vis* foreign direct investors who in particular are ignoring labour standards, independently as to whether these are protected as a matter of *jus cogens*. Protection in these areas no longer depends upon a consensus

[14] Article 41 of International Law Commission, Draft articles on the responsibility of states for internationally wrongful acts, with commentaries, 53rd session of the ILC, UN Doc. A/56/10, 2001.

[15] *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*), ICJ, Second phase, Judgment of 5 February 1970, paras 33–36.

[16] de Schutter 2014, at 91 ff.

[17] Cottier 1998, at 336–350; Palmeter and Mavroidis 2004, at 300 ff.

and international recognition of *jus* cogens. At the same time, measures in international economic law include peremptory norms and thus can be deployed to enforce them more effectively.

The chapter also points to the limits of law enforcement by means of economic law. Reliance on agreed peremptory norms is crucial in the absence of a linkage to imported products, and sanctions need to be based upon *jus cogens* in such configurations. Given the weaknesses of enforcement outside economic law, this contribution finally suggests that respect for *jus cogens* should be understood as a Common Concern and that states are obliged to act in accordance with this emerging principle. Under this principle, it will be argued below that countries should eventually be obliged to positively take measures, if disciplines of *jus cogens* are involved, subject to the principle of proportionality. This finding is supported by the movement towards Responsibility to Protect (R2P).[18] Both are strategies complementing and concurrent to *jus cogens* in the process of reinforcing peremptory norms in public international law.

11.2 A Close Relationship

International economic relations have been one of the main drivers of *jus cogens* in the past. We recall that the prohibition of slavery in the 19th century—one of founding human rights and today's core principles of peremptory norms in international law—was a reaction to the then licit trade in human beings and the workforce. That state of play at the time in early international economic law, informing and harnessing international relations, triggered the international human rights movement with the gradual abolition of slavery.[19] The recognition of legal personality of all human beings and the ban on trade in persons and slave labour became an essential underpinning of the modern international trading and investment system, which thenceforth was essentially focused on, and limited to, trade in goods and services and the protection of foreign direct investment, excluding all illicit trade in humans.

The protection of labour rights became, within the International Labour Organization (ILO), a topic of its own, and it is here where controversial linkages of international economic law with *jus cogens* today are mainly discussed.[20] Eventually, the prohibition of apartheid emerged as an important organising principle in society and the economy, influencing international economic law and the

[18] Nadakavukaren Schefer and Cottier, at 123 ff.

[19] In the United Kingdom, the Slavery Abolition Act was adopted in 1833 (much due to the effort of Zackary Macaulay and William Wilberforce). Encyclopedia Britannica, William Wilberforce. http://www.britannica.com/EBchecked/topic/643460/William-Wilberforce. Accessed 10 May 2015. See also Ferguson 2003, at 116–118.

[20] Shelton 2006, at 294; Weissbrodt and Anti-Slavery International 2002, at 12 ff.

law of economic sanctions, in particular. The abolition of apartheid in South Africa was mainly supported and perhaps brought about by recourse to restrictions on international trade and investment and thus disciplines of international economic law.[21] Recourse to economic sanctions and countermeasures emerged as the main tool in realising and implementing the values protected by *jus cogens*. In the history of *jus cogens*, these developments were perhaps more important than the doctrinal roots of the concept,[22] initiated in response to positivism and the advent of unethical international agreements in the 1930s, which eventually led, after the experiences of World War II, to the adoption of Articles 53, 64 and 65 VCLT, but which have remained controversial ever since, and explain to a great extent the lasting abstention of the United States (US) from adhering to the Convention.[23]

Overall, the substance of international economic law, based upon non-discrimination, market access, respect for legitimate policy goals, transparency and the protection of foreign direct investment contributes to the realisation of *jus cogens* and respect thereof. Its principles and underlying notions of fairness are supportive of many of the values expressed in *jus cogens*, while not excluding tensions with others. However, the relationship between the two fields is often very indirect and has hardly been explored. The impact at different stages of political, social and economic development varies. No simple findings are possible. But, overall, the framework, allowing and supporting an open economy, has in many countries facilitated essentially voluntary compliance with core values expressed in terms of *jus cogens*.[24]

Today, international economic law theory also supports the doctrine of peremptory norms, and thus the concept of hierarchy in international law, through the emerging doctrines of multilayered or multilevel governance.[25] Next to the human rights doctrine, international economic law theory contributes, in manifold ways and through different schools of thought, to the process of constitutionalisation of international law.[26] These contributions are not driven by theoretical ambition, but rather the desire to solve practical problems of coordination, allocation of power and management of transnational public goods in a rational manner, developing democracy and the rule of law in the age of enhanced globalisation and mutual interdependence. International economic law, with its different branches of trade, investment, financial and monetary affairs and the law of natural resource management, amounts to one of the more advanced areas of public international law that are part of this process. The fact and impact of WTO dispute settlement, and recourse to investor-state arbitration

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[21] McCrudden 1999, at 5–6; Crawford 2012, at 591 ff.

[22] Nieto-Navia 2001, at 2 ff.

[23] The US is not a contracting state to the VCLT. It signed the Convention in 1970, but refrained from adopting and ratifying the instrument while accepting most of its provisions to amount to customary international law. Shelton 2006, at 298 ff.; Nieto-Navia 2001, at 9.

[24] Cottier 2009, at 16 ff., 23 ff.

[25] Petersmann 2012, at 288 ff.; 475 ff.; Shelton 2006, at 292, 306–307 and 317 ff.

[26] Klabbers et al. 2009, at 153 ff.

in investment protection, make strong contributions to the rule of law.[27] Thus, they also provide an important context for *jus cogens*, which has generally been linked more closely to the fields of non-aggression, the protection of core human rights and humanitarian law and less to international economic law.[28]

11.3 International Trade Regulation

International trade regulation, under the auspices of the WTO and an increasing number of preferential trade agreements, is formally part of *jus dispositivum*. It has not been strongly related to the cause of *jus cogens*. Indeed, the term does not appear in the treaty language of the WTO. Yet, under WTO law and other trade agreements, countries are allowed to impose trade restrictions in the pursuit of legitimate policy goals under carefully defined and circumscribed conditions. Basic principles relating to market access and non-discrimination of goods, services and service suppliers, in particular most-favoured nation (MFN) and national treatment (NT), are qualified to this effect.[29] The same holds true for the grant of unilateral tariff preferences to developing countries under the General System of Preferences of the General Agreement on Tariffs and Trade (GATT).[30] Such schemes have been operated, in particular, by industrialised countries, including the European Union (EU).[31] It also applies to privileged access granted to service providers from all developing countries.[32] All these policies are not limited to *jus cogens*, but may be conditioned to respect peremptory norms. This is of particular importance in relation to so-called process and production methods (PPMs).

11.3.1 The Linkage to Process and Production Methods (PPMs)

In practical terms, the conditions for the importation of goods and services are not limited to product specifications, but can be conditioned to requirements relating to process and production methods (PPMs), and imports can even be banned if these requirements are not met.[33] In a recent landmark ruling, the EU was in result

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[27] See Vadi 2016.

[28] Petersmann 2012, at 35 ff.; Cottier 2011, at 503 ff.

[29] van den Bossche 2008, at 38–37; Cottier and Oesch 2005, at 350 ff. and 382 ff.

[30] 1994 General Agreement on Tariffs and Trade, 1867 UNTS 187.

[31] Cottier and Oesch 2005, at 552 ff.

[32] WTO Ministerial Conferences, Official Documents of the Geneva Ministerial, 2011. https://www.wto.org/english/thewto_e/minist_e/min11_e/official_doc_e.htm. Accessed 8 May 2015.

[33] Cottier and Oesch 2005, at 58 and 412 ff.; van den Bossche 2008, at 331 and 381; Conrad 2011, at 20 ff.; Holzer 2014.

found to be in principle entitled to rely upon domestically defined perceptions of public morals to ban the importation of seal-related products, subject to certain exceptions.[34] The parties, the panel and the Appellate Body (AB) did not explicitly discuss the matter in terms of PPMs or in terms of extraterritorial effects of such measures.[35] The outcome, however, was acceptance of the proposition that trade restrictions, in principle, can operate on the basis of factors independent of the particular quality of the product itself. Such restrictions are subject to a number of stringent and detailed requirements under Article XX GATT. In particular, the measures need to pass a necessity test, demonstrating, in particular, that no less intrusive measure is available. Moreover, under the so-called chapeau provisions of these exceptions, measures can be unilaterally imposed only upon failure to reach an agreement on the matter. The measures must not amount to arbitrary and unjustifiable discrimination or disguised restrictions to trade. The requirement, in effect, seeks to avoid abuse of rights contrary to the principle of good faith and the protection of legitimate expectations, but does not exclude less favourable treatment of imported products. Ultimately, it is a matter of avoiding economic protectionism under the guise of legitimate policy goals.[36] Comparable texts apply in the field of technical barriers to trade (TBTs), which is of paramount importance for requirements imposed relating to the labelling of products. Countries are, in principle, entitled to impose mandatory labelling or mandatory requirements if labelling is being used in order to inform consumers about methods of production used for a product being offered for sale.[37] Again, a measure needs to be well-designed or well 'calibrated' and no more trade restrictive than is necessary to achieve its goals.[38]

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[34] *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products (European Communities v. Canada)*, WTO, Appellate Body Reports, WT/DS400/AB/R and WT/DS401/AB/R, 22 May 2014, paras 2.152–163, 5.3, 5.10 and 5.12.

[35] The Appellate Body held the following: 'Finally, we note that, in *US—Shrimp*, the Appellate Body stated that it would not "pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation". The Appellate Body explained that, in the specific circumstances of that case, there was "a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)". As set out in the preamble of the Basic Regulation, the EU Seal Regime is designed to address seal hunting activities occurring "within and outside the Community" and the seal welfare concerns of "citizens and consumers" in EU member States. The participants did not address this issue in their submissions on appeal. Accordingly, while recognising the systemic importance of the question of whether there is an implied jurisdictional limitation in Article XX(a), and, if so, the nature or extent of that limitation, we have decided in this case not to examine this question further.' Ibid., para 5.173.

[36] *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Antigua and Barbuda v. United States)*, WTO, Appellate Body Report, WT/D5285/AB/R, 7 April 2005, paras 51, 72 and 103.

[37] 1994 WTO Agreement on Technical Barriers to Trade, 1868 UNTS 120. van den Bossche 2008, at 806 ff.; Cottier and Oesch 2005, at 750 ff.; Conrad 2011, at 52 ff. and 374 ff.

[38] See *United States—Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO, Appellate Body Report, WT/DS381/AB/R, 16 May 2012, paras 282–297.

Under GATT, these types of restriction were mainly developed in the context of environmental goals and conservation.[39] Nonetheless, they apply equally to the field of labour standards and human rights. Countries are basically entitled to condition the importation of goods and services to compliance with labour standards considered to pertain to *ordre public* or public morality of a particular jurisdiction. Restrictive conditions similarly apply to these constellations. Yet, in principle, a WTO member today is free to require compliance with core labour standards, or the ban on child labour, in treating imported products on the basis of such PPMs. To the extent that the making of a product (good or service) is related to the protection of these core values, compliance can be enforced by means of imposing necessary trade restrictions.

Failing international agreements, these standards are unilaterally defined. Importantly, they do not depend upon *ex ante* definitions as *jus cogens* in international law. Whether or not an *ordre public* or public morality interest pertains to the body of *jus cogens* in international law is not essential in this context. The two standards exist independently. Countries may, on that basis, adopt measures, which include violations of *jus cogens*, but may also go beyond the minimal standards of peremptory norms.[40] The issue is of particular importance in labour relations, which are discussed below, where the status of core labour standards still is disputed.[41] If considered a basic and fundamental concern within a society, an appropriate trade measure can be taken, provided there is a solid anchorage in a particular market and jurisdiction, and applied under conditions defined by international trade law as discussed above. Protection from what is considered deeply unethical or contrary to what a country believes to be part of *jus cogens*, can thus be addressed independently of an internationally accepted and shared qualification as a peremptory norm.[42] Measures taken do not depend upon a consensus whether or not the norm at stake qualifies as peremptory in international law.

Since unilaterally defined standards can be invoked, this is even more possible and true for internationally agreed standards, and, foremost, for those accepted as *jus cogens*. The latter do not depend upon claims made by parties, but need to be taken into account *ex officio* under the relevant provisions of WTO law by panels and the Appellate Body.[43] The first step will be a matter of recognising such principles as peremptory, for example, racial segregation on production sites, human

[39] WTO, Technical information on technical barriers to trade. www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm. Accessed 3 May 2015.

[40] Conrad 2011, at 65 ff. and 425 ff. In relation to labour standards, see Denkers 2008, at 111–141.

[41] See International Law Commission, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission, 58th session, UN Doc. A/CN.4/L.682, 13 April 2006; Collins 2011, at 137 and 153 ff.

[42] Marceau 2002, at 799.

[43] Article 3.2 of the 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 UNTS 401.

trafficking or child labour. If accepted such a standard must be respected as a matter of prevailing *jus cogens*, and independently of exceptions discussed above, in assessing trade restrictions challenged by an exporting country.[44]

11.3.2 Protection of Labour Standards

11.3.2.1 Core Labour Standards and *Jus Cogens*

Based upon the prohibition of slavery, the legal personality of all human beings and their rights, international labour standards addressing human capital as a factor of production are present in numerous international agreements concluded under the auspices of the ILO. These agreements are at the disposition of parties.[45] There is neither an obligation to join in a package deal, nor are there effective mechanisms of implementation and monitoring beyond regular reporting and policies of naming and shaming. In response to efforts to bring labour standards under the auspices of the WTO, the concept of core labour standards emerged and was adopted. These include four core standards pertaining to the rules governing labour market transactions. The first standard relates to the elimination of all possible forms of forced or compulsory labour. The second concerns the prohibition of discrimination based on gender, race, ethnicity, or religion in regard to employment and occupation. The third standard seeks the effective abolition of child labour. The fourth relates to the freedom of association and the effective recognition of the right to collective bargaining.[46]

These standards are generally considered to be universally accepted and are thus discussed as potential expressions of *jus cogens*. However, there is no consensus to this effect and the core principles cannot be considered to be part of the *jus cogens* as the matter stands. Strong views have been expressed in the literature that standards relating to the protection from forced labour related to the ban on slavery and child labour, at least in its most exploitative forms, form part of *jus cogens*.[47] The problem remains that many of the standards are considered to impair the comparative advantages of developing countries. For such reasons their governments resent the ever-growing recognition of labour standards and oppose developments towards *jus cogens*. The importance of education, linked to labour

[44] See Marceau 2002, at 756, 778 (n76 and n78), 795, 796 and 802. While conflicts between WTO law and *jus cogens* are unlikely and can be avoided by means of interpretation and application, *jus cogens* prevails in case of conflict, removing the application of WTO norms inconsistent with *jus cogens*. As Marceu put it, '[i]n the case of jus cogens, the inconsistent WTO provision is automatically invalidated.' Ibid., at 802.

[45] Hughes and Haworth 2011, at 23 ff.

[46] Ibid.; Elliott and Freeman 2003, at 11–12. See also ILO Declaration on Fundamental Principles and Rights at Work, 86th session of the International Labour Conference, 18 June 1998.

[47] Humbert 2009, at 114 ff.; Weissbrodt and Anti-Slavery International 2002, at 3; Smith 2005, at 461 ff.

standards, is still often considered a trade-off of lesser importance than cheap labour, despite the challenges of globalisation and an educated workforce, faced by all countries alike.

Progress in binding labour standards, beyond the prohibition of forced labour and child labour, therefore, cannot hope to build upon a consensual doctrine of *jus cogens*. There will always be major players opposing such developments.[48] We face a classical collective action problem, similar to the ones encountered in other areas such as the management of the seas or combating climate change. While common action and cooperation is imperative, we cannot wait for it before addressing these issues. At the same time, the process of globalisation and global value chains in the production of goods and services no longer allows the matter to be entirely left to domestic law and the need to find consensus on core principles at all costs. The need to act jointly must be complemented by the options of unilateral measures taken in addressing these kinds of problems.[49]

Clear-cut violations of *jus cogens* can be readily identified in outright cases of slavery, forced labour, severe child labour, apartheid and (in my view) refoulement of persons, but there are also grey areas. Yet, exploitation in terms of extremely low wages and disrespect for minimum labour standards, sexual exploitation, underpaid work of *sans-papiers*, or policies of *de facto* racial segregation in housing and schooling, are more likely to occur. In domestic law, such twilight configurations need to be assessed in the light of domestic law and existing international human rights obligations, and if absent, in terms of *jus cogens*. In international economic law, however, the constellation is different. A country is entitled to take appropriate countermeasures in response to such treatment on the basis of the rules described above. Countermeasures in trade and investment are not limited to *jus cogens* but essentially rely upon safeguards based upon public morals and *ordre public*.[50] The two notions differ from *jus cogens.* As a result, the precise definition of *jus cogens* is not an essential prerequisite for taking action in the field of protecting labour standards internationally. This does not mean that *jus cogens* is irrelevant: to the extent that a peremptory norm exists, it has to be applied irrespective of exceptions discussed above.

11.3.2.2 Objections Raised

The option in international economic law to take action on the basis of *ordre public* and public morals against imports of products raises serious concerns of protectionism. The objection can be made that it amounts to excessive recourse to public

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[48] Kaufmann 2007, at 78–79, 87 ff. and 92 ff.; Gross and Compa 2009, at 7 ff.; Denkers 2008, at 111 ff.

[49] Kaufmann 2007, at 234 ff.

[50] Ibid., at 238 ff. and 250 ff.; *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China v. United States)*, WTO, Appellate Body Report, WT/DS363/AB/R, 21 December 2009.

morals and *ordre public* due to extraterritorial effects in the application of domestic law and domestic perceptions of fairness and justice. These risks are real, and necessary safeguards need to be established.[51]

Indeed, existing possibilities to unilaterally enforce basic values, including *jus cogens*, within the international trading system are subject to strong criticism beyond protectionist interests. It is feared that they undermine the multilateral trading system and market access, impose extensive extraterritorial effects of domestic legislation on large markets and thus lead to a new type of imperialism.[52] The risk of abusing labour standards and human rights-related PPMs for protectionist purposes exists. It is somewhat constrained by disciplines imposed in WTO law. International economic law provides such disciplines, in particular under Article XX GATT and Article XIV General Agreement on Trade in Services (GATS).[53] As stated, the chapeau of these provisions guards against abuse of rights, qualified discrimination and, in particular, the imposition of measures without first seeking negotiated settlement of the issue at stake.[54] Still, illegal measures may be taken and it takes time to remove them. The experience with excessive recourse to trade remedies (safeguards, countervailing and anti-dumping measures) for purely protectionist purposes may be repeated. Measures may stay in place until they have to be removed following dispute settlement.

11.3.2.3 Flanking Policies

From this perspective, there is a need to accompany these *ordre public* and public-moral-induced policies with flanking polices and measures abroad which, in the future, assist in reducing negative economic impacts on developing countries henceforth dependent upon practices found inconsistent with *ordre public* of an importing country. In the field of environmental law, the main and most effective remedy amounts to transfer of technology and know-how, and much greater efforts than have been made so far are necessary. This is even truer in the field of labour standards. Cooperative and educational models, as developed under the North American Free Trade Agreement (NAFTA),[55] with educational components fostering cooperation are important flanking measures to be pursued.[56] Such packages may also foster the development of commonly agreed standards. Unilateral policies supporting basic values within an importing country are thus only fully legitimate if accompanied with a flanking measure relating to development assistance, aid for trade, product development and improvement of the market in a manner

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51 van den Bossche 2008, at 615–616 and 650–651.

52 Shelton 2006, at 301 ff.

53 1994 General Agreement on Tariffs in Services, 1869 UNTS 183.

54 Cottier and Oesch 2005, at 428 ff.; van den Bossche 2008, at 615 ff.

55 1992 North American Free Trade Agreement, 32 ILM 289.

56 Kofi Addo 2015, at 216 ff.; Kaufmann 2007, at 188 ff.

compatible with the labour and human rights standards defined. Yet, unilateral measures remain essential in providing sticks and carrots, and amount to important means to foster the enforcement of *jus cogens* in particular.

11.3.3 Protection of Human Rights

Similar considerations apply to the protection of human rights beyond core labour standards, provided that there is a sufficient linkage between the measure taken and the production of the goods and services that are imported.[57] A country is basically entitled to condition the importation and sale of products and services within its jurisdiction on compliance with unilaterally defined human rights standards while making and trading such products.[58] It is therefore a matter of unilaterally defining core human rights, which in trade policy can and should be respected under the terms and conditions of the WTO law and of preferential trade agreements (PTAs). It may address discrimination on the grounds of race, age and gender. Again, action does not depend upon qualification as *jus cogens*. However, if the standard qualifies as a peremptory norm, for example racial segregation in the workplace under the ban of apartheid, panels and the Appellate Body of the WTO will have to take this into account *ex officio* in assessing the claim and defence.[59]

Human rights violations and violations of *jus cogens*, however, often are not linked to the production of goods and services. They cannot be addressed in terms of PPMs. Torture and degrading human treatment, genocide or refoulement of refugees often occur in a context not directly related to economic activities. Responses primarily depend upon remedies made available by human rights law and the general law of retorsion, reprisals and countermeasures in response to violations of international law. Such interventions depend upon conditions defined by general international law, and the law of protecting human rights in particular.[60] Options under international trade law are very limited, if not practically excluded. Targeted import restrictions of goods amount to quantitative restrictions banned under Article XI GATT. Also, they are in violation of MFN protected in Article I GATT as they are directed against a particular country of origin but not to others. While human rights qualify for public morals under Article XX GATT, it is doubtful whether the measure passes the necessity test and the requirements of the chapeau of the provision, in particular the obligation to treat all countries alike where the same conditions prevail. Similar concerns exist in restricting access to services under Articles II, XVI and XVII and XIV GATS. Economic countermeasures

[57] Cottier 2002; Jackson 2006, at 20 ff.

[58] Breining-Kaufmann 2005, at 95 ff.

[59] See Marceau 2002.

[60] Pauwelyn 2005, at 212 ff.

unrelated to specific products are essentially limited to aggression, threats to international peace and security and depend upon UN Security Council decisions. Or, they may rely upon unilateral invocation of essential national security interests which, however, must entail major problems for the country concerned. Both are addressed in Article XXI GATT and Article XIVbis GATS and require, in particular, that measures are 'taken in time of war of other emergency in international relations.'[61]

The scope for enforcing human rights outside the linkage to specific product characteristics or production methods is thus very narrow. It is here that the definition of *jus cogens*, entitling countries to take measures on their own becomes critical. Only if accepted as *jus cogens*, can countries react on the basis of an obligation *erga omnes*. Gross violations of human rights may amount to violation of *jus cogens*, in particular relating to slavery, torture and apartheid or genocide. States and the international community are bound to respect these norms in foreign policy.[62] All countries alike are entitled to take appropriate countermeasures, including imposing economic sanctions.

The law, however, is far from settled. It was seen that the catalogue of *jus cogens* is not well defined. There is no established doctrine and law in place addressing the enforcement of *jus cogens* outside international trade and national security.[63] Moreover, in WTO law, no clear precedents so far exist. The right to intervene with economic and other measures in constellations of gross violations of human rights and threats thereof (humanitarian intervention) faces the objection of the ban of use of force, non-aggression and the preservation of national sovereignty. It is contested as a revival of the concept of just wars.[64] Even more contested and controversial is the obligation to intervene against violations of peremptory norms, subject to considerations of proportionality. The emerging doctrine of Responsibility to Protect (R2P) stipulates and includes the right to intervene *erga omnes* in the defence of *jus cogens*, also by means of economic countermeasures.[65] Again, the doctrine is strongly contested, certainly beyond the realm of *jus cogens*. The concept of R2P faces problems of coherence, equal treatment, consistency and sovereignty in leading foreign policy due to preferences and alliances in the pursuit of *realpolitik* and interests. While interventions may be found appropriate and opportune in once instance, comparable situations may be left without taking similar action. We shall return to this issue below under the emerging principle of Common Concern.

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[61] Called the National Security Exception and UN Sanctions. Cottier and Oesch 2005, at 468 ff.; van den Bossche 2008, at 664 ff.

[62] *Barcelona Traction, Light and Power Company, Limited*, at 3 and 32; Nieto-Navia 2001, at 14; Shelton 2006, at 314.

[63] Marceau 2002, at 756 and 795 ff.

[64] Nadakavukaren Schefer and Cottier 2015, at 127 ff.

[65] Hilpold 2015, at 2 ff. and 16 ff.; Nadakavukaren Schefer and Cottier 2015, at 16 ff.

11.4 Investment Protection and Corporate Social Responsibility

In the field of international investment protection, the second mainstay of international economic law, *jus cogens* likewise plays a lesser role as host countries are generally entitled, under customary international law and bilateral investment treaties (BITs), to pursue public policy interests in response to the practices and conduct of investors on their territory without running the risk of having to pay compensation. Motives are not limited to *jus cogens*. The main problem lies with the current lack of responsibility of home countries of investors and multinational corporations (MNCs) for securing compliance with peremptory norms.

11.4.1 Host States

There is no legal problem for host states of enforcing peremptory norms, in particular, against slavery, forced labour or child labour, under customary international investment protection law or existing BITs. Even agreements operating under the old European gold standards—mainly protecting investors' interests in developing countries—host country legislation protecting *jus cogens* is captured by *ordre public* exemptions. A grey area existed in relation to additional standards potentially incurring regulatory takings and thus leading to compensation. With the advent of the NAFTA, standards of fair and equitable treatment as new global standards were increasingly incorporated in new BITs, and such policy space has been increasing in recent years.[66] This development will also shape future investment protection of the EU, which has become a prerogative of the Union and no longer pertains to the domain of foreign economic policy of Member States.[67] Comparable to and in parallel to the legal developments within the WTO, the policy space of countries in the pursuit of legitimate domestic policy goals beyond the narrow bounds of *jus cogens* has been widening.[68] Host countries taking measures inconsistent with the BIT may be forced to withdraw these measures. Generally speaking, however, investment protection is limited to compensation and disputes often arise once the investment has been withdrawn. The interest in attracting foreign direct investment, of course, limits the potential to take recourse to unilaterally defined measures.[69] Countries are therefore interested in sharing agreed

[66] Valenti 2014, at 27 ff.; Barbieri 2014, at 131 ff.

[67] Perfetti 2014, at 308 ff.

[68] Cottier and Oesch 2005, at 969 ff.

[69] Dimsey 2013, at 161 ff.

minimal standards, which are respected by both investors and host countries.[70] These standards are essentially of a bilateral nature and thus not suitable per se to develop into *jus cogens*, unless they are widely received and used. The lack of a multilateral framework makes progress more difficult in this field.

11.4.2 Home States

Host countries of foreign direct investment often lack the political and legal structure to impose and enforce peremptory norms for various reasons. Authoritarian governments, lack of rule of law, and corruption are factors that leave people potentially and actually affected by foreign direct investment infringing *jus cogens* standards and beyond without protection and defence. Beyond *jus cogens*, issues related to land grabbing for large agricultural production, or water rights relating to extracting industries are cases in point.[71] In such constellations, compliance with *jus cogens* largely depends upon voluntary conduct of investors or rules imposed and enforced by the home state of the investors.

