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Chapter 1

Jus Cogens and the Humanization and Fragmentation of International Law

Maarten den Heijer and Harmen van der Wilt

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

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

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

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1.1 Introduction

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

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

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

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

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

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

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

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

³ Meron 2006.

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

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

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

1.2 The *Jus Cogens* Debate

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

⁴ For an overview, see Shelton 2006.

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

⁶ Linderfalk 2016.

⁷ d'Aspremont 2016.

seeks to circumvent the issue of consent by pointing out that Article 53 of the Vienna Convention⁸ at least offers proof of states' recognition of the concept, neither solution is, indeed, likely to allay the positivist's qualms.⁹

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

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

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

⁹ For the first mentioned suggestion, see Hameed 2014.

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

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

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

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

¹⁴ Kadelbach 2016; Shelton 2016, at 42.

¹⁵ Santalla Vargas 2016.

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

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

1.3 *Jus Cogens* and Human Rights

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

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

¹⁷ Kleinlein 2016.

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

¹⁹ Shaw 2008, at 258.

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

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

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

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

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

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

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

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

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

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

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

²⁵ For a seminal analysis, see Fortin 2015.

²⁶ Costello and Foster 2016.

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

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

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

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

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

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

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

²⁹ Shelton 2016.

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

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

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

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

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

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

³¹ Pinker 2011, at 310.

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

³³ Mueller 2004, at 1.

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

There are two avenues to sustain accountability under international law in respect of such international crimes that would qualify as violations of *jus cogens*. First, the perpetrators of these crimes may incur criminal responsibility and stand trial before the International Criminal Court (ICC) in The Hague. However, that is contingent on the Court having jurisdiction and being able to obtain custody over the suspects. Secondly, the acts of rebels or organized crime engaging in very serious offences might be imputed to the state. International law leaves very little room for direct attribution of acts of individuals to the state, unless they are organs of that state. Article 10 of the International Law Commission's (ILC) Articles on State Responsibility³⁵ covers the situation of an insurrectional movement that succeeds in becoming the new government or establishing a new state. The conduct of such a movement shall be considered an act of that state. However, this provision offers no relief in case of protracted and indecisive struggle and in case of defeat of the rebels. Crawford, in his commentary on the ILC Articles, quotes Commissioner Nielsen in the *Solis* case as authority for the

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

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

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

³⁶ Crawford 2002, at 116.

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

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

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

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

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

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

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

⁴⁰ See also Snyder 2015, Chapter 4.

1.4 *Jus Cogens* and the Quest for Hierarchy

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

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

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

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

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

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

⁴³ Weil 1983, at 441.

⁴⁴ Reisman 1990; Schrijver 1999.

⁴⁵ Fragmentation of international law.

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

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

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

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

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

⁴⁷ E.g. Mitchell 2005.

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

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

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

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

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

⁵⁰ Kotzé 2016.

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

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

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

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

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

⁵⁴ Article 21 ICC Statute.

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

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

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

⁵⁸ Alvarez-Rio and Contreras-Garduno 2013.

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

1.5 Conclusion

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

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

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

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

⁶¹ *Ibid.*, Annex, at 274 ff.

⁶² *Ibid.*, n.60.

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

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