

1. Introduction

1.1 RESEARCHING THE *JUS COGENS* REGIME

Why is there still a need for jus cogens research?

This is a book about the application of the concept of *ius cogens* in international law and the resort to *ius cogens* arguments in international legal discourse. In so phrasing its topic, the book presupposes a particular understanding of ‘international law’ and ‘international legal discourse’. ‘Legal discourse’ refers simply to any collection of verbal exchanges of legal propositions. By a contribution to ‘international legal discourse’, consequently, this book understands any utterance in oral or written form expressing a proposition about international law, whether it is made by a scholar, a court or tribunal, an organ or representative of a state or an international organisation, a legal counsellor, a legal advisor, a judge or an arbitrator, or an NGO.¹ ‘International law’ refers to the system of rules and principles operating in this discourse as mandatory and exclusionary reasons, that is to say, as reasons to disregard other possible reasons or arguments.²

Since the late 1990s and the beginning of the twenty-first century, there has been a remarkable increase of the use of *ius cogens* arguments in international legal discourse. The concept of *ius cogens* has attracted remarkable attention among international law scholars, who have used it, in particular in the context of human rights and international criminal law, to argue such things as the invalidity of UN Security Council resolutions;³ the non-applicability of amnesties,⁴ immunity rules,⁵ and

¹ So understood, international legal discourse extends over a number of different activities, such as the making of international law, the interpretation and application of international law, the description of international law, the systematisation of international law, the critical assessment of international law, the pleading of a particular interpretation or application of international law, the appeal for its revision and so forth.

² Raz, 1999, p 178 ff.

³ See e.g. Orakhelashvili, 2005, pp 59–88.

⁴ See e.g. Mitchell, pp 229–30.

extradition agreements;⁶ and the existence of an international obligation for states to offer asylum.⁷ States have referred to the *jus cogens* status of norms in meetings with international organisations such as the United Nations, the International Labour Organization, the African Union, the Council of Europe and the Organization of American States.⁸ Many international organisations have themselves resorted to the concept in various contexts.⁹

Domestic court cases involving *jus cogens* arguments started appearing at the beginning of the 1990s, often concerning issues of state immunity.¹⁰ *Jus cogens* has been an element also in proceedings before international judicial fora, including the International Criminal Tribunals for the Former Yugoslavia and Rwanda,¹¹ the Special Tribunal for Lebanon,¹² the Special Court for Sierra Leone,¹³ the Inter-American and European Courts for Human Rights,¹⁴ the Court of Justice of the

⁵ See e.g. Bartsch & Elberling, pp 477–91.

⁶ See e.g. Van der Wyngaert, p 769.

⁷ See e.g. Allain, pp 533–58.

⁸ For further references, see First report on *jus cogens* by Dire Tladi, Special Rapporteur, UN Doc A/CN.4/693, pp 28–9.

⁹ For further references, see *ibid.*

¹⁰ For extensive references, see Weatherall, 2015, pp 167–71.

¹¹ For the jurisprudence of the ICTY, see e.g. *Prosecutor v Kupreškić*, Judgment of 14 January 2000, paras 519–20; *Prosecutor v Kunarac and others*, Judgment of 22 February 2001, para 466; *Prosecutor v Furundžija*, Judgment of 10 December 1998, paras 153–54. For the jurisprudence of the ICTR, see e.g. *Prosecutor v Kayishema and Ruzindana*, Judgment of 21 May 1999, para 88.

¹² See e.g. *Prosecutor v El Sayed*, Order of 15 April 2009, para 29; *Prosecutor v Ayyash*, Decision of the Defence Appeals, 20 October 2012, para 68.

¹³ See e.g. *Prosecutor v Gbao*, Appeals Chamber, Decision on Preliminary Motion, 25 May 2004, paras 9–10; *Prosecutor v Morris Kallon and Brimma Bazzy Kamara*, Decision on Challenge to Jurisdiction, 13 March 2004, paras 60, 66–71.

¹⁴ For the jurisprudence of the Inter-American Court, see e.g. *Mendoza v Argentina*, Merits, Reparation and costs, Ser C No 260, Judgment of 14 May 2013, para 199; *Río Negro Massacres v Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Ser C No 250, Judgment of 4 September 2012, paras 114, 227; *Huilca Tcse v Peru*, Merits, Reparations and Costs, Ser C No 229, Judgment of 26 August 2011, paras 84, 90. For the jurisprudence of the European Court, see e.g. *Al-Adsani v UK*, Judgment of 21 November 2001, paras 60–7; *Othman (Abu Qatada) v UK*, Judgment of 17 January 2012, para 266; *Jones and Others v UK*, Judgment of 14 January 2014, para 198; *Nait-Liman v Switzerland*, Judgment of 15 March 2018, para 129.

European Union,¹⁵ and numerous arbitration tribunals.¹⁶ Even the International Court of Justice, which previously proved consistently reluctant to engage closely with arguments of *jus cogens*, has now explicitly endorsed the relevance of the concept.¹⁷

The International Law Commission has dealt with issues bearing on *jus cogens* in the context of the consideration of several topics on its agenda, including state responsibility,¹⁸ reservation to treaties,¹⁹ unilateral declarations of states,²⁰ fragmentation of international law,²¹ diplomatic

¹⁵ See e.g. *Kadi and Al-Barakaat International Foundation v Council and Commission of the European Union*, Judgment of 3 September 2008, paras 280, 287.

¹⁶ See e.g. *Delimitation of Maritime Boundary between Guinea-Bissau and Senegal*, Award of 31 July 1989, UNRIAA, Vol 20, para 44; *Methanex v United States*, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ILM, Vol 44, Part IV, Ch C, para 24; *EDF v Argentina*, Award of 11 June 2012, available at: https://arbitrationlaw.com/sites/default/files/free_pdfs/edf_international_v_argentina_award_jun_11_2012.pdf, para 909.

¹⁷ See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Merits, Judgment of 3 February 2015, paras 87–8; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, para 99; *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, paras 92–7; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, para 81; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, para 161; *Armed Activities on the Territory of the Congo, New Application (Democratic Republic of Congo v Rwanda)*, Jurisdiction and admissibility, Judgment of 3 February 2006, para 64.

¹⁸ Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its 53rd session, UN Doc A/56/10 and Corr.1, p 20 ff. On 12 December 2001, the UN General Assembly adopted Resolution 56/83, recognising the work of the ILC and the adoption of the ILC Articles. From then on, the ILC Articles have officially been referred to as the ‘Articles on Responsibility of States for Internationally Wrongful Acts’.

¹⁹ Guide to Practice on Reservations to Treaties, Report of the ILC on the work of its 63rd session, UN Doc A/66/10, p 26 ff.

²⁰ Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Report of the ILC on the work of its 58th session, UN Doc A/61/10, p 159 ff.

²¹ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the work of the 58th session of the ILC, UN Doc

protection,²² the responsibility of international organisations,²³ immunity of state officials from foreign criminal jurisdiction,²⁴ the obligation to extradite or prosecute,²⁵ and crimes against humanity.²⁶ In 2015, the Commission decided to include *jus cogens* as a separate topic in its current programme of work. It appointed for this purpose a Special Rapporteur, Mr Dire Tladi, who up until now has submitted four reports to the Commission.²⁷

If the concept of *jus cogens* was once regarded by international lawyers as an idea of little more than academic interest,²⁸ in the past 15 or so years it has undoubtedly established itself as an ineluctable part of the rhetoric of the international legal profession. These developments come with a need for further rigorous investigations and analyses of the *jus cogens* concept as applied in international law. The important ramifications of the concept reinforce this need.

Jus cogens expresses the idea of the existence of an international *lex superior*.²⁹ The assumption is that *jus cogens* norms have an authority

A/61/10, p 175 ff. Other part of the report. The bulk of the report of the Study Group is contained in UN Doc A/CN.4/L.682.

²² First report on diplomatic protection, by Mr John R. Dugard, Special Rapporteur A/CN.4/506 and Add. 1.

²³ Draft Articles on the Responsibility of International Organizations, Report of the International Law Commission on the work of its 63rd session, UN Doc A/66/10 and Add.1, p 39 ff.

²⁴ Fifth report on immunity of state officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc A/CN.4/701.

²⁵ Final Report of the ILC on the obligation to extradite or prosecute (*aut dedere aut judicare*), Report of the International Law Commission on the work of its 66th session, UN Doc A/69/10, p 139 ff.

²⁶ Second report on crimes against humanity, by Sean D Murphy, Special Rapporteur, UN Doc A/CN.4/690.

²⁷ First report on *jus cogens*, UN Doc A/CN.4/693; Second report on *jus cogens*, UN Doc A/CN.4/706; Third report on peremptory norms of general international law (*jus cogens*), UN Doc A/CN.4/714 and Corr 1; Fourth report on peremptory norms of general international law (*jus cogens*), UN Doc. A/CN.4/727.

²⁸ Compare the comment made by Ian Brownlie in 1988: “I think *jus cogens* has become part of *lex lata*. At the same time, as has been pointed out, the vehicle does not often leave the garage. In other words the concept does not seem to have a lot of obvious relevance” (Brownlie, 1988, p 110).

²⁹ Compare Draft Conclusion 2 of the ILC Special Rapporteur, Mr Dire Tladi: “Norms of *jus cogens* ... are hierarchically superior to other norms of international law” (UN Doc A/71/10, p 299). See, similarly, Weil, p 423 ff;

which exceeds that of ordinary international law. It lies in the very nature of such a hierarchically superior law that it is applicable without any limits as to either subject or situation. If, for example, a *jus cogens* status is conferred on the prohibition of torture as defined in, say, the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,³⁰ then it will apply to all subjects of international law, whether they are states, international organisations, insurrectional or national liberation movements, corporations or individuals.³¹ No norm of ordinary international law will offer any valid excuse for not complying with the prohibition of torture, regardless of its source, and regardless of the particular circumstances. In every case of a conflict between the prohibition of torture and a norm of ordinary international law, for example, the prohibition of torture shall prevail. So understood, the concept of *jus cogens* has a significant impact on the construction of international legal argument, as the classification of a norm as *jus cogens* will dramatically increase the strength of a legal proposition relying upon that norm. For international legal scholars, who, up to the introduction of the concept of *jus cogens*, were generally unaccustomed to the idea of the existence of a legal hierarchy among international norms, it has far-reaching consequences for the construction of the international legal system.