The problem of certain conduct being prescribed to investors by their home countries is legally much more complex and difficult than regulations imposed by the territorial host country. There is a lack of multilateral mechanisms, comparable to carrots and sticks in the trade field, which would encourage such efforts.[72] Recently, new standards requiring enhanced transparency in reporting of MNCs in extracting industries were adopted in the US and the EU.[73] Voluntary effects to enhance transparency in particular with a view to fairness in taxation and revenue sharing have been made.[74] Corporate social responsibility (CSR) and compliance

[70] United Nations Office of the High Commissioner for Human Rights, Guiding principles on business and human rights: implementing the United Nations 'protect, respect and remedy' framework, HR/PUB/11/04, 2011, at 3 ff.

[71] Nadakavukaren Schefer and Cottier 2015, at 125 ff.; Gass 2013, at 137 ff.; Wilske and Obel 2013, at 180 ff.; Tamada 2015, at 107 ff.

[72] Polanco Lazo 2015, at 430 ff.

[73] Section 1504 Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111-203, H.R. 4173; Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance; Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC Text with EEA relevance. See Reilkoff 2014, at 2435 ff.; and Mattfess 2012.

[74] OECD 2011, at 30, 34, 48–49, 61, 71 and 85 ff.

with voluntary standards entered into by companies is the most promising avenue.[75] What has been lacking are appropriate norms to enforce and implement such commitments. All too often, they are considered to be marketing tools that are of no consequence in the case of non-compliance.

The law protecting against unfair competition, however, offers a potential remedy.[76] Under Article 10bis of the Paris Convention for the Protection of Industrial Property, as incorporated in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs),[77] members to these conventions are obliged to make available appropriate remedies and tools.[78] It is a matter of taking up non-compliance by companies case by case before domestic courts of law. The *Nike* case in the US offers a pertinent example.[79] Appropriate rules, based upon Article 10bis Paris Convention, could be introduced into the WTO TRIPs Agreement and render these remedies effective, thus reinforcing compliance with CSR commitments. Such rules would need to grant standing to non-governmental organisations (NGOs) and consumer protection organisations and not be limited to competitors. In addition to unfair competition, civil and penal responsibilities of companies for illicit conduct abroad exist and are being developed.[80]

Finally, it is conceivable that the disciplines of *jus cogens* could be extended to MNCs beyond voluntary commitments made under CSR. This entails a major shift in international law, but could amount to an important tool for enforcing peremptory norms binding upon corporations operating abroad. Responsibilities will be increasingly defined in a triangle of home states, host states and MNCs. Jurisdiction of home countries will substantially improve compliance and enforcement in host countries. This development is still in an early stage, but may eventually include such disciplines addressing peremptory norms.

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[75] United Nations Conference on Trade and Development, Investment and Enterprise Responsibility Review, UNCTAD/DIAE/ED/2010/1, August 2010, at 31 and 34 ff.; United Nations Office of the High Commissioner for Human Rights, Guiding principles on business and human rights: implementing the United Nations 'protect, respect and remedy' framework, HR/PUB/11/04, 2011, at 13 ff.

[76] For a detailed discussion, see Cottier and Wermelinger 2014, at 86 ff.

[77] 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights, 1869 UNTS 299 (TRIPs Agreement).

[78] Article 41 TRIPs Agreement.

[79] Nike Inc. was condemned to pay damages for false information on labour practices in Vietnam, based upon the State of California unfair competition act. The US Supreme Court denied certiorari: *Kasky v. Nike, Inc.,* California Supreme Court, 45 P 3d 243 (Cal. 2002); and *Kasky v. Nike, Inc*., US Supreme Court, 539 U.S. 654 (2003). For further information, see Cottier and Jevtic 2009, at 669 ff.; Cherry and Sneirson 2011, at 1028 ff.; Besmer 2006, at 279 ff.

[80] Cottier and Wermelinger 2014, at 86 ff.

11.5 Financial and Monetary Law

It is difficult to find explicit linkages between *jus cogens* and financial and monetary law. Banking and insurance are services and are subject to the GATS.[81] General exceptions allow for the invocation of *ordre public* and public morals, and no state will face a problem of protecting *jus cogens* in the field. No relationship can currently be found between *jus cogens* and monetary law. Largely limited to defining powers among different institutions, policies are essentially based upon economic theory and devoid of legal considerations.[82] No exploration of the role of *jus cogens*, for example, in the context of the standby agreements of the International Monetary Fund (IMF) or of conditions imposed by lending banks, in particular public institutions like the World Bank, has yet been further developed. A 2015 report to the General Assembly by the special rapporteur on extreme poverty and humans rights qualified the World Bank as a 'human rights-free zone'.[83] There can be no doubt that these institutions need to take *jus cogens* minimal standards into account in their policies and programmes. Proposals to take into account human rights and impact assessment readily include *jus cogens*, in particular the prohibition of forced labour and racial segregation, which may occur in projects which are funded.

11.6 Respect for *Jus Cogens* as a Matter of Common Concern

11.6.1 Most Fundamental Precepts of International Justice

The paradox of finding more extended and efficient mechanisms of judicial enforcement of international treaties in trade and investment law than those relating to the most fundamental precepts of justice and principles, in particular human rights, invites for further reflections upon a better integration of the concept of *jus cogens* into the overall structure of public international law. We need to look for better foundations, all with a view to reinforcing compliance with, and implementation of peremptory norms.[84] The classical distinction of *jus dispositivum* and of *jus cogens*, of voluntary and peremptory norms no longer meets today's and future regulatory needs in public international law.

It is generally understood that the notion of *jus cogens* relates to an exceptional and confined category of law, while leaving the rest to the will and consent of

[81] Howse 2014, at 317 ff.

[82] Marceau and Maughan 2014, at 358 ff.

[83] Philip Alston, Special Rapporteur, Report of the Special Rapporteur on extreme poverty and human rights, 70th session of the GA, UN Doc. A/70/274, 4 August 2015.

[84] Shelton 2006, at 292, 305, 317 and 321–322.

states. While this may be formally true, ultimately *jus cogens* equally depends on consensus and shared perceptions.[85] Ratio, natural or divine law are not sufficient to establish standards of *jus cogens*. But more importantly, international law today is more nuanced than these two categories. The legal effects are less categorical. The two categories much more form part of a continuum, short of clear-cut distinctions. Except for persistent objectors, customary law is binding upon all states, whether or not they agree. It is not at the disposition of governments. Equally, general principles of law form part of international law. Equity, good faith or non-retroactivity are essential ingredients and cannot be understood merely in terms of *jus cogens* or *dispositivum*.[86] They do not depend upon consent. Finally, treaties may be revoked, but their impact goes way beyond voluntary commitments and effects. The WTO is a case in point. Its obligations form a package and have to be agreed to as a whole. There is no picking and choosing and the treaty also contains rules, which a Member was practically forced to accept. Moreover, all provisions are subject to mandatory dispute settlement, which produces results inherently objected to by one of the parties involved.[87] On substance, international treaty law, reflecting interdependence and cooperation, can no longer be adequately described in terms of *jus dispositivum*. In addition, soft law—at the other end of the spectrum—often imposes strong de facto commitments or even legally binding effects under the principle of good faith and the doctrine of legitimate expectations. Unilateral promises of governments may be binding under estoppel.[88] In the final analysis, all law is binding and peremptory in that sense.

From the point of view of compliance and implementation, we therefore submit that there is no fundamental difference between *jus cogens* and *jus dispositivum* in international law. A clear distinction drawn between mandatory, compelling norms on the one hand, and voluntary ones on the other can be formally made, but not on substance. The Roman and civil law distinction does not adequately capture the complexities of international law and relations, if not of law in general. There is a much wider body of essential norms today, which call for universal respect beyond the narrow bounds of the two categories. The differences are much narrower, and rely upon broader foundations than the juxtaposition of *jus cogens* and *dispositivum*.

To speak of *jus cogens* thus makes sense only if it stands for a qualified level of commitment of states in this continuum. It is submitted that it represents the most fundamental values shared by the international community. They reflect globally accepted standards of *ordre public* and very basic human rights. They are binding upon all states and take effect *erga omnes*.[89] They offer the most important remedies against state failure, comparable and in addition to the treaty-based principles

[85] Nieto-Navia 2001, at 2.

[86] Shaw 2014, at 5, 69 ff., 595 ff. and 654 ff.

[87] Cottier and Oesch 2005, at 143 ff.; van den Bossche 2008, at 235 ff.

[88] Shaw 2014, at 73 and 83–84.

[89] Nieto-Navia 2001, at 14.

of non-discrimination in international economic law. Governments and domestic courts ignoring these precepts fail to discharge fundamental duties and in that respect are dysfunctional. It is here that the international system is bound to intervene in a system of vertical checks and balances. This particular quality further entails that these values, principles and norms apply without exceptions. They are absolute and not subject to balancing with other interests or to compromise. They thus ought to entail an obligation to respond to violations and challenges of these values, subject to the needs of proportionality.

These qualities and implications also explain why, as discussed, the content of *jus cogens* is not precisely defined within the international community. *Jus cogens* is not static and must be able to adjust to new challenges. Further developments will be introduced by states' practice, in particular, on the basis of claims, unilateral action taken within the bounds of international law set out above. The option to take recourse to unilaterally defined standards of public morals and *ordre public* in international economic law will be an important driver and entry point in this process. *Jus cogens* may eventually be consolidated and generally accepted with the support of domestic courts and the literature; but blurred lines are bound to persist.

We will now leave the juxtaposition of *jus cogens* and *jus dispositivum* behind and conceptualise the values, rules and principles protected by *jus cogens* in terms of an emerging doctrine of Common Concern in international economic law broadly speaking, taking into account different levels of normativity.[90] It is submitted that the respect for *jus cogens*, the implementation, realisation and compliance with fundamental precepts of justice, is a Common Concern of Humankind and a shared responsibility of all subjects of international law alike.

11.6.2 The Emerging Principle of Common Concern

11.6.2.1 In General

The concept of 'Common Concern of Humankind' so far has been recognised by the United Nations Framework Convention on Climate Change[91] (UNFCCC), the 1992 Biodiversity Convention,[92] the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture states,[93] and the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage,[94] all expressing shared responsibilities and the need for international cooperation. Yet, Common Concern

[90] For a detailed discussion, see Cottier et al. 2014, at 3 ff.

[91] 1992 United Nations Framework Convention on Climate Change, 1771 UNTS 107.

[92] 1992 Convention on Biological Diversity, 1760 UNTS 79.

[93] Preamble para 3 of the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture, 2400 UNTS 303.

[94] 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, 2368 UNTS 1.

also carries the potential to develop into a general legal principle, which is able to legitimise, but also limit, extraterritorial state action as an incentive to bring about appropriate responses and international cooperation in addressing common problems. Common Concern applies equally to other transboundary resource-related issues, such as air pollution and marine pollution, and genetic resources.[95] Potentially, it can also apply to the field of economic activities in the light of global value chains and high levels of international interdependence. Compliance with core labour standards and basic human rights,[96] and policy coordination in monetary and financial affairs, are all potential areas of Common Concern.

The principle of Common Concern entails, firstly, an obligation to international cooperation in addressing shared problems. If such efforts fail, it allows and entitles states to take unilateral action, but also sets limits to such action. Common Concern implies that action with extraterritorial effects can be taken if the problem can be defined and understood as one of Common Concern, i.e. a problem, which inherently cannot be successfully addressed unilaterally and domestically.[97] Defining climate change as a Common Concern allows for unilateral action, in case international cooperation fails, in order to bring about appropriate incentives (sticks and carrots).

It is submitted that respect for, and compliance with, *jus cogens* amounts to a Common Concern of Humankind. The fundamental precepts of international justice, applicable *erga omnes*, and without exemptions are a shared concern and responsibility of all subjects of international law, in particular in light of the currently weak enforcement and compliance mechanisms. All subjects of international law are obliged to comply with peremptory norms. They share a common interest in ensuring that other states comply with *jus cogens* and thus contribute to domestic and international stability and the realisation of basic precepts of justice. They need to cooperate in the matter with each other.

Conceptualising *jus cogens* as a Common Concern allows framing appropriate policies and legal responses. It allows defining duties to negotiate and defining to the scope of action, affirming a proper duty and obligation to act in response to violations of *jus cogens*. The tools and remedies developed in international economic law offer an important, albeit not sufficient framework and starting point.

11.6.2.2 Lessons from International Economic Law

The modes of operation of the principle Common Concern can learn from international economic law. In applying the principle, respect for *jus cogens* as a Common Concern firstly obliges states concerned to engage in international negotiations aimed at addressing the problem at hand. Peremptory norms may

[95] Cottier et al. 2014, at 19 and 25.

[96] Nadakavukaren Schefer and Cottier 2015, at 6 ff.

[97] Ibid., at 14 ff.; Cottier et al. 2014, at 5 ff.

eventually be respected voluntarily upon completion of negotiations. Willingness to negotiate will be enhanced by the desire to avoid unilateral measures and disadvantages linked to such measures, in particular in terms of restricting market access. Secondly, if negotiations fail, Common Concern allows governments and courts of law to act and to deploy in result extraterritorial effects by applying international and domestic law. Unilateral action and the threat of it, again, provide a stick, offering in return incentives and carrots to cooperate. The option of unilateral action, in particular on the part of large markets, thus enables long-term deadlocks and collective action problems to be overcome.[98] The problem is no different from addressing climate change, universal human rights protection, or international labour standards, to the extent that they are related to imported products. Negotiated settlements and unilateral action can take place within the realm and framework of WTO law or investment protection.

Common concern and *jus cogens* assume additional functions by defining the scope of unilateral action in relation to import restrictions of goods and services not directly related to the violations addressed. Compliance with *jus cogens* outside international economic law is more difficult to achieve as conditions allowing unilateral actions under international law are more restrictive for the reasons discussed. Measures depend upon clearance of international sanctions under the law of the United Nations or measures justified in the pursuit of essential national security interests and in cases of war or international emergencies. Aggression and genocide, and the threat of it, may be addressed on that basis, but other expressions of *jus cogens* may not.

Under an emerging principle of Common Concern, these restrictions need to be reviewed. Compliance with *jus cogens* as a Common Concern must entail the necessary set of carrots and sticks. Failing an international settlement and voluntary compliance,[99] subjects of international law must be entitled to take necessary unilateral action in seeking to bring about compliance with *jus cogens*. The international law of sanctions should be clarified to this effect under the umbrella of Common Concern. Irrespective of threats to piece and national security, the international community and states should be entitled to adopt as a matter of common concern all appropriate measures necessary to remove and remedy violations of peremptory norms by another subject of international law.

11.6.2.3 Towards an Obligation to Act Against Violations of *Jus Cogens*

It may be argued that the emerging principle of Common Concern does not add much to existing international economic law and peremptory norms; enforcement of *jus cogens* does not depend upon it. Yet, apart from reinforcing legitimacy and widening appropriate disciplines of unilateral measures, the main potential of

[98] Shaw 2014, at 86–87.

[99] Cottier et al. 2014, at 20 ff.

Common Concern as applied to *jus cogens* consists of introducing an obligation to act against offending and thus failing states violating peremptory norms.

It would seem inherent to *jus cogens* and basic precepts of international justice that states are obliged to take appropriate actions, subject to a test of proportionality.[100] Governments may only refrain from reacting if it is shown that measures are unsuitable and that it is impossible to achieve the desired effects. It is submitted that this is the feature which distinguishes *jus cogens* from other binding commitments under international law. The obligation to act is commensurate with the well accepted *erga omnes* nature of these obligations, but more profoundly with the necessity to maintain the basic values and precepts of international justice entailed in *jus cogens*. Such an obligation includes duties to address the problem in international negotiations. Failing such negotiations, it obliges states to take unilateral action.

While the emerging principle of Common Concern applies to a variety of fields, ranging from climate change to human rights protection under general international law,[101] its specific application to compliance with *jus cogens* is submitted to entail an obligation to act, not similarly present in other fields of law. The emerging principle of Common Concern supports and reinforces the legitimacy of intervention and measures adopted to address violations of *jus cogens* as a matter of shared responsibility in securing the most fundamental precepts of international justice and addressing state failure abroad. It is better suited to communicate the idea of shared responsibility for fundamental precepts of international justice than traditional notions of *jus cogens* and *jus dispositivum*. Moreover, the principle supports and reinforces the case for R2P. The two concepts are closely related. This is even more true for R2P relating to compliance with *jus cogens* and thus the most basic standards of international justice. Within this framework limited to obligations under *jus cogens*, R2P may eventually be accepted by the international community of states under the umbrella of the emerging principle of Common Concern. [102] The proposition also is in line with the obligation to cooperate of Article 41(1) Draft Articles on State Responsibility, and informs further developments in terms of legal remedies indicated in Article 41(3). The right to act unilaterally as well as a potential obligation to intervene under the doctrine of R2P forms part of the remedies envisaged under the principle of common concern. Of course, this will take time and it would be naïve to believe that Common Concern can readily change traditional patterns of states. State practice does not support this proposition as noted in the introduction. Governments generally refrain from interfering and taking action against violations of *jus cogens* abroad. It was recalled that the proposition of an obligation to act is controversial, both under *jus cogens* and the doctrine of R2P. Yet, it is hoped that in the long run the principle of Common Concern will bring about new perceptions of shared responsibilities in a system of multi-level governance and a globalising world.

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[100] Nieto-Navia 2001, at 2–3.

[101] Cottier et al. 2014, at 5 ff.

[102] Nadakavukaren Schefer and Cottier 2015, at 136–137; Bellamy 2015, at 38 ff.

11.7 Conclusions

Focusing on mechanisms to enforce compliance with *jus cogens*, international economic law offers important avenues of support. States are entitled to revert to trade restrictions in support of *jus cogens* provided there is a sufficient linkage of the measure with the products restricted from importation. States are entitled under international trade law to operate such restrictions invoking public morals and *ordre public* as unilaterally defined and subject to requirements of necessity. Importantly, to do so they do not depend upon universally agreed standards of *jus cogens* shared by the international community. The mechanisms of international economic law are suitable to serve a number of peremptory norms relating to the process of production, in particular in terms of protecting and enforcing minimal labour standards and basic human rights. The same holds partly true in investment protection, but many issues relating to the responsibility of home states need further research. Other peremptory norms, such as the prohibition of torture or genocide, are more difficult to enforce by means of international economic law, except for reasons of national security. International law does not make available appropriate instruments to address violations of *jus cogens*, which are unrelated to products characteristics or production and process requirements. The general rules of public international law on economic sanctions and countermeasures are too rigid and do not allow appropriate answers in many instances. The authority of *jus cogens* mainly rests with voluntary compliance and to a large extent depends upon the will and convictions of governments. It does not live up to the legal aspirations of *jus cogens*. A new approach is warranted.

Leaving formal distinctions of *jus cogens* and *jus dispositivum* behind, the paper defines *jus cogens* as basic precepts of international and global justice with which all states are obliged to comply, without exceptions. It understands compliance with, and enforcement of, *jus cogens* as a common Concern of Humankind and applies the emerging principle to the field. Derived from the law of natural resources, the principle of Common Concern combines obligations to cooperate and negotiate settlements with the options of unilateral action having extraterritorial effects should cooperation and negotiations fail. This principle can be readily applied under existing WTO rules restricting trade in products relating to the violation of *jus cogens* and beyond, in particular in the field of core labour standards, discrimination and basic human rights. The paper suggests expanding these mechanisms, combining carrots and sticks of cooperation and unilateral measures to restrictions in trade and investment to non-related products in cases of violations of *jus cogens* and to extend this to other fields of international law. It suggests confirming an obligation to negotiate and take unilateral action in support of compliance with *jus cogens* by taking recourse to appropriate measures. The very essence of *jus cogens* having effect *erga omnes* and providing the very basic and shared standards of justice calls for obligations to act, entailing both negotiations and unilateral action, if need be. It is here that the principle of Common Concern as applied to compliance with *jus cogens* joins the effort to develop an

R2P in international law within the rules on state responsibility. As an umbrella, it enhances the legitimacy of action taken in discharging shared responsibilities. Limiting the obligation to act to peremptory norms and thus the very foundations of international justice, both under Common Concern and R2P, will increase the prospects of duties to engage in fostering compliance with jus cogens in international law and relations. The process can be built upon the model, tools and the experience of international economic law.

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Chapter 12
Jus Cogens in International Investment Law and Arbitration

Valentina Vadi

The mystery of jus cogens remains a mystery
(Sinclair 1984), at 224.

Abstract Despite growing reference to *jus cogens* in the jurisprudence of international courts and scholarly writings, the concept remains vague. What is *jus cogens*? Why does it matter? What are its effects? These questions remain unsettled, and the time is ripe for further in-depth investigation. This chapter aims at addressing this set of questions, focusing on the role of *jus cogens* in international investment law and arbitration. *Jus cogens* has played an important role in the evolution of international investment law, and illuminating the trajectory of this concept is important for the future of the field. In fact, not only can the study contribute to further clarifying the concept of *jus cogens* but it can also reinforce the perceived legitimacy of the international investment law system. These developments can be significant for international investment lawyers, international law scholars and other interested audiences.

Keywords *Jus cogens* · International investment law · Investment treaty arbitration · Transnational public order · Peremptory norms

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12.1 Introduction

Despite the wealth of scholarly writings on various aspects of *jus cogens*,[1] *jus cogens* remains an elusive, ambiguous and contested concept. *Jus cogens*, a Latin expression which can be translated as 'compelling law', refers to peremptory norms of general international law from which no derogation is possible. *Jus cogens* is grounded in and guards the most fundamental and highly valued interests of the whole international community. Peremptory norms 'do not exist to satisfy the needs of the individual states but the higher interest of the whole international community'.[2]

While *jus cogens* belongs to the modern fabric of international law, it remains an elusive concept. Very few international law instruments embrace this notion, and the jurisprudence of international courts and tribunals have not used it extensively at least until recently. Article 53 of the Vienna Convention on the Law of Treaties (VCLT)[3] defines *jus cogens* as

> 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.[4]

The same Article provides that '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'.[5] While this

[1] There is considerable literature on *jus cogens* in international law. See, *inter alia*, Verdross 1937, at 571–577; Rolin 1960, at 441–462; Schwarzenberger 1964–1965, at 455–78; Schwarzenberger 1965, at 191–214; Verdross 1966, at 55–63; Ronzitti 1984, at 209–272; Saulle 1987, at 385–396; Janis 1987a–1988 1987–1988a; Orakhelashvili 2006; Bianchi 2008, at 491–508.

[2] Verdross 1966, at 58.

[3] Article 53 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (VCLT).

[4] Ibid.

[5] Ibid.

provision sets a legal framework as to how peremptory norms work, it does not specify which norms constitute *jus cogens*.

Jus cogens remains ambiguous because its precise nature, contours and consequences remain unclear. The problem of identifying these norms has always been a vivid one in international legal literature, and the VCLT has by no means ended the scholarly debate.[6] There is no consensus on which norms are part of *jus cogens*, nor on how a norm reaches or loses that status.

Jus cogens has been contested because it recalls the idea of natural law (*jus naturalis*)—a body of law, which is common to mankind, pre-exists and trumps other laws that have been set out or posited by the lawmakers within given communities (*jus positum*). Historically, *jus cogens* was seen as a non-consensual type of law deriving from natural law.[7] Like natural law, *jus cogens* emphasises the importance of human beings rather than necessarily conforming with the consolidated positivist and state-centric Westphalian understanding of international law. Like natural law, *jus cogens* seems to override the idea that public international law is purely based on the consent of states. In this sense, it can restrict state sovereignty, viewing individuals as emerging subjects of international law and contributing to the humanisation of the same. Yet, even though the notion of peremptory norms can be traced back to ancient times and is conceptually linked to the idea of natural justice, it became part of positive international law since the end of World War II.[8]

Some authors contend that *jus cogens* is not a scientific reality,[9] but an absurdity,[10] and that 'the sheer ephemerality of *jus cogens* is an asset, enabling any writer to christen any ordinary norm of his or her choice as a new *jus cogens* norm, thereby in one stroke investing it with magical power'.[11] In this vein, Koskenniemi contends that '[*jus cogens* and obligations *erga omnes*] have no clear reference in this world but … [i]nstead of meaning, they invoke a nostalgia for having such a meaning'.[12] Other scholars have highlighted the risk of political misuse of *jus cogens*, 'leav[ing] everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law'.[13] Accordingly, the differentiation between higher and lower norms would 'devalue ordinary law' and 'ideologize international law'.[14]

However, the notion of peremptory norms is now firmly rooted in international law and has an ascertainable basis. Although there is no simple criterion by which

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6 Sztucki 1974, at 4.

7 Verdross 1937.

8 See generally Kadelbach 2016.

9 Janis 1987a–1988 1987–1988b.

10 Glennon 2006, at 529.

11 D'Amato 1990–1991, at 1.

12 Koskenniemi 2005, at 113.

13 Schwarzenberger 1965, at 213.

14 Paulus 2005, at 309.

to identify a general rule of international law as having the character of *jus cogens*, the concept of *jus cogens* is positive law.[15] Generally accepted examples are the prohibition of: apartheid, the use of force, slavery, torture, piracy and genocide.[16]

Norms of *jus cogens* can appear in the form of customary law, treaty law and even general principles of law.[17] It is the content rather than the form of a given norm that makes it belong to the *jus cogens* regime.[18] The fact that *jus cogens* norms can appear in different forms, i.e. as treaty and/or customary law and/or general principles of law, is confirmed by the relevant jurisprudence. The ICJ has upheld the *jus cogens* status of given norms irrespective of whether they were based on treaties or customary law. For instance, in its *Congo v. Rwanda* judgment, the ICJ affirmed that *jus cogens* is part of international law and that the prohibition of genocide belongs to this category of norms.[19] In doing so, the Court did not refer to the specific form of the *jus cogens* norm, whether customary or treaty law. A year later, the Court restated its recognition of *jus cogens* in the *Genocide* case.[20] In the *Genocide* case, Bosnia and Herzegovina alleged, *inter alia*, that the Serbian forces' attempt 'to eradicate all traces of the culture of the protected group through the destruction of historical, religious and cultural property' amounted to a form of genocide under the Genocide Convention.[21] The Court considered that there was 'conclusive evidence of the deliberate destruction of the cultural and religious heritage of the protected group'.[22] However, in the Court's view, the destruction of cultural heritage 'd[id] not fall within the categories of acts of genocide set out in Article II of the [Genocide] Convention'.[23] In the ruling, the Court recognised the prohibition on genocide as a *jus cogens* norm arising

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15 Dupuy 2005, at 136.

16 Criddle and Fox-Decent 2009, at 331; Brownlie 1998, at 517.

17 *Case Concerning the Delimitation of Maritime Boundary Between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, vol. XX UNRIAA, 119 at para 44 (highlighting that a *jus cogens* norm can develop as either custom or general principle of law); Kadelbach 2016, at 167 (noting that *jus cogens* norms can be 'found in many if not all sources of international law'); Weil 1983, at 425 (noting that 'peremptory norms may originate in any of the formal sources of international law: conventions, customs and general principles of law').

18 International Law Commission, Reports on the second part of its 17th session and on its 18th session, 17th and 18th session of the ILC, UN Doc. A/6309/Rev.1, 1966, at 248. The report states that '[i]t is not the form of a general rule of international law, but the particular nature of the subject matter with which it deals that … may give it the character of *jus cogens*'.

