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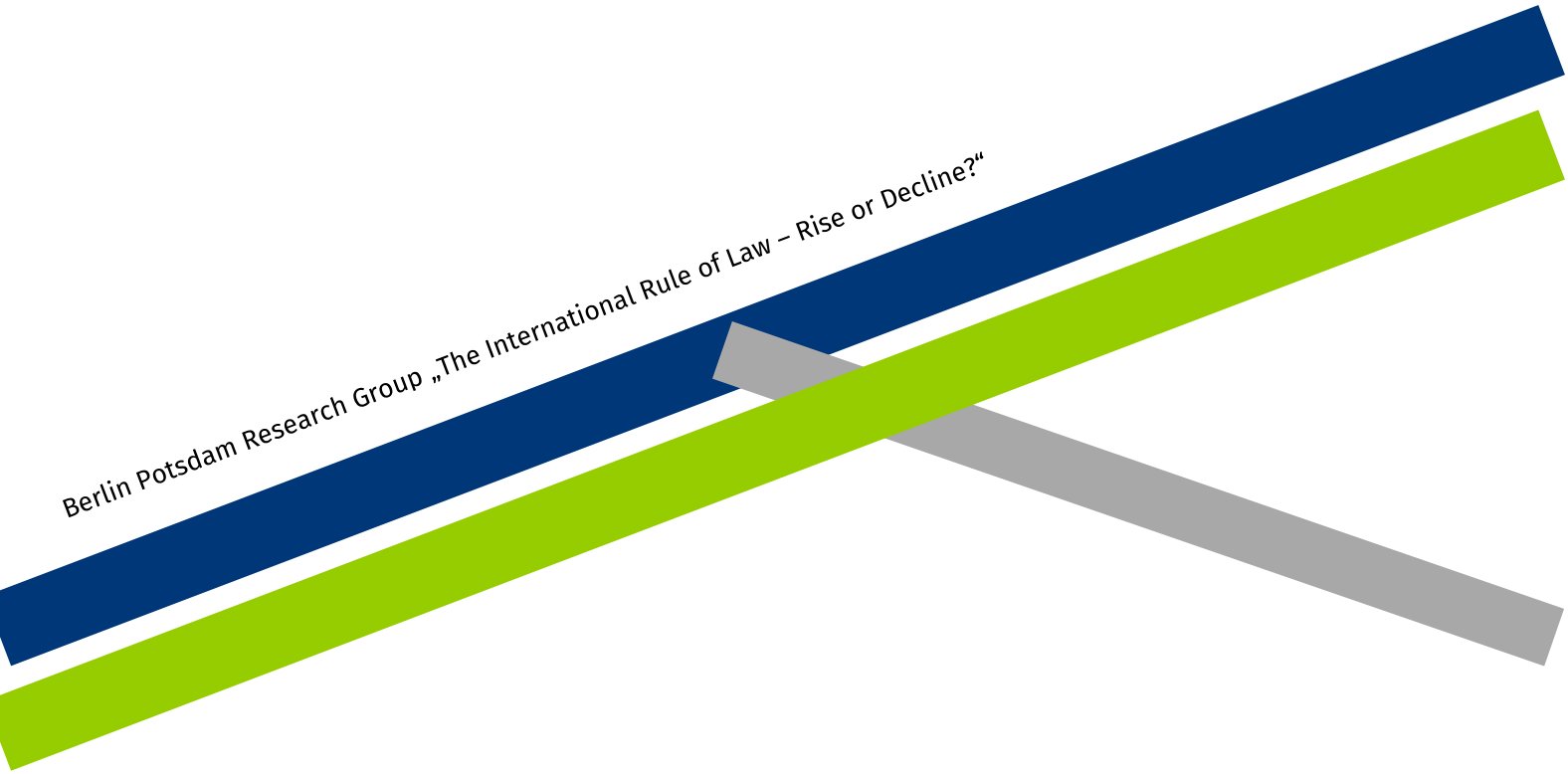

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International Law – Rise or Decline?