This book is motivated by a desire to contribute to the further scholarly investigation of the application of the concept of *jus cogens* in international law. The approach of research is not the traditional. In legal research, as a matter of course, concepts are conceived of as mediating links or connectives in legal inferences from identifying criteria to legal consequences.³² *Identifying criteria* are the particular properties used in international law for the categorisation of a particular phenomenon or state of affairs, or a class of phenomena or state of affairs, as one that comes within the extension of some particular concept.³³ *Legal consequences*, on the other hand, refer to the particular significance ascribed in international law to having so categorised a particular phenomenon or

Carillo Salcedo, p 595; Mitchell, p 228; Wouters & Verhoeven, p 403; Sarkin, p 541; Ruiz Fabri, p 1050; Macdonald, 1987, p 129 ff.

³⁰ Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. Compare the approach of the ICTY Trial Chamber in *Prosecutor v Delalić and others*, Judgment of 16 November 1998, para 457 ff.

³¹ Cassese, 2005, p 205.

³² Compare Lindahl, p 182 ff.

³³ See Linderfalk, 2012, p 8.

state of affairs, or a class of phenomena or state of affairs.³⁴ Conducting a traditionally designed investigation of the application of a concept in international law, researchers would systematically explore all relevant means for the determination of law and try to identify patterns that can be reconstructed as identifying criteria and legal consequences. As applied to the analysis of the application of the concept of *jus cogens*, investigations would engage with: (i) relevant state practice, including any existing treaty law; (ii) relevant judicial decisions; and (iii) the vast body of monographs and scholarly articles written on the topic. They would seek to obtain knowledge about, first, the particular property or properties to be used for the categorisation of norms as *jus cogens*, and second, the legal consequences that ensue from the conferral of this status on a norm. Not surprisingly, this approach permeates much international *jus cogens* research.³⁵

This book will begin by conducting a very brief survey along precisely these lines, only to conclude that at this stage of development of the international legal discourse, traditional approaches make very little sense. In Sections 1.2 and 1.3, the book will attempt to establish, respectively, the criteria used for the categorisation of norms as *jus cogens* and the legal consequences that ensue from the conferral of this status on a norm. As will be revealed, a consistent pattern of practice is still absent.³⁶ Indications suggest that this is the result of the prevailing imperfect conditions for rational legal discourse. Since the introduction of the *jus cogens* concept in international legal discourse, fruitful exchange of ideas and suggestions has been inhibited by a general failure of participants to fully understand the relevance of some basic assumptions that they bring to bear on their respective contributions. The only sensible way forward is to give *jus cogens* research a new focus. Instead of continuing traditionally designed investigations of the application of

³⁴ Ibid.

³⁵ For some recent examples, see e.g. Orakhelashvili, 2006; Costelloe; Weatherall, 2015. To this extent, international legal scholars still seem to follow in the footsteps of the Danish legal philosopher Alf Ross, whose writing in the 1950s introduced the topic of conceptual terms on the agenda of legal scholarship. See Ross, pp 812–25.

³⁶ Compare Jure Vidmar, who as late as 2013 commented on the state of affairs of *jus cogens* discourse: “*Jus cogens*, or peremptory norms, is a controversial concept in international law. Not only is there some ambiguity as to which norms have acquired this status; it is even more problematic that the legal effects of the peremptory status remain unclear” (Vidmar, p 1; a footnote is omitted.) H  l  ne Ruiz Fabri, a year after, referred to the “limits” and “very meagre outcomes” of the discourse (Ruiz Fabri, p 1050).

jus cogens in international law, researchers should start to explore the many implicit basic assumptions held by participants in international legal discourse, and the way in which these assumptions explain the various propositions defended. What is required is a metaperspective similar to the one that this book will be taking. Section 1.4 will lay out this idea in more detail.

1.2 IN SEARCH OF IDENTIFYING CRITERIA

Which are the criteria used for the categorisation of norms as jus cogens?

1.2.1 The Significance of the Vienna Convention

Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides what is currently the only treaty-based definition of the concept of *jus cogens*:

For the purposes of the present Convention, a peremptory norm of general international law [that is to say “a *jus cogens* norm”] 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.³⁷

Not surprisingly, this definition obtains a prominent place in the post-1969 scholarly analysis on the concept of *jus cogens* in international law. Analysis is impeded by the design of the Article, which leaves space for international lawyers to speculate about some of the important general issues involved.

To begin with, as follows explicitly from the wording of Article 53, it provides a definition applicable only for the limited purposes of the Vienna Convention. This is to say that the definition is applicable only relative to the 116 or so states that are currently parties to the Vienna

³⁷ Vienna Convention on the Law of Treaties, adopted on 22 May 1969, 1155 UNTS 331. Compare the identical Art 53 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted on 21 March 1986, UN Doc. A/CONF.129/15. At the time of writing, however, this Convention has not yet entered into force.

Convention,³⁸ and only relative to cases of conflict involving a treaty concluded by two or more parties to the Vienna Convention after its entry into force for these parties.³⁹ The language of Article 53 leaves scope for the argument that the definition lacks much of the significance often ascribed to it. There are, indeed, commentators who, on different occasions, have taken such a position.⁴⁰ Other commentators have emphasised the purport of the Vienna Convention, which was drafted by the International Law Commission so as to reflect the existing customary international law.⁴¹ As argued, Article 53 – like most other provisions of the Vienna Convention – should be seen as confirmation of the existence, in customary international law, of a general definition of *jus cogens* applicable to situations of conflict, whether they formally come within the ambit of the Vienna Convention or not.⁴²

The stricter position – that which understands Article 53 as merely reflective of an agreement, and not of customary international law – is now hardly tenable, if it ever was. The post-1969 work of the International Law Commission has drawn heavily on the Article 53 definition. Thus, the perfectly identical Article 53 of the 1986 Vienna Convention on the Law of Treaties extends its significance to treaties concluded between states and international organisations, and between international organisations *inter se*.⁴³ The Commentaries appended to the Articles on the Responsibility of States for Internationally Wrongful Acts make repeated

³⁸ Multilateral treaties deposited with the General Secretary, available at: https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en, status as of 2 May 2019.

³⁹ See Art 4 of the VCLT.

⁴⁰ See e.g. Czaplinski, pp 87–9; Martenczuk, p 517.

⁴¹ Compare the preamble to the VCLT: “Believing that the codification and progressive development of the law of treaties achieved in the present Convention will promote the purposes of the United Nations set forth in the Charter, namely, the maintenance of international peace and security, the development of friendly relations and the achievement of cooperation among nations” (para 7).

⁴² Compare the comment by Dire Tladi, in his First report to the ILC on *jus cogens*: “[T]he syllabus on which the topic is based also recognizes article 53 of the Vienna Convention as ‘the starting point for any study of *jus cogens*’” (UN Doc A/CN.4/693, para 33; a footnote is omitted). A few paragraphs later, the Special Rapporteur adds: “[T]he definition in the Vienna Convention is accepted as the definition, in general terms, of *jus cogens*, even beyond the law of treaties” (ibid, para 36; a footnote is omitted).

⁴³ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, adopted on 21 March 1986, UN Doc. A/CONF.129/15. At the time of writing, however, this Convention has not yet entered into force.

reference to Article 53 of the 1969 Vienna Convention.⁴⁴ They leave the impression that in each of the several Articles where the concept of *jus cogens* is applied,⁴⁵ it has the very same scope as in the Vienna Convention. The Guiding Principles applicable to unilateral declarations of states affirm, in Principle 8, the voidness of any declaration contrary to *jus cogens*.⁴⁶ As revealed by the history of its drafting, this principle builds upon the assumption “that the provisions of Article 53 of the 1969 Vienna Convention apply in general, and again *mutatis mutandis*, to unilateral acts”.⁴⁷ Similarly, both the Conclusions of the ILC Study Group on the Fragmentation of International Law,⁴⁸ and the work completed by the ILC Special Rapporteur on *jus cogens* (Mr Dire Tladi),⁴⁹ suggest that the Article 53 definition be used for the purpose of the consideration of hierarchical relations between rules of international law, generally.

1.2.2 Identifying Criteria Suggested by Discussants

Even though there may now be little doubt that Article 53 of the 1969 Vienna Convention reflects a general definition of *jus cogens* applicable for all purposes, and not just the limited purposes of the Convention itself, aspects of its design still cause debate. Discussion is spurred, most importantly, by the indirect way in which the concept of *jus cogens* is delineated. If legal concepts can be described as mediating links between identifying criteria and legal consequences, a definition of a concept is an attempt to explain this mediating function in general terms.⁵⁰ There are

⁴⁴ Report of the ILC of the work of its 53rd session, UN Doc A/56/10, pp 85, 111, 113.

⁴⁵ Arts 26, 40, 41 and 50.

⁴⁶ Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations, Report of the ILC on the work of its 58th session, UN Doc A/61/10, p 159, at 161.

⁴⁷ Ninth Report on unilateral acts of states, by Mr Victor Rodríguez Cedeño, Special Rapporteur, UN Doc A/CN.4/569 and Add.1, p 162. See also the Commentaries appended by the ILC to the Guiding Principles, as finally adopted. Report of the work of the 58th session of the ILC, UN Doc A/61/10, pp 378–9.

⁴⁸ UN Doc A/CN.4/L.702, paras 40–1.