19 *Armed Activities on the Territory of the Congo (Congo v Rwanda)*, ICJ, Judgment of 3 February 2006, para 64.

20 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, ICJ, Judgment of 26 February 2007, para 161.

21 Ibid., para 320.

22 Ibid., para 344.

23 Ibid.

from the Genocide Convention and customary law.[24] In *Questions Relating to the Obligation to Prosecute or Extradite*, the Court held that 'the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)'.[25] The ICJ noted that the prohibition was 'grounded in a widespread international practice and on the *opinio juris* of States', and that it appeared 'in numerous international instruments of universal application'.[26]

Jus cogens permeates different fields of international law. Despite growing reference to *jus cogens* in the jurisprudence of arbitral tribunals and scholarly writings, no study has been devoted to the specific interplay between *jus cogens* and international investment law. The time is ripe for in-depth investigation. This article aims at filling this gap, addressing two fundamental questions: What role does *jus cogens* play in international investment law? Have arbitral tribunals paid due attention to peremptory norms of international law? The chapter aims at addressing these questions focusing on the role of *jus cogens* in international investment law and arbitration.

Although international investment law is of more recent pedigree than other fields of international law, and at first sight its main focus—the protection of foreign direct investment—seems far outside the traditional scope of *jus cogens* norms (such as the prohibition of torture, slavery, etc.), the chapter will show that *jus cogens* has played an important role in the evolution of international investment law. Illuminating the trajectory of *jus cogens* in international investment law and arbitration is important for the future of the field, as it can reinforce the perceived legitimacy of international investment law and arbitration. Moreover, the study can also contribute to further clarifying the concept not only in international investment governance but also in other areas of international law. In fact, ideas can cross-pollinate among fields of law. Therefore, this discussion can be significant for international investment lawyers, international law scholars and other interested audiences.

This chapter will proceed as follows. First, it will examine the interplay between *jus cogens* and international investment law in theory. Second, it will explore the relevant jurisprudence of arbitral tribunals. There are several arbitrations in which peremptory norms have been at stake.[27] Third, the study will address the question as to whether and, if so, how, arbitral tribunals have considered the arguments of the parties concerning *jus cogens*. How have arbitral tribunals dealt with this concept? Is there a dialectical interaction between *jus cogens* and *ordre public*? Finally, the conclusions will sum up the key findings of the study.

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[24] Ibid., para 161.

[25] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v Senegal*), ICJ, Judgment of 20 July 2012, para 99.

[26] Ibid.

[27] See sect. 12.4 below.

12.2 The Interplay Between *Jus Cogens* and International Investment Law in Theory

The interplay between *jus cogens* and international investment law can be scrutinised from, at least, three different perspectives. First, one can investigate the interplay between *jus cogens* and international investment law in terms of possible conflicts of norms. What happens if a norm of international investment law conflicts with a norm of *jus cogens*? *Jus cogens* invalidates *ab initio* any violating provision. However, genuine conflicts between investment law provisions and peremptory norms are difficult to conceive. In most cases, the good faith interpretation of international investment law will lead to the avoidance of such a violation. Second, are arbitrators bound to apply relevant peremptory norms of international law *ex officio* (i.e. whether or not such approach is pleaded by the parties)? This matter relates to the troublesome question as to whether the principle of *jura novit curia* (i.e. the court knows the law) applies to investment treaty arbitration. Arguably, because of its very nature, *jus cogens* would have direct effect in international investment law. Third, one can analyse the linkage between *jus cogens* and international investment law by focusing on the interaction between *jus cogens* and transnational public policy. This section examines the interplay between *jus cogens* and international investment law from these three different perspectives.

12.2.1 Conflict of Norms

The Vienna Convention on the Law of Treaties establishes a framework which governs the interplay between different international law rules.[28] In particular, it addresses three different relationships: 1) the relationship between two or more treaties relating to the same subject matter; 2) that between a treaty and *jus cogens* norms; and 3) that between a treaty and other relevant rules of international law. Given their relevance for the chapter, this section will concentrate on the second and third relationships only.

With regard to the relationship between a treaty and *jus cogens* norms, Article 53 VCLT states that a treaty shall be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. In parallel, Article 64 VCLT provides that 'if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. The necessary consequence would be the nullity of investment treaties that conflict with a peremptory norm because in no case may an investment law obligation be allowed to conflict with a *jus cogens* norm.[29] Alternatively, some

[28] The literature on the VCLT is extensive. See, e.g., Cannizzaro 2011; Villiger 2009; Dörr and Schmalenbach 2012.

[29] Article 53 VCLT.

argue that any violation of peremptory norms would automatically annul any contrary treaty provisions.[30] However, this conclusion is not supported by the VCLT which provides that '[i]n cases falling under article[…] … 53, no separation of the provisions of the treaty is permitted'.[31]

However, the hypothesis that investment treaties or that some of their norms are incompatible *tout court* with *jus cogens* proves to be overstated. International investment treaties generally include vague and open-ended provisions, giving states parties flexibility in the implementation of their investment law obligations. Because of the character of investment treaty provisions and the subject matter they cover, it is difficult if not impossible to envisage a direct conflict between international investment law and peremptory norms. Rather, some interpretations of investment treaties may be incompatible with peremptory norms. Therefore, where such interpretation would lead to the incompatibility of the investment treaty with a *jus cogens* norm, it should be avoided. In most cases, the good faith interpretation of international investment law will lead to the avoidance of such a violation, resolving all or most apparent and direct conflicts with peremptory norms. In other words, arbitral tribunals should read investment law provisions so as to avoid conflicts with peremptory norms.

With regard to the relationship between a treaty obligation and other international law sources, international law comes into play under any investment treaty pursuant to Article 31(3)(c) VCLT, which provides that the treaty interpreter shall take into account 'any relevant rules of international law applicable in the relations between the parties'.[32] This interpretive rule applies by virtue of the norm being a rule of international law even if the *jus cogens* nature of the norm is still uncertain. As stated by Sinclair, pursuant to Article 31(3)(c) VCLT, '[e]very treaty provision must be read not only in its own context, but in the broader context of general international law, whether conventional or customary'.[33] International law serves as a relevant context and colours the interpretation of the investment treaties. Accordingly, Article 31(3)(c) VCLT reflects a 'principle of integration', emphasising the 'unity of international law' and requiring that 'rules should not be considered in isolation of general international law'.[34]

12.2.2 Jura Novit Curia

Arbitral tribunals are not courts of general jurisdiction like the ICJ; rather they have a limited mandate: to interpret and apply the applicable law as well as to

[30] Marceau 2002, at 778.

[31] Article 44(5) VCLT.

[32] The literature on treaty interpretation is extensive. See, for instance, Gardiner 2008; Orakhelashvili 2008; MacLachlan 2005.

[33] Sinclair 1984, at 139.

[34] Sands 1999, at 49.

ascertain whether an investment treaty provision has been violated. Arbitral tribunals cannot, thus, reach any legal conclusion on the eventual violations of or compliance with other international law norms, for example environmental law norms. However, international investment law cannot be read in 'clinical isolation from public international law'.[35] As mentioned, customary rules of treaty interpretation, as restated in the VCLT, require systematic interpretation. Arbitral tribunals should presume that states must comply with their international law obligations and therefore they should interpret and apply international investment law accordingly. Moreover, Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)[36] provides that in the absence of an agreement of the parties on the applicable law, 'the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'. In parallel, Article 1131 of the North American Free Trade Agreement (NAFTA)[37] provides that the Tribunal 'shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law'. In such cases, it is quite evident that the applicability of *jus cogens* raises no difficulty. *Jus cogens* is part of international law and thus also of international investment law. An international law scholar and arbitrator, Pierre-Marie Dupuy, suggests that 'arbitrators can, at their own initiative, invoke an issue of blatant violation of fundamental human rights deemed to be incompatible with the "transnational public policy"'.[38] The questions as to whether these 'fundamental human rights' are *jus cogens* norms or a broader category, who determines what 'transnational public policy' is, and whether *jus cogens* norms can be conceptualised as 'transnational public policy' will be addressed in the next subsection.

Are arbitrators bound to apply relevant peremptory norms of international law whether or not such approach is pleaded by the parties? According to some scholars, this question must be answered in the affirmative. The question is not whether to add new claims to those articulated by the parties, but to determine which law is applicable to the dispute.[39] The applicable law and the principle of *nec ultra petita* ('not beyond the request') are two different issues. The applicable law concerns the bodies of law that may apply to the dispute. The principle of *nec ultra petita* concerns the claims raised by the parties but does not infringe on or supersede the mandatory rules possibly applicable to the dispute. As Jan Paulsson puts it, 'a tribunal in an investment dispute cannot content itself with inept pleadings, and

[35] This expression is borrowed from *United States – Standards for Reformulated and Conventional Gasoline* (*US – Gasoline*), Appellate Body Report, WT/DS2/AB/R, 20 May 1996, at 18.

[36] 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, 575 UNTS 159 (the ICSID or Washington Convention).

[37] 1992 North American Free Trade Agreement, 32 ILM 289 (NAFTA).

[38] Dupuy 2009, at 60.

[39] See, for instance, Cordero Moss 2006, at 13.

simply uphold the least implausible of the two. Furthermore, as the PCIJ put it in *Brazilian Loans*, an international tribunal is "deemed itself to know what [international law] is"'.[40] Such an approach would not amount to arbitral lawmaking, but to the recognition that arbitrations do not take place in a *vacuum*, rather they contribute to the development of international law and must be in conformity with its basic rules.

For instance, authors have criticised the approach adopted by the ICJ in the *Gabcikovo-Nagymaros* case, where the Court stated that since none of the parties invoked *jus cogens* norms of environmental law, it would not examine the effects and scope of Article 64 VCLT.[41] The Court left the issue open as to whether or not certain environmental law rules may be considered as peremptory.[42] However, the Court should have adjudicated the issue on its own initiative or '*motu proprio* since it involved the question of objective invalidity' of a treaty.[43]

Certainly, the problem of the vagueness of the concept of *jus cogens* and the risk of judicial activism seem to run against the question of whether adjudicators/arbitrators should consider *jus cogens* norms as applicable law of their own motion. Some have cautioned that peremptory norms 'can readily be made to serve hidden sectional interests, … leav[ing] everybody absolutely free to argue for or against the *jus cogens* character of any particular rule of international law'.[44]

While one can agree that there is a need to prevent free decision-making,[45] the difficulties in identifying norms of *jus cogens* and the necessity to avoid judicial activism should not lead adjudicators to dismiss *jus cogens tout court*, given that *jus cogens* constitutes 'an important structural element of international law as a legal system'.[46] By considering *jus cogens* arguments, adjudicators can contribute to the development of international law. By not considering it, they adopt an overly positivist approach to international law and risk cristallising the same in a shape that may no longer be adequate to evolving needs. In conclusion, it seems correct to consider *jus cogens* as a legal concept, to be considered applicable by relevant judges and arbitrators.[47]

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[40] Paulsson 2006, at 888–889.

[41] *Case Concerning the Gabcikovo-Nagymaros Project* (*Hungary/Slovakia*), ICJ, Judgment of 25 September 1997, para 76.

[42] Orakhelashvili 2006, at 498.

[43] Ibid.

[44] Schwarzenberger 1964–1965, at 477 (internal citations omitted).

[45] Verdross 1966, at 62.

[46] Casanovas 2001, at 77.

[47] In his separate opinion to the ruling on jurisdiction in the case *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda*, Judge Dugard affirmed: 'norms of *jus cogens* advance both principles and policy … they must inevitably play a dominant role in the process of judicial choice'. *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v Rwanda)*, ICJ, Jurisdiction and Admissibility, Judgment of 3 February 2006, Separate Opinion of Judge ad hoc Dugard, para 10.

12.2.3 Jus Cogens and Transnational Public Policy

According to some scholars, peremptory norms constitute the 'international public order': 'International *jus cogens* and international public policy are synonyms, conveying the idea of rules of international law which may not be changed by consent between individual subjects of international law'.[48] The concept of 'transnational public policy', or 'truly international public policy' (*ordre public vraiment international*) is said to comprise principles of universal justice possessing an absolute value covering fundamental laws with a status higher than the ordinary rules of international law.[49] According to these scholars, while national public policy 'refers to a body of legal standards which protects the essential interests or values of the legal system',[50] transnational public policy reflects the fundamental 'principles that are commonly recognised by political and legal systems around the world'.[51] Transnational public policy would refer to those principles that receive an international consensus as to universal standards and accepted norms that must always apply.[52]

This view is not uncontroversial. In fact, other scholars contend that 'the characterisation of *jus cogens* as international public policy remains … vague', 'add[ing] a further layer of obscurity (and complexity) to an area of law—*jus cogens*—that is already shrouded in darkness'.[53] Critics contend that analogising *jus cogens* to transnational public order does not unravel the mystery of *jus cogens*.[54] Rather, according to some critics, the equation or analogy would presuppose a non-consensualist theory of *jus cogens*, i.e. it would favour the notion that like public order (or *ordre public*), peremptory norms operate as a matter of necessity rather than being based on state consent. According to other critics, the two concepts of *jus cogens* and *ordre public* are *notions voisines* or neighbouring concepts,[55] but remain conceptually different: while *jus cogens* belongs to the international sphere, *ordre public* belongs to the domestic plane.[56]

Yet, as was shown in section one, rather than being an autonomous source of international law, *jus cogens* expresses a type of norm of superior quality that can be endorsed in any of the typical sources of international law, be they customary, treaty or general principles of law. The dichotomy between consent-based and

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48 Schwarzenberger 1964–1965, at 455.

49 Zemanek 2011, 383 (noting that '[t]his public order explanation has attracted the widest following amongst scholars'). See also Meyer 1994, at 140; Lalive 1986, at 329–373; Schwelb 1967, at 949.

50 Hameed 2014, at 66.

51 Hunter and Conde e Silva 2003, at 367.

52 Sheppard 2004, at 1.

53 Hameed 2014, at 67.

54 Virally 1966, at 7.

55 Ibid., at 7.

56 Ibid., at 8.

non-consent-based approaches to *jus cogens* may in fact have become moot. Substantively, the fact that *jus cogens* and transnational public policy are complex notions should not lead adjudicators and interpreters to dismiss the challenge of confronting them. The risks and opportunities of analogising, juxtaposing and eventually merging the two concepts are also shown by the fact that, like *jus cogens*, transnational public policy is not an autonomous source of law, but may be embodied in customary, treaty or general principles of law. Public order does not merely belong to the national plane; rather, it also presents a truly international dimension when a large majority of states share the same principles. As is known, transnational or truly international public policy has priority over purely national public policy.[57] In turn, *jus cogens* does not merely belong to the international plane, but has a pervasive effect on the national plane.

Even assuming that *jus cogens* protects the international public order, one has to ascertain what the international public order actually stands for.[58] Arbitral tribunals have stressed that '[t]ribunals must be very cautious … and must check the objective existence of a particular transnational public policy rule in identifying it through international conventions, comparative law and arbitral awards'.[59] Like *jus cogens*, transnational public policy (or *ordre public international*) aims at maintaining the integrity of the fundamental norms of international law and must always apply.[60] Transnational public policy is a flexible and dynamic concept that can be used as a corrective mechanism or as a tool to balance complex and often conflicting goals.

Transnational public policy imposes *positive* duties on arbitrators, by requiring a minimum level of quality for international awards.[61] Therefore, authors have highlighted that '[a]ny tribunal owes an obligation to the international community to apply international public policy' and that 'the faithful application of public order would acquit a tribunal of its obligations to the parties to apply the law chosen by them through compromise or otherwise, but nothing can acquit a tribunal of its mandate to apply public policy'.[62] In other words, arbitrators 'have the right—and even the obligation—to themselves raise the issue of whether disputed contracts or legal provisions before them satisfy the requirements of international public policy'.[63] Kreindler also highlights that '[t]he arbitrator need not apply the agreed or determined governing law if doing so would cause him to violate

[57] Lalive 1987, at 266 (noting that 'the international public policy of the forum has no reason to intervene, properly speaking, whenever public international law applies by reason of its priority').

[58] Linderfalk 2012, at 11.

[59] *World Duty Free v. Republic of Kenya*, ICSID, Award, Case No. ARB/00/7, 4 October 2006, para 141.

[60] Orakhelashvili 2006, at 492; and Dupuy 2009, at 25.

[61] Rubino-Sammartano 2001, at 507; and Arfazadeh 2005, at 178.

[62] Orakhelashvili 2006, at 493; and Gaillard and Savage 1999, at 861.

[63] Gaillard and Savage 1999, at 861.

international public policy'.[64] Finally, Lew and Mistelis pinpoint that '[t]o the extent that human rights protection constitutes a core part of international or national public policy, human rights aspects must be considered by the tribunal'.[65]

Traditionally, both national and truly international public policy have played a *negative* role, acting as a limit to the recognition of arbitral awards.[66] Arbitral tribunals have an obligation to the parties to render an enforceable award.[67] Such obligation 'encourag[es] arbitral tribunal[s] to take into account transnational public policy—the public policy that is applicable in all jurisdictions' to facilitate enforcement and protect the award against review by national courts.[68]

In particular, if an arbitral award contravenes public policy, national courts can deny its enforcement.[69] In this context, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[70] expressly provides for a limited judicial review on the merits of an award for public policy reasons.[71] Similarly, the United Nations Commission on International Trade Law (UNCITRAL) Model Law,[72] which has formed the basis for arbitration laws adopted by many countries throughout the world, provides that a court shall refuse recognition or enforcement of an award if it finds that the award is in conflict with the public policy of its state.[73] Indeed, some commentators deem public policy as the ultimate and necessary limit to the autonomy of international arbitration.[74]

With regard to investment arbitration, ICSID awards are considered truly delocalised. Indeed, the ICSID Convention[75] excludes any attack on the award in the national courts, and ICSID awards are deemed to be final and self-executing.[76]

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64 Kreindler 2003, at 244.

65 Lew, Mistelis and Kröll 2003, at 93–94.

66 Rubino-Sammartano 2001, at 504.

67 See, for instance, Article 35 of the 1997 International Chamber of Commerce (ICC) Rules of Arbitration, 36 ILM 1604: 'the Arbitral Tribunal shall act in the spirit of these rules and shall make every effort to make sure that the Award is enforceable at law.'

68 Menaker 2010, at 72.

69 The grounds for setting aside arbitral awards are set out in the *lex loci arbitri* or the law of the seat which establishes the link between an arbitration procedure and a certain legal order. See Giovannini 2001, at 115.

70 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (New York Convention).

71 Article V.2 New York Convention.

72 United Nations Commission on International Trade Law (UNCITRAL), Model law on international commercial arbitration, UN Doc. A/40/17 Annex 1 and A/61/17 Annex I, 21 June 1985, amended on 7 July 2006 (UNCITRAL Model Law on International Commercial Arbitration).

73 Article 36(1)(b)(ii) UNCITRAL Model Law on International Commercial Arbitration.

74 Arfazadeh 2002, at 1–10.

75 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159 (ICSID Convention).

76 Article 54(1) of the ICSID Convention requires Contracting States to enforce an ICSID award 'as if it were a final judgment of a court in that State'.

In fact, the ICSID Convention provides an internal system of remedies,[77] including an internal annulment mechanism and excluding appeals or any other remedies at the national level.[78] In its quest for finality and enforceability of its awards, the Convention has created an autonomous regime for recognition and execution, which excludes the applicability of relevant national arbitration laws. Crucially, public policy is not a ground for annulment of the arbitral award under the ICSID Convention. As Schreuer highlights, '[t]he finality of awards would also exclude any examination of their compliance with international public policy or international law in general'.[79]

However, this does not mean that arbitrators should not respect international law and public policy. The arbitral tribunal must observe international law under Article 42 of the ICSID Convention.[80] Giardina rightly points out that the fact that ICSID awards are recognised and enforced as binding on all states that are parties to the relevant agreements requires their necessary compliance with international law. Thus, respect for public international law and, *a fortiori*, international public policy, would be an implicit requisite of ICSID awards.[81]

Also, national courts have shown some resistance to the detachment of ICSID awards from every form of judicial supervision and have elaborated a distinction between enforcement and execution. Thus, while ICSID rules would cover enforcement, the law governing execution would be national law.[82] Furthermore, arbitral awards under the so-called ICSID Additional Facility, as well as those rendered under commercial arbitration rules (e.g. UNCITRAL, International Chamber of Commerce (ICC), etc.) may be reviewed in local courts.

The enforceability of arbitral awards constitutes a pillar of investment treaty arbitration as the system relies on the finality of arbitral awards and legal certainty. Furthermore, according to Article 27 VCLT, a state cannot rely on its national law to justify non-compliance with its treaty obligations.[83] Yet, public policy is not a mere national concept as the existence of a proper international public order common to all nations is widely recognised. The international community as a whole requires arbitral justice to respect the general interests protected by transnational public policy.[84] Thus, there would be a difference between public order, as such, and transnational public order or truly international public order (*ordre public vraiment international*) as the former concerns the fundamental values of a given

[77] The ICSID Convention provides for the following remedies: interpretation of the award (Article 50), rectification of the award (Article 51), and annulment of the award (Article 52).

[78] Article 53(1), ICSID Convention.

[79] Schreuer 2001, at 1129.

[80] Ibid.

[81] Giardina 2007, at 29–39.

[82] Baldwin, Kantor and Nolan 2006, at 8.

[83] *Case Concerning Certain German Interests in Polish Upper Silesia*, PCIJ, Merits, Judgment of 25 May 1926, at 167.

[84] Seraglini 2001, at 533.

state, while the latter refers to the fundamental values of the international community of states.[85] In this sense, if an ICSID award were contrary to peremptory norms of public international law, the national court would be obliged not to execute it because of its non-compliance with the transnational public order.

If an international award did not comply with transnational public order, such an award would be unlikely to be executed at the national level. If a contracting state failed to abide by and comply with the award rendered, the state of the foreign investor could decide to bring an international claim on behalf of the investor before the International Court of Justice. However, diplomatic protection would be an unlikely discretionary move on the side of the state in practice. Therefore, this possibility does not constitute a strong disincentive to refuse execution due to international public order concerns.

In general terms, in order to avoid subsequent challenges in terms of annulment proceedings and non-enforcement of arbitral awards, arbitrators should take public policy considerations into account in the course of the arbitral proceedings. Not only does public policy protect the compelling public interests of single states, but it also protects the fundamental interests of the international community at large. Above all, public policy compels arbitrators to integrate these eclectic, diverse and often conflicting interests into one coherent conception of international justice. In conclusion, the link between truly international public policy and *jus cogens* deserves further scrutiny as the former may already encapsulate much of the content of the latter.

12.3 The Interplay Between *Jus Cogens* and International Investment Law in Investment Treaty Arbitration

After having examined the forms, content and boundaries of *jus cogens* in the previous sections, this chapter now examines and critically assesses the interplay between *jus cogens* and international investment law in investment treaty arbitration. While the former sections necessarily have a theoretical approach, this section sheds light on the *jus cogens*-related arbitrations. Arbitral tribunals have settled disputes carrying *jus cogens* arguments in support of either the complaint or the defence. In this context, arbitral tribunals have been called upon to answer the following questions. Can foreign investors claim that a host state has violated *jus cogens* norms before arbitral tribunals? Can a host state invoke *jus cogens* to refuse to comply with international investment treaties? Can arbitral tribunals consider *jus cogens* as part of the applicable law even when there is no reference to the same in the text of investment treaties? Does *jus cogens* have direct application in international investment arbitration? In order to address these questions, this section discusses the interplay between *jus cogens* and international investment law in international investment treaty arbitration focusing on three dimensions

[85] Orakhelashvili 2006, at 27.

of this interaction: 1) *jus cogens* arguments put forward by the investors; 2) *jus cogens* arguments put forward by the host states; and 3) the interplay between *jus cogens* and international public order.

12.3.1 Jus Cogens Arguments Put Forward by the Investors

A number of investors have sought to bolster their claims before arbitral tribunals by invoking *jus cogens* arguments. For instance, in the *Methanex* case,[86] Methanex, a Canadian investor, initiated arbitration against the United States of America, claiming compensation for losses caused by a ban on the use of a gasoline additive. As scientific evidence showed that MTBE (methyl tertiary-butyl ether) contaminated groundwater and was difficult and expensive to clean up, the State of California enacted legislation to prevent the commercialisation and use of MTBE. Methanex submitted that the Californian regulation was tantamount to expropriation within Article 1110 NAFTA as the US measures were enacted to seize the company's market share to favour the domestic ethanol industry. Since no compensation was paid, Methanex argued that this violated due process of law, non-discrimination and the minimum standard of treatment in violation of *jus cogens* norms.

The Tribunal held that there was no expropriation. With regard to the *jus cogens* arguments of the claimant, the Arbitral Tribunal asserted that 'as a matter of international constitutional law, a tribunal has an independent duty to apply imperative principles of law or *jus cogens* and not to give effect to the parties' choice of law that is inconsistent with such principles'.[87] Yet, it found that in the present case, 'even assuming that the USA errs in its argument for an approach to minimum standards that does not prohibit discrimination, this is not a situation in which there is a violation of a *jus cogens* rule'.[88] In fact, the Tribunal noted that the restrictive approach to the minimum standard of treatment 'does not exclude non-discrimination from NAFTA Chapter 11, an initiative which would, arguably, violate a jus cogens and thus be void under Article 53 of the Vienna Convention on the Law of Treaties'. Rather, such a restrictive interpretation 'confine[s] claims based on alleged discrimination to Article 1102 [of NAFTA Chapter 11], which offers full play for a principle of non-discrimination'.[89]

In *Biloune* v. *Ghana*,[90] a Syrian investor, Mr. Biloune, was arrested, held in custody for thirteen days without charge and finally deported from Ghana to Togo. In the ensuing arbitration, the claimant sought redress for the alleged violations of his

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[86] *Methanex v. United States of America*, UNCITRAL (NAFTA), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, 44 ILM 1345, Part IV, ch. C, para 24.

[87] Ibid., Part IV, ch. C, para 24.

[88] Ibid.

[89] Ibid.

[90] *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184.

human rights, including torture. The Arbitral Tribunal held that customary international law requires states to accord foreign nationals a minimum standard of treatment and that international law endows all individuals with inviolable human rights. However, it held that its competence is limited to disputes 'in respect of' the foreign investment and that it 'lack[ed] jurisdiction to address, as an independent cause of action, a claim of violation of human rights'.[91] So far, the *jus cogens* claims of investors have not been taken into account by arbitral tribunals; this ruling is typical of the outcomes of these disputes. One is left wondering what would happen if the specific *jus cogens* claim was within the jurisdiction of the relevant tribunal.

In *Roussalis v. Romania*,[92] the investor argued that a preservation of rights provision in the Greece-Romania Bilateral Investment Treaty (BIT)[93] provided the Arbitral Tribunal with the jurisdiction to hear his human rights claims as the relevant human rights provisions[94] were more protective of his investment than the pertinent investment treaty provisions. The Arbitral Tribunal dismissed the argument as moot in the present case, 'given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments referred above'.[95] The Tribunal did not exclude, however, that the relevant provision 'could include obligations deriving from multilateral instruments to which those states are parties, including, possibly, the European Convention of Human Rights (ECHR) and its Additional Protocol No.1'.[96] While in this specific case, the investor had not invoked the violation of *jus cogens* norms, relevant international law instruments such as the ECHR include norms which have attained *jus cogens* status.