Unter den Linden 9
10099 Berlin, Germany

info@kfg-intlaw.de
+49 (0)30 2093-3322
www.kfg-intlaw.de

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Entrenching international values through positive law: The (limited) effect of peremptory norms

Erika de Wet[1]

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Abstract:

Underpinning a legal system with certain values and helping to resolve norm conflicts is in domestic legal systems usually achieved through hierarchical superiority of certain norms of a constitutional nature. The present paper examines the question whether jus cogens can discharge this function within the traditionally horizontal and decentralized international legal order. In so doing, it commences with an overview of the historical origins of peremptory norms in legal scholarship, followed by its endorsement by positive law and courts and tribunals. This analysis illustrates that there are lingering uncertainties pertaining to the process of identification of peremptory norms. Even so, the concept has been invoked in State executive practice (although infrequently) and has been endorsed by various courts. However, such invocation thus far has had a limited impact from a legal perspective. It was mainly confined to a strengthened moral appeal and did in particular not facilitate the resolution of norm conflicts. The contribution further suggests that this limited impact results from the fact that the content of peremptory obligations is either very narrow or very vague. This, in turn, implies a lack of consensus amongst States regarding the content (scope) of jus cogens, including the values underlying these norms. As a result, it is questionable whether the construct of jus cogens is able to provide meaningful legal protection against the erosion of legal norms. It is too rudimentary in character to entrench and stabilize core human rights values as the moral foundation of the international legal order.

[1] BIur, LLB, LLD (University of the Free State, South Africa); LLM (Harvard); *Habilitationsschrift* (Zurich); SARChI Professor of International Constitutional Law, University of Pretoria, South Africa; Honorary Professor, University of Bonn, Germany.

Contents:

1. Introduction

In domestic legal systems, some norms are of a constitutional nature and, thereby, hierarchically superior to ordinary norms.[2] This system of norm hierarchy, in accordance with which the higher norm will override the ordinary one in case of conflict, is underpinned by the value system of a certain constitutional polity.[3] International law, on the other hand, has traditionally been regarded as a horizontal system of legal norms.[4] It resembles a patchwork of treaty regimes and customary obligations that were adopted by multiple sovereign States.[5] These different normative regimes and the respective values embodied by them operate on an equal footing, in the sense that that there is no formal hierarchy between them. As a consequence, it is difficult to resolve norm conflicts in international law on the basis of a normative hierarchy, that is, on the basis that the values underpinning a particular norm are of overriding importance.[6] Different treaty regimes, therefore, can be a reflection of competing values in a decentralized, pluralist international order in the absence of shared values that can guide judicial decision-making in case of a normative conflict.

Subsequent to the creation of the United Nations (UN) and against the backdrop of an increasingly organized international legal order, various 'collective interest treaties' emerged that were premised on the existence of shared values across State parties. These treaties may be distinguished from multilateral treaties that contain 'bundles of bilateral' obligations,[7] that is, obligations of which the performance involves two individual States, even though the treaty framework in question establishes obligations applicable to all State parties.[8] Instead, collective interest treaties regulate interests in the protection of which all State parties at all times have a legal interest. A typical example would be human rights treaties, such as the UN Covenant on Civil and Political Rights of 1966 (ICCPR),[9] as well as the UN Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR).[10] Furthermore, where the obligations stemming from such a collective interest treaty have been recognized as customary international law, these obligations arguably would have an *erga omnes* effect, i.e. all States would have a legal interest in their protection.[11] The

[2] See Hans Kelsen, General Theory of Law and State (Russell and Russell 1961) 115, arguing that national law is not a system of 'co-ordinated norms', operating side-by-side on the same level, 'but a hierarchy of different level of norms'.

[3] See Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 American Journal of International Law 291.

[4] See Erika de Wet and Jure Vidmar, 'Conflicts Between International Paradigms: Hierarchy Versus Systemic Integration' (2013) 2 Global Constitutionalism 197.