⁴⁹ See First report on *jus cogens*, UN Doc A/CN.4/693; Second report on *jus cogens*, UN Doc A/CN.4/706; Third report on peremptory norms of general international law (*jus cogens*), UN Doc A/CN.4/714 and Corr 1; Fourth report on peremptory norms of general international law (*jus cogens*), UN Doc. A/CN.4/727.

⁵⁰ See Linderfalk, 2012, pp 8–9.

different ways in which such an explanation can be given.⁵¹ One way is to refer to identifying criteria. This was the model used for Article 1 of the 1961 Vienna Convention on Diplomatic Relations,⁵² for example, where ‘premises of a diplomatic mission’ are defined as “buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission”. Another way is to refer partly to legal consequences and partly to identifying criteria. One good example would be Article 55 of the United Nations Convention on the Law of the Sea,⁵³ which defines ‘the exclusive economic zone’ as “an area beyond and adjacent to the territorial sea ... under which the rights and obligations of the coastal State and the rights and freedoms of others States are governed by the relevant provisions of this Convention”.

The remarkable thing about the definition laid down in Article 53 of the Vienna Convention is that it does not say anything about the particular properties of *jus cogens* norms. Instead, as the definition provides, a norm of *jus cogens* is to be identified based on its acceptance among states and their recognition of the existence of some very particular legal obligations being tied to it – a *jus cogens* norm permits no derogation, and it cannot be modified except by the creation of a new norm having the same character. With this particular wording, it is not very surprising that international lawyers have different opinions about precisely what identifying criterion or criteria are to be applied, if any.

Some claim that, actually, no legally accepted criterion or criteria exist.⁵⁴ In fact, states and international lawyers have many different ideas of the particular property or properties of norms that identify them as *jus cogens*. While most assume that *jus cogens* norms do exist, when they identify a norm as *jus cogens* they do this on different grounds. As lawyers of this camp maintain, it was in order to steer clear of precisely this problem that the International Law Commission decided to draft Article 53 in the way it did.⁵⁵

⁵¹ Ibid.

⁵² 500 UNTS 95.

⁵³ 1833 UNTS 3.

⁵⁴ See e.g. Linderfalk, 2012, pp 9–11.

⁵⁵ Compare the Commentaries appended by the ILC to Draft Article 50 of the Vienna Convention: “The formulation of the article is not free from difficulty, since there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*.” Yearbook of the ILC, 1966, Vol 2, UN Doc A/CN.4/191, pp 247–8. But see also the sentence that ends this same paragraph: “It is not the form of a general rule of international law but

Other lawyers maintain that legally accepted identifying criteria do exist.⁵⁶ Since the concept of *jus cogens* is undoubtedly applied in international law, surely international law must provide some other criterion or criteria that allow the identification of single *jus cogens* norms – anything else would be absurd.⁵⁷ Hence, the fact that Article 53 of the Vienna Convention offers no information about these criteria must not be seen to exclude that legally accepted criteria exist. As the argument goes, the criteria simply have to be looked for elsewhere.⁵⁸

Understanding Article 53 in this latter sense, international lawyers have claimed the existence of a multitude of different identifying criteria. Depending on the particular claim, as shown by the several references given below, *jus cogens* norms are to be identified based on, for example, their fundamental character; the importance of the values that they represent; the interest or interests that they satisfy, or the entity or group of entities in which those interests are vested; the legal relationship or relationships that they establish; their origin or the source of law from which they derive; their deontic character; or the legal consequences ensuing from their classification as *jus cogens*. Articles 53 and 64 of the 1969 Vienna Convention “recognize the existence of substantive norms of a fundamental character”:⁵⁹

- (1) “[*J*]us cogens norms serve to protect fundamental values of the international community.”⁶⁰
- (2) *Jus cogens* norms are to be identified based on their importance to international public order.⁶¹

the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*.” Ibid, p 248.

⁵⁶ Compare the comment of Olivier De Schutter: “Unless we accept to take these provisions [i.e. Arts 53 and 64] as mere tautologies ... the *jus cogens* nature of a norm must be seen as based on something else than on the sense of the international community that no derogation is to be allowed to those norms” (De Schutter, pp 68–9).

⁵⁷ See e.g. Orakhelashvili, 2015, pp 122–3.

⁵⁸ Ibid.

⁵⁹ See the Commentaries appended by the ILC to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the work of the 53rd session of the ILC, UN Doc A/56/10, p 111.

⁶⁰ First report on *jus cogens* by Dire Tladi, Special Rapporteur, UN Doc A/CN.4/693, p 38.

⁶¹ See the Commentaries appended by the ILC to 1966 Draft Article 61 (now Article 64): “Article 50 [now Article 53] ... is based upon the hypothesis that in international law to-day there are a certain number of fundamental rules

- (3) “The juridical framework of national and international public order rests on it and it permeates the whole juridical system.”⁶²
- (4) “All obligations established by *jus cogens* norms ... have the character of *erga omnes* obligations.”⁶³
- (5) “[*J*]us *cogens* norms are universally applicable.”⁶⁴
- (6) *Jus cogens* norms are invariably norms of customary international law.⁶⁵
- (7) *Jus cogens* norms are invariably prohibitions.⁶⁶
- (8) *Jus cogens* obligations “arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States”.⁶⁷
- (9) *Jus cogens* obligations “arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of ... peoples”.⁶⁸
- (10) *Jus cogens* obligations “arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to ... the most basic human values”.⁶⁹
- (11) “These offences are included among the conducts deemed to harm essential values and rights of the international community.”⁷⁰

of international public order from which no State may derogate even by agreement with another State.” Yearbook of the ILC, 1966, Vol 2, UN Doc A/CN.4/191, p 261.

⁶² *YATAMA v Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Ser C No 127, Judgment of 23 June 2005, para 184.

⁶³ Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the work of the 58th session of the ILC, UN Doc A/61/10, p 183.

⁶⁴ First report on *jus cogens* by Dire Tladi, Special Rapporteur, UN Doc A/CN.4/693, p 38.

⁶⁵ See e.g. Czaplinski, p 88.

⁶⁶ See e.g. Carillo Salcedo, p 592, Vidmar, p 17.

⁶⁷ See the Commentaries appended by the ILC to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC of the work of its 53rd session, UN Doc A/56/10, p 113.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Goiburu et al v Paraguay*, Merits, Reparations and costs, Ser C No 153, Judgment of 22 September 2006, para 128.

- (12) The nonderogable quality of *jus cogens* norms distinguishes them from other norms of international law.⁷¹
- (13) “[T]he only possible criterion [for distinguishing between *jus cogens* and other rules of international law] was the substance of the rule; to have the character of *jus cogens*, a rule of international law must not only be accepted by a large number of States, but must also be found necessary to international life and deeply rooted in the international conscience.”⁷²

This quick inventory helps to explain the precarious state of international legal discourse. The discourse suffers from a lack of three things.

First, most of the suggested criteria are in clear need of further justification. This is so especially since many of them apply only to the exclusion of others. Situations can be conceived, for example, when the violation of a norm presents a threat to the survival of a state (see Criterion 9), but not to the survival of its people (see Criterion 10). Similarly, quite clearly, many norms classify as contrary to national public order (see Criterion 4) without classifying at the same time as contrary to international public order (see Criterion 3), and vice versa. This is to say that not all of the suggested criteria can be a correct description of international law. The state of international legal discourse obviously prompts a distinction between criteria that are legally accepted and criteria that are not. It presupposes a further engagement with issues concerning the source of *jus cogens* obligations.

Second, many of the suggested criteria are extremely vague and in need of further clarification. In some cases, this is because the nature of criteria suggest that they are not themselves sufficient to identify any *jus cogens* norms. Not all norms of customary international law are *jus cogens* (Criterion 7), for example; neither are all prohibitions (Criterion 8), nor all norms that establish obligations owed to the international community as a whole (Criterion 5). International legal scholars have yet to explain how these criteria are to be cumulated and how they relate when simultaneously categorising and not categorising a norm as *jus cogens*. Other criteria are difficult to operate because they use concepts that are essentially contested.⁷³ They inevitably beg further questions. For example, when Criterion 1 refers to the fundamental character of norms, what precise property or properties of norms make norms *fundamental*?

⁷¹ See e.g. Brunné, p 457.

⁷² Yasseen, Summary records of the 15th session of the ILC, Yearbook of the ILC, 1963, Vol 1, p 63.

⁷³ Compare Gallie, pp 167–98.

When Criterion 11 refers to the most basic human values, what particular property or properties of values make them *basic* and *human*? When Criterion 12 refers to the essential values and rights of the international community, what are the *rights* of the international community if not the *jus cogens* norms themselves, and how is the *international community* to be defined?

Third, some of the criteria raise methodological concerns. Take for example the suggestion that *jus cogens* norms should be identified based on whether they are “rooted in the international conscience” or not (Criterion 14). Apart from the many things that can be said about the idea of putting one’s trust in the vagaries of a conscience, international lawyers lack a methodology for exploring cognitive processes of this kind. Reference can be made also to the suggestions that the identification of *jus cogens* norms be based on their nonderogable character (Criterion 13), or the effect of their application on “international life” (Criterion 14), which are problematic for similar reasons. Criterion 13 obviously presupposes an inductive approach to the identification of *jus cogens* norms. In order to say whether a norm (N) is nonderogable, international lawyers must study the operation of this norm in situations of normative conflict. According to what the criterion envisages, a norm is *jus cogens* if, and only if, in every such conflict it is not invalidated or overridden. As Chapter 5 of this book will explain in more detail, this approach brings a crucial methodological question, since the operation of an international norm cannot possibly be studied in relation to every other such norm. The question that must be answered is at what point of the study lawyers can be excused for drawing the conclusion either that N is *jus cogens* or that it is not, without making the conclusion arbitrary or the criterion unworkable.⁷⁴ Criterion 14 presupposes an assessment of the instrumental relationship between the conferral of a *jus cogens* status of a norm (N) and the prospect of international life. What will have to be determined is the extent to which the conferral of a *jus cogens* status on N will contribute to the realisation of this state of affairs. According to the criterion, if, at all times of the future application of N, a *jus cogens* status has to be conferred on this norm to sustain international life, then N is *jus cogens*. In the reverse, if international life can be sustained although a *jus cogens* status is *not* conferred on N, then it is not *jus cogens*. It remains to be explained how knowledge of this kind can ever be obtained.⁷⁵

⁷⁴ See *infra*, Section 5.3.1.