12.3.2 Jus Cogens Arguments Put Forward by the Host States

A number of host states have sought to bolster their defence before arbitral tribunals by invoking *jus cogens* arguments. In a seminal case, the 1875 *Maria Luz*

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[91] Ibid., at 203.

[92] *Spyridon Roussalis v. Romania*, ICSID, Award, Case No. ARB/06/1, 7 December 2011.

[93] Article 10 of the Greece-Romania BIT provided: '[i]f the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to this Agreement, contain a regulation, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable, prevail over this Agreement'. *Spyridon Roussalis v. Romania*, para 310.

[94] *In casu* the claimant referred to the right to property and the right to fair proceedings as protected under Article 6 of the European Convention on Human Rights and of Article 1 of the First Additional Protocol to the European Convention. Ibid., para 10.

[95] Ibid., para 312.

[96] Ibid.

arbitration, the Czar of Russia, sitting as the sole arbitrator, declared that Japan 'had not breached the general rules of the Law of the Nations' in freeing the slaves carried on the Peruvian vessel *Maria Luz* and denying the subsequent demands for indemnity of the Peruvian citizens.[97] The vessel was carrying Chinese workers to Peruvian plantations.[98] After suffering damage during a severe storm, it called at the port of Yokohama, Japan for repairs.[99] While anchored there, a Chinese worker escaped and complained before Japanese authorities about severe mistreatment analogous to slavery asking for protection and the rescue of the other Chinese workers aboard.[100] The Japanese authorities prevented the *María Luz* from leaving port and found that its cargo of illiterate workers had been deceived in Macao into signing contracts, the contents of which they could not read or understand, and were being confined against their will under inhumane conditions. A domestic court held that the shipping company owning the *María Luz* was guilty of wrongdoing and that the workers were freed of their contract.[101] For the purposes of our discussion, it is interesting to note that the captain argued that involuntary servitude did not run against Japanese law, as it was then practised in Japan in the form of the sale of prostitutes.[102] However, the court ruled that the conduct of the captain breached the law of nations rather than Japanese law. The Chinese workers were then sent back to China.

While the Chinese government officially thanked the Japanese government for the assistance rendered to Chinese subjects, the Peruvian government protested against the irregularity of the proceedings and requested compensation. At the time, most nations supported the protests of the Peruvian Government, contending that Japan had overcome the provisions of various treaties to rule against a foreign company. As Japan declined to pay compensation, the two states agreed to nominate a third neutral to settle the dispute. As a matter of law, a number of 'unequal treaties', which were imposed on Japan in the 1850s, ensured that foreigners in Japanese ports were not subject to Japanese laws and tribunals.[103] However, such treaties only covered the citizens of countries that had actually signed treaties with Japan—and because Peru had not done so, the *Maria Luz* had come under Japanese jurisdiction as it entered Japanese territorial sea. Tsar Alexander II of Russia arbitrated the issue, and in 1875 he upheld Japan's position.

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[97] *Maria Luz* Arbitration, award rendered by the Czar of Russia, 17–19 May 1875, quoted by Lalive 1986, at 49.

[98] For a detailed account of the case, see Botsman 2006.

[99] Saveliev 2002, at 75–78.

[100] Ibid.

[101] Keene 2002, at 216–218.

[102] Saveliev 2002, at 75–78.

[103] 'Unequal treaties' refer to a series of treaties signed during the 19th and early 20th centuries by European countries on the one hand and China, Korea and Japan on the other hand, after the latter suffered military defeat or a threat of military action by the former. See, generally, Auslin 2006.

In the *Aminoil* arbitration,[104] the Arbitral Tribunal affirmed the existence of *jus cogens*, albeit excluding that the invoked norm had peremptory character. In 1948, the Sheikh of Kuwait granted to Aminoil, a US company, a 60-year oil concession. The concession agreement contained a stabilisation clause that prevented Kuwait from unilaterally changing or terminating the agreement. When Kuwait subsequently demanded an increase in its royalty for every ton of oil recovered, Aminoil did not consent and in 1977 Kuwait nationalised the investment with payment of compensation. Aminoil initiated arbitration proceedings, contending that the nationalisation was contrary to the stabilisation clause. The Arbitral Tribunal held that the nationalisation was lawful and that it did not breach the stabilisation clause, as the latter prevented only confiscatory nationalisations. In particular, the Arbitral Tribunal stated that permanent sovereignty over natural resources did not prevent states from subscribing to stabilisation clauses. The Tribunal held: 'on the public international law plane, it has been claimed that permanent sovereignty over natural resources has become an imperative rule of *jus cogens* prohibiting states from affording by contract or by treaty, guarantees of any kind against the exercise of the public authority … This contention lacks all foundation'.[105]

In the *Texaco* case,[106] arising out of the nationalisation of the Lybian government of certain assets held by Texaco and related to oil concessions, the sole arbitrator, Professor René-Jean Dupuy, adopted a more subtle solution. He did not deny the *jus cogens* nature of permanent sovereignty. However, he rejected the Libyan arguments based either on *jus cogens* relating to permanent sovereignty over natural resources or on the assimilation of the concession contract to an 'administrative contract' that would have justified the existence of a unilateral power of amendment in favour of the government. Rather, he stated that the contested contract between the host state and the foreign investor was in the exercise of sovereignty over natural resources.[107] While the award refers to a political context that is now obsolete, it remains 'a keystone in the construction of the modern international law of foreign investment'.[108]

In several arbitrations brought against Argentina in the aftermath of its financial crisis, the host state raised human rights and *jus cogens*-related arguments to justify the measures it had adopted to cope with the crisis. In a nutshell, the argument, far from being new to international law scholars, is that there are state duties

[104] See *The Government of Kuwait v. The American Independent Oil Co (Kuwait v. Aminoil)*, Ad Hoc Arbitral Tribunal, 24 March 1982, 21 ILM 976.

[105] Ibid., para 90.2.

[106] *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, International Arbitral Tribunal, Award on the Merits, 19 January 1977, 17 ILM 11.

[107] Ibid., para 78.

[108] Cantegreil 2011, at 441.

of status higher than other duties.[109] For instance, in *EDF v. Argentina*,[110] the respondent argued that the measures it had adopted to cope with its financial crisis were justified by human rights concerns.[111] In particular, Argentina argued that those fundamental human rights should prevail over other treaty obligations because of their peremptory character.[112] While the Tribunal did not contest the existence of human rights and peremptory norms, it questioned the content of such norms[113] and the relevance of the contested state measures for their enjoyment. The Tribunals held that 'no showing has been made that Argentina was not able to comply with the relevant treaty provision'.[114] In *Suez v. Argentina*, the Tribunal rejected the argument that 'Argentina's human rights obligations to assure its population the right to water somehow trumps its obligations under the BITs … Argentina is subject to both international obligations, i.e. human rights and treaty obligations, and must respect both of them equally'.[115]

In some cases, the arbitral tribunals did not substantively address *jus cogens* arguments finding that they had not been fully argued. For instance, in *Azurix* v. *Argentina*, an ICSID case concerning water and sewage systems, Argentina raised the issue of the compatibility of the BIT with human rights treaties, arguing that 'a conflict between a BIT and human rights treaties must be resolved in favour of human rights because the consumers' public interest must prevail over the private interest of service provider'.[116] The Tribunal dismissed this argument finding that it had not been fully argued.[117] In *Siemens* v. *Argentina*, Argentina claimed that given its financial crisis, the full protection of the property rights of investors would jeopardise its compliance with human rights obligations.[118] The Tribunal, however, held that the argument had not been developed and that 'without the benefit of further elaboration and substantiation by the parties, it [wa]s not an argument that, *prima*

[109] Verdross 1937, at 575 (arguing that 'a state cannot be bound to close its schools, universities or courts, to abolish its police or to reduce its public services in such a way as to expose the population to the dangers of disorder and anarchy, in order to obtain the necessary funds for the satisfaction of foreign creditors').

[110] *EDF International, SAUR international, and Léon Participationes Argentinas v. Argentina*, ICSID, Award, Case No. ARB/03/23, 11 June 2012.

[111] Ibid., para 192 (quoting the Respondent's Rejoinder: 'it was necessary to enact the Emergency Tariff measures in order to guarantee the free enjoyment of certain basic human rights such as, *inter alia*, the right to life, health, personal integrity, education, the rights of children and political rights which were directly threatened by the socio-economic institutional collapse suffered by the Argentine Republic').

[112] Ibid., para 193 (stating that 'the non-derogable nature of such rights is said to be conclusive evidence that they are tantamount to *jus cogens*').

[113] Ibid., paras 909–911.

[114] Ibid., paras 912–914.

[115] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID, Decision on Liability, Case No. ARB/03/19, 30 July 2010, para 262.

[116] *Azurix v. Argentine Republic,* ICSID, Award, Case No. ARB/01/12, 14 July 2006, para 254.

[117] Ibid., para 261.

[118] *Siemens v. Argentina*, ICSID, Award, Case No. ARB/02/8, 6 February 2007, para 75.

facie, bears any relationship to the merits of this case'.[119] Analogously, in *CMS Gas v. Argentina*, despite Argentina's arguments that given the country's economic and social crisis, the performance of specific investment treaty obligations 'would be in violation of … constitutionally recognised rights',[120] the Arbitral Tribunal held that 'there [wa]s no question of affecting fundamental human rights'.[121]

As Reiner and Schreuer point out, '[t]hese awards seem to indicate the tribunals' reluctance to take up matters concerning human rights, preferring to dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves'.[122] Admittedly, some of these arbitrations involved human rights the *jus cogens* status of which is uncertain. In some arbitrations, the host states have preferred to make reference only to domestic constitutional provisions rather than relying on the alleged *jus cogens* nature of the rights involved. This is not surprising, as such pleadings may be considered to contribute to state practice, and states are very careful in invoking *jus cogens* as the same arguments could be used against them in other contexts. For instance, with regard to indigenous peoples' rights, including the right to be consulted in matters affecting them, states have referred to domestic constitutional provisions.[123] Yet, even in such cases, *jus cogens* has played an indirect role: when states invoke public order to justify the breach of relevant investment treaty provisions, an argument can be made that there is a link and/or partial overlap between public order and *jus cogens*. Undoubtedly, states have to guarantee certain human rights 'as the primary custodians of the general interest within their jurisdiction but also as primary guardians of the public order on their territory'.[124]

Other tribunals, however, have adopted a more sensitive approach to human rights issues. For instance, in *Sempra v. Argentina,* the Tribunal acknowledged that the dispute 'raise[d] the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners'. Regardless, it found that

> the real issue in the instant case [wa]s whether the constitutional order and the survival of the State were imperilled by the crisis, or instead whether the Government still had many tools at its disposal to cope with the situation.

It concluded that 'the constitutional order was not on the verge of collapse' and that 'legitimately acquired rights could still have been accommodated by means of temporary measures and renegotiation'.[125]

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[119] Ibid., para 79.

[120] Ibid., para 114.

[121] *CMS Gas Transmission Co. v. Argentina*, ICSID, Award, Case No. ARB/01/08, 12 May 2005, at para 121.

[122] Reiner and Schreuer 2009, at 90.

[123] *Glamis Gold, Ltd. v. United States of America*, ICSID/UNCITRAL, Award, 8 June 2009, 48 ILM 1038, para 654.

[124] Boisson de Chazournes 2010, at 310.

[125] *Sempra Energy International* v. *The Argentine Republic,* ICSID, Award, Case No. ARB/02/16, 28 September 2007, para 332.

In *Continental Casualty v. Argentine Republic*, concerning an insurance business,[126] the Arbitral Tribunal showed a sensitive approach to human rights issues. In particular, the Arbitral Tribunal considered that the Government's efforts struck an appropriate balance between the protection of investor's rights and the responsibility of any government towards the country's population:

> it is self-evident that not every sacrifice can properly be imposed on a country's people in order to safeguard a certain policy that would ensure full respect towards international obligations in the financial sphere, before a breach of those obligations can be considered justified as being necessary under this BIT. The standard of reasonableness and proportionality do not require as much.[127]

12.3.3 The Interplay Between Jus Cogens and International Public Order

A third type of claim, which so far has produced copious jurisprudence, relates to the analogy and/or equation between *jus cogens* and transnational public order. This type of cases is characterised by the fact that third parties are adversely affected by given investments as investors and/or host state authorities circumvented human rights and/or *jus cogens* obligations. For instance, bribery causes an adverse effect on third parties including business competitors and the population of the host state. In fact, the negative effects of corruption on the protection of human rights are widely acknowledged. Corruption may affect the enjoyment of both civil and political rights on the one hand and economic, social and cultural rights on the other, weakening democratic institutions and compromising the government's ability to deliver an array of services, including health, educational and welfare services.[128] Scholars have identified the norm against public corruption as an emerging norm that is not widely recognised as *jus cogens* today 'but nonetheless merit[s] peremptory force'.[129]

In an ICC arbitration, parties who had entered into an 'agency agreement' by which one party paid bribes to government officials on behalf of the other, were deemed to have forfeited any right to file arbitration claims to settle their dispute.[130] Mr. Lagergreen acting as a sole arbitrator affirmed that

> it cannot be contested that there exists a general principle of law recognized by civilized nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators.[131]

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[126] *Continental Casualty v. Argentine Republic*, ICSID, Award, Case No. ARB/03/9, 5 September 2008, para 192.

[127] Ibid., para 227.

[128] See, generally, Boersma 2012.

[129] Criddle and Fox-Decent 2009 at 327.

[130] *Argentine Engineer v. British Company*, ICC, Award, Case No. 1110, Yearbook of Commercial Arbitration 47, at 61.

[131] Ibid. For commentary, see Tirado, Page and Meagher 2014, at 495.

Similarly, in *World Duty Free Company Limited v. The Republic of Kenya*,[132] the ICSID Tribunal referred to both national and international public policy and did not allow claims based on bribes or on contracts obtained by corruption.[133] The Arbitral Tribunal stated that

> in light of domestic laws and international conventions relating to corruption, and in light of decisions taken in the matter by courts and international tribunals, this tribunal is convinced that bribery is contrary to the international public policy of most, if not all states or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[134]

The Tribunal concluded that '[t]he claimant [wa]s not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of ordre public international and public policy under the contract's applicable laws',[135] pointing out that public policy 'protects not the litigating parties but the public'.[136]

In *Inceysa v. El Salvador*, the Tribunal found that the claimant had made fraudulent misrepresentations concerning its financial condition in its bid for a government contract and concluded that it did not have jurisdiction over the claim brought before it by the investor, as the respondent had not consented to the protection of investments procured by fraud, forgery or corruption.[137] In *Phoenix Action Ltd v. the Czech Republic*, an ICSID Tribunal held that

> nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs'.[138]

The prohibitions of torture, genocide and slavery relate to public order and coincide with established elements of *jus cogens*. In fact, these specific items exemplify the type of norms which have acquired *jus cogens* status. Analogously, in *Metal-Tech Ltd. v. The Republic of Uzbekistan*,[139] the Arbitral Tribunal dismissed all of the claims brought by an Israeli company for lack of jurisdiction because 'the investment was tainted by illegal activities, specifically corruption'.[140]

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[132] *World Duty Free v. Republic of Kenya*, ICSID, Award, Case No ARB/00/7, 4 October 2006, para 157.

[133] Ibid., para 157.

[134] Ibid.

[135] Ibid., para 188.

[136] Ibid., para 181.

[137] *Inceysa Vallisoletana SL v. Republic of El Salvador*, ICSID, Award, Case No. ARB/03/26, 2 August 2006, paras 263–4.

[138] *Phoenix Action Ltd. v. The Czech Republic*, ICSID, Award, Case No. ARB/06/5, 15 April 2009, para 78.

[139] *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID, Award, Case No. ARB/10/3, 4 October 2013.

[140] Ibid., para 422.

In other cases, as Professor Martin Hunter points out, notwithstanding arbitrators 'would claim that they have never applied transnational public policy principles in formulating their awards', they have applied such principles, in particular with regard to environmental goods.[141] Indeed, public policy is 'a flexible and dynamic concept' that can be used as a 'a tool to balance complex and often conflicting goals such as protection of the environment while assuring the rights of foreign investor'.[142] If arbitrators keep public policy concerns into account when adjudicating investment disputes, this can contribute to the unity and the harmonious development of international law.

This section discussed the interplay between *jus cogens* and international investment law in international investment treaty arbitration focusing on three dimensions of this interaction: 1) *jus cogens* arguments put forward by the investors; 2) *jus cogens* arguments put forward by the host states; and 3) the interplay between *jus cogens* and international public order. First, foreign investors cannot claim that a host state has violated *jus cogens* norms as an independent cause of action before arbitral tribunals, as the latter have limited jurisdiction. This does not mean, however, that *jus cogens* arguments cannot and have not been made in the context of arbitral proceedings, or that they have not played any role in the same. Second, host states have invoked *jus cogens* to avoid compliance with given investment treaty obligations, especially in the context of severe economic crisis. The mere reference to *jus cogens*, however, is not enough to lead arbitral tribunals to accept such arguments; in fact some arbitral tribunals have dismissed such arguments considering that they had not been fully pleaded.

The third type of case remains the most promising venue for the insertion by default (i.e. the direct applicability) of *jus cogens* and/or international public policy in international investment law and arbitration. As noted by Douglas,

> [t]he concept of international public policy vests a tribunal with a particular responsibility to condemn any violation regardless of the law applicable to the particular issues in dispute and regardless of whether it is specifically raised by one of the parties.[143]

If an arbitral tribunal finds a breach of international public policy, the claims will be inadmissible.[144] In fact, 'no legal effect can be given to a transaction involving the transgression of a peremptory norm of international law'.[145] While the relationship between *jus cogens* and transnational public policy remains to be fully explored, certainly the two notions overlap to a certain extent. Certain norms of international public policy have acquired *jus cogens* status.[146] For instance, if

141 Hunter and Conde e Silva 2003, at 372.

142 Ibid., at 374.

143 Douglas 2014, at 180.

144 Ibid., at 181.

145 Ibid.

146 Trari-Tani 2011, at 89.

an investment violated a *jus cogens* norm, such as a private military company committing genocide, or a business using slave labour, or a factory with a policy of torturing workers who attempt to organise, or a pharmaceutical company conducting medical experiments without free prior informed consent, an arbitral tribunal would not have jurisdiction to hear a case dealing with such illegal investments.[147] Reportedly, arbitrators have considered that legally sanctioned boycotts of companies with business in Israel, as contained in the domestic law of an Arab country and chosen as the applicable law by the host state and the foreign investor, are contrary to international public policy, implicating, according to the tribunal, religious and racial discrimination.[148]

12.4 Critical Assessment

What role does *jus cogens* play in the field of international investment law? Growing jurisprudence and scholarly writings attest to the emergence of *jus cogens* as an inspiring, useful and fruitful legal concept, which can evolve through time.[149] *Jus cogens* constitutes a mixture of legal positivism and legal idealism,[150] which goes beyond the traditional physics of international law. Not only are some norms 'of greater specific gravity than others',[151] but they seem to include a metaphysical component, the idea that certain norms are so fundamental to the common weal so as to pre-exist and trump contrary norms.

Jus cogens has a destabilising, transformative and revolutionary potential,[152] as it envisages an evolution of international law from interstate law to transnational law in which both individuals and nations matter. Peremptory norms insert a hierarchy in the sources of international law, prioritising fundamental values and adopting a humanist conception of law according to which international law is at the service of human beings. This development is a 'factor of progress'. *Jus cogens* 'help[s] to ensure the primacy of ethics over the aridity of positive law',[153] 'opening … the imagination of international lawyers', shaping 'a new world of ideas where creative and moral thinking seem credible again', and projecting the

147 Vadi 2012, at 42–43; Madalena and Pereira 2012, at 5; and Douglas 2014, at 181.

148 Trari-Tani 2011, at 96.

149 This dynamism is acknowledged by the VCLT which admits that new peremptory norms may emerge, causing the voidness or termination of any treaty which is in conflict with that norm (Article 64) and that newly arisen peremptory norms can modify previous norms having the same character (Article 53).

150 Linderfalk 2016.

151 Weil 1983, at 421.

152 Virally 1966, at 6 (noting that 'Son admission sur une large échelle aurait des conséquences qu'il n'est pas exagéré de qualifier révolutionnaires').

153 Weil 1983, at 422.

parallel images of a 'systemic … international law' as well as 'a … morally cohesive international society'.[154]

Yet, the *jus cogens* paradigm is not neutral.[155] It presupposes the existence of a scale of values and the abandonment of the apparent neutrality of law. *Jus cogens* found its way into positive international law in the aftermath of World War II.[156] It was introduced to international law at that particular point in time as a response to the devastations of two world wars, and as a reminder of the vulnerability of human beings and the importance of peaceful relations among nations.[157] The inclusion of peremptory norms in the VCLT implied the condemnation of 'imperialism, slavery, forced labour, and all practices that violated the principles of the equality of all human beings and of the sovereign equality of states'.[158] *Jus cogens* reflects the aspiration of the international community to 'a greater unity', overcoming 'juxtaposed egoisms' as well as political and economic differences in the pursuit of the common good.[159] During the Cold War, *jus cogens* became a tool for crystallising the 'peaceful coexistence between East and West … between States having different economic and social structures'.[160] The freedom of states was thus limited 'to safeguard the interests of all'.[161] *Jus cogens* protects human or collective interests, rather than state interests, thus limiting the autonomy of states, their contractual freedom and their sovereignty.[162] It constitutes

> an instrument against power, to bring the powerful into legal constraints they would otherwise reject, and an instrument of and for power, allowing for intervention where otherwise state sovereignty prevents interference of any kind.[163]

International courts and tribunals have adopted a restrictive approach to the interpretation and application of this concept to avoid its political misuse. The revolutionary nature of *jus cogens* has been 'domesticated' by the positivist and voluntarist orthodoxy. While the conceptual vocabulary of *jus cogens* has found its way in international law, state practice and international judicial practice remain dominated by positivism and voluntarism, especially when state prerogatives are at stake.[164]

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154 d'Aspremont 2016, at 94.

155 d'Aspremont 2016.

156 Janis 1987a–1988, at 361; Criddle and Fox-Decent 2009; and Gould 2011, at 271.

157 Gould 2011, at 271.

158 Ibid., at 272 (quoting Mr. Cole, representative from Sierra Leone at the Vienna Conference).

159 Weil 1983, at 422.

160 Cassese, 2005, at 202.

161 Gould 2011, at 272 (quoting Mr. Dons, representative from Norway at the Vienna Conference).

162 Virally 1966, at 10.

163 Paulus 2005, at 299–300.

164 Gould 2011, at 264.

This peculiar iteration of individual-oriented public order norms with the traditionally state-based form of international law is also evident in international investment law and arbitration. On the one hand, this chapter has shown that arbitral tribunals have adopted a particularly restrictive approach when private parties have claimed that a host state has violated *jus cogens* norms. In particular, arbitral tribunals have held that investors cannot invoke *jus cogens* as an independent cause of action, as arbitral tribunals have limited jurisdiction. Analogously, when such *jus cogens* arguments have been raised by third parties, mainly non-governmental organisations (NGOs) intervening in the arbitral proceedings as *amici curiae*, arbitral tribunals have tended to dismiss such arguments as irrelevant.[165] This approach reflects a positivist and voluntarist approach: it is up to the contracting states to eventually consider inserting the violation of *jus cogens* as an independent cause of action under the relevant bilateral investment treaties. In parallel, the arbitral sympathy for voluntarist approaches is also shown by the fact that when host states have invoked *jus cogens* to decline to comply with given investment treaty obligations, arbitral tribunals have not dismissed the argument *tout court*. The mere reference by the host states to *jus cogens*, however, is not enough to lead arbitral tribunals to accept such arguments. In fact, some arbitral tribunals have dismissed such arguments considering that they had not been fully pleaded. Other tribunals have merely alluded to the *jus cogens* arguments as advanced by the host state without deeming it necessary to take a stance on the matter.

On the other hand, the emergence of individual-oriented public order norms is particularly evident in the interplay between *jus cogens* and international public order in investment treaty arbitration. As mentioned, in a number of cases, arbitral tribunals have declined their jurisdiction on the basis of transnational public policy. In this regard, *jus cogens*, in its peculiar interaction with, and/or articulation as, international public order, can play a legitimising role in investor-state arbitration, making sure that the most fundamental values of the international community are not violated by either foreign investors or the host states, and indicating how future practice might be shaped or reformed in a way that can both promote and protect responsible and legitimate investments.

12.5 Conclusions

While *jus cogens* is an important thread in the fabric of international law, it remains an essentially contested concept[166] and a source of controversy.[167] On the one hand, *jus cogens* 'attempt[s] to forge [the] coherence and unity of the

[165] Due to space limits, this chapter does not discusses *amicus curiae* briefs or third party/NGO *jus cogens* arguments. For an interesting case study, see Vadi 2015.

[166] Linderfalk 2012, at 11.

[167] Bianchi 2008, at 493.

international legal system'.[168] It is based on the assumption that despite divergent interests and values, there is one international community and some common values.[169] The idea of a hierarchy of norms responds to 'the hope that international law can be put in order; that it can be driven by [justice and] values other than the mere satisfaction of selfish … interests'.[170] Substantively, peremptory norms express the idea of safeguarding community interests and 'the common core of human values',[171] clarifying that international law 'is not an aim in itself, but a means for the safeguard of human values and interests'.[172] The indeterminacy of *jus cogens* can be a virtue: as Bassiouni puts it,

> we are left with our imagination to analogize *jus cogens* to a shooting star in the firmament of higher values, without much knowledge of how it got there or why. We do not know how to distinguish between the various trajectories taken by these shooting stars, nor do we know how to compare their relative brilliance.[173]

On the other hand, sceptics contend that *jus cogens* is a dangerous concept with anarchical qualities, raising more questions than it answers, and potentially doing more harm than good.[174] In fact, not only does it delimit state power but it can also be an instrument of power.[175] Without a clear determination of what rules are peremptory there is a risk that *jus cogens* can be used to foster the interests and values that are deemed to be paramount by powerful actors rather than expressing objective community interests.

Adjudicators are in the best position to fulfil the promise of *jus cogens*,[176] interpreting, applying and making concrete the various formal sources of international law embodying peremptory norms. Although no court has specifically been entrusted with the role of adjudicating *jus cogens*[177] and international courts and tribunals lack formal coordination, the proliferation of adjudicative bodies has seen the emergence of a growing cross-pollination of concepts and judicial dialogue. Arbitral tribunals have participated in this dialogue, contributing to the development of international investment law and to the clarification of the role of *jus cogens* within the same. The impact of well-argued awards can extend well beyond the four corners of international investment law and arbitration.