[5] Maarten den Heijer and Harmen van der Wilt, 'Jus Cogens and the Humanization and Fragmentation of International Law' (2015) 46 Netherlands Yearbook of International Law 15.

[6] Ibid.

[7] An example in point would be art 22 of the Vienna Convention on Diplomatic Relations of 1961 (adopted 18 April 1961, 500 United Nations Treaty Series 95), where the obligation to protect the premises of a diplomatic mission is owed by the individual receiving State to the individual sending State. See James Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries (Cambridge University Press 2002) 258.

[8] Crawford (n 6) 257-8.

[9] International Covenant on Civil and Political Rights (adopted 16 December 1966), 999 United Nations Treaty Series 171.

[10] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966), 993 United Nations Treaty Series 3.

[11] Pierre-Marie Dupuy 'L'unité de l'ordre juridique international', Collected Courses of the Hague Academy of International Law (2002) 297, 382, 384; Crawford (n 6) 277-8. However, see ILC, Third Report on Peremptory

notion of obligations *erga omnes* has been endorsed by the International Court of Justice (ICJ) in the *Barcelona Traction* decision of 1970.[12] References to obligations towards the 'international community (of States) as a whole' have since also found their way into various treaties,[13] as well as the work of the UN International Law Commission (ILC).[14]

However, for the most part the recognition of the collective interest nature of certain norms did not result in their acquiring a hierarchically superior status *vis-à-vis* other norms. Instead, it facilitated modest opportunities for the invocation of State responsibility by third States in instances where such norms were violated.[15] Stated differently, the fact that a particular treaty or customary obligation is underpinned by values that are shared across States (or State parties) does not in and of itself imply that it would override any other conflicting international obligation binding on any of the parties. Some scholars have attempted to link the rise of international human rights protection through international and regional treaties to a process of constitutionalization. In line with this reasoning, obligations stemming from human rights would be concretizations of pre-existing constitutional rights and, therefore, would have a superior standing *vis-à-vis* other international obligations.[16] However, only a small number of norms have over time acquired hierarchical features. These notably include peremptory norms of international law (jus cogens), which consist of a small number of obligations representing the fundamental values

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Norms of General International Law (jus cogens) by Dire Tladi, Special Rapporteur, UNGA Doc A/CN.4/714, 12 February 2018, para 4. Tladi is sceptical as to whether there can be any other erga omnes obligations than jus cogens. This point is taken up again below in section 3.

[12] Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Judgment) [1970] ICJ Rep, 3, 32. Subsequently the ICJ has reaffirmed the notion on several occasions, among others in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion [2004] ICJ Rep 136, paras 15 ff; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion [2010] ICJ Rep 403, paras 89 ff; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, para 103.

[13] See the Preamble of the Rome Statute of the International Criminal Court (adopted 17 July 1998), 2187 United Nations Treaty Series 90. It refers to 'the most serious crimes of concern to the international community as a whole'. See also arts 136 and 137 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982) 1833 United Nations Treaty Series 397. It determines that the seabed and ocean floor that stretch beyond the limits of the national jurisdiction constitute the 'common heritage of mankind'. Rüdiger Wolfrum, 'Enforcing Community Interests through International Dispute Settlement: Reality or Utopia?' in Ulrich Fastenrath et al (eds), *From Bilateral to Community Interest. Essays in Honour of Judge Bruno Simma* (OUP 2011) 1136.

[14] See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts of November 2001, Supplement No 10/(A/56/10) ch IV.E.1. Arts 42 and 48 drew a distinction between breaches of bilateral obligations and obligations of a collective (community) interest nature, which include obligations towards the international community as a whole. See also Tladi (Third Report) (n 10) paras 103ff.