⁷⁵ See *infra*, Section 5.3.2.

1.2.3 The Many Suggested Examples of *Jus Cogens* Norms

International law scholars frustrated at the state of the current *jus cogens* discourse may want to try an alternative method of obtaining knowledge about the possibly existing legally accepted criteria for the identification of *jus cogens* norms. Traditional investigations of the relevant means for the determination of law have left plenty of examples of norms alleged to have attained a *jus cogens* status. Scholars may think it possible to build a theory around these examples. They may assume that the examples present a pattern, which allows the inference that some or other identifying criterion or criteria exist. As the following list of examples will help to illustrate, it cannot seriously be said that they do:

- The law of the Charter of the United Nations concerning the prohibition of the use of force.⁷⁶
- The prohibition of aggression.⁷⁷
- Almost all of the principles listed in Article 2 of the Charter of the United Nations.⁷⁸
- The right of nations to self-defence.⁷⁹
- The principle of the sovereign equality of states.⁸⁰
- The principle of respect of sovereignty.⁸¹
- The equidistance principle.⁸²
- The right of self-determination.⁸³
- The prohibition of slavery and the trade in slaves.⁸⁴

⁷⁶ See e.g. the Commentaries appended by the ILC to Draft Article 50 of the Vienna Convention, Yearbook of the ILC, 1966, Vol 2, UN Doc A/CN.4/191, p 247.

⁷⁷ See e.g. the Commentaries appended by the ILC to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the work of the 53rd session of the ILC, UN Doc A/56/10, p 85.

⁷⁸ See e.g. Macdonald, 1999, p 208.

⁷⁹ See e.g. Gangl, p 72.

⁸⁰ See e.g. Tams, p 142.

⁸¹ See e.g. Sztucki, p 84, and the further references cited there.

⁸² *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Separate opinion of Judge Tanaka, ICJ Reports, 1969, p 182.

⁸³ See e.g. the Commentaries appended by the ILC to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the work of the 53rd session of the ILC, UN Doc A/56/10, p 85.

⁸⁴ See e.g. Brownlie, 1979, p 513.

- The prohibition of piracy.⁸⁵
- The prohibition of genocide.⁸⁶
- The prohibition of crimes against humanity.⁸⁷
- The prohibition of war crimes.⁸⁸
- The prohibition against torture.⁸⁹
- The prohibition of widespread rape.⁹⁰
- The prohibition of rape in international humanitarian law.⁹¹
- The prohibition of racial discrimination.⁹²
- The prohibition of torture and cruel, inhuman or degrading punishment or treatment.⁹³
- The prohibition of apartheid.⁹⁴
- The obligation of states not to encourage or condone genocide.⁹⁵
- The basic rules of international humanitarian law applicable in armed conflict.⁹⁶

⁸⁵ See e.g. *Tel-Oren v Libyan Arab Republic*, US Court of Appeals, DC Cir, Judgment of 3 February 1984, 726 F.2d 774, at p 794.

⁸⁶ See e.g. *Armed Activities on the Territory of the Congo, New Application (Democratic Republic of Congo v Rwanda)*, Jurisdiction and admissibility, Judgment of 3 February 2006, para 64.

⁸⁷ See e.g. the Commentaries appended by the ILC to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the work of the 53rd session of the ILC, UN Doc A/56/10, p 85.

⁸⁸ See e.g. *Prosecutor v Kupreškić*, ICTY Trial Chamber, Judgment of 14 January 2000, para 520.

⁸⁹ See e.g. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Judgment of 20 July 2012, para 99.

⁹⁰ See e.g. Adams, pp 386–7.

⁹¹ See e.g. Mitchell, p 256.

⁹² See e.g. the Commentaries appended by the ILC to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the work of the 53rd session of the ILC, UN Doc A/56/10, p 85.

⁹³ See e.g. *Servellon García v Honduras*, Merits, Reparations and Costs, Ser C No 152, Judgment of 21 September 2006, para 97.

⁹⁴ See e.g. Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the work of the 58th session of the ILC, UN Doc A/61/10, p 183.

⁹⁵ See e.g. Restatement (Third) of the Foreign Relations Law of the United States (Revised), § 702, Comment n.

⁹⁶ See e.g. Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the work of the 58th session of the ILC, UN Doc A/61/10, p 183.

- The fundamental principle of equality and nondiscrimination.⁹⁷
- The principle of equality before the law, equal protection before the law and nondiscrimination.⁹⁸
- The prohibition of forced disappearance of persons and the corresponding obligation to investigate and punish those responsible.⁹⁹
- The principle of the freedom of the high seas.¹⁰⁰
- The principle of good faith.¹⁰¹
- The *pacta sunt servanda* rule.¹⁰²
- Most norms of international humanitarian law.¹⁰³
- Basic human rights.¹⁰⁴
- The most essential human rights.¹⁰⁵
- Some human rights obligations.¹⁰⁶
- The entire body of human rights norms.¹⁰⁷
- The right of access to justice.¹⁰⁸
- The right not to be subjected to involuntary servitude.¹⁰⁹
- The right not to be subjected to forced labour.¹¹⁰
- The right to life.¹¹¹
- The application of the death penalty to juveniles.¹¹²

⁹⁷ See e.g. *Juridical Condition and Rights of the Undocumented Migrants*, Ser A No 18, Advisory Opinion of 17 September 2003, paras 97–101, 103.

⁹⁸ See e.g. *Velez Looz v Panama*, Preliminary Objections, Merits, Reparations and Costs, Ser C No 218, Judgment of 23 November 2010, para 248.

⁹⁹ See e.g. *Goiburu et al v Paraguay*, Merits, Reparations and Costs, Ser C No 153, Judgment of 22 September 2006, para 84.

¹⁰⁰ See e.g. Scheuner, p 526.

¹⁰¹ See e.g. Suy, p 27.

¹⁰² See e.g. Janis, p 362.

¹⁰³ See e.g. *Prosecutor v Kupreškić*, Judgment of 14 January 2000, para 520.

¹⁰⁴ See e.g. De Schutter, p 69.

¹⁰⁵ See e.g. Charlesworthy & Chinkin, p 92.

¹⁰⁶ See e.g. Rinwigati Waagstein, pp 148–54.

¹⁰⁷ See e.g. Parker & Neylon, p 411.

¹⁰⁸ See e.g. *La Cantuta v Peru*, Merits, Reparations and Costs, Ser C No 162, Judgment of 29 November 2006, para 160.

¹⁰⁹ See e.g. *Río Negro Massacres v Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Ser C No 239, Judgment of 24 October 2012, para 227.

¹¹⁰ See e.g. Report of the Commission of Inquiry on Forced Labour in Myanmar (Burma), ILO Official Bulletin, 1998, Special Suppl, Vol 81, Ser B, para 538.

¹¹¹ See e.g. Parker & Neylon, p 411.

¹¹² See e.g. De Schutter, p 65.

- The right not to be subjected to prolonged arbitrary detention.¹¹³
- The right to property.¹¹⁴
- The right of free trade.¹¹⁵
- The right to adequate food.¹¹⁶
- The right of development.¹¹⁷
- The principle of nonrefoulement.¹¹⁸
- The obligation to make reparation for damages at the request of the injured party.¹¹⁹
- The obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinctions.¹²⁰
- The obligation not to prevent access to space.¹²¹
- The principle of the common heritage of mankind.¹²²

Although many of the suggested examples can be categorised as either ‘international crimes’ or ‘human rights standards’, a significant number do not fall within these categories, as commonly defined. Obvious examples are: the principle of good faith; the *pacta sunt servanda* rule; the principle of the sovereign equality of states; the law of the Charter of the United Nations concerning the prohibition of the use of force; the principle of the common heritage of mankind; the obligation not to prevent access to space; the equidistance principle; and the principle of the freedom of the high seas. Conversely – and this is perhaps even more problematic – few lawyers would seem prepared to go as far as to argue that *all* international crimes or *all* human rights standards have the status of *jus cogens*, for the mere reason of their categorisation as such. What the long list of examples possibly suggests is that *some* international crimes, and *some* human rights standards, have been elevated to a *jus*

¹¹³ See e.g. Restatement (Third) of the Foreign Relations Law of the United States (Revised), § 702, Comment n.

¹¹⁴ See e.g. *Kadi v Council and Commission of the European Union*, Judgment of 21 September 2005, paras 225–33.

¹¹⁵ See e.g. Allen, p 346.

¹¹⁶ See e.g. Forrest Martin, pp 348–52.

¹¹⁷ See e.g. Upadhye, pp 68–70.

¹¹⁸ See e.g. Allain, pp 533–58.

¹¹⁹ See e.g. Suy, p 27.

¹²⁰ See e.g. Macdonald, 1999, p 207.

¹²¹ See e.g. Macdonald, 1987, p 132.

¹²² See e.g. Letter, dated 29 August 1980, from the Chairman of the Group of 77 to the President of the UN Conference on the Law of the Sea, UN Doc A/CONF.62/106, pp 111–14.

cogens status.¹²³ Consequently, a mere reference to international crimes or human rights standards will never suffice to explain the *jus cogens* status of a norm, but will always prompt a distinction between those international crimes and human rights standards that have attained the status of *jus cogens* and those that have not. This distinction will have to be made on the basis of some other, yet unknown, criterion or criteria.