At the same time, because of the vagueness of the concept and the ensuing risk of ideological abuse, the impact of *jus cogens* on concrete cases has remained

168 Paulus 2005, at 297.

169 Ibid., at 299.

170 Ruiz Fabri 2012, at 1050.

171 Ibid.

172 Paulus 2005, at 332.

173 Bassiouni 1990, at 808–809.

174 Ruiz Fabri 2012, at 1052.

175 Paulus 2005, at 332.

176 Cassese 2012, at 166.

177 Zemanek 2011, at 388 (arguing that the closest is the ICJ). See also Ford 1994–1995, at 145.

limited. Arbitrators have been mindful of the perils of *jus cogens*, namely the dangers that 'the powerful players of the system … use international hierarchies for the benefit of their perception of community interests'.[178] Moreover, the particular interplay between individual-oriented public order norms with the traditionally state-based form of international law which characterises the evolution of *jus cogens* is also evident in international investment law and arbitration. Arbitral tribunals have adopted a voluntarist approach when private parties have claimed that a host state has violated *jus cogens* norms. In particular, arbitral tribunals have held that investors cannot invoke *jus cogens* as an independent cause of action, as such tribunals are of limited jurisdiction. Analogously, when such *jus cogens* arguments have been raised by *amici curiae* briefs, arbitral tribunals have tended to dismiss such arguments as irrelevant. This approach reflects the idea that it is up to the contracting states to eventually consider inserting the violation of *jus cogens* as an independent cause of action under the relevant international investment treaties. In parallel, when host states have invoked *jus cogens* to repudiate certain investment treaty obligations, arbitral tribunals have not dismissed the argument out of hand. Yet, most tribunals have dismissed such arguments considering that they had not been fully pleaded. Other tribunals have merely touched upon the *jus cogens* arguments as advanced by the host state without deeming it necessary to take a stance on the matter. Like other judicial bodies, arbitral tribunals 'have demonstrated a willingness to identify *jus cogens* [norms] when the issue has little direct bearing on the case'.[179] *Jus cogens* tends to be relied upon *ad abundantiam*,[180] 'for rhetorical purposes—to confer pathos on legal arguments'.[181] While 'peremptory means absolute; final; decisive; that cannot be denied, changed or opposed',[182] this is far from being the case at least in current international adjudication. Very often arbitral tribunals mention *jus cogens* in passing to dismiss its relevance in the context of a given dispute.

This, however, does not mean that *jus cogens* has not shaped and/or played a significant role in the making of international investment law and arbitration. The emergence of individual-oriented public order norms is particularly evident in the interplay between *jus cogens* and international public order in investment treaty arbitration. As mentioned, in a number of cases, arbitral tribunals have declined their jurisdiction on the basis of transnational public policy. In this regard, *jus cogens*, in its peculiar interaction with, and/or articulation as, international public order, can play a legitimising role in investor-state arbitration, ensuring that the most fundamental values of the international community are not violated by either foreign investors or the host states, and indicating how future practice might be

[178] Paulus 2005, at 331.

[179] Saul 2015, at 28.

[180] Focarelli 2008, at 429.

[181] Linderfalk 2008, at 855.

[182] Ibid., at 868.

shaped or reformed in a way that can both promote and protect responsible and legitimate investments. Especially if *jus cogens* is analogised or equated to international public order, then it plays a prominent role in defining what investments are permissible.

In conclusion, the dialectics between individual-oriented public order norms and the traditionally state-based form of international investment law confirms the hypothesis that *jus cogens* constitutes the outcome of convergence between an emerging individual-oriented normative framework, a traditional state-based legal order, and values common to the international community as a whole.[183]

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Part II
Dutch Practice in International Law

'Dutch Practice in International Law': An Introductory Note

At the start of the *Netherlands Yearbook of International Law* (NYIL), in 1970, the core idea was to have a publication that, apart from articles on a variety of topics in the field of international law, would devote special attention to Dutch state practice in the field of international law. That *Documentation* section would relate, amongst other things, to treaties and other international agreements to which the Netherlands is or would become a party, summaries of Dutch judicial decisions involving questions of public international law (many of which were not published elsewhere), extracts from relevant municipal legislation, as well as publications by authors in the field based in the Netherlands. It was felt that such overviews would provide a great helping hand for legal practitioners, state representatives and scholars. In retrospect, given the (growing) amount of legal materials at the time and the absence of search engines and the like, the documentation section of the *Yearbook* will no doubt have foreseen in a variety of needs.

But The Times They Are a-Changin. At some moment, the Editorial Board of the *Netherlands Yearbook* started asking itself the question in what way the *Documentation* section was still a response to a need for those searching for such materials. The answer to that question can be found in *Preface* to NYIL 2012, stating that 'because of the ample electronic availability of state practice related documents' the section has been removed from the *Yearbook*. It had been succeeded by an online overview of *Dutch Literature in the Fields of Public and Private International Law, European Community Law and Related Matters*, made by the Peace Palace Library, The Hague. The overviews for each volume can be found at http://www.asser.nl/asserpress/documentation/.

Instead of focusing on an overview of the type of materials mentioned, the Editorial Board introduced in 2012 the new part *Dutch Practice in International Law*. The idea was and still is to select every year one or more topics with which Dutch legal practice, broadly taken, has been struggling in one way or another. Further to that, the topics have some fundamental, conceptual characteristics, and a wider scope than being relevant for a small group of key specialists only. The chapters are written upon invitation by the Board of Editors by authors with proven expertise in the relevant fields.

The first contributions in this part related to Dutch Courts and Srebrenica (NYIL 2012); the Iranian sanctions case (NYIL 2013); the Arctic Sunrise dispute (NYIL 2014), followed this year by three contributions, on respectively: Immunities of international organizations before domestic courts'; judicial review on the island of Saint Martin; the Dutch responses to recommendations of international human rights bodies.

The General Editors and the Managing Editor

Chapter 13
Immunities of International Organizations Before Domestic Courts: Reflections on the Collective Labour Case Against the European Patent Organization

Cedric Ryngaert

Abstract The Netherlands is home to a substantial number of international organizations, which on the basis of international agreements are entitled to immunity from jurisdiction and enforcement before Dutch courts. This immunity grant has not stopped claimants from suing international organizations in The Netherlands, sometimes successfully. Dutch courts have indeed proved willing to entertain claims that a particular activity of the organization was not necessary for the fulfilment of its functions, or that the organization failed to offer an alternative remedy. In a recent case against the European Patent Organization, a Dutch court dismissed the organization's immunity on the ground that it failed to offer an alternative remedy *and* that the impugned substantive violations rose to the level of fundamental rights violations. The author supports this approach, with some reservations, but regrets the quasi-absolute immunity from enforcement which international organizations continue to enjoy.

Keywords Immunity · International organizations · The Netherlands · Right to a remedy · Collective labour law

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13.1 Introduction

The Netherlands is home to a substantial number of international organizations, which on the basis of international agreements are entitled to immunity from jurisdiction and enforcement before Dutch courts.[1] This immunity grant has not stopped claimants from suing international organizations in The Netherlands, sometimes successfully. In essence, claimants have made two sorts of arguments: (1) that a given activity of the organization was not necessary to discharge the functions assigned to it; (2) that the organization did not offer alternative means of dispute settlement. The first argument has had some traction in Dutch courts, with the Court of Appeal of Amsterdam, in a criminal case against Euratom, dismissing the organization's immunity on the grounds that violating Dutch environmental regulations did not form part of the organization's functions,[2] and the Court of Appeal of The Hague, in a procurement case against the European Patent Organization (EPO), dismissing the organization's immunity on the grounds that offering catering facilities was unrelated to the EPO's function of issuing patents.[3] The second argument, based on the principle which the European Court of Human

[1] Exceptionally, Dutch courts have been willing to ground an organization's immunity directly on customary international law, in the absence of headquarters or other international agreement. See *A. Spaans* v. *The Netherlands*, Supreme Court, NJ 1986/438, 20 December 1985.

[2] The Court of Appeal was, however, overruled by the Supreme Court, which did grant the organization functional immunity. See *Euratom*, Supreme Court (criminal case), LJN: BA9173, 13 November 2007 (and the summary of the Court of Appeal's judgment cited therein).

[3] *European Patent Organization v. Stichting Restaurant de la Tour*, Court of Appeal The Hague, No. 200.065.887/01, LJN: BR0188, 21 June 2011.

Rights laid down in *Waite and Kennedy*,[4] has been entertained by Dutch courts, but so far not led to a dismissal of immunity—exception in the collective labour case against the EPO discussed below. In individual labour cases—the typical cases coming before domestic courts—Dutch courts have acknowledged the applicability of the principle, and have ruled that the International Labour Organization Administrative Tribunal was a reasonably available alternative means of dispute-settlement, thus confirming the immunity of organizations, such as the EPO, using this tribunal for individual labour disputes.[5] In the *Mothers of Srebrenica* case, however, the Supreme Court held that the principle was not applicable to litigation against the United Nations in respect of its peace and security mandate; this position was later confirmed by the European Court of Human Rights.[6] In the recent scholarly literature, both in English and Dutch, fine descriptions of the pertinent cases, as well as critical comments thereto, can be found.[7]

In the limited space allotted to me here, I will not repeat these analyses. Rather, I would like to reflect on one particular case that recently made headlines in the Netherlands, namely, a case filed against the European Patent Organization (EPO) by two of its trade unions in respect of the organization's restrictions of collective labour rights, leading to two court decisions and a ministerial order (2014–2015).

The EPO is an international organization set up to strengthen co-operation between the states of Europe in respect of the protection of inventions. It has an establishment in Rijswijk, close to The Hague, whereas its main establishment is in Munich, Germany. The EPO had earlier been sued before Dutch courts, namely concerning a public procurement case concerning catering activities and an individual labour dispute. As set out above, in the former case, The Hague Court of Appeal (2011) rejected the EPO's immunity defence on the ground that offering a catering facility was not strictly necessary to the end of granting patents.[8] In the latter case, the Dutch Supreme Court (2009) held that the EPO could avail itself of its immunity as it had made available an alternative dispute settlement mechanism

[4] *Waite and Kennedy v Germany*, ECtHR, No. 26083/94, 18 February 1999, para 68. 'It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial … For the Court, a material factor in determining whether granting [the European Space Agency, an international organization headquartered in Germany] immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.'

[5] Court of Appeal The Hague, No. 01/136, NIPR 2004, No. 268, 13 February 2002; *Claimant v. European Patent Office*, Supreme Court, No. 08/00118, LJN: BI9632, 23 October 2009.

[6] *Stichting Mothers of Srebrenica and others v. United Nations*, Case No. 10/04437, 13 April 2012, Supreme Court, ILDC 1760 (NL 2012), para 4.3.3; *Stichting Mothers of Srebrenica and others v. The Netherlands,* ECtHR, No. 65542/12, 27 June 2013, para 165. The Court of Appeal, however, did apply *Waite and Kennedy*. *Stichting Mothers of Srebrenica and others v. United Nations*, Court of Appeal The Hague, Case No. 200.022.151/01, 30 March 2010.

[7] Schrijver 2013; Henquet 2010, 2013; and Dekker and Ryngaert 2011.

[8] *European Patent Office v. Stichting Restaurant de la Tour*, para 14.

effectively guaranteeing a staff member's right to a remedy.[9] The case that is the subject of this note constitutes the first *collective labour* dispute involving the EPO, or any other international organization for that matter, that was ever brought before Dutch courts.

Problems had arisen between the EPO and two of its trade unions (VEOB and SUEPO), which accused the organization of unduly limiting collective labour rights. After the EPO failed to heed the unions' demands in 2013, they filed suit against EPO before Dutch courts. In 2014, the District of The Hague court dismissed the case, citing the risk of fragmentation of the EPO.[10] In 2015, however, the Court of Appeal of The Hague held that the organization could not avail itself of its immunity from jurisdiction and went on to assess the merits of a claim brought by the unions.[11] While the organization's immunity was laid down in the relevant headquarters agreement between the EPO and The Netherlands,[12] this immunity could not, according to the Court, be relied on since the organization had not made alternative mechanisms of dispute settlement available to the claimants. This 'alternative means' test is derived from the *Waite and Kennedy* judgment (1999) of the European Court of Human Rights (ECtHR).[13] The Court of Appeal then went on to consider the restrictions, which EPO had imposed on trade union formation and communication, as well as the right to strike, as violations of fundamental collective labour rights. The remedy, which the Court imposed, consisted of giving the trade unions unimpeded access to the EPO's internal mailing system, of allowing them to participate in collective labour negotiations, and of prohibiting the organization from applying the provisions of its service regulation, which limited the right to strike. Eventually, however, the Minister of Justice and Security ordered the bailiff not to enforce the Court's decision on the ground that enforcement would amount to a violation of the EPO's internationally protected immunity from execution.[14]

The EPO case is internationally relevant in two respects: (1) because the Court of Appeal rejected the international organization's claim of immunity from jurisdiction on human rights grounds, transposing to collective labour disputes the *Waite and Kennedy* test developed by the European Court of Human Rights in the

[9] Supreme Court of the Netherlands, ECLI:NL:PHR:2009:BI9632, 23 October 2009, para 3.5.

[10] District Court The Hague, ECLI:NL:RBDHA:2014:420, 14 January 2014.

[11] Court of Appeal The Hague, ECLI:NL:GHDHA:2015:255, 17 February 2015. I have discussed this case with my co-author Frans Pennings in Ryngaert and Pennings 2015a and 2015b.

[12] Article 3(1) of the 1973 Protocol on Privileges and Immunities of the European Patent Organization, 1050 UNTS 500 (EPO Protocol); Article 8 of the 1973 Convention on the Grant of European Patents, 1065 UNTS 199 (EPO Convention).

[13] *Waite and Kennedy v Germany*, para 68.

[14] Ministerie van Veiligheid en Justitie, Directoraat-Generaal Rechtspleging en Rechtshandhaving, Directie Juridische en Operationele Aangelegenheden, Aanzegging ex artikel 3a, tweede lid, van de Gerechtsdeurwaarderswet, 23 February 2015.

context of individual labour disputes;[15] and (2) because it affirmed the international organization's quasi-absolute immunity from execution. The case invites some broader reflections from my side regarding the relationship between an international organization's treaty-based immunity from jurisdiction and fundamental human rights, as well as regarding the scope of the organization's immunity from execution. I will proceed in three stages. First, I give a short overview of the decisions of the District Court and the Court of Appeal. Secondly, starting from these decisions, I voice some critical comments regarding international organizations' immunity from jurisdiction measured against claimants' rights of access to a remedy. Thirdly, taking the Minister's decision to block enforcement of the judgment against the EPO as my starting point, I criticize the quasi-absolute immunity from execution of which international organizations can still avail themselves.

13.2 The Collective Labour Dispute Involving the European Patent Organization Before Dutch Courts

As noted in the introduction, EPO had earlier been sued before a Dutch court in an *individual* labour dispute. In that case the Dutch Supreme Court, applying the *Waite and Kennedy* principle, had held that EPO could avail itself of its immunity on the ground that it had made available an alternative dispute settlement mechanism effectively guaranteeing the individual claimant's right to a remedy under Article 6 of the European Convention on Human Rights (ECHR):[16] individual staff members of EPO indeed had access to a jurisdictional procedure before the Administrative Tribunal of the International Labor Organization (ILOAT), even if they were not entitled to a public hearing.[17] The ILOAT does not have jurisdiction, however, over *collective* labour disputes between international organizations and trade unions, nor do international organizations normally provide for other collective labour-related alternative dispute-settlement mechanisms that could satisfy the *Waite and Kennedy* standard. Collective labour disputes have not earlier been brought before Dutch courts nor—to my knowledge—before other domestic courts. Thus, *VEBO/SUEPO v EPO* constitutes a primer that may serve as a precedent.

In 2013, the trade unions in question had requested the (first instance) District Court of The Hague to force EPO to terminate violations of the right to strike and the right to collective negotiations. The District Court rendered a somewhat confused decision on 14 January 2014, first rejecting and subsequently upholding EPO's

[15] *Waite and Kennedy*, para 68.

[16] 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).

[17] Supreme Court of the Netherlands, ECLI:NL:PHR:2009:BI9632, 23 October 2009, para 3.5. The Court held that the claimants had not established that the ILOAT would decline motivated requests to hold a public hearing (although in practice such hearings were rarely held).

immunity. On the one hand, it ruled that EPO was not entitled to immunity as the trade unions did not have access to an effective remedy under Article 6 ECHR.[18] On the other hand, it decided that upholding the claims could result in fragmentation of EPO, in the sense that in The Netherlands different rules than in other participating EPO States (in particular Germany) would be applied. This would allegedly impinge on the essence of the immunity, in violation of the EPO Convention, which safeguards the functioning of EPO as a whole, including the application of organization-wide and uniform regulation.[19] According to the Court, the trade unions would instead have to submit their claims to the central organization of EPO in Germany.[20] The Court's reasoning is open to criticism as it oddly relies on organizational necessity to limit the trade unions' right to a remedy, whereas normally, the right to a remedy is resorted to so as to limit adverse effects of an organizational necessity analysis.

On appeal, the Court of Appeal of The Hague struck down the first instance judgment, notably on the ground that the unions had not intended to fragment the organizational rules, even if these had been set for the entire organization. In so doing, it appeared to reject the argument that EPO's immunity was necessary for the exercise of the organization's competences, at least insofar as no similar cases were pending before other states' courts. Relying on human rights considerations, the Court went on to characterize the impugned violations—of the right to strike and the right to collective negotiations—as violations of fundamental rights.[21] In addition, it held, applying the *Waite and Kennedy* principle, that the judicial protection offered by EPO in respect of alleged violations of the right to collective action and negotiation was 'manifestly deficient' since the procedure before ILOAT is limited to individual staff members[22] and because EPO had not provided any remedy to safeguard collective labour rights.[23] The Court then went on to hold EPO's invocation of immunity with respect to the trade unions' *prima facie* claims, in the absence of any alternative judicial protection, to be a disproportionate restriction of the right of access to a court, laid down in Article 6 ECHR.[24]

13.3 Immunity from Jurisdiction: Some Reflections

Even while I agree with the outcome of the case (the rejection of EPO's immunity from jurisdiction on human rights grounds), in this section I provide a critique of three considerations of the Court: (a) that the unavailability of an alternative

[18] District Court The Hague, ECLI:NL:RBDHA:2014:420, 14 January 2014.

[19] Ibid., para 3.11.

[20] Ibid.

[21] Court of Appeal The Hague, ECLI:NL:GHDHA:2015:255, 17 February 2015, paras 3.7 and 3.10.

[22] Ibid., para 3.8.

[23] Ibid., para 3.9.

[24] Ibid., para 3.10.

means of dispute settlement does not *ipso facto* lead to the rejection of an international organization's immunity; (b) that an international organization's immunity is only lifted in case the available mechanisms of dispute settlement are manifestly deficient; and (c) that human rights prevail over immunity agreements.

13.3.1 The 'Additional Circumstances' Test

It bears notice that the Court found violations of *substantive and procedural human rights*, namely of fundamental social rights *and* of the right to a remedy (access to a dispute settlement mechanism) under Article 6 ECHR, and it found that only the combination of both violations led to the (automatic) rejection of the organization's immunity. Directly relying on the *Waite and Kennedy* judgment, where the ECtHR held that the availability of an alternative remedy is just a 'material factor' in determining whether granting immunity is permissible,[25] the Court of Appeal averred that the absence of an alternative remedy, combined with a conferral of immunity, does not *ipso facto* amount to a violation of Article 6 ECHR. According to the Court, such a violation can only be found in case of 'additional circumstances', in particular the systematic and far-reaching violation of the fundamental principles of the rule of law,[26] in the case collective labour rights. This reasoning implies, *a contrario*, that in case the underlying violation does not rise to the level of an (international) human rights violation—say a breach of (employment) contract—a domestic court is allowed to *uphold* the immunity of the organization, even if it does not offer an alternative remedy to the claimant. In my view, this is an overly restrictive interpretation of the protection offered by Article 6 ECHR, which, moreover, does not find support in recent case-law of the ECtHR. From the ECtHR's decision (preceding The Hague Court of Appeal's decision in EPO) in *Klausecker v Germany* (2015), a case concerning—as it happened—the immunity of EPO, it follows that, at least in individual labour disputes, the availability of an alternative means of dispute settlement is a necessary condition for the organization to avail itself of its immunity,[27] without further requirements being imposed regarding the character of the underlying violation allegedly committed by the organization.

Outside the context of individual labour disputes, an affirmation of the immunity of international organizations, even in the absence of alternative means of dispute settlement being made available to the claimants, may arguably be permissible in limited circumstances. The most obvious scenario is where the

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[25] *Waite and Kennedy*, para 68.

[26] Court of Appeal The Hague, ECLI:NL:GHDHA:2015:255, 17 February 2015, para 3.10.

[27] *Klausecker v. Germany,* ECtHR, No. 415/07, 6 January 2015, para 69. 'Having regard to the importance in a democratic society of the right to a fair trial, of which the right of access to court is an essential aspect, the Court therefore considers it decisive whether the applicant had available to him reasonable alternative means to protect effectively his rights under the Convention.'

nature and the mission of the organization are such that lifting its immunity would produce serious adverse effects on world peace. This exception, drawn from consequentialist ethics, may justify the affirmation of the immunity of the United Nations in respect of acts committed in the framework of peace operations, even where the impugned acts amount to gross human rights violations. As Steven Ratner, in his remarkable *The Thin Justice of International Law* (2015), recently argued, a norm of international law, e.g. on immunity, even if does not fully respect fundamental human rights, may be morally justified if at least it furthers international peace.[28] For this reason, he considered the personal immunity of heads of State and heads of government in office defensible, because rejection of such immunity may cause international tension, possibly leading to inter-state war.[29] Along similar lines, a failure to confer immunity may make the United Nations reluctant to authorize such operations, and the member states to contribute troops, with dire consequences for international peace and security: vicious civil wars, with the attendant human toll, may continue unabated. The Dutch Supreme Court and the ECtHR appear to have relied on this argument in their *Mothers of Srebrenica* judgments, in which they held that the conferral of immunity of the UN by Dutch courts in respect of UN peacekeeping failures was not a violation of Article 6 ECHR, even if the UN had not provided alternative dispute settlement mechanisms (in fact, unlike what, in 1946, was envisaged in Section 29 of the UN Convention on the Privileges and Immunities of the UN).[30] According to the Dutch Supreme Court, in the context of maintaining international peace and security, the immunity of the UN was absolute, and states would be under an obligation, pursuant to Article 103 of the UN Charter, to give priority to their UN obligations over obligations flowing from any other international agreements, such as human rights obligations under the ECHR.[31] The ECtHR has supported this approach in its 2013 judgment, in which it held that it does not follow from *Waite*

[28] Ratner 2015, at 64.

[29] Ibid., at 204. Note that Ratner considered other forms of immunity to be unjust on the ground that they overly restrict the enjoyment of human rights without evidence being offered of such immunities furthering international peace. Ibid., at 411.

[30] Section 29 of the 1946 UN Convention on the Privileges and Immunities of the UN, 1 UNTS 15. This section provides that the UN shall make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the UN is a party, but such modes have never been established. In practice, the UN settles disputes arising out of peacekeeping operations administratively, via *ex gratia* payments or lump sum agreements with host States, without offering judicial guarantees. See Schmalenbach 2006.

[31] *Stichting 'Mothers of Srebrenica' c.s. tegen de Staat der Nederlanden en de VN*, Hoge Raad 13 April 2012, LJN: BW19, paras 4.3.5–4.3.6. For an extensive discussion of the decisions of the Supreme Court, the Court of Appeal, and the District Court in this case, see Schrijver 2013.

and Kennedy that 'the absence of an alternative remedy the recognition of immunity is *ipso facto* constitutive of a violation of the right of access to a court'.[32] The ECtHR considered that such a rule may perhaps be applicable to employment disputes, but that the *Mothers of Srebrenica* case was 'fundamentally different from [these] earlier cases'[33] given the special nature of the United Nations as a collective security organization.[34]

The Court of Appeal in the EPO case has, somewhat unfortunately, seised on the ECtHR's pronouncement in *Mothers of Srebrenica* to condition the dismissal of immunity on 'additional circumstances' being present, beyond just the unavailability of alternative means of dispute settlement,[35] whereas the ECtHR did no more than drawing attention to the special position of the UN as a collective security organization. As far as the collective labour dispute at issue was concerned, the importance of these 'additional circumstances' should not be exaggerated, however, as a considerable number of basic collective employment rights rise to the level of fundamental rights.[36] Still, under the standard suggested by the Court of Appeal, an international organization may continue to avail itself of immunity with regard to disputes over detailed regulations in collective labour agreements between an international organization and its trade unions, even if it has not provided for an alternative dispute settlement mechanism. It remains elusive in this respect what additional circumstances—apart from fundamental rights violations—could nevertheless set aside this immunity in these cases. In my view, the 'additional circumstances' test has no place in collective or individual labour disputes, and should be limited to the very specific case of the UN in its capacity as a collective security organization; in other cases, the international organization's immunity should be conditioned on its making available alternative means of dispute settlement.

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[32] *Stichting Mothers of Srebrenica and others v the Netherlands,* ECtHR, No. 65542/12, 27 June 2013, para 164. The Court drew attention to *Waite and Kennedy*'s enunciation that the absence of an alternative dispute settlement mechanism was only '"material factor" in determining whether granting an international organisation immunity from domestic jurisdiction was permissible.' Ibid., para 163.

[33] Ibid., paras 149 and 165.

[34] The Court finds that since operations established by United Nations Security Council Resolutions under Chapter VII of the United Nations Charter are fundamental to the mission of the United Nations to secure international peace and security, the Convention cannot be interpreted in a manner which would subject the acts and omissions of the Security Council to domestic jurisdiction without the accord of the United Nations. Ibid., para 154 (citing its decision in *Behrami*, in which it refused to hold UN member States responsible for violations committed in the context of UN peace operations). *Behrami and Behrami v France and Saramati v France, Germany and Norway,* ECtHR, Nos. 71412/01 and 78166/01, 2 May 2007.

[35] Court of Appeal The Hague, ECLI:NL:GHDHA:2015:255, 17 February 2015, para 3.4.

[36] See for a list of fundamental collective labour rights Articles 1–10 of the 1961 European Social Charter, 529 UNTS 89.

13.3.2 The Standard of Manifest Deficiency

Where international organizations duly make alternative dispute settlement mechanisms available to claimants, the next question is what standards these mechanisms should meet. The Court of Appeal in the EPO case seemed to imply that the remedies offered by the organization need not be perfect; as long as they are not 'manifestly deficient' they may satisfy the requirements of Article 6 ECHR.[37] This standard of manifest deficiency does, however, not feature in the ECtHR's case-law on the immunity of international organizations. Rather, it is borrowed from the ECtHR's *Bosphorus*-based case-law on the responsibility of member states for the internationally wrongful acts of international organizations,[38] where it is used to hold a member state responsible for an ECHR violation in connection with an act of an international organization, even in a situation of the organization offering protection equivalent to the level of protection offered by the ECHR.[39] By transposing the standard of manifest deficiency to the immunity of international organizations, the Court of Appeal appears to imply that Article 6 ECHR is only violated in cases of manifestly deficient protection. In so doing, it overlooks the requirement that, according to the *Bosphorus* principle, the organization is supposed to offer *equivalent* protection in the first place.

Arguably, by abandoning this prior requirement of equivalence, the Court may—possibly unconsciously—have lowered the threshold for a finding of immunity. Indeed, a rudimentary mechanism offered by the organization to settle disputes may well not be manifestly deficient, while nevertheless offering only limited judicial protection. *A la limite*, even the mere existence of a dispute settlement mechanism may pass muster when the manifest deficiency standard is used. Truth be told, however, while, as indicated above, the standard of manifest deficiency is not used by the ECtHR in its case-law on the immunity of international organizations, friendly treatment of the organization may not only follow from the application of the manifest deficiency standard but also of the 'reasonably available alternative means' standard. There is, indeed, quite some case-law of courts, including case-law of the ECtHR itself, paying deference to international organizations even where the dispute settlement mechanisms, which they made available, were hardly up to standard.[40] In my view, while domestic courts need not require protection *identical* to the protection offered by the ECHR (as such a requirement may pay insufficient justice to the autonomy of international

[37] Court of Appeal The Hague, ECLI:NL:GHDHA:2015:255, 17 February 2015, paras 3.8–3.9. Note that the Court held that in the case, the remedies were indeed manifestly deficient.