[15] The purpose of the recognition of obligations *erga omnes (partes)* is to facilitate the invocation of State responsibility and not to establish a hierarchy of norms. See James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in Ulrich Fastenrath *et al* (n 12) 230. However, see Tladi (Third Report) (n 10) para 108, who is of the opinion that obligations *erga omnes* and *jus cogens* flow from one another. For an analysis of the different avenues for invoking State responsibility of *erga omnes (partes)* obligations in a decentralized legal order, see Erika de Wet, 'Invoking Obligations *Erga Omnes* in the Twenty-First Century: Progressive Developments since Barcelona Traction' (2013) 37 South African Yearbook of International Law 1ff.

[16] See the analysis by Stephen Baumgard, 'Human Rights as International Constitutional Rights' (2008) 19 European Journal of International Law 757-8; see extensively also Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006). See also the dissenting opinion of Judge Tanaka in the *South-West Africa case (Ethiopia v South Africa; Liberia v South Africa)* (Judgment, Second Phase) [1966] ICJ Rep 6, 298.

underpinning the international legal order.[17] The ILC has described peremptory norms as necessary for preventing conduct that threatens the survival of 'States, their peoples and the most basic human values'.[18]

The subsequent analysis will give an overview of the benchmarks of *jus cogens*. In so doing, it commences with an overview of the historical origins of peremptory norms in legal scholarship, followed by its endorsement by positive law and courts and tribunals. This analysis will illustrate that there are lingering uncertainties pertaining to the process of identification of peremptory norms. Even so, the concept has been invoked in the practice of State executives (although infrequently) and has been endorsed by various courts. However, such invocation thus far has had a limited impact from a legal perspective, including in the context of norm conflict resolution. This contribution further suggests that this limited impact results from the fact that the content of peremptory obligations is either very narrow or very vague. This, in turn, implies a lack of consensus amongst States regarding the content (scope) of *jus cogens*, including the values underlying these norms. As a result, it is questionable whether the construct of *jus cogens* is able to provide meaningful legal protection against the erosion of legal norms. It is too rudimentary in character to entrench and stabilize core human rights values as the moral foundation of the international legal order.[19]

2. A contested creature of scholarship

While jus cogens only found its way into positive law via the Vienna Convention on the Law of Treaties (Vienna Convention) in 1969,[20] the concept has been present in legal writings since Roman times.[21] It has predominantly been developed through scholarship in an attempt to limit the freedom of contract of States in order to protect fundamental international values.[22] It is also at the level of scholarship that most of the open contestation pertaining to the nature and scope of jus cogens, as well as the process for its identification has taken place and is continuing to do so. Already at an early stage, scholars explored the possibility of curbing the power of States both nationally and internationally through norms that could bind a State regardless of whether the State in question expressed its consent thereto.[23] For example, classic authors tended to distinguish between consensual law (jus dispositivum) and mandatory norms (jus natural nessarium) that bind a State independently of its will.[24] By the nineteenth century, the idea that

[17] See Pierre-Marie Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi' (2005) 16 European Journal of International Law 133. See also ILC, Statement of the Chairman of the Drafting Committee (Peremptory Norms of General International Law (Jus Cogens)), 26 July 2017, Draft Conclusion 2[3](2).

[18] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 2001, UN Doc A/Res/56/83, 12 December 2001, Commentary on art 40, para 3.

[19] Den Heijer & Van der Wilt (n 4) 14-15; Jean d'Aspremont, 'Jus Cogens as a Social Construct Without Pedigree' (2015) 46 Netherlands Yearbook of International Law 92. [

[20] Vienna Convention on the Law of Treaties (adopted 23 May 1969), 1155 United Nations Treaty Series 331. See also Dinah Shelton, 'Sherlock Holmes and the Mystery of Jus Cogens' (2015) 46 Netherlands Yearbook of International Law 24, 26.

[21] D'Aspremont (n 18) 90. See also Stefan Kadelbach, 'Genesis, Function and Identification of Jus Cogens Norms' (2015) 46 Netherlands Yearbook of International Law 150, who notes that the term itself stems from nineteenth century Pandectism.

[22] Shelton (n 19) 24.

[23] Shelton (n 19) 25.