1.3 IN SEARCH OF LEGAL CONSEQUENCES

Which are the legal consequences that ensue from the conferral of a jus cogens status on a norm?

1.3.1 The Significance of the Vienna Convention

When legal scholars attempt to give a general description of the legal consequences of *jus cogens*, they typically refer to the definition laid down in Article 53 of the 1969 Vienna Conventions on the Law of Treaties.¹²⁴ This definition emphasises the nonderogability of *jus cogens* norms and the severely restricted conditions for accomplishing their modification:

For the purposes of the present Convention, a peremptory norm of general international law [i.e. a norm of *jus cogens*] 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.

What scholars would seem to take for granted is that Article 53 serves as an accurate description of the legal consequences of *jus cogens* not only for the somewhat limited purposes of the Vienna Convention, but also beyond: (i) *no norm* of ordinary international law will offer any valid excuse for not complying with *jus cogens*; (ii) *no international lawmaker* has competence to modify any *jus cogens* norm by other means than the creation of a new norm having the same character; and (iii) *no action* will

¹²³ For important human rights bodies, this would seem inconsistent with the “incontrovertible truth” that all human rights are of equal status and importance. See e.g. UNFPA, Human Rights Principles, available at: www.unfpa.org/resources/human-rights-principles.

¹²⁴ See e.g. Vidmar, p 3; Mitchell, p 228; Orakhelashvili, 2005, p 63 ff; Hannikainen, 1996, p 104; Helmersen, p 170; Macdonald, 1987, pp 130, 136; Allain, p 534 ff; Birney & Onuf, p 190 ff.

serve to modify a *jus cogens* norm except the creation of a new norm having the same character.¹²⁵

Some confirmation of this proposition can be found already in the 1966 ILC Commentaries. In the final Draft Articles on the Law of Treaties adopted in 1966, the Commission included a rule to the effect that if a new norm of *jus cogens* emerges, that would render void any existing treaty in conflict with that norm.¹²⁶ As the Commentaries explained: “This [effect] follows from the fact that a rule of *jus cogens* is an over-riding rule depriving *any act or situation* which is in conflict with it of legality.”¹²⁷

The proposition finds further support in the later work of the International Law Commission, and in the practice of courts and tribunals. Courts have emphasised the nonderogability of *jus cogens* norms in several cases involving rules of customary international law. In *Prosecutor v Furundžija*, for example, an ICTY Trial Chamber affirmed the *jus cogens* status of the prohibition against torture and spelled out the consequences that this would have for treaties or customary rules providing for torture – they “would be null and void ab initio”.¹²⁸ In the *Gaddafi Case*, this same statement was cited with approval by the Advocate General in his submission to the French Court of Cassation.¹²⁹ In *Jurisdictional Immunities of the State*, Italy alleged that the customary rule of state immunity did not prevent Italy from allowing tort claims to be brought against Germany originating in breaches of *jus cogens* obligations. The International Court, although quickly coming to the conclusion that no *jus cogens* conflict existed,¹³⁰ seemed never to have questioned the validity of the alleged principle that a rule of *jus cogens* prevails over a rule of ordinary customary international law. In the *Arrest Warrant Case*, Belgium maintained the relevance of *jus cogens* norms for the application of the customary rule, which prevents states from allowing criminal charges to be brought against the head of state, head of

¹²⁵ See e.g. Allain, p 535; Byers, p 215; Ermolaeva, p 763; Esposito, p 161; Simma, 1994, p 288.

¹²⁶ This rule can now be found in Art 64 of the VCLT.

¹²⁷ Yearbook of the ILC, 1966, Vol 2, UN Doc A/CN.4/191, p 261; emphasis added.

¹²⁸ *Prosecutor v Furundžija*, Judgment of 10 December 1998, para 155.

¹²⁹ *Gaddafi Case*, General Prosecutor at the Court of Appeal of Paris, Judgment of 20 October 2000, ILR, Vol 125, p 506.

¹³⁰ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, paras 92–7.

government or foreign minister of another country.¹³¹ To this effect, it quoted a passage of the decision of Lord Millet in the *Pinochet (No 3) Case*: “International law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.”¹³²

The relevance of *jus cogens* norms for the implementation of resolutions adopted by the UN Security Council is another case in point. Judge Lauterpacht addressed precisely this issue in his Separate Opinion to the ICJ Order of 13 September 1993 in the *Bosnia Genocide Case*.¹³³ More concretely, he explored the hypothesis that Security Council resolution 713 could be seen in effect to have called on members of the United Nations to become, to some degree, supporters of the genocidal activity of the Serbs. As the judge insisted, because acts of genocide are prohibited by a rule of *jus cogens*, the resolution adopted by the Council would not be valid, and members of the organisation would be free to disregard it.¹³⁴ Article 103 of the Charter of the United Nations, he maintained, did not change that conclusion: “The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot – as a matter of simple hierarchy of norms – extend to a conflict between a Security Council resolution and *jus cogens*.”¹³⁵ Judge Lauterpacht can be understood to have affirmed by this Opinion the existence of two important principles. The first principle is applicable to cases of conflict involving rules of *jus cogens* and a treaty or a treaty provision; it assumes the perspective of the UN Security Council. As the principle goes, if the implementation of a resolution adopted under Article 41 implies a derogation from a *jus cogens* rule, then the resolution is devoid of any legal effect. This is to say that rules of *jus cogens* serve to limit the powers conferred upon the UN Security Council under provisions of the

¹³¹ *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment of 14 February 2002, Counter-Memorial of Belgium, p 152 ff.

¹³² *Ibid*, p 154.

¹³³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, ICJ Reports, 1993, p 407.

¹³⁴ *Ibid*, paras 102–3.

¹³⁵ *Ibid*, para 100.

Charter.¹³⁶ The second principle affirmed by Judge Lauterpacht is applicable to cases of conflict involving rules of *jus cogens* and a UN Security Council resolution; this principle assumes the perspective of the UN member states. As the principle goes, rules of *jus cogens* are superior to any resolution adopted by the UN Security Council. This is to say that in the event of a conflict between an obligation imposed by a rule of *jus cogens* and an obligation imposed upon UN member states by the Charter, the former obligation shall prevail.

Individual opinions of judges of the International Court of Justice have addressed the relevance of *jus cogens* norms for the effect of treaty reservations. More specifically, in the *North Sea Continental Shelf Cases*, Judges Padilla Nervo, Tanaka and Sørensen considered the validity of a reservation to Article 12 of the 1958 Geneva Convention on the Continental Shelf in light of the possible *jus cogens* status of the principle of equidistance.¹³⁷ They seem to have all assumed the relevance of the *jus cogens* concept for the assessment of the legal effect of treaty reservations, even though the then-draft Convention on the Law of Treaties suggested nothing of the kind. Judge Padilla Nervo explained the rule in general terms: “Customary rules belonging to the category of *jus cogens* cannot be subjected to unilateral reservations.”¹³⁸ Judge Tanaka, expressing himself in the same vein, spelled out the precise consequences that this rule would have for the assessment of the particular facts of the case:

[I]f a reservation were concerned with the equidistance principle, it would not necessarily have a negative effect upon the formation of customary international law, because in this case the reservation would in itself be null and void as contrary to an essential principle of the continental shelf institution which must be recognized as *jus cogens*.¹³⁹

¹³⁶ In its Final Report submitted to the ILC, the ILC Study Group on Fragmentation on International Law referred to this principle as *natural*: “If (as pointed out above), the United Nations Charter is not above *jus cogens*, then it also cannot transfer a power to contradict *jus cogens* to bodies that receive their jurisdiction from the Charter” (UN Doc A/CN.4/L.682, para 360).

¹³⁷ *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Separate Opinion of Judge Padilla Nervo, Separate opinion of Judge Tanaka, Dissenting Opinion of Judge Sørensen, ICJ Reports, 1969, pp 97, 182, 249, respectively.

¹³⁸ *Ibid*, p 97.

¹³⁹ *Ibid*, p 182.

This important case law had no notable effect on the drafting of the 1969 or 1986 Vienna Conventions.¹⁴⁰ Importantly, however, it is reflected in the ‘Guide to Practice on Reservations to Treaties’ adopted by the International Law Commission in 2011. Article 4.4.3(2) reads: “A reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law.”¹⁴¹

Recent work of the International Law Commission has established the relevance of *jus cogens* norms for the validity and effect of other unilateral acts. The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), for example, as well as the Articles on the Responsibility of International Organisations (ARIO), exclude the possibility of countermeasures when affecting “obligations under peremptory norms of general international law”.¹⁴² Similarly, according to the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations: “A unilateral declaration which is in conflict with a peremptory norm of general international law is void.”¹⁴³ The relevance of *jus cogens* norms for the legal effect of waiver was discussed by Judge Cañado Trindade in his Dissenting Opinion to the ICJ Order of 6 July 2010 in the *Jurisdictional Immunities of the State Case*. As insisted upon by the judge, a state can make no valid waiver of claims to reparation originating in the violation of *jus cogens* obligations.¹⁴⁴

1.3.2 The Many Suggested Examples of Legal Consequences

If Article 53 of the Vienna Convention serves as an accurate general description of the legal consequences of *jus cogens*, this is once again reason to subject this provision to careful analysis. As Article 53 makes apparent, the legal consequences of *jus cogens* fall into three separate categories. First, the conferral of a *jus cogens* status on a norm brings with it a series of new legal obligations. According to the general description of the legal consequences of *jus cogens* reflected in Article 53

¹⁴⁰ See, however, Human Rights Committee General Comment No 24, UN Doc CCPR/C/21/Rev.1/Add.6, para 8.

¹⁴¹ Guide to Practice on Reservations to Treaties, Report of the ILC on the work of its 63rd session, UN Doc A/66/10, p 35.

¹⁴² Art 26 of ARSIWA; Art 26 of ARIO.

¹⁴³ Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations, Report of the ILC on the work of its 58th session, UN Doc A/61/10, p 159, at 161.