[38] *Bosphorus v. Ireland,* ECtHR, No. 45036/98, 30 June 2005. The case is cited in Court of Appeal The Hague, ECLI:NL:GHDHA:2015:255, 17 February 2015, para 3.6.

[39] *Bosphorus v. Ireland*, paras 155–156.

[40] See notably *Chapman v. Belgium,* ECtHR, No. 39619/06, 5 March 2013 (regarding the compatibility with Article 6 ECHR of the procedures before the NATO Appeals Board, made available to NATO employees). For a discussion of relevant other cases, see Ryngaert 2010.

organizations), they should not recoil from inquiring into the *quality* of the dispute settlement mechanisms offered by the organization and reject the organization's immunity defence where these mechanisms are not just manifestly deficient but also where they fail to offer *equivalent* protection.

13.3.3 The Normative Relationship Between Immunity Agreements and Human Rights

A final point to be made, as far as the Court of Appeal's holding on the EPO's immunity from jurisdiction is concerned, pertains to the legal relationship between the Protocol on the Privileges and Immunities of EPO, on the one hand, and the ECHR and/or fundamental (social) rights, on the other. The Court implied that the latter prevail over the former,[41] but it remained silent on the normative justification of this prevailing effect. Such an effect is not self-evident, however, as there is no principled normative hierarchy between a headquarters agreement/protocol on privileges and immunities and a human rights treaty. The *lex specialis* and *lex posterior* canons of treaty construction are of no particular use in this respect as both categories of treaties cover very different subject-matters. The better argument is that human rights treaties do not prevail over immunity treaties, but that the latter treaties should be interpreted in light of international human rights norms on the ground that these are other 'relevant rules of international law applicable in the relations between the parties', in the sense of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (1969), which enshrines one of the general rules of interpreting treaties. Accordingly, Article 6 ECHR, as interpreted by the ECtHR, informs the application of Article 3 of the Protocol on Privileges and Immunities of EPO, as result of which norms on human rights and immunities are balanced with each other.[42] This balancing process ensures that an organization's immunity is not per se lifted when measured against norms of international human rights law on access to a court (otherwise no immunity would survive) but only where the organization fails to offer a minimum level of (quasi-)judicial protection to aggrieved individuals or entities.

[41] Court of Appeal The Hague, ECLI:NL:GHDHA:2015:255, 17 February 2015, para 3.11.

[42] See in this sense indeed *Lutchmaya v. General Secretariat of the ACP*, Court of Cassation (Belgium), Case No. C07 0407F, International Law in Domestic Courts, OUP, 1576 BE 2009, paras 30 and 32. The case avers that applying Article 6 ECHR in immunity cases involving international organizations comes down to balancing two norms, and that Belgium has not committed an internationally wrongful act by acceding to the instrument providing for immunity (the headquarters agreement).

13.4 Immunity from Enforcement

The relevance of the EPO case does not only lie in the Court of Appeal's rejection of its immunity from jurisdiction on human rights grounds but also in the subsequent affirmation of its immunity from enforcement or execution. Precedents as far as enforcement measures against international organizations are concerned, are few and far between, for the simple reason that most claims against international organization strand at the jurisdictional stage. To my knowledge, only once has a high court endorsed the taking of enforcement measures against an organization; in 2009, the Belgian Court of Cassation lifted the immunity from enforcement of the Secretariat of the African, Caribbean, and Pacific Group of States (ACP) in an individual labour case, on the ground that the ACP had not made available alternative execution procedures to the claimant.[43] The Belgian Court thus applied the *Waite and Kennedy* principle, developed with respect to an international organization's immunity from jurisdiction, to an organization's immunity from enforcement. How an organization could reasonably have provided an adequate alternative *execution* procedure in this case remained an open question, however.

The EPO case will not go down the annals as a second case of immunity from enforcement being rejected by a domestic court. While the case against the EPO did survive the jurisdictional stage, its enforcement was blocked by the Minister of Justice, who ordered the bailiff not to execute the Court of Appeal's judgment. The Minister has this power pursuant to a statutory provision, which provides that notification of execution measures should be refused insofar as such measures are incompatible with the Dutch state's obligations under international law.[44] The provision is normally used to prevent enforcement measures from being taken against foreign states but, going by the text, its application can also extend to international organizations. In the past, for instance, the responsible Minister, supported by the Court of Appeal of The Hague, has blocked notification of a court judgment to the Organization for the Prohibition of Chemical Weapons (OPCW), concerning the payment of salary, on the ground that this notification and the ensuing threat of execution were incompatible with the internationally protected immunity from execution, as laid down in the headquarters agreement between The Netherlands and the OPCW.[45] In this context, the Court of Appeal reaffirmed the well-known principle that immunity from execution is separate from immunity from jurisdiction[46] and that immunity from execution guarantees that the OPCW make use of its goods and properties unhindered by any execution measure.[47] On the same

[43] Ibid.

[44] Articles 3a(2) and (5) Gerechtsdeurwaarderswet (Act on Bailiffs).

[45] *European Patent Organization v. Stichting Restaurant de la Tour*. The Court referred to Article 4(2) of the headquarters agreement concluded between the Netherlands and the OPCW.

[46] Ibid., para 4.

[47] Ibid., para 6.

ground, in another case against EPO, The Hague Court of Appeal held that the imposition of a non-compliance penalty (dwangsom) violated the principle of immunity from execution since such a penalty can be executed without any further judicial review.[48]

Immunity from execution may not only be invoked to block enforcement of monetary judgments but also to block enforcement of court injunctions. In the EPO case, for instance, the Court of Appeal did not order the organization to pay compensation to the claimants. Rather, it ordered the organization to carry out specific acts, such as giving the trade unions access to the EPO's internal mailing system. Obviously, such orders could be backed up by a non-compliance penalty, in which case measures of attachment against properties representing the value of the penalty could be taken. Such orders could, however, also be directly enforced by state authorities, e.g. by IT specialists hired by the government who penetrate the organization's computer systems so as to ensure compliance with the court order. Such direct enforcement will normally be accompanied by violations of the inviolability of the premises of the organization, unless representatives of the international organization happen to give their consent to enforcement.

Domestic authorities may believe that they have no other choice than to uphold an international organization's immunity from enforcement, as pursuant to headquarters agreements between international organizations and their host states, the former usually enjoy quasi-absolute immunity from enforcement in the framework of their official activities. The Protocol on the Privileges and Immunities of the EPO, for instance, provides unambiguously that properties and assets of the Organization are not subject to attachment, expropriation, confiscation, or any other enforcement measure, except insofar as the Organization has waived its immunity, the claim relates to an accident involve a motor vehicle, or the case concerns the execution of an arbitral award.[49]

Similar unambiguous wording also applies to international organizations' immunity from jurisdiction, but as discussed above, this has not stopped the ECtHR and domestic courts from dismissing an international organization's immunity from jurisdiction on human rights grounds. The question then arises whether human rights considerations could not equally inform the scope of an organization's immunity from execution and whether such considerations (should) differ from those that limit the organization's immunity from jurisdiction. For is the protection offered by the ECHR not illusory if claimants are precluded from executing a judicial decision against an international organization rendered in their favour?

The law of state immunity, in any event, while not abandoning the distinction between immunity from jurisdiction and immunity from execution, has allowed post-judgment measures of constraint to be taken against state property to the extent that it has been established that the property is specifically in use or intended for use by the state for other than government non-commercial purposes

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[48] *European Patent Organization v. Stichting Restaurant de la Tour*.

[49] Article 3 of the EPO Protocol.

and is in the territory of the state of the forum,[50] even if, in practice, the implementation of such enforcement measures may be an uphill battle.[51] No such exception has, however, found its way to headquarters agreements between states and international organizations or to customary international law on the immunity of international organizations (the latter being largely absent for that matter).[52]

From a policy perspective, and from the perspective of the claimants, it makes sense to also apply the commercial purpose exception to international organizations and not only to states. After all, the proper functioning of the international organization need not be impeded where measures of constraint are taken against property which it uses for commercial purposes and is thus not directly necessary for it to carry out its responsibilities. Where the claimant presents *prima facie* evidence that specific properties of the organization (e.g. bank accounts) are used for commercial purposes, post-judgment measures of constraint may well be taken against the organization. Alternatively, domestic courts may extend application of the *Waite and Kennedy* principle to immunity from enforcement, as the Belgian Court of Cassation did in 2009. This principle may in fact work to the advantage of the international organization, as it may allow organizations to take good faith execution measures that fall short of full execution, while still providing satisfaction to the claimants ('equivalent protection').

The ECtHR has never addressed the issue of immunity from execution before, but guidance from its side would be most welcome. It is not excluded that the lawyers of EPO trade unions will in due course submit an application to the ECtHR in case no compromise with the EPO can be found and the Dutch courts uphold EPO's immunity from execution.

13.5 Concluding Observations

The case against the European Patent Organization before Dutch courts has invited me to reflect on the scope of international organizations' immunities from jurisdiction and enforcement. I have supported The Hague Court of Appeal's rejection of EPO's immunity defence on human rights grounds. Nevertheless, I have appended some reservations to its reasoning, which admittedly led to the rejection of the organization's immunity but may prove unduly restrictive in future cases. Notably

[50] Article 19(c) of the 2004 UN Convention on Jurisdictional Immunities of States and their Property, Doc. A/59/508. The International Court of Justice has confirmed that this cardinal principle constitutes customary international law, although it doubted 'whether all aspects of Article 19 reflect current customary international law'. *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece Intervening*), ICJ, Judgment of 3 February 2012, paras 117–118.

[51] For the difficulties of attaching embassy bank accounts, see Ryngaert 2013.

[52] But see *AS v. Iran-United States Claims Tribunal*, Supreme Court, LJN AC9158, 20 December 1985 (conferring immunities on the Iran-U.S. Claims Tribunal, considered as an international organization, on the basis of customary international law).

the principle that the unavailability of an alternative dispute settlement mechanism does not *ipso facto* lead to the rejection of immunity and the principle that internal organizational procedures need to be 'manifestly deficient' for immunity to be rejected are open to criticism. In addition, I have criticized the Minister's decision to prevent enforcement of the EPO judgment. Instead, I have suggested applying the rules of state immunity from execution to the immunity of international organizations; this would allow claimants to take enforcement measures against property of the organization that is used for commercial purposes. Alternatively, I have suggested applying the 'alternative means' *Waite and Kennedy* principle to immunity from execution.

Key is that claimants, aggrieved by acts of an international organization, should not be left in the cold. The principle of accountability demands that organizations should not lightly be allowed to invoke their immunity from jurisdiction and enforcement and that they be amenable to suit if no other remedy is available to the claimants. It is not certain that in future cases Dutch courts will be sensitive to this accountability argument. Seizing on para 68 of the ECtHR's *Waite and Kennedy* judgment, they may well reason that the (non-)availability of alternative mechanisms is just one material factor in the immunity determination, which could be outweighed by other factors, in particular the autonomy of the organization from Member State interference, and the specific tasks assigned to the organization. The ECtHR's *Mothers of Srebrenica* judgment, which rejected the applicability of *Waite and Kennedy* in peace and security-related cases brought against the UN, gives Dutch courts further ammunition for such a reasoning. To the extent that Dutch courts do accept *Waite and Kennedy*—mainly in individual labour cases and possibly in some other contractual cases—it is well possible that they will refrain from inquiring in-depth into the quality of the alternative mechanisms offered, and thus affirm the autonomy and immunity of the organization via the backdoor as it were. It is recalled in this respect that Dutch courts have upheld the immunity of the organization even if the dispute settlement mechanism offered by the latter failed to organize oral hearings—a basic tenet of a fair trial, one would assume.[53] Alternatively, one may expect Dutch courts to further explore the avenue of rejecting the organization's immunity on the grounds that the impugned activity was not necessary to fulfil its functions. However, this avenue is largely a dead end, as in keeping with the principle of conferral organizations do not normally act *ultra vires*. Only where the organization engages in activities that are very incidental to its functions (e.g. catering, when issuing patents is the function of the organization), may the argument have some suasion.

It will now fall to the Supreme Court, hearing the appeal in the collective labour case against the EPO to clarify how functional necessity in the context of immunities will play out in future cases, and to what extent *Waite and Kennedy* applies beyond individual labour cases. In light of the Supreme Court's earlier case-law on the immunity of international organizations, I would not be surprised

[53] *Claimant v. European Patent Office*, Supreme Court, No. 08/00118, LJN BI9632, 23 October 2009, para 3.5.

if it were to confirm the Court of Appeal's rejection of the EPO's immunity. I refrain from extending this optimism to organizations' immunity from enforcement, however. Given the more invasive character of enforcing a judgment against an international organization, absent ECtHR guidance in this matter I do not expect Dutch courts to take the lead in restricting the immunity from enforcement.

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Chapter 14
Judicial Review on the Island of Saint Martin: An Example for The Kingdom of the Netherlands?

Roel Schutgens and Joost Sillen

Abstract In its first judgment, the Constitutional Court of Saint Martin reviewed the constitutionality of the island's new penal code in the light of both the government's positive obligation to ensure the welfare of animals and the Strasbourg Court's *Vinter* decision which calls into question the legitimacy of life imprisonment. In doing so, the Court could show the way to courts in The Netherlands and abroad, both for its acceptance of judicial review of statute law against fundamental social rights and its openness towards the European Court of Human Rights' jurisprudence. In addition, the Court managed to strike a convincing balance between an all-too-conservative form of judicial restraint on the one hand, and excessive interference in political matters on the other.

Keywords Judicial review · Judicial restraint · Fundamental social rights · Animal rights · Life imprisonment · Effects of the *Vinter* judgment

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14.1 Introduction[1]

On 8 November 2013, the Constitutional Court of the Caribbean Island of Saint Martin delivered its first and thus far only judgment.[2] Saint Martin is part of the Kingdom of The Netherlands, which further comprises the Caribbean islands of Curaçao and Aruba as well as The Netherlands proper. Although—with a population of around 47.000—it is the smallest and least populated of these four countries, Saint Martin is the only one of them that can boast a fully fledged Constitutional Court. The first judgment of this Court is interesting from both a constitutional and an international law perspective. It allows us to examine whether and, if so, how legal developments in one country can be influenced by court decisions in comparable countries. In fact, although the decisions by the Saint Martin Court only have legal force in Saint Martin, both the legal issues submitted to the Court and the way in which it addresses them are relevant for The Netherlands proper as well.

There are a number of reasons for this. First of all, the fundamental rights against which the Court reviews legislative acts closely resemble their Dutch counterparts. Some (classic) fundamental rights are even nearly identical,[3] including the way in which these rights can be limited.[4] The social rights against which the Court carries out its review bare a strong structural resemblance to several provisions in the Dutch Constitution as well.[5] Furthermore, the Saint Martin Court, like the Dutch courts, must give priority to treaties like the European Convention on Human Rights[6] (ECHR) over all national law, including the respective national constitutions.[7] This leads the Court to a far-reaching incorporation of Strasbourg case law into the Saint Martin State Constitution. As will be shown below, the Saint Martin Court treats the ECHR and the jurisprudence of the Strasbourg Court as an integral element of the meaning of the relevant fundamental rights in the

[1] This contribution is partly based on a previous publication by us. See Schutgens and Sillen 2014.

[2] *Ombudsman v. Regering van Sint Maarten*, Constitutional Court of Saint Martin, Judgment, 2013/1, 8 November 2013.

[3] In particular, Article 16 State Constitution (equality principle) is nearly identical to Article 1 Dutch Constitution. Cf. *Ombudsman v. Regering van Sint Maarten*, paras 3.4, 3.6, and 3.7 in the Court's judgement. The wording of Article 6 State Constitution (physical integrity) is virtually the same as Article 11 Dutch Constitution. See also *Ombudsman v. Regering van Sint Maarten*, para 3.7.

[4] Cf. Article 31(1) State Constitution, which codifies the unwritten parts of the Dutch system of limitation of fundamental rights (necessity, proportionality, and specificity of the restriction).

[5] Cf. Article 22 State Constitution (animal welfare) with, for example, Article 21 Dutch Constitution.

[6] 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (ECHR).

[7] Article 94 Dutch Constitution. By virtue of the Charter of the Kingdom of The Netherlands, this 'Dutch' provision also applies in Saint Martin.

Saint Martin State Constitution. Lastly, the Saint Martin Court and the Dutch courts share the same legal tradition. That is because the laws of Saint Martin are inspired by Dutch legislation, and the judges of the Court all have a Dutch law degree, and are or have been members of the Dutch judiciary. Therefore, it is relatively easy for Dutch courts to transplant elements from the jurisprudence of the Saint Martin Court into their own case law.

The reader should bear in mind that a constitutional court like Saint Martin's is unprecedented in the constitutional tradition of the Kingdom of The Netherlands. Since 1848, the Dutch Constitution has expressly forbidden the Dutch courts to test the constitutionality of statutes.[8] Although since 1953, the Constitution enables the courts to review statutes against treaties like the ECHR, the prohibition of judicial review against the national constitution has made The Netherlands an outcast from an international perspective. This review prohibition has now become exceptional even within the federal Kingdom itself as the (more recent) State Constitutions of Aruba, Curaçao and Saint Martin give their courts the power to assess the compatibility of national ordinances with the fundamental rights in their respective State Constitutions. In all of these three countries, the ordinary courts are competent to set aside the application of a national statute or ordinance in a specific dispute on account of violation of fundamental rights.[9] In addition to this power of review by the ordinary courts, in 2010, Saint Martin established a very Constitutional Court. This Court has the power to assess *in abstracto* the compatibility with the Saint Martin State Constitution of statutory regulations which have been ratified but have not yet entered into force.[10] Complaints can only be lodged by the Saint Martin Ombudsman, an independent state official. Complaints suspend the entry into force of the contested statutory regulation.[11] If it contravenes the State Constitution, the Court can quash the statutory regulation in question.[12]

In its first judgment, the Court reviewed various provisions of the new Saint Martin Criminal Code. Below, we will discuss the Court's review of the regularisation of animal fighting against a fundamental social right (Sect. 14.2) and its evaluation of lifelong prison sentences in the light of ECtHR's case law (Sect. 14.3).

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[8] Article 120 Dutch Constitution.

[9] Cf. Article VI.4 and Article I.22 State Constitution of Aruba; and Article 96 State Constitution of Curaçao.

[10] Article 127(2) State Constitution. Moreover, following the entry into force of a country ordinance, every (ordinary) court can review it against the substantive provisions of the State Constitution and, if necessary, declare its inapplicability (Article 119 State Constitution). Hoogers 2011, at 310–314.

[11] Article 127(4) State Constitution.

[12] Article 127(5) State Constitution.

14.2 Animal Fights

Article 3:54 of the new Criminal Code makes it a crime to hold animal fights without a licence.[13] Under the former code, only the organisation of cockfights without a licence was punishable by law. There were no provisions for fights involving other animals. The new code thus expanded the scope of this offence in the interest of animal welfare.[14] Nevertheless, the Ombudsman asked the Court to review whether the new provision would (still) contravene Article 22 State Constitution, which reads:

> It shall be the constant concern of the government to keep the country habitable and to protect and improve the natural environment and the welfare of animals.

According to the Ombudsman, the government can be released from this duty of care only on the basis of compelling interests. Unlike the Government, the Ombudsman does not consider the continuation of animal fighting a cultural expression of a compelling interest.[15]

The Court's decision on this complaint has two interesting aspects. First, the Court reviews a statutory provision against a fundamental social right: a positive obligation for the government to focus its efforts on the attainment of a certain goal. This kind of judicial review is—or was, up until very recently—highly unusual (Sect. 14.2.1). Second, Article 3:54 Criminal Code will be applied on a case-to-case basis by way of individual government licenses that can in turn be subjected to review by the courts. This possibility of scrutiny of the individual animal fight licenses raises the question whether it is necessary to review the legal provision as such *in abstracto* (Sect. 14.2.2).

14.2.1 Judicial Review Against Fundamental Social Rights

In 1983 a catalogue of fundamental social rights was incorporated in the Dutch Constitution for the first time. The (younger) Saint Martin State Constitution contains a highly comparable set of rights. In Dutch legal doctrine it is generally assumed that the fundamental social rights in the national Constitution—other than the civil rights and liberties—cannot by applied by the courts, because they impose on the government a duty of care which has been formulated in such an open manner that their application still requires state action. Application of these rights by the courts would therefore interfere with the law-making power.[16]

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[13] Article 3:54 Criminal Code. See *Ombudsman v. Regering van Sint Maarten*, para 3.3.8.

[14] *Ombudsman v. Regering van Sint Maarten*, para 3.3.7.

[15] Ibid., para 3.3.3.

[16] See, for example, Kortmann 2008, at 463. For a contrary position, see, e.g. Bovend'Eert et al. 2012, at 385–387. Incidentally, the parliamentary history of the Dutch Constitution of 1983 does lend some support to the view that fundamental social rights can be applied by the courts—albeit with some reservations. At the same time, published case law shows that Dutch courts are hardly, if at all, prepared to do this.

Before the Court, the Saint Martin government invoked this 'old' Dutch legal doctrine: firstly it argued that Article 22 State Constitution solely addresses the legislator. The Court, however, did review the constitutionality of the statute. Secondly, the government referred to Article 127(2) State Constitution, which prohibits judicial review against any provision in the Constitution that 'does not lend itself' to such assessment. The Court, however, gives a narrow interpretation of this prohibition. According to the Court, a provision is a suitable standard of review if 'in view of [its] wording, context, aim and thrust … and coherence with other provisions, it is sufficiently concrete and straightforward so that it can be applied by a court of law'.[17] The provision which imposes a duty of care for the welfare of animals on the government meets this requirement. At the same time, the Court holds that the provision leaves a large degree of discretionary power to the government, which compels the Court to exercise 'great restraint'.[18] This restraint applies all the more to the Court, which conducts preventive and abstract review. Its review is therefore limited to the question whether the legislator 'has made a substantial evaluation of interests, resulting in legislation which incorporates care for the well-being of animals'.[19] According to the Court, this is the case.

Thus, the Court makes clear choices with regard to its review against fundamental social rights. It does not allow itself to be discouraged from reviewing the law against these rights by the argument that the provision concerned is intended for another branch of government or does not require a concrete result. In doing so, the Court deviates from the above-mentioned traditional position of many Dutch legal experts that fundamental social rights are instruction standards, which cannot, in principle, be invoked before a court of law. We think this is the right choice,[20] partly because the possibility of conducting such a review has been explicitly mentioned in the explanatory memorandum to the State Constitution.[21] The Court, however, gives a quite restrained interpretation of the power of constitutional review against fundamental social rights. It chooses a restrictive, procedural approach and only checks whether the protected interest is reflected in the legislation under review. We think the Court thus strikes a fair balance between fundamental rights protection on the one hand and the separation of powers on the other.

The Court could have decided otherwise. For instance, the Court could have checked whether in this case it was reasonable to say that the government had made serious efforts to promote animal welfare. A few Dutch authors even contend that fundamental social rights require the government to assure a minimum standard of welfare (of animals or others). According to them, the Court should

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[17] *Ombudsman v. Regering van Sint Maarten*, para 3.3.5.

[18] Ibid., para 3.3.6.

[19] Ibid., para 3.3.6.

[20] See Fleuren 2008, at 620–621.

[21] Explanatory Memorandum, State Constitution, AB 2010, GT No. 1 (Translation of the Official Publication of Sint Maarten), at 55–56, http://decentrale.regelgeving.overheid.nl/cvdr/Images/Sint%20Maarten/i240625.pdf. Accessed 20 October 2015.

assess whether the legislation and policies meet this threshold.[22] One could counter this with the argument that the Court has very few tools to determine this minimum standard. According to some, this should not prevent the Court from setting an appropriate threshold, just like a certain degree of indeterminacy of the standard does not prevent it from reviewing the law against classic fundamental rights. For others, this indeterminacy is a reason to argue that the Court should leave the constitutional review to the (democratic) legislator.

We are of the opinion that when taking a position between these two extremes—in-depth review against a fundamental social right as opposed to leaving all choices to the legislator, one should take into account not only legal but also institutional arguments.[23] In this respect, the Court must weigh two different interests against each other, that is the possibility that the government will violate a given minimum standard of animal welfare at some point in the future, and the risk of undermining the authority of the Court by formulating such a minimum standard right away, partly because it has little power to enforce it. In this light, the Court's restrained standard of review seems very plausible to us, especially since it concerns a rather innovative form of judicial review in the Dutch legal tradition.

Furthermore, Saint Martin's acceptance of review against fundamental social rights is consistent with a broader international development in which the courts have become less hesitant to assess compliance with fundamental social rights. Another example of this development within the Kingdom is a recent judgment by the Dutch Supreme Court.[24] Historically,[25] the courts throughout the Kingdom of the Netherlands have had jurisdiction to apply provisions from international treaties[26] and, where appropriate, assess the compatibility of national regulations with these provisions. However, this competence applies only to self-executing treaty provisions. Treaty provisions addressing the legislator rather than citizens and treaty provisions granting citizens a fundamental social right are traditionally regarded as non-self-executing. As a result, the traditional non-invocability of national fundamental social rights coincided with the practice of classifying their international counterparts as non-self-executing. In its smoking ban judgment of 10 October 2014, however, the Dutch Supreme Court has broken with this tradition.

In this case, the Dutch Supreme Court was asked to review a Dutch regulation exempting small pubs from a general smoking ban against Article 8, para 2 of the WHO Framework Convention on Tobacco Control. The latter obliges the contracting states to take effective legislative and administrative measures to ban smoking in indoor public places—a provision that would traditionally have been considered non-self-executing as it primarily addresses the legislative and the executive branch. In its groundbreaking ruling, however, the Supreme Court decided that

[22] See, for example, Fleuren 2008.

[23] See Boogaard 2013, at 251–252.

[24] Supreme Court, ECLI:NL:HR:2014:2928, 10 October 2014.

[25] This has been established beyond doubt since the constitutional reform of 1953.

[26] EU law has its own system on the basis of Case 26/62, *Van Gend en Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1.

such provisions are no longer per se non-invocable in a court of law. If treaty provisions are sufficiently precise and unconditional within the context in which they are invoked, they are to be regarded as self-executing. The fact that the provision is intended for the legislator or leaves the government freedom of policy—the traditional rationale for the courts to consider international social rights as non-self-executing—is simply no longer a reason for the courts to categorically refuse its application.[27] As a consequence, the possibilities of conducting judicial review against international fundamental social rights have expanded dramatically. It therefore seems reasonable to adopt a less restrictive approach towards national fundamental social rights as well. The above-mentioned judgment by the Dutch Supreme Court and the judgment by the Saint Martin Court appear to be expressions of this rationale.

14.2.2 Possibility of Judicial Scrutiny of Animal Fight Licenses

As mentioned before, the Court does not consider the animal fight provision (Article 3:54 Criminal Code) at odds with Article 22 Saint Martin Constitution because the legislator has made a substantial evaluation of interests in which considerations of animal care have been given their proper place. In addition to that, the Court gives a second reason for not annulling the animal fight provision.