¹⁴⁴ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Order of 6 July 2010, Dissenting Opinion of Judge Cañado Trindade, ICJ Reports, 2010, p 329, para 178.

of the 1969 Vienna Convention, if a *jus cogens* status is conferred on a norm, henceforth international law will not permit any derogations from it. This description translates into a series of obligations imposed on states and international organisations *qua* legal decisionmakers. Examples include the priority rule implicitly confirmed by the International Court of Justice in the *Jurisdictional Immunities of the State Case*: in the event of a conflict between a *jus cogens* norm and a rule of customary international law, states must act upon the former.¹⁴⁵

Second, the conferral of a *jus cogens* status on a norm has an effect on the powers of states and international organisations *qua* lawmakers. According once again to the general description reflected in Article 53, if a *jus cogens* status is conferred on a norm, henceforth, this norm can be modified only by the creation of a subsequent norm having the same character. This description translates into a no-competence rule: if a *jus cogens* status has been conferred on a norm, then states and international organisations have no power to modify this norm except by the creation of a new norm having the same character.

Third, if the conferral of a *jus cogens* status on a norm has an effect on the powers of states and international organisations *qua* lawmakers, then it has also a corresponding effect on their legal obligations *qua* legal decisionmakers. If states or international organisations take action to modify a *jus cogens* norm, despite being incapacitated to do so, the question arises: What will now be the effect of this action for their legal obligations? If ‘power’ is defined as the capacity to change or create a legal relationship, it would seem reasonable to think that, absent such a power, no legal effect can ensue from that action. The relevant rules of the Vienna Convention provide accordingly. As laid down in Articles 53 and 64, respectively: “If, at the time of its conclusion, a treaty is in conflict with a *jus cogens* norm, that treaty is void”;¹⁴⁶ “If a new *jus cogens* norm emerges, then any existing treaty in conflict with that norm becomes void and terminates.”¹⁴⁷ The fact that a treaty is void implies, by definition, the negation of the legal state of affairs that the conclusion of the treaty would have otherwise engendered. If what the conclusion of a treaty engenders is a series of new obligations, then consequently, for any

¹⁴⁵ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, para 92.

¹⁴⁶ It should be noted that according to Art 44 of the VCLT, no separation of single clauses of a treaty is permitted.

¹⁴⁷ It should be noted that according to Art 44 of the VCLT, if the ground for invalidating the treaty relates only to one or several particular clauses, then the ground may be invoked only with respect to those clauses.

situation in which a norm (N) is in conflict with a treaty, it would seem fitting to say that the conferral of a *jus cogens* status on N brings with it also a series of ‘no-obligations’. In the case of Articles 53 and 64, these no-obligations would be phrased as follows:

- (1) If, at the time of its conclusion, a treaty is in conflict with a *jus cogens* norm, then no party to this treaty must perform it.¹⁴⁸
- (2) If a new *jus cogens* norm emerges, and this norm is in conflict with an already existing treaty, then no party to this treaty must perform it.¹⁴⁹

As indicated by the examples provided in Section 1.3.1, similar no-obligations are claimed outside of the context of the 1969 Vienna Convention. Obvious examples are Articles 53 and 64 of the 1986 Vienna Convention on the Law of Treaties, whose wording is identical to that of Articles 53 and 64 of the 1969 Vienna Convention, except that the treaty concerned is between states and international organisations or between international organisations *inter se*. More interesting are the no-obligations that address action other than the conclusion of a treaty,¹⁵⁰ such as any of the following:

- (3) If a state or an international organisation makes a reservation to a treaty purporting to modify a *jus cogens* norm, then parties to the treaty must not act upon this reservation.
- (4) If an international organisation takes a decision purporting to modify a *jus cogens* norm, then members of the organisation must not act upon this decision.
- (5) If a state makes a unilateral declaration purporting to modify a *jus cogens* norm, then no state must act upon that declaration.

Taken together, these examples allow the inference that for every case in which states and international organisations have been incapacitated to modify a *jus cogens* norm, this no-competence corresponds to a no-obligation to perform any new norm accomplished through modification of that norm. This observation finally closes the gap that would

¹⁴⁸ It should be noted that according to Art 44 of the VCLT, no separation of single clauses of a treaty is permitted.

¹⁴⁹ It should be noted that according to Art 4 of the VCLT, if the ground for invalidating the treaty relates only to one or several particular clauses, then the ground may be invoked only with respect to those clauses.

¹⁵⁰ See *supra*, Section 1.2.1.

seem to exist at first sight between the legal obligations ensuing from the conferral of a *jus cogens* status on a norm and the ensuing effect of this conferral on the powers of lawmaking agents.

For purposes of easy reference, henceforth in this book, the no-competences, legal obligations and no-obligations that ensue from the conferral of a *jus cogens* status on a norm will be termed as ‘secondary *jus cogens* obligations and no-competences’. This terminology will help to distinguish them from, for example, the prohibition of torture or the right of self-determination, which will be termed as ‘primary *jus cogens* obligations’.

International lawyers have claimed the existence of a great number of secondary *jus cogens* obligations and no-competences. Examples include:

- (6) Because the prohibition of genocide is *jus cogens*, when a reservation is made to Article IX of the Genocide Convention, exempting the jurisdiction conferred on the International Court of Justice under this provision, then that reservation is null and void.¹⁵¹
- (7) Because a *jus cogens* status is conferred on the prohibition of widespread rape, domestic tribunals have standing to adjudicate such offences although they occurred in another country.¹⁵²
- (8) States have a duty to exercise jurisdiction over offences prohibited by peremptory norms of international law (*jus cogens*), where the offences are committed by the nationals of that State or on the territory under its jurisdiction.¹⁵³
- (9) Because a *jus cogens* status is conferred on the prohibition of torture, states must not absolve a perpetrator of torture through amnesty laws; neither must they refuse extradition of such a perpetrator under any political offence exemption.¹⁵⁴
- (10) Because a *jus cogens* status is conferred on the right of self-determination, when a state of affairs is established through the

¹⁵¹ This was one of the arguments invoked by the DRC in *Armed Activities on the Territory of the Congo* to establish the jurisdiction of the International Court. See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, para 56.

¹⁵² See e.g. Adams, pp 386–7.

¹⁵³ Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, UN Doc A/CN.4/714 and Corr 1, p 68.

¹⁵⁴ See e.g. *Prosecutor v Furundžija*, Judgment of 10 December 1998, paras 155–7.

breach of that right, third states have an obligation not to recognise that state of affairs as lawful.¹⁵⁵

- (11) Because aggression, war crimes and crimes against humanity are prohibited in *jus cogens* terms, if a head of state has committed such crimes, other states have a right to abduct that person for the purposes of prosecution; similarly, they have an *obligation* to assassinate said head of state.¹⁵⁶
- (12) The rule of state immunity does not prevent a state from allowing tort claims to be brought against another state when originating in breaches of *jus cogens* norms.¹⁵⁷
- (13) “The fact that an offence prohibited by a peremptory norm of general international law (*jus cogens*) was committed by a person holding an official position shall not constitute a ground excluding criminal responsibility.”¹⁵⁸
- (14) “Immunity of *ratione materiae* shall not apply to any offence prohibited by a peremptory norm of general international law (*jus cogens*).”¹⁵⁹
- (15) Since torture is prohibited by a *jus cogens* norm, “every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction”.¹⁶⁰
- (16) The principle of equality and non-discrimination has entered the realm of *jus cogens*, and consequently, “[s]tates are obliged not to introduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognize and ensure the effective equality before the law of each individual.”¹⁶¹
- (17) The prohibition against the enforced disappearance of people is *jus cogens*. As a result, violations of this rule “entail the activation of national and international measures, instruments and mechanisms to

¹⁵⁵ See e.g. Orakhelashvili, 2006, p 375 ff.

¹⁵⁶ See e.g. Beres, 1992, pp 351–8.

¹⁵⁷ See e.g. Weatherall, 2014/15, p 1155.

¹⁵⁸ Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, UN Doc A/CN.4/714 and Corr 1, p 68.

¹⁵⁹ Ibid.

¹⁶⁰ *Prosecutor v Furundžija*, Judgment of 10 December 1998, para 156.

¹⁶¹ *YATAMA v Nicaragua*, Preliminary objections, Merits, Reparations and Costs, Ser C No 127, Judgment of 23 June 2005, para 185.

ensure their effective prosecution and the sanction of the authors, so as to prevent them and avoid them remaining unpunished".¹⁶²

- (18) Statutes of limitation do not apply to any crimes which are prohibited by a *jus cogens* norm.¹⁶³

What this list of examples helps to reveal is the great divergence of opinion that exists among international lawyers commenting upon the legal consequences of *jus cogens*. While all lawyers would seem to agree with the general description of *jus cogens* as norms which cannot be derogated from, and which cannot be modified except by the creation of new norms of *jus cogens*, as the list goes to show, the precise legal obligations that they infer are markedly different. As Section 1.3.3 will suggest, this is for two reasons. Partly it is because international lawyers have different ideas of the proper definition of the concept of a conflict of norms. Partly it is because they have different ideas of the proper criteria to be used for separating *jus cogens* norms from norms of ordinary international law.

1.3.3 Why Discussants Disagree

As lawyers of all camps would seem to agree, if a norm (N) has the status of *jus cogens*, then the following legal consequences ensue: (i) no norm of ordinary international law will offer any valid excuse for not complying with N; (ii) no international lawmaker has competence to modify N by other means than the creation of a new norm of *jus cogens*; and (iii) if, nevertheless, international lawmakers take action to modify N, this action, if it does not amount to the creation of a new norm of *jus cogens*, will be devoid of legal effect.¹⁶⁴ This general description translates into the following three normative propositions:

- (1) Whenever a *jus cogens* norm gives a state or international organisation reason to do X, and a norm of ordinary international law gives this same entity reason to do the opposite (-X), it must act upon the former of the two norms.

¹⁶² *Goiburú et al v Paraguay*, Merits, Reparations and Costs, Ser C No 153, Judgment of 22 September 2006, para 128.

¹⁶³ See e.g. *Almonacid-Arellano v Chile*, Preliminary Objections, Merits, Reparations and Costs, Ser C No 154, Judgment of 26 September 2006, p 153.

¹⁶⁴ See Section 1.3.1.

- (2) Whatever international lawmaking agent is considered, this agent may not modify a *jus cogens* norm by other means than the creation of a new norm having the same character.
- (3) Whatever action is taken by states or international organisations to modify a *jus cogens* norm, they must not act upon the new norm created, unless it amounts to a new norm of *jus cogens*.

These propositions help to clarify the conditions for the performance of the secondary *jus cogens* obligations and no-competences.

An obvious condition for the performance of the secondary *jus cogens* obligations and no-competences is the existence of a normative conflict. The first of the three propositions envisages situations in which a *jus cogens* norm gives an agent reason to do X, and a norm of ordinary international law gives the same agent reason to do -X. As lawyers would put it, in such situations, the *jus cogens* norm and the norm of ordinary international law are in conflict. The second and third propositions refer to action taken to modify a *jus cogens* norm. 'Modification' in this case means the creation of a new norm of ordinary international law, which, if valid, would have served as a reason for legal decisionmakers to depart from an existing *jus cogens* norm, wholly or partly. This is to say that the second and third propositions, just like the first, envisage a conflict between a *jus cogens* norm and a norm of ordinary international law.

Section 1.3.2 listed 18 suggested examples of no-competences and secondary *jus cogens* obligations. These examples do not compare very well. More precisely, they would seem to fall into two distinct conceptual categories. Whereas the first five examples bear on the performance of primary *jus cogens* obligations, the others bear in various ways on the enforcement of such primary obligations. This observation brings to mind the *jus cogens* argument that was put forth by Italy in the *Jurisdictional Immunities of a State Case*,¹⁶⁵ and especially the way in which this argument was dealt with by the International Court of Justice.

On 23 December 2008, Germany submitted an application instituting proceedings in the International Court of Justice against Italy.¹⁶⁶ The application was provoked by a series of decisions taken by Italian courts involving Germany as a respondent in civil proceedings, and in some case also directly affecting German state-owned property. Among other things, Italy had allowed tort claims to be brought against Germany

¹⁶⁵ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012.

¹⁶⁶ As a basis for the jurisdiction of the Court, the applicant cited Art 1 of the European Convention on the Peaceful Settlement of Disputes, ETS No 23.

based on violations of international humanitarian law committed by German armed forces and other organs of the German Reich during its occupation of Italy in 1943–5. Violations involved the largescale killing of civilians as part of a policy of reprisals; deportation of members of the civilian population to slave labour in Germany; and the denial of prisoner of war status to members of the Italian armed forces, who were similarly used as forced labourers. Certainly, Germany had itself taken several steps to ensure the reparation of victims of Nazi persecution during the Second World War. However, it had excluded from the scope of its national compensation schemes most claims by Italian military internees on the ground that prisoners of war were not entitled to compensation for forced labour.¹⁶⁷

The Court began its consideration of the dispute by clarifying the issue before it. In its application, Germany had asked the Court to adjudge and declare that Italy, by allowing Italian citizens to bring tort claims against Germany in Italian courts, had failed to respect the jurisdictional immunity of that state under customary international law, and by so doing had engaged its international responsibility. Italy, for its part, had asked the Court to adjudge and to hold that the claims of Germany were unfounded.¹⁶⁸ Consequently, as the Court explained, it was not its task to decide whether the conduct of the German armed forces and other organs of the German Reich was unlawful or not. No doubt, several (if not all) of the Italian court proceedings about which Germany was complaining had their origin in acts that were contrary to international law. Even worse, in the terminology of Article 6 of the Charter of the International Military Tribunal convened at Nuremberg, they originated in the commission of *war crimes* and *crimes against humanity*. However, for the resolution of the dispute between Germany and Italy, in the final analysis, this legal classification was somewhat beside the point. The only question for the Court to decide was whether or not, in proceedings regarding claims of compensation arising out of the unlawful conduct of German state organs, Italy had a duty to ensure that Italian courts accorded Germany immunity.¹⁶⁹

As the Court emphasised, the rule of state immunity occupies a prominent place in customary international law.¹⁷⁰ Although both parties to the dispute agreed that states are generally entitled to immunity in

¹⁶⁷ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, paras 20–6.

¹⁶⁸ *Ibid*, paras 15–17.

¹⁶⁹ *Ibid*, paras 52–3.

¹⁷⁰ *Ibid*, para 57.

respect of *acta jure imperii*, they had different opinions as to the precise scope of application of this rule. While Germany insisted that the rule had no exceptions relevant to the consideration of the case at hand, Italy maintained that it had.¹⁷¹ Among other things, as Italy argued, Germany was not entitled to immunity because the acts it had committed involved violations of rules of international law having the character of *jus cogens*. In reflecting upon this argument, the Court noted that it assumed the existence of a conflict between the rule of state immunity and the rules of armed conflict having the character of *jus cogens*:

Since *jus cogens* rules always prevail over any inconsistent rule of international law, whether contained in a treaty or in customary international law, so the argument goes, and since the rule which accords one State immunity before the courts of another does not have the status of *jus cogens*, the rule of immunity must give way.¹⁷²

In the opinion of the Court, no such conflict existed:

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 the proceedings are brought was lawful or unlawful.¹⁷³

There can be little objection to this finding. The prohibitions of war crimes and crimes against humanity are oft cited examples of international norms having obtained a *jus cogens* status. However, they are not in the case at hand – or, for that matter, in any other possible case of their application – applicable relative to the same concrete conduct as the rule of state immunity, which is a first obvious condition for categorising the situation as a conflict of norm, however you define that concept. Italy had forestalled this pronouncement, however. In its Counter-Memorial, it had argued that in the determination of whether or not a conflict existed, focus should be less on the violations of humanitarian law committed by the German Reich in 1943–5, and more on the duty of Germany to redress those violations.¹⁷⁴ It had noted the provision laid down in Article

¹⁷¹ Ibid, para 61.

¹⁷² Ibid, para 92.

¹⁷³ Ibid, para 93.

¹⁷⁴ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Counter-Memorial of Italy, 22 December 2009, available through the webpage of the Court: www.icj-cij.org, paras 5.7–5.26.

51, 52, 131 and 148 of the four Geneva Conventions of 1949, respectively: “No Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by any other High Contracting Party in respect of breaches referred to in the preceding Article [that is, grave breaches of the Convention].”

As Italy maintained,¹⁷⁵ this provision reflected a rule of customary international law having the character of *jus cogens* – based as it was on the idea that states should not be allowed to trade off rights of those protected by the Conventions by entering into derogatory postwar agreements.¹⁷⁶ If the acts committed by the German Reich in 1943–5 involved violations of *jus cogens*, then the duty of Germany to make reparation for those violations must be *jus cogens*, too, as must the obligation of Italy not to release Germany from this duty. Consequently, in maintaining the existence of a conflict between the rule of state immunity and peremptory international law, Italy primarily thought not of the obligation of Germany to avoid acts constituting war crimes or crimes against humanity, but rather of the duty of Italy not to absolve Germany of any liability incurred in respect of such crimes. The International Court, once again, declared itself not convinced:

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. The law of State immunity concerns only the latter; a decision that a foreign State is immune no more conflicts with the duty to make reparation than it does with the rule prohibiting the original wrongful act. Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump-sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.¹⁷⁷

A great number of international lawyers and scholars have commented upon this case.¹⁷⁸ Many of them find the reasoning of the Court

¹⁷⁵ Ibid, para 5.18.

¹⁷⁶ See ICRC Commentaries to each respective article of the four 1949 Geneva Conventions, available through the webpage of the ICRC: www.icrc.org.

¹⁷⁷ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, para 94.

¹⁷⁸ See e.g. Bianchi, 2013, pp 1–19; Espósito, pp 161–74; Boudrault, pp 1003–12; Talmon, 2012, pp 979–1002; Orakhelashvili, 2013, pp 89–103;

unconvincing.¹⁷⁹ Like Italy, they prefer to conceive of the situation as one involving two norms, both of which concern the enforcement of international obligations. According to the one norm, Italy has an obligation not to exercise jurisdiction over any tort claims brought against Germany in Italian courts. According to the other norm, Italy has a duty not to absolve Germany of any liability incurred in respect of war crimes and crimes against humanity. The Court discarded Italy's argument, concluding that even though the situation is construed in this way, the two norms are not in conflict. This is so for the simple reason that allowing tort claims to be brought in Italian courts was not the only way for Italy to ensure that the war crimes committed by German armed troops during the Second World War are properly redressed. This conclusion presupposes a definition of the concept of a conflict between norms that pays regard only to whatever logical relationship that holds between them. As assumed, two norms are not in conflict if by complying with the obligation entailed by the one norm, an agent does not necessarily act in contravention of the obligation entailed by the other. What critics take for granted is that there are other ways to understand the concept of a normative conflict, and that their preferred definition is the one that fits better with the context of conflicts involving a *jus cogens* norm.

Italy's *jus cogens* argument, as well as the argument of the critics, not only presupposes that Italy has an obligation not to absolve Germany of any liability incurred in respect of war crimes and crimes against humanity. It also presupposes that this is a *jus cogens* obligation. The Court found reason to hold otherwise:

[a]gainst the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump-sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.¹⁸⁰

The interesting thing to note is the strict separation of the Court between, on the one hand, Germany's obligation to abstain from perpetrating war crimes and crimes against humanity, and on the other, the possible duty

Vidmar, pp 1–25; Costelloe, pp 267–73; Linderfalk, 2013(a), pp 591–614; Saul, pp 1–29; Weatherall, 2014/15, pp 1151–1212.