This provision effectively *allows* holding animal fights provided the organiser has been granted a government licence. The licensing system for these fights has not been set up yet, but it is clear that as soon as that is the case, every single license will be open to scrutiny by the ordinary courts.

In this light, the Saint Martin Constitutional Court takes the principled view that the necessary judicial restraint exercised by a constitutional court in its abstract *ex ante* review implies that a statutory regulation can be quashed only if it contravenes the State Constitution *on its own*. If a statutory regulation leaves a margin of discretion to the administrative authorities, which enables the latter to apply it in accordance with the State Constitution, it is not for the Court to annul the statutory regulation itself. It is then up to the ordinary courts to ensure that the concrete application of a statutory regulation will sufficiently cover the interests protected under the State Constitution. The Court is confident that the legislation in question will provide adequate scope for the protection of animal welfare through concrete licensing requirements.[28]

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[27] This new criterion is clearly derived from the case law of the Court of Justice of the European Union.

[28] *Ombudsman v. Regering van Sint Maarten*, para 3.3.8. It does, however, conclude that as long as a licensing system for animal fighting has not been provided for by law—so that there is no clarity concerning the conditions set by the government for such a licence—the holding of animal fights is a criminal offence.

The Court concludes—rightly, it seems—that the animal fight provision in itself does not constitute a violation of Article 22 State Constitution. Obviously, this does not relieve the government form its obligation to warrant (a minimum of) animal welfare when deciding on an application for a license to organise an animal fight.

14.3 Life Imprisonment

In addition to the animal fight provisions in the new Criminal Code, the Ombudsman also asked the Court to review the provisions in this code which regard the imposition of lifelong prison sentences. Both in The Netherlands and in Saint Martin the criminal courts can impose such sentences for the most serious offences.[29] Every once in a while, the justifiability of that sentence is being called into question, but until recently there were no legal impediments. The high-profile *Vinter* judgment has changed this.[30] In that judgment, the European Court of Human Rights has reviewed the British whole-life prison sentence against Article 3 ECHR which prohibits cruel, inhuman or degrading punishment. According to the Strasbourg Court, the imposition of a life sentence does not in itself contravene this prohibition.[31] However, the punishment is inhuman if the convicted person is not offered a prospect of release and a possibility of review.[32] The necessary review of the sentence over time need not be carried out by courts, but should lead to release if further execution of the sentence is no longer justified on legitimate penal grounds.[33] Moreover, the state should provide sufficiently clear criteria for the eventual, possible release of the convicted person. These should be available at the time of the imposition of the sentence so that the convicted person can immediately start working on his rehabilitation.[34] Incidentally, this does not alter the fact that in concrete cases it might (ultimately) turn out to be justified to actually keep the convicted person imprisoned for life.[35]

The Saint Martin Court was now asked whether the Saint Martin life sentence contravened Article 3 of the State Constitution, which is very similar to Article 3 ECHR. In this context, the Court invokes the principles of ‘concordance’ and ECHR-compliant interpretation, two principles that the Court itself developed in the general introductory recitals of the judgment.

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[29] In The Netherlands, this has been enshrined in Article 10(1) Criminal Code, in Saint Martin (at the time of the dispute) in Article 1:13(1) Criminal Code.

[30] *Vinter et al. v. United Kingdom*, ECtHR, No. 66069/09, 130/10, and 3896/10, 9 July 2013.

[31] Ibid., para 106.

[32] Ibid., para 110.

[33] Ibid., para 119.

[34] Ibid., para 122.

[35] Ibid., para 108.

Since many fundamental rights under the Saint Martin State Constitution are also protected by the ECHR, the State Constitution, according to the Court, is to be interpreted 'in a harmonised manner' and in accordance with the ECHR in the interest of legal uniformity and legal certainty.[36] Within the constitutional framework of the Kingdom of the Netherlands, the ECHR and the Strasbourg case law take precedence over all national legislation, including the respective constitutions. This allows the court to give the aforementioned 'harmonised interpretation' of the Saint Martin constitutional prohibition on cruel, inhuman or degrading punishment in light of its ECHR counterpart and the related *Vinter* case.[37] This interpretation effectively incorporates the Strasbourg case law on Article 3 ECHR into the Saint Martin constitution. Thus, the Court that—strictly speaking—was only assigned the task of reviewing national legislation against the Saint Martin Constitution effectively carries out a test of the compatibility of the statute provisions in question with the European Convention on Human Rights.

The result of this test is also relevant for The Netherlands for two reasons. First, because, as mentioned earlier, The Netherlands share with Saint Martin the principle that every national law can and should be tested against treaty law like Article 3 ECHR. Second, Saint Martin's law on lifelong sentencing is inspired by Dutch legislation. As is the case in The Netherlands, a lifelong convict in Saint Martin can request a pardon from the state government.[38]

Deciding on this request, the government can review the legitimacy of continued execution of the sentence against Article 3 ECHR and, in the case of Saint Martin, against Article 3 State Constitution. In The Netherlands, the granting of a pardon is regulated in the Pardons Act. Pursuant to Article 2(b) of this Act, the (Dutch) government 'may' grant a pardon following judicial advice when it is plausible that further execution of the sentence 'cannot reasonably serve any penological purpose'.[39] The Dutch Pardons Act does not provide an elaboration of this rather vague criterion. The Saint Martin State Constitution requires the adoption of further regulation concerning the granting of pardons.[40] However, such regulation had not seen the light of day at the time of the judgment, nor had it entered any preparatory stage.

In the absence of further regulation, it is difficult to say in abstract terms whether the mere existence of the possibility of a pardon in Saint Martin offers a (realistic) prospect of release. Moreover, the criteria for possible release—if formulated at all—remain unclear. The Court therefore requested the government in

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[36] *Ombudsman v. Regering van Sint Maarten*, para 2.3.5.

[37] *Ombudsman v. Regering van Sint Maarten*, para 3.5.3.

[38] In The Netherlands, this follows from Article 122 Dutch Constitution; in Saint Martin from Article 118 State Constitution.

[39] Article 2(b) Pardons Act. For the mandatory judicial advice, see Section 4 Pardons Act.

[40] Article 118 State Constitution.

its interim decision to confirm that a pardon '*shall be granted*' if the criterion of Article 2 of the Dutch Pardons Act is fulfilled, i.e. that it has become apparent that further execution of the sentence cannot reasonably serve any penal purpose.[41] The government merely replied that in the case in question a pardon 'may' be granted. In its final decision, the Court subsequently concludes that, as a consequence, lifelong convicts are being offered insufficient prospects of release so that the imposition of a lifelong prison sentence contravenes the State Constitution. It has annulled all provisions in the Criminal Code that provide for the possibility of imposing a lifelong sentence.

The way in which the Saint Martin Court reached its conclusion is very different from the way the Dutch courts applied *Vinter* up until very recently. At the time of the judgment, only the criminal division of the Amsterdam district court had expressed its concerns about the compatibility of Dutch legislation with the line of reasoning in *Vinter*.[42] Unlike the Saint Martin Court—and the ECtHR—it decided that the imposition of a lifelong sentence in itself does not constitute an infringement of Article 3 ECHR.[43] Only if further execution of that sentence 'is not justified on legitimate penal grounds', may it *eventually* be considered contrary to Article 3 ECHR.[44] The Amsterdam criminal court clearly did not consider the shortcomings of the Dutch Pardons Act a sufficient reason to stop imposing life sentences. Thus, the criminal court was much more reticent than the Saint Martin Court.

There may be some grounds for the Amsterdam district court's reticent view in spite of it being at odds with the *Vinter* judgment. Unlike the Constitutional Court, criminal courts are competent to rule on concrete criminal cases. On occasion, the criminal offence can be so serious that the criminal court decides that lifelong imprisonment is the only appropriate punishment. A criminal court is placed in a very difficult situation if, in such a case, it should rule that, on the one hand, lifelong imprisonment is appropriate, while, on the other hand, it is unable to impose that sentence in the adjudication of the case because of the absence of a sufficiently clear policy for granting pardons, whereas the convicted offender may apply for such a pardon only after many years. Such a decision could, moreover, undermine the authority of the court. Because of the nature of the proceedings being conducted before the Saint Martin Constitutional Court, it is not faced with such a decision. After all, the Court is not competent to try individuals but rules on the lawfulness of legislation. Through its immediate annulment of Article 1:13 Criminal Code, the Court has forced the government to take action—at least if the latter attaches some significance to the possibility of imposing a lifelong sentence—and it prevents individual criminal judges from having to make the

[41] *Ombudsman v. Regering van Sint Maarten*, Interim Decision, 15 August 2013, para 2.9.

[42] Amsterdam District Court, ECLI:NL:RBAMS:CA4041, BZ3412 and BZ0392, 29 January 2013.

[43] See *Vinter et al. v. United Kingdom*, para 122.

[44] The court which decides on a rejected pardon request can then offer interim relief.

aforementioned difficult decision in a concrete case.[45] Thus, the annulment served the objective of 'practical and effective review' (see Sect. 14.2).

Since the Saint Martin Court has drawn conclusions from *Vinter* with a much broader scope than the Dutch courts, the judgment gave some ammunition to Dutch opponents of lifelong sentences (or the current seemingly cautious policy of granting pardons). In this light, the Dutch parliament asked the government about the consequences of the judgment for The Netherlands. The Government replied with some reservation. It noted, first of all, that judgments by the Saint Martin Court are not binding upon The Netherlands.[46] The question whether the Court's judgment deviates from the ECtHR's decision was, however, answered in the negative. Because the government was not asked in concrete terms about the Court's requirement that at the time of the imposition a life sentence there has to be clarity concerning the criteria on the basis of which a pardon request will be reviewed, this question was not answered by the government. However, the government's replies has not ended the debate on the justifiability of lifelong sentences in The Netherlands.[47] As a result of the judgment by the Saint Martin Constitutional Court, the legislator in Saint Martin has introduced a new statutory regulation by virtue of which a lifelong convict is entitled to release by the court after twenty-five years if the sentence no longer serves any reasonable purpose; if the opposite is still the case, he will be entitled to a review of his situation every five years. Meanwhile, several authors in Dutch literature have argued that a similar regulation needs to be introduced in The Netherlands.[48]

In the autumn of 2015 a Dutch district court for the first time expressly refused to impose a lifelong sentence with reference to *Vinter* because the criteria for release were not available.[49] Although this court did not expressly refer to the Saint Martin Court's ruling, it clearly reasoned along the same lines.

14.4 Conclusion

In the five years since its creation, the Saint Martin Court has thus far delivered one judgment. This single judgment provides food for thought. The way in which the Court reviews the regularisation of animal fights against a fundamental social right and its evaluation of life imprisonment in the light of the ECtHR's case law, can—and sometimes do—fuel the legal debate in The Netherlands. As it is has

[45] The Saint Martin Criminal Code, just like its Dutch counterpart, does not contain mandatory life sentences. Hence, it is always *possible* for judges to impose a limited time of imprisonment instead.

[46] Aanhangsel Handelingen II, Official Report II, 2013/14, 1336, at 1.

[47] Janssen et al. 2015.

[48] Van Hattum 2015.

[49] North-Netherlands District Court, ECLI:NL:RBNNE:2015:5389, 24 November 2015.

become easier for Dutch courts to review laws against international fundamental social rights as a result of its previously mentioned smoking ban judgment, the way in which the Saint Martin Court has carried out its judicial review against similar national standards can be an inspiration for Dutch courts. The topic of life-long sentences in The Netherlands still remains open to debate. As a result of the Saint Martin judgment, the legislation in that country has been better adapted to the requirements laid down by the Strasbourg Court than Dutch law. The example of Saint Martin, indeed, plays a key role in the current Dutch debate on lifelong prison sentences.

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Chapter 15
Between Pretence and Practice: The Dutch Response to Recommendations of International Human Rights Bodies

Jasper Krommendijk

Abstract How do countries respond to international criticism and recommendations of international human rights bodies? Do they take it seriously and act upon it or do they dismiss it and then hide it among other documents? This chapter reflects upon these questions as far as The Netherlands is concerned. It reveals a gap between rhetoric and reality in The Netherlands. While The Netherlands champions itself as a leading human rights country that takes international human rights criticism seriously, the preliminary reaction of government officials or Member of Parliaments (MPs) to international criticism is often defensive. This gap between pretence and practice can, however, be bridged and change can be realized when (international) recommendations are taken up and lobbied on by domestic actors. This chapter illustrates this possibility on the basis of some topical and sometimes highly divisive human rights issues in The Netherlands, including ethnic profiling, the *bed, bad en brood* [bed, bath and bread] discussion about assistance for rejected asylum seekers and human rights education.

Keywords Human rights · UN human rights treaty bodies · ECSR · Bed, bad en brood

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15.1 Introduction

How does The Netherlands deal with international criticism about its human rights record? Do Dutch policy-makers take such critique seriously and do they (immediately) act upon it? Or do they dismiss it? Two quotes of Dutch politicians are already quite revealing and illustrate a reluctance to accept external criticism on the Dutch human rights record. Member of Parliament (MP) Pechtold (D66; centrist social-liberal party), for example, held in response to a report of the European Commission against Racism and Intolerance (ECRI): 'I do not think that we in The Netherlands are really out of tune with other countries.'[1] Former State Secretary of Emancipation, Dijksma, stated in 2010 during a discussion with the UN Committee on the Elimination of all forms of Discrimination against Women (CEDAW Committee): 'Sometimes the situation in The Netherlands is so specific that it is as it is'.[2]

This chapter reflects upon the above-mentioned questions studying the period of October 2013 until October 2015. It builds on a completed Ph.D. project about the domestic impact and effectiveness of recommendations of UN human rights treaty bodies in The Netherlands, New Zealand and Finland. The PhD was based on an analysis of a wide range of primary sources (UN documents, parliamentary papers, court judgments and newspaper articles) as well as 175 interviews with domestic stakeholders, including government officials, representatives from NGOs and human rights institutions and MPs.[3] The focus of the project was the monitor-

[1] 'Europa beticht Nederland van discriminatie', 15 October 2013, http://www.powned.tv/uitzendinggemist/2013/10/pownews_472.html. Accessed 20 September 2015.

[2] Krommendijk 2014, at 165.

[3] For a list of interviewees, see Krommendijk 2014, at 405–416.

ing by UN human rights treaty bodies of the implementation of the six[4] oldest UN human rights treaties which results in so-called Concluding Observations (COs).[5] Even though COs are strictly speaking legally non-binding, COs are increasingly seen as authoritative statements or interpretations which cannot easily be ignored by states.[6] This chapter not only looks at the UN human rights treaty bodies, but also the recommendations and criticism by other monitoring bodies of the Council of Europe or the UN, such as the European Committee on Social Rights (ECSR) or ECRI.

This chapter shows that there is frequently a gap between rhetoric and reality. On the one hand, there is the pretence that The Netherlands is a strong defender of international human rights monitoring mechanisms which takes recommendations and criticism seriously. On the other hand, this rhetoric is not always matched by the actual reality which is characterized by reluctance on the part of the Dutch government to accept international criticism and a hesitation to ratify new human rights treaties or protocols. The situation is, however, not so black or white as it may look at first sight. The initial gap between pretence and practice can be closed, especially when the government is pressured to change its policy or legislation by other domestic actors, such as courts, MPs, NGOs and the media.

Section 15.2 portrays the way in which Dutch policy makers, especially politicians, MPs and government officials, generally deal with international human rights criticism. Section 15.3 illustrates the gap between rhetoric and reality by focusing on some prominent human rights issues and discussions in the past two years (2013–2015), including ethnic profiling, the *bed, bad en brood* [bed, bath and bread] discussion about assistance for rejected asylum seekers and human rights education.

[4] These six UN human rights treaties are the following: 1966 Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195 (ICERD); 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (ICCPR); 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3 (ICESCR); 1979 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (CEDAW); 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (CAT); and 1989 Convention on the Rights of the Child, 1577 UNTS 3 (CRC).

[5] State parties are obliged to submit periodically, usually every four or five years, a report on the implementation of each UN human rights treaty to a committee of independent experts. This report, together with information submitted by NGOs or human rights institutes, is discussed during a 'constructive dialogue' between the treaty body and the representatives of the state party.

[6] Steiner 2000, at 52, and O'Flaherty 2006.

15.2 The Netherlands and International Human Rights Criticism[7]

It is undeniable that The Netherlands has a strong tradition of protecting human rights. This country ranks high in democracy indexes and has a very open and favourable constitutional and political system for the reception of international (human rights) law. In addition, it is often seen by others—and it sees or presents itself—as a front runner or model when it comes to human rights protection. There is a strong idea or even missionary spirit among politicians and the wider public that The Netherlands is the most progressive country in the world and that it should act as a leading country (gidsland) and set an example in terms of protecting human rights.[8] In addition, there is an increased recognition that the effectiveness of the Dutch foreign human rights policy depends upon the way in which The Netherlands deals with international criticism and recommendations: if we criticize others about their level of human rights protection, we should be open to criticism ourselves.[9] Former Minister of Foreign Affairs Verhagen, for example, held in 2008 that recommendations of UN treaty bodies are taken very seriously, also because this is of direct relevance to the credibility of the foreign policy on human rights.[10] One would thus assume that the Dutch government is—at least at first glance—open towards criticism concerning its human rights protection.

Yet, international recommendations of human rights monitoring bodies almost always encounter a lukewarm reaction. Between the mid-1990s and mid-2011, more than 400 COs of UN human rights treaty bodies remained ineffective in The Netherlands and did not have any effect whatsoever.[11] The government either argues that such COs are already sufficiently complied and simply points to existing initiatives.[12] Or the government explicitly dismisses the COs. Examples of policy areas where the Dutch government easily disregards international criticism includes the refugee and asylum policy, the Dutch euthanasia policy or action against discrimination. Another recent example is the unwillingness of the Dutch government to act upon the view of the CEDAW Committee that The Netherlands violated Article 11, para 2(b) CEDAW by not providing an adequate maternity

[7] Parts of this section are taken from Krommendijk 2014.

[8] Baehr et al. 2002, Reiding 2007, at 12–15; Oomen 2011, at 2 and 9, and Larson et al. 2014, at 101.

[9] 'Respect en recht voor ieder mens', Tweede Kamer, Kamerstuk 2012/13, 32735, nr. 78, at 9–10.

[10] Tweede Kamer, Kamerstuk 2007/08, 31263, nr. 10, at 1.

[11] Krommendijk 2014, at 263–264.

[12] E.g., the government response to the COs of CESCR of 2010 in Tweede Kamer, Kamerstuk 26150, nr. 100, 2010. The fact that the government simply points to already existing policy or legislative measures also stems from the unspecific way in which the COs are formulated. Many COs simply recommend the government to 'increase its efforts' or 'strengthen certain measures'. E.g., UN Committee on the Elimination of Racial Discrimination, Concluding Observations, UN Doc. CERD/C/64/CO/7 (2004), 10 May 2004, paras 11 and 13.

benefit scheme to cover loss of income for the self-employed authors, in the period between 1 August 2004 and 4 June 2008.[13]

As an excuse for not acting upon COs, the Dutch government frequently points to other international legal obligations or judgments of the European Court of Human Rights (ECtHR).[14] The government, for example, discounted COs of the Human Rights Committee (HRC) about the long period of pre-trial detention and the broad use of anonymous witnesses by invoking judgments of another supervisory body, the ECtHR, that did not find a conflict with the European Convention on Human Rights (ECHR) in relation to an allegedly similar practice in the United Kingdom.[15] Another strategy to justify inaction following COs is the use of euphemistic labels.[16] One example is the response of State Secretary Dijksma to the critical questions of a member of the CEDAW Committee in 2010 about isolation problems among elderly rural women as a consequence of a lack of public transport and community involvement. She reacted by saying that this is not the biggest problem The Netherlands is currently facing, because travelling from border to border only takes two hours.[17] An additional line of defence to justify non-compliance with COs is to attack the credibility of the treaty body that adopted the COs.[18] This 'strategy' is not so much used in relation to specific COs, but serves more as the underlying idea to justify why COs do not need to be acted upon. It is thus more an attitude, which is not easily discernible in official documents, but primarily has come to the forefront during interviews with government officials. Almost all 36 Dutch government officials interviewed were rather negative about the treaty bodies and spoke about them as amateurish, lacking knowledge, being one-sided or activist.[19] One Dutch official, for example, referred to CEDAW as a 'biased club of feminist lawyers', while another qualified the Committee on Economic, Social and Cultural Rights (CESCR) as 'an amateurish Committee that made arbitrary decisions [and] functioned as a kangaroo court'.[20]

This short overview shows that there is often a gap between rhetoric and reality. This seems inconsistent at first sight, but closer scrutiny reveals that it is actually this rhetoric that 'produces' the reality of timid reception of international criticism. That is to say, there is a tendency among politicians and government representatives to disregard international recommendations (the reality) because of a

[13] *Elisabeth de Blok* et al. *v. The Netherlands*, CEDAW Committee, No. 36/2012, 19 March 2014. Attachment to Tweede Kamer, Kamerstuk 2014/15, 30420, nr. 208, 2014.

[14] This was also done in response to the ECSR's BBB-decision (see Sect. 15.3.4). Tweede Kamer, Kamerstuk 2014/15, nr. 2134, at 2.

[15] *Brogan and others v. United Kingdom*, ECtHR, Nos. 11209/84, 11234/84, 11266/84 and 11386/85, 29 November 1988. Tweede Kamer, Kamerstuk 2001/02, 28000 VI, nr. 54, at 7. Krommendijk 2014, at 132.

[16] Cohen 1996, at 527.

[17] UN Doc. CEDAW/C/SR.917 (2010), at para 34

[18] Cohen 1996, at 524.

[19] Krommendijk 2014, at 90–97.

[20] Ibid., at 159 and 197; and Reiding 2007, at 146.

self-image of being a leading country (the rhetoric). There is a self-image of being 'uniquely enlightened' and a feeling of 'Dutch exceptionalism' of being 'the most progressive country in the world'.[21] These visions imply that, according to policy-makers there are no particular human rights problems that need to be dealt with in this country. The website of the government, for example, stipulated: 'Because the protection of human rights is well regulated in The Netherlands, the central government concentrates on the improvement of human rights abroad'.[22] One Belgian journalist observed the following in relation to the reaction in The Netherlands to the murder of the politician, Fortuyn and filmmaker, Van Gogh in 2002 and 2004: 'In the eyes of the Dutch I saw that typical Dutch characteristic of their identity: this will never happen to us, because we are too civilized, too tolerant, too open-minded, too liberal – actually too Dutch for those kinds of things.'[23] Dutch politicians, government officials, MPs and the wider public frequently fail to acknowledge human rights problems. International human rights norms are often considered irrelevant in domestic political debates and public discourse.[24] There is an idea that the Dutch democratic state functions naturally in line with human rights.[25] Human rights are primarily seen as relevant for other countries, because there is hardly anything to improve in The Netherlands itself.[26] This was also noted by MP Van Tongeren (Groenlinks (GL); green left party) who said that 'we' always think about 'far away countries' in relation to human rights violations and that there is complacency in the sense that everything is already arranged rather well inside the country.[27]

This complacent mindset means that politicians and government officials frequently react defensively and in a self-righteous way in response to international criticism and recommendations concerning the level of protection of human rights in The Netherlands. This has been noted by some interviewed government officials and MPs as well.[28] Likewise, Larson et al. noted that 'a number of individuals … spoke of the 'arrogance' of The Netherlands, the felt assumption that its efforts were either sufficient or beyond assault, a mindset that produces no agenda for self-criticism or a call for wholesale reform.'[29] Based on a self-image of near perfection, government officials often question why international committees and

[21] Larson et al. 2014, at 97.

[22] Krommendijk 2014, at 52. Quote is taken from a website, which does not exist anymore. www.rijksoverheid.nl/onderwerpen/mensenrechten/mensenrechtenbeleid.

[23] Larson et al. 2014, at 101 (citing Blokker et al. 2008, at 10).

[24] Oomen 2011, at 7 and 15–17.

[25] Larson et al. 2014, at 107.

[26] Oomen referred in this context to 'human rights exportism'. Oomen 2011, at 3. See also Oomen 2013, at 45.

[27] Tweede Kamer, Kamerstuk 2013/14, 33826, nr. 2, at 7.

[28] Krommendijk 2014, at 85–90. Sjoerdsma (D66) and Van Tongeren (GL) in Tweede Kamer, Kamerstuk, 2013/14, 33826, nr. 2, at 7.

[29] Larson et al. 2014, at 110.

courts meddle in 'our' domestic affairs.[30] An interesting illustration is the statement of former Minister of Foreign Affairs, Rosenthal: 'Not so long ago, I was called to account by a lofty person in the field of human rights in Geneva … who dared to say that a few things are not that well here. Well, I said, shall we first determine that what you hold against us is of an entirely different order than what happens in countries where they do not care a straw for human rights'.[31]

Does that mean that international criticism has never been effective? Can the gap between the rhetoric and reality be closed? There have indeed been several COs that eventually led to legal, policy or any other measures despite initial reluctance on the part of the government.[32] Examples include the establishment of a Children's Ombudsman, the prohibition of corporal punishment, the abolishment of life imprisonment for minors and improvement to the asylum procedure for minors. These four changes could partly be attributed to repeated recommendations of the Committee on the Rights of the Child (CRC Committee) and other international monitoring bodies.[33] Likewise, a Dutch orthodox protestant political party (SGP) changed its regulations allowing women to be placed on the list of candidates for election following COs of the CEDAW Committee.[34] Factors that were essential for realizing these changes were the activities of domestic actors, such as NGOs, MPs, the media and national courts, who pressured and lobbied for change and used the COs as an important tool. An initial dismissive reaction could thus be overcome by domestic and transnational mobilization and litigation.[35]

15.3 Developments Between October 2013 and October 2015

This section highlights several developments in the past two years that are noteworthy, because they offer a good illustration of the reluctance with which the government deals with international criticism despite assertions that recommendations are taken very seriously. Before discussing concrete policy issues (Sects. 15.3.3–15.3.5), attention is given to the minimalistic or non-ratification of Optional Protocols to several UN human rights treaties (Sect. 15.3.1) and the way in which the report of the European Commissioner of Human Rights of 2014 was received (Sect. 15.3.2).

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[30] Reading out some COs, one government official reacted by saying 'what do they (the CEDAW Committee) know about it' and 'why should they meddle in' and 'not all countries have to be like Sweden'. Krommendijk 2014, at 179, Oomen 2013, at 308.

[31] M. Zonneveld, Het interview, *Wordt Vervolgd*, 2011, at 16 (translation by author).

[32] For an overview of the 24 effective COs, see Krommendijk 2014, at 264.

[33] For a discussion of these measures and support, see Krommendijk 2014, at 234–244.

[34] Krommendijk 2014, at 184–185.

[35] Risse et al. 1999, and Simmons 2009.

15.3.1 Minimalistic or Non-ratification of UN Treaties and Protocols: OP-ICESCR, CRPD and OPCAT

A controversial issue is the non-ratification of some UN human rights treaties and protocols, including the Convention on the Rights of Persons with Disabilities (CRPD) and the Optional Protocol under the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR).[36] In addition, the Optional Protocol under the Convention Against Torture (OPCAT) was ratified, but in a rather minimalistic way. This issue shows the reluctance of the government to accept new international human rights standards and supervisory mechanisms, especially when they are contrary to existing laws and policies and would, hence, require their amendment.[37] This lack of enthusiasm stands in sharp contrast with the government's eagerness to develop (some of) these new mechanisms at the international level. As will be shown below, the latter wish is primarily driven by foreign policy considerations and the earlier mentioned idea among government officials that human rights are relevant for other countries.