¹⁷⁹ See e.g. Espósito, pp 161–74; Orakhelashvili, 2013, pp 89–103.

¹⁸⁰ *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, para 94.

imposed on Italy not to absolve Germany of any liability incurred in respect of any such crimes. As the Court sees it, obviously, these obligations derive from separate international norms. Just because international law imposes on Germany a *jus cogens* duty to abstain from perpetrating war crimes and crimes against humanity, Italy does not have, for that same reason, a *jus cogens* duty not to absolve Germany of any liability incurred in respect of any such crimes. What the argument of the critics appears to assume is that the two obligations should be considered instead as elements of one single norm. This raises the general question of what particular criteria are to be used to separate international norms from one another. Phrased in the context of the particular case: What particular criteria are to be used to separate *jus cogens* norms from norms of ordinary international law?

This analysis of the *Jurisdictional Immunities of the State* case can be generalised. It would then seem to be relevant also for the assessment of the several suggested no-competences and secondary *jus cogens* obligations given in Section 1.3.2, numbered 6–18. Whether or not you are willing to accept that secondary *jus cogens* obligations bear on the enforcement of primary *jus cogens* obligations, your position will inevitably depend on two things. First, it will depend on the way in which you define the concept of a normative conflict. Second, it will depend on the particular criteria that you think should be used to separate *jus cogens* norms from norms of ordinary international law. To come to grips with the great divergence of opinion that exists among international lawyers about the legal consequences of *jus cogens*, international scholars need to engage more closely with these two issues.

1.4 WAYS AHEAD: THE NECESSITY OF A METAPERPECTIVE

Why will a fuller understanding of the jus cogens debate lead to a fuller understanding of the international jus cogens regime?

As revealed by the quick survey conducted in Sections 1.2 and 1.3, international legal discourse has not come very far towards establishing either the criteria used for the categorisation of norms as *jus cogens*, or the legal consequences ensuing from having so categorised a norm. Admittedly, the practice of international law has helped to clarify the significance of Article 53 of the 1969 Vienna Convention. Lawyers now take for granted that it reflects the existence in international law of a general rule, which serves to define the concept of *jus cogens* and its

legal consequences for purposes of the Vienna Convention as well as beyond. This concurrence of opinion exists only on the most superficial of levels. As the survey revealed, when you start looking for an adequate answer to the many concrete questions that are bound to be raised in the course of the application of the general rule, very little agreement remains. This is so even with respect to fundamental questions, such as: How do you identify a *jus cogens* norm? Who is bound by the categorisation of a norm as *jus cogens*? Can a *jus cogens* norm be modified? What obligations ensue from the categorisation of a norm as *jus cogens*?

International legal scholars are left to speculate about the precise reason or reasons for this state of affairs. It does not appear that an insufficient number of international lawyers have devoted an insufficient amount of time to the topic, or that the topic simply requires a greater analytical effort on the part of everyone. As this book rather suggests, rational discussion has been 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 consideration of the international *jus cogens* regime. Such assumptions, in the case of almost every particular issue of *jus cogens*, eventually turn on discussants' respective definitions of the very concept of international law.

Take, for example, the judgment of the International Court of Justice in the *Jurisdictional Immunities of the State Case*. As noted, the judgment led to 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.¹⁸¹ The Court decided that Italy's obligation not to exercise jurisdiction over any tort claims brought against Germany in Italian courts was not in conflict with Italy's obligation not to absolve Germany of any liability incurred in respect of war crimes and crimes against humanity.¹⁸² Depending on whether you think that the Court decided correctly or not, your opinion will assume different ideas about the function of the international *jus cogens* regime. If you approve of the decision, your position will assume that the *jus cogens* regime establishes a hierarchical order among rules. It will assume that norms are the sole elements of the international legal system, and that, therefore, the relationship between norms cannot be anything other than the way in which they relate to each other according

¹⁸¹ See *supra*, Section 1.3.3.

¹⁸² *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment of 3 February 2012, paras 93–5.

to deontic logic. If you think that the Court decided incorrectly, your position will assume that the *jus cogens* regime establishes a hierarchical relationship among values. It will assume that norms exist to facilitate the realisation of one or several assumed legal ideals, and that consequently, when lawyers consider the relationship between norms, the one conclusive question is whether and to what extent they serve as instruments for this purpose.

For another clearcut example, take the suggestion that there can be such a thing as *jus cogens* norms created by the conclusion of an international agreement or derived from a regional, bilateral or anything less than a generally applicable custom.¹⁸³ If you find this suggestion convincing, your assessment presupposes a conception of international law that emphasises the will of states. According to this conception, the function of international norms, regardless of the source, is to help realise the will of states and put it into practice – this applies whether norms are *jus cogens* or not. More specifically, the function of the *jus cogens* regime is to execute a hierarchical relationship between norms *relative to those states that have accepted it*. If, on the other hand, you find this same suggestion unconvincing, your assessment presupposes that, by mere definition, *jus cogens* norms are applicable to all states of the world, whether they have consented to be bound by these norms or not. The function of the *jus cogens* regime is not to execute the will of states but to constrain it.

Lacking a clear perception of this relationship between *jus cogens* arguments and different definitions of the very concepts of international law, participants in international legal discourse will be unable to communicate at anything other than a very superficial level. Moreover, they will be unable to form an internally coherent position, at all moments and at all points of the debate running the risk of arguing irreconcilable propositions. Naturally, in such a situation, it is not realistic to expect that the *jus cogens* discourse overall will be anything other than incoherent and unproductive. This observation suggests the necessity of an entirely new approach to the topic.

This book is motivated by a belief in the power potential of legal discourse. It fully endorses the idea that by sharing legal propositions in verbal form, international lawyers are able to obtain knowledge about international law that they would be unable to obtain without this common communicative enterprise – this is so even with an issue such as the application of the concept of *jus cogens* in international law.

¹⁸³ See e.g. Kolb, 1998, pp 98–102; Pellet, p 89; De Schutter, p 65.

Accepting realities, however, the book comes to the conclusion that because of the route that international legal discourse has taken in this particular case, it needs restructuring. It is, in a way, like ordering your office. Say that you have decided to place items on your bookshelves in alphabetical order. Up to a certain point that may serve the purpose of always helping you to find what you are looking for. However, as the number of items in your collection increases – whether because of its size, or because of the disparate nature of the material of which it consists – eventually this same purpose may suggest that you order items differently: chronologically, according to type or according to colour, depending on your memory. As this book suggests, *jus cogens* discourse is in need of something of the same kind. Continuing current exchanges of propositions about the identifying criteria and legal consequences tied to the *jus cogens* concept will not help to clarify until conditions for communication have been significantly improved. The way to achieve this improvement is to clarify some basic assumptions that discussants bring to bear on their respective analyses and consideration of the international *jus cogens* regime – more specifically, the assumed definitions of discussants of the concept of international law.

When considering the way lawyers perceive the concept of international law, most of them can be said to belong to either one of two schools of thought, both of which will be carefully delineated in Chapter 2. These schools of thought will be referred to throughout as ‘legal positivism’ and ‘legal idealism’, respectively. It is the objective of the book to clarify the relevance of legal positivism and legal idealism for international *jus cogens* discourse with a view to explaining the divide between different international lawyers’ respective conceptions of *jus cogens*.

The method that will be used to obtain this clarification is rational reconstruction.¹⁸⁴ In practical terms, what the book aims to do is theoretically systemise and make explicit some of the inescapable logical conditions for making certain *jus cogens* arguments. As assumed, by logical necessity, every *jus cogens* argument entails an idea of the proper definition of the concept of international law. In the reverse, whatever a lawyer’s definition of the concept of international law, he or she is committed to the several propositions that can be logically inferred from that definition. It needs to be emphasised that in no way does this book claim to provide a description of the actual universes of thought or

¹⁸⁴ On the concept of rational reconstruction, see e.g. Bankowski and others, p 18 ff.

mindsets of any single international lawyers. In reality, individual lawyers rarely lend themselves to easy found categorisations such as legal positivists or legal idealists. This is so because, when lawyers engage in legal discourse, they typically give only fragments of a logically complete argument, and they frequently express or imply propositions that are logically inconsistent. It could be said that what this book aims to come to grips with is really the respective viewpoint of legal positivism and legal idealism as such.

Let it be clear also that in trying to clarify the relevance of legal positivism and legal idealism for international *jus cogens* discourse, naturally, this book does not presuppose itself a commitment to any one of these schools of thought. Hence, it does not intend to express either criticism or approval of any particular definition of the concept of international law. What the book purports to do is give a description of the current *jus cogens* discourse in a way that remains neutral to all such definitions. The project underlying this book builds on the assumption that, irrespective of what some scholars would like you to believe,¹⁸⁵ such descriptions are indeed fully possible.

The organisation of the book will be based on experience of *jus cogens* discourse as international lawyers now know it, from its formation in the late 1950s up to the present. As transpired from the brief survey conducted in Sections 1.2 and 1.3, much of what is currently expressed about *jus cogens* raises one or several fundamental questions. In the final analysis, the fundamental questions boil down to the following six, each of which will be the subject of a separate chapter of this book:

- (1) What is the source of *jus cogens* obligations and no-competences? (Chapter 3)
- (2) What is the role of state consent in the creation and modification of *jus cogens* norms? (Chapter 4)
- (3) How are single *jus cogens* norms to be identified? (Chapter 5)
- (4) Does the definition of *jus cogens* help to delimit the category of *jus cogens* norms? (Chapter 6)
- (5) In the context of secondary *jus cogens* obligations and no-competences, what is the proper definition of the concept of a normative conflict? (Chapter 7)

¹⁸⁵ See e.g. Fish.

- (6) In the context of secondary *jus cogens* obligations and non-competences, what particular criterion or criteria should be used to separate *jus cogens* norms from norms of ordinary international law? (Chapter 8)