The best example of this gap is OP-ICESCR. Despite repeated questions in parliament and by international monitoring bodies, the Minister of the Interior Plasterk could not give a timetable for the ratification of the OP-ICESCR in July 2015, even though this Protocol was already signed in 2009.[38] The government used the argument that it was waiting for the results of a study about the consequences of ratification. Notwithstanding the completion of the study in February 2014, no decision has yet been taken.[39] There has not even been a government reaction to the study even though this is common practice when studies are contracted. Especially one of the current governing parties, the VVD (centre-right liberal conservative party), is reluctant because of possible far-reaching financial implications as well as a principled objection to (international) judges reviewing parliamentary decisions in the field of economic, social and cultural rights.[40] What also plays a role is that some government officials and politicians do not regard economic, social and cultural rights as true fundamental human rights.[41] During the negotiations of the OP, the government advocated the possibility of excluding several rights enshrined in the ICESCR from the individual complaints

[36] Similar problems exist in relation to the ratification of the Optional Protocols under the CRC and CRPD. 2011 Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, A/RES/66/138; 2006 Optional Protocol to the Convention on the Rights of Persons with Disabilities, Doc.A/61/611.

[37] Reiding 2007, at 414–416.

[38] Tweede Kamer, Kamerstuk 2014/15, 33826, nr. 9; Eerste Kamer, Kamerstuk 2014/15, 34000-VI nr. AF.

[39] Dibbets et al. 2014.

[40] E.g. Taverne in Tweede Kamer, Kamerstuk 2014/15, 33826, nr. 12, at 4.

[41] Interviews as discussed in Krommendijk 2014, at 155–156.

procedure.[42] The reluctance to subscribe to international monitoring of social rights could also be explained by the 'traumatic' and 'unnerving experience' of the late 1980s during which courts applied Article 26 ICCPR to social security issues.[43] As a result of this experience, government officials are conscious of the potential risks of justiciable economic, social and cultural rights and therefore reluctant to acknowledge the direct effect of the ICESCR. This begs the question as to why The Netherlands signed OP-ICESCR in the first place? This seems to be inspired by foreign policy considerations and the fact that a complaint mechanism might play a stimulating part in countries in which politics is not directed towards the fulfilment of these rights and social justice.[44] The non-ratification of OP-ICESCR thus illustrates the idea that human rights treaties are seen as primarily relevant for others.

Another treaty the ratification of which is long under way is the CRPD. This Convention was signed on 30 March 2007, but is still not ratified, because the government wanted to study first the laws to be amended and the financial implications.[45] This delay is somehow remarkable, because the government has at the same time downplayed the required changes which implies that ratification is not really that difficult. That is to say, the government maintains that the Convention does not create new rights, but simply gives a more specific elaboration of the rights and obligations arising from existing human rights treaties.[46] The government is of the opinion that the CRPD thus requires little *legal* change.[47] In a subsequent plan for implementation, the government noted that the CRPD primarily

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[42] Tweede Kamer, Kamerstuk 2007/08, nr. 2015; and Reiding 2012, at 137.

[43] Reiding 2012, at 132–133, and Reiding 2007, at 200. The Central Appeals Tribunal applied Article 26 ICCPR in relation to legislation providing for social security (and thus the rights contained in ICESCR) and concluded in several cases that women were wrongfully denied social security benefits. See, e.g., Central Appeals Tribunal, ECLI:NL:CRVB:1987:AK7528, 14 May 1987. The change of the Tribunal's stance on the direct effect of Article 26 ICCPR was the result of two earlier Views of the HRC. In these Views, the HRC determined that Article 26 ICCPR was violated, because a married woman had to prove that she was a breadwinner in order to receive unemployment benefits, while married men did not have such an obligation. *Broeks v. The Netherlands*, HRC, No. 001/1984, 9 April 1987; *F. H. Zwaan-de Vries v. The Netherlands*, HRC, No. 182/1984, 9 April 1987.

[44] Tweede Kamer, Kamerstuk 2010/11, 32735, nr. 26, at 42. Eerste Kamer, Kamerstuk 2007/08, nr. 33, at 1392.

[45] J.M. de Jong et al., Economische gevolgen van ratificatie van het VN Verdrag Handicap, 16 May 2013, www.mensenrechten.nl/sites/default/files/Eindrapportage%20economische%20gevolgen%20VN%20verdrag%20Handicap%5B2%5D.pdf. Accessed 20 September 2015; J.E. Goldschmidt en M.E.C. Gispen, Ratificatie… en dan?, January 2012, www.mensenrechten.nl/sites/default/files/SIM%20ratificatie_en_dan.pdf. Accessed 20 September 2015.

[46] Tweede Kamer, Kamerstuk 2013/14, 33992 (R2034), nr. 3, at 4.

[47] The Explanatory Memorandum contains, in the eyes of the Council of State, for the large part an enumeration of existing measures that already comply with the CRPD according to the government. Tweede Kamer, Kamerstuk 2013/14, 33992 (R2034), nr. 4, at 2.

necessitates a process of cultural change within the society, especially at the local level.[48]

Besides a reluctance to ratify treaties with high or unknown budgetary consequences, the government also tends to ratify treaties in a minimalistic way. One recent example is OPCAT, which was ratified by The Netherlands in 2010, more than five years after signing it. This delay stands in sharp contrast with the forceful lobby campaign by The Netherlands and the EU to create a strong inspection mechanism. This gap between rhetoric and reality can again be explained by a conflict of interests between the Ministry of Foreign Affairs and the other ministries responsible for the actual incorporation. On the one hand, the Ministry of Foreign Affairs emphasized foreign policy considerations and stressed the importance of the Optional Protocol for countries in which there was no active regional supervisory mechanism.[49] On the other hand, the Minister of Justice had doubts as to the duplication of workload in the light of the ECPT, while the Ministry of Health, Welfare and Sport worried about the disclosure of medical files of patients.[50] The Dutch government eventually opted for a rather 'minimalistic implementation' of OPCAT. The idea was that The Netherlands complied with OPCAT because a comprehensive and effective monitoring system already existed that performed all the necessary tasks required by OPCAT. The Ministry of Security and Justice only felt it necessary to facilitate the creation of a network (NPM) of these different authorities to share information and signals as well as coordinate research themes.[51] Since OPCAT's ratification, doubts have been expressed as to whether this way of implementing is in conformity with OPCAT. The National Ombudsman, for example, decided to no longer participate in the NPM in July 2014 because the NPM did not function sufficiently, given its organisational structure and doubts about the independence of the participating monitoring institutions.[52] The latter view has since then been expressed by other actors, including the Council for the Administration of Criminal Justice and Protection of Juveniles, the Dutch Section of the International Commission of Jurists (NJCM) and the Dutch Human Rights Institute.[53] The lack of clear independence was also the main criticism of the three-member delegation from the UN Subcommittee on

[48] It held that it was not a matter of 'pressing a button' at the central level. Tweede Kamer, Kamerstuk 2014/15, 33990 and 33992 (R2034), nr. 9, at 1.

[49] Tweede Kamer, Kamerstuk 2004/05, nr. 1138; Tweede Kamer, Kamerstuk 2007/08, 31263, nr. 15.

[50] Tweede Kamer, Kamerstuk 2004/05, nr. 1138. Tweede Kamer, Kamerstuk 2007/08, nr. 78, pp. 5519–5522, at 5221.

[51] Tweede Kamer, Kamerstuk 2014/15, nr. 466.

[52] V.L. Derckx, Implementatie van het OPCAT: preventie van onmenselijke behandeling in zorginstellingen, 2013, www.rug.nl/rechten/congressen/archief/2013/osi-project/rapport-implementatie-opcat.pdf. Accessed 20 September 2015.

[53] See also Committee Against Torture, Concluding observations on the combined fifth and sixth periodic reports of The Netherlands, UN Doc. CAT/C/NLD/CO/5-6, 20 June 2013, para 28.

Prevention of Torture (SPT), which visited The Netherlands at the end of July 2015.[54] The government denied these charges in its response to the press release. The spokesperson of the Ministry of Security and Justice simply repeated that monitoring was already well organized by the existing authorities at the time of ratification.[55]

15.3.2 The Report of the European Commissioner of Human Rights of 2014

There have been several reports of international monitoring bodies about the Dutch human rights situation in the period of October 2013 until October 2015.[56] The most comprehensive one was the report of the European Commissioner of Human Rights who visited The Netherlands in May 2014.[57] The response of the Dutch government is interesting to examine more in depth, since the government itself identified three flavours of follow-up in it. First, recommendations that will be acted upon. One example of such an effective recommendation is the procedure to identify stateless persons and determine statelessness in The Netherlands.[58] Second, recommendations that do not require any addition action. The government simply reiterates measures dating before the Commissioner's report. Such a reaction implies either that these measures have not been taken (sufficiently) into account by the Commissioner, at least according to the government, or that the government is of the opinion that there are already enough initiatives that would

[54] The press release mentioned that '[m]ore work needs to be done to make this body fully independent'. Netherlands detention monitoring body needs more political support – UN experts, UNHCRC, 3 August 2015, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16284&LangID=E#sthash.HViNxOKT.dpuf. Accessed 20 September 2015.

[55] Kritiek VN op Nederlands toezicht detentie, nu.nl, 3 August 2015, www.nu.nl/binnenland/4099975 /kritiek-vn-nederlands-toezicht-detentie.html. Accessed 20 September 2015. In response to questions of Rebel (PvdA)about this news article, State Secretary of Justice Dijkhoff noted that he did not want to anticipate the COs which will only be formally published in November. Tweede Kamer, Kamerstuk 2014/15, nr. 3202.

[56] See also ECRI, Fourth report on The Netherlands, CRI(2013)39, 15 October 2013; Committee on the Rights of the Child, Concluding observations on the fourth periodic report of The Netherlands, UN Doc. CRC/C/NDL/CO/4, 8 June 2015; Committee on Enforced Disappearances, Concluding observations on the report submitted by The Netherlands, UN Doc. CED/C/NLD/CO/1, 10 April 2014; and Report to the Government of The Netherlands on the visit to The Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 16 to 18 October 2013, CPT/Inf (2015) 14, 5 February 2015.

[57] Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Report – following his visit to The Netherlands from 20 to 22 May 2014, CommDH(2014)18, 14 October 2014.

[58] Attachment to Tweede Kamer, Kamerstuk 2014/15, 33826, nr. 6, at 9.

adequately address the Commissioner's concerns.[59] Third, recommendations that are not acted upon because of objections to some aspects of their content.[60] The government, for example, simply repeats its standard line of defence as to access to healthcare for irregular migrants by emphasizing the *formal* legal possibility under the Benefit Entitlement (Residence Status) Act (Koppelingswet) for undocumented migrants to benefit from necessary medical treatment in urgent situations.[61] Likewise, the government repeats that it is not willing to withdraw its reservation to Article 37(c) Convention on the Rights of the Child (CRC), and noted that trying children older than 16 on the basis of adult law is sometimes desirable.[62] Interestingly, it seems that the response to these recent recommendations is a bit more blunt in stating the government's disagreement than reactions to earlier international recommendations. The government, for example, held that the Commissioner's statement that everyone has the right to shelter, irrespective of their status, 'fails to appreciate' the legitimate balance between protection of fundamental rights of asylum seekers whose applications have failed and the general interest of the state and society of a well-functioning asylum policy.[63] Likewise, the government explicitly states that it 'does not share the opinion of the Commissioner' as to the lack of adapted learning materials for children with special education needs.[64]

15.3.3 Bed, Bath and Bread (BBB)

The so-called 'bed, bath and bread' issue (BBB: Dutch acronym of: *bed, bad en brood*) is another good example which illustrates an initial reluctance to accept international criticism. The European Committee of Social Rights (ECSR) determined that The Netherlands violated both the right to social and medical assistance and the right to housing (Articles 13(4) and 31(2) of the European Social Charter (ESC)) by not giving any assistance to rejected asylum seekers.[65] Never before has an international pronouncement in relation to human rights had such dramatic *political* effects. The decision of ECSR almost led to the fall of the cabinet. The first public reaction of the State Secretary of Justice, Teeven, at the end of

[59] The government's reaction to the fourth report of ECRI in 2013 likewise contained an enumeration of steps taken in the years prior to ECRI's report. Tweede Kamer, Kamerstuk 2013/14, 30950, nr. 62.

[60] Attachment to Tweede Kamer, Kamerstuk 2014/15, 33826, nr. 6, at 1.

[61] For a similar earlier reaction, see Tweede Kamer, Kamerstuk 2010/11, 26150, nr. 100, at 14.

[62] Attachment to Tweede Kamer, Kamerstuk 2014/15, 33826, nr. 6, at 9–10. For an earlier rejection, see Tweede Kamer, Kamerstuk 2010/11, 28741 nr. 17, at 5–6; and Tweede Kamer, Kamerstuk 2007/08, 24587, nr. 287, at 7.

[63] Attachment to Tweede Kamer, Kamerstuk 2014/15, 33826, nr. 6, at 6.

[64] Ibid., at 13.

[65] *Conference of European Churches (CEC) v. The Netherlands*, ECSR, No. 90/2013, 1 July 2014.

October 2014 dismissed the decision as 'extremely undesirable' and noted that the decision is 'not a legally binding judgment, but the provisional view of a lower commission. We are not going to jump to attention and give everyone food and drink. We are examining it and will await the final position'.[66] There was enormous domestic and international pressure on the government by opposition parties and civil society groups to take immediate action.

The Dutch government decided to postpone any decision on the matters in 2014 and to wait for 'the final position' of the Committee of Ministers in Spring 2015. The government primarily embarked on a legal defence by pointing to the non-binding and provisional nature of the decision. Former State Secretary of Security and Justice, Teeven, stated in the Senate that the government respects court judgments, also those of international 'agencies', as far as they are definitive and binding.[67] The subsequent Committee of Minister's Resolution did, however, not give an unambiguous direction. On the one hand, it stressed that the 'powers entrusted to the ECSR are firmly rooted in the Charter itself', while, on the other hand, it 'recalls the limitation of the scope'. The Committee thus held in rather non-committal terms that it 'looks forward to The Netherlands reporting on any possible developments in the issue'.[68] Not surprisingly, the Resolution was interpreted by both parties in different ways and did not offer a clear policy trajectory. The government coalition parties VVD and PvdA (centre-left social democratic labour party) needed forty hours spread over nine days to negotiate a compromise. This discussion took place at the highest political level and included the leaders of both governing parties as well as the Prime-Minister and Vice-Prime Minister. The eventual agreement entails in short that shelter, which will be financed by the central level, will only be provided in six different locations in The Netherlands for a limited number of weeks with the objective of preparing the migrants for their return.[69]

The initial reluctance to act on the basis of legally non-binding decisions of international tribunals is exemplary of how The Netherlands deals with international monitoring. What eventually forced the government to act were the judgments of several national courts that ruled, in line with the ECSR, that irregular migrants should be given shelter during the night.[70] National courts are thus inter-

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[66] S. van der Laan, Teeven niet blij met opmerking Raad van Europa over illegalen, Elsevier, 31 October 2013, www.elsevier.nl/Politiek/nieuws/2013/10/Teeven-niet-blij-met-opmerking-Raad-van-Europa-over-illegalen-1401471W/. Accessed 20 September 2015. The Dutch government also argued that the decision is *contra legem*, since the states parties explicitly laid down a limited personal scope of the Charter in para 1 of the Appendix. See Committee of Ministers, Resolution CM/ResChS (2015) 5, 15 April 2015, Appendix.

[67] Eerste Kamer, Kamerstuk 2014/15, nr. 16, at 35.

[68] Committee of Ministers, Resolution CM/ResChS (2015) 5, 15 April 2015.

[69] Attachment to Tweede Kamer, Kamerstuk 2014/15, 33826, nr. 10, at 5.

[70] The Central Appeals Tribunal held that the decision of the ECSR, despite not being legally binding, is an 'authoritative interpretation'. ECLI:NL:CRVB:2014:4178, para 5.7 See also ECLI:NL:RBDHA:2014:16447, para 16.

mediaries for the effectiveness of international criticism and decisions.[71] Important was also that several municipalities decided (to continue) providing shelter in the absence of a decision by the central government. Extensive media coverage, lobbying of NGOs and parliamentary scrutiny were important contributory factors as well.

15.3.4 Ethnic Profiling

The issue of ethnic profiling has to date hardly received any attention in The Netherlands, at least until the end of 2013. This was the case despite critical questions of several international human rights bodies since at least 2008, including ECRI and the Advisory Committee on the Framework Convention for the Protection of National Minorities.[72] ECRI, for example, recommended in 2008 'in-depth research and … ethnic monitoring of relevant police and security activities', but this recommendation was left unaddressed by the Dutch government its response.[73] Questions during the Universal Period Review of the UN Human Rights Council in 2012 also led to replies which failed to acknowledge the severity of the problem. The government merely stated in response to a recommendation of Russia: 'The Dutch government rejects the use of ethnic profiling for criminal investigation purposes as a matter of principle'.[74]

It took until a thorough 116-pages report of Amnesty International of October 2013—which also reproduced several recommendations of international

[71] This also happened in relation to an earlier decision of the ECSR which was received in a similar dismissive way by the government. In the *DCI* case, the ECSR determined a violation of the right to shelter in Article 31(2) ESC, because no adequate shelter was provided to children unlawfully present. The District Court Utrecht, for example, characterized this decision as 'an authoritative decision' which needs to be taken into consideration and can only be deviated from with an express motivation. *Defence for Children International (DCI) v. The Netherlands*, ECSR, No. 47/2008, 29 October 2009. See, e.g., Eerste Kamer, Kamerstuk 2009/10, nr. 26, at 1128–1129; Tweede Kamer, Kamerstuk 2009/10, nr. 2035.ECLI:NL:RBUTR:2010:BM0846, paras 2.4 and 2.13–2.15.

[72] For a good overview, see Amnesty International, Proactief politieoptreden vormt risico voor mensenrechten. Etnisch profileren onderkennen en aanpakken, October 2013, www.amnesty.nl/sites/default/files/public/rapport_etnisch_profileren_ainl_28_okt_2013.pdf, at 22–24. Accessed 20 September 2015.

[73] ECRI, Third report on The Netherlands, CRI(2008), 29 June 2007, para 26.

[74] UN Human Rights Council, Report of the Working Group Netherlands, Addendum, UN Doc. A/HRC/21/15/ Add.1/Rev.1, 12 October 2012, at 8.

bodies—before the issue was put on the political agenda and received (some) attention.[75] The initial reaction of the government tended to downplay the severity of the problem. Minister of Social Affairs and Employment, Asscher, who is responsible for integration, held that the police and the ministry did not share ECRI's conclusion that ethnic profiling happens more than incidentally.[76] Likewise, the Minister of Justice held several times that the research available at this time does not show that there is 'systematic discriminatory profiling by the police'.[77] One study conducted by researchers from Leiden University about the police in The Hague[78] was frequently used by the government in support of this observation, while other studies with different conclusions as to the prevalence of ethnic profiling were not referred to.[79]

This initial defensive reaction has somehow been tempered and some policy measures have eventually been announced, partly as a result of the lobbying of several NGOs, growing attention in parliament and the broader acknowledgement that racism is a problem.[80] The latter is, for example, visible in the 2015 Martin Luther King speech given by the Minister of Social Affairs and Employment, Asscher. He called upon politics and the media to open their eyes for unconscious racism and prejudices. He pointed out what the corps leadership of the National Police, Bouman, wrote in his blog about a Dutch-Moroccan policewoman who was confronted with racist remarks and jokes by many of her colleagues about her religion and origin on a daily basis.[81] Another recent event further acted as a catalyst for greater acknowledgment of the issue. In July 2015, the Aruban Mitch Henriquez died due to lack of oxygen as a result of a stranglehold applied on him

[75] Amnesty International, Stop and search powers pose a risk to human rights. Acknowledging and tackling ethnic profiling in The Netherlands, 2013, https://www.amnesty.nl/sites/default/files/public/amnesty_stopandsearchpowersposearisktohumanrights.pdf. Accessed 20 September 2015. A report of June 2014 noted the rather abrupt change in terms of societal and academic attention. van der Leun et al., Etnisch profileren in Den Haag? Een verkennend onderzoek naar beslissingen en opvattingen op straat, 2014, at 4, www.politieacademie.nl/kennisenonderzoek/kennis/mediatheek/PDF/89640.PDF. Accessed 20 September 2015.

[76] Tweede Kamer, Kamerstuk 2013/14, 30950, nr. 62, at 23.

[77] Tweede Kamer, Kamerstuk 2013/14, 29628, nr. 423. See also Tweede Kamer, Kamerstuk 2013/14, 29628, nr. 463, at 2.

[78] Van der Leun et al., Etnisch profileren in Den Haag? Een verkennend onderzoek naar beslissingen en opvattingen op straat, 2014, www.politieacademie.nl/kennisenonderzoek/kennis/mediatheek/PDF/89640.PDF. Accessed 20 September 2015.

[79] E.g. Çankaya 2011; Amnesty International, Stop and search powers pose a risk to human rights. Acknowledging and tackling ethnic profiling in The Netherlands, 2013, https://www.amnesty.nl/sites/default/files/public/amnesty_stopandsearchpowersposearisktohumanrights.pdf. Accessed 20 September 2015; Mutsaers 2013.

[80] For parliamentary attention, see Tweede Kamer, Kamerstuk 2014/15, nr. 1190; and Tweede Kamer, Kamerstuk 2013/14, nr. 548, at 26–27. For additional measures, see Tweede Kamer, Kamerstuk 2013/14, 29628, nr. 463.

[81] Toespraak van minister Asscher bij de Martin Luther King lezing, 9 April 2015, www.rijksoverheid.nl/documenten-en-publicaties/toespraken/2015/04/09/martin-luther-king-speech-minister-asscher.html. Accessed 20 September 2015.

during his arrest at a music festival. This incident led to debates about alleged ethnic profiling and excessive violence by the police in The Hague towards ethnic minorities. The mayor of The Hague acknowledged, for the first time, that there are policemen who are guilty of racism and discrimination and he proposed several reforms, including a complaints procedure and a more diverse composition of the police.[82]

15.3.5 Human Rights Education

The Dutch government has consistently rejected recommendations of international monitoring bodies, including the CRC Committee and the European Commissioner for Human Rights, to introduce human rights and child rights education into school curricula. The major reason for this is freedom of education of parents and schools as laid down in Article 23 Constitution.[83] The government has consistently argued that it 'can and will not' prescribe any programmes, because this would violate the Constitution.[84] In addition, the government is reluctant to charge schools with ever more tasks and prefers to give schools the freedom to make their own choices.[85] The government simply argued that attention can already be paid to human rights in the context of various other courses.[86] Despite some additional measures, no 'fundamental' change has yet taken place.[87] Several NGOs as well as the Dutch human rights institute are lobbying hard to achieve this change.[88] A recent motion of 10 June 2015 proposed by MP Jadnanansing (PvdA) requested the government to consult several stakeholders about the strengthening of citizenship and human rights education within the core school curricula. This motion was, however, not adopted.[89] The Minister of Education dissuaded parliament from adopting this motion, since a government appointed platform was reflecting more integrally on school curricula in the context of a report about education in 2032 and because this platform had already consulted with some

[82] J. Visser, Onderzoek naar nekklem na dood Henriquez, Volkskrant, 8 July 2015, www.volkskrant.nl/politiek/van-aartsen-pleit-voor-meer-diversiteit-bij-politie~a4097216/. Accessed 20 September 2015.

[83] Committee on the Rights of the Child, Third periodic report of The Netherlands, UN Doc. CRC/C/SR.1377, 23 January 2009, para 81.

[84] See the attachment to Tweede Kamer, Kamerstuk 2003/04, 29284 and 26150, nr. 3, at 19.

[85] Tweede Kamer, Kamerstuk 2007/08, nr. 36, at 2893.

[86] Tweede Kamer, Kamerstuk 2008/09, 31700, nr. 72, at 2–3.

[87] Krommendijk 2014, at 242–243.

[88] E.g., plea for human rights education on Nederlands Juristen Comité voor Mensenrechten, Pleidooi voor mensenrechteneducatie op Nederlandse scholen, 23 June 2015, www.njcm.nl/site/newsposts/show/354. Accessed 20 September 2015.

[89] The motion was rejected by VVD, CDA (centre-right Christian democratic party), D66, PVV (Dutch right-wing party) and SGP.

stakeholders.[90] The Minister once more stressed the 'enormous pressure' on education to integrate numerous themes in the curricula.

The government's reluctance to act stands in sharp contrast with its rhetoric at the international level. A national action plan for human rights education was, for example, already promised to the UN in 2005.[91] The Minister of Foreign Affairs, Koenders recently told the UN Human Rights Council in March 2015: 'But let us not turn into complacency, the world needs a reset, a new activism, a realisation that we are at a historic low point. It needs more human rights education, much more'.[92]

15.4 Conclusion

This chapter showed that there is often a gap between the rhetoric of The Netherlands being a leading country willing to listen to international human rights criticism and the reality of a lukewarm reception of specific recommendations. The initial reaction of Dutch policy-makers to international criticism with respect to the level of human rights protection is defensive. This is, however, not the whole story. International recommendations can eventually become (at least partly) effective. Such 'change' can be in the form of a limited policy adjustment (BBB), or a greater acknowledgement and political attention to an issue (ethnic profiling and human rights education). These three examples thus show that the gap between pretence and practice can be bridged when the policy issue and (international) recommendations are taken up and lobbied on by various domestic actors. Often a long political process is needed to convince the government or parliament of the necessity of change. When domestic actors, however, do not use international recommendations in their work and pressure the government to act upon them, the government can easily get away with ignoring them. It is thus essentially up to domestic stakeholders to decide whether the gap between pretence and practice is bridges. Their actions thus determine whether international recommendations remain merely 'paper-pushing' or whether they are used as

[90] See also Tweede Kamer, Kamerstuk 2013/14, 33826, nr. 8, at 3.

[91] Oomen 2013, at 44. In addition, the national human rights action plan of 2013 already mentioned that the Ministry of Education 'is considering the proposal that human rights, including children's rights, be mentioned explicitly in the attainment targets defined for primary and secondary education'. Ministry of the Interior and Kingdom Relations, National action plan on human rights. The protection and promotion of human rights within the Netherlands, 2014, https://www.government.nl/documents/policy-notes/2014/03/19/national-action-plan-on-human-rights. Accessed 20 September 2015.

[92] Bert Koenders, Minister of Foreign Affairs, We are at a historic low point, let's end rituals. Speech by the Minister of Foreign Affairs of the Kingdom of The Netherlands, Bert Koenders, to the UN Human Rights Council, 2 March 2015, http://geneve.nlvertegenwoordiging.org/organization/recente-speeches/2-maart-2015---speech-koenders-mensenrechtenraad.html. Accessed 20 September 2015.

'policy prompting' devices. The four examples show that international criticism can be a 'practical prop', which gives extra strength to the arguments and demands of domestic actors when they are advocating for policy or legislative change.

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