[24] See Alberico Gentili, De Iure Belli Libri Tres (1646); Hugo Grotius, De Jure Belli ac Pacis Libri Tres (1625); Chistian Wolff, Jus Gentium Method Scientifica Petratctorum (1764); Emer de Vattel, Le Droit de Gens au

certain agreements by States would be contra bonos mores gained ground within scholarship, as international law evolved into a distinct legal sub-discipline at universities.[25] This coincided with the first attempts at the humanization of international law (namely, codifying obligations closely linked to human dignity), as exemplified by the abolition of slavery and the development of the law of armed conflict.[26]

In the twentieth century, the claim that jus cogens protected values that were indispensable to the international community of States at any given time persisted against the backdrop of two world wars and the increased organization of international society.[27] Influenced also by the work of Alfred Verdross, the concept gained moral ground after World War II.[28] As of the 1950s, references to jus cogens became a constant feature in textbooks on international law.[29] Moreover, it made its way into the work of the ILC on the law of treaties that subsequently culminated in the Vienna Convention.[30] References to the need for limiting the contractual freedom of States were already present in the work of the first ILC Rapporteur on the Law of Treaties.[31] The report of the ILC that was ultimately submitted to the Vienna Conference stated that it was increasingly difficult to argue that there is no rule of international law from which States cannot contract out.[32]

In 1969, this reasoning was endorsed at the Vienna Conference through article 53 of the Vienna Convention, with the support of the (then) socialist and newly-independent States and despite the reluctance of some Western States (notably France).[33] Article 53 determined:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general

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Principes de la Loi Naturelle (1758). See also ILC, Report of the Study Group of the International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.682, 13 April 2006 181. The study group pointed to the Roman law distinction between jus cogens or jus strictum and jus dispositivum and the maxim jus publicum privatorum pactis mutari non potest. See also Shelton (n 19) 26-7.

[25] Kadelbach (n 20) 150.

[26] Ibid.

[27] Den Heijjer & Van der Wilt (n 4) 19; D'Aspremont (n 18) 90; Shelton (n 19) 28-9. As far as earlier authors are concerned, see William Hall, *A Treatise on International Law* (8th edn, Clarendon Press 1924) 382-3; Lassa Oppenheim, *International Law* (Longmans 1905) 528.

[28] See Alfred Verdross, 'Forbidden Treaties in International Law' (1947) 31 American Journal of International Law 571ff. See also Alfred Verdross, '*Jus Dispositivum* and *Jus Cogens* in International Law' (1966) 60 American Journal of International Law 55ff.

[29] See eg Arnold McNair, Law of Treaties (Clarendon Press 1961) 213-4. In this classic work on the law of treaties, McNair found it difficult to imagine any society, whether of individuals or States, whose laws set no limit to freedom of contract. See also Kadelbach (n 20) 150; Shelton (n 19) 2.

[30] D'Aspremont (n 18) 90; Giorgio Gaja, 'The Protection of General Interests in the International Community' (2012) 364 Collected Courses of The Hague Academy of International Law 47.

[31] Report of James Brierly, Special Rapporteur, UN Doc A/CN.4/23, 14 April 1950 (1950) II Yearbook of the International Law Commission 246; Report by Mr Hersch Lauterpacht, Special Rapporteur, UN Doc A/CN.4/63, 24 March 1953, paras 4-5. See also Shelton (n 19) 31.

[32] ILC, Report of the International Law Commission on the Work of its Eighteenth Session, 4 May-9 July 1966 (1966) II Yearbook of the International Law Commission 247. Shelton (n 19) 33.

[33] Eric Suy, 'Article 53: Treaties Conflicting with a Peremptory Norm of General International Law (*jus cogens*)' in Oliver Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (Vol II, Oxford University Press 2011) 1224–33, 1225. See also Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International System?' in Erika De Wet and Jure Vidmar, *Hierarchy in International Law. The Place of Human Rights* (Oxford University Press 2012), 13-41, 26. See Dupuy (n 16) 134.

international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[34]

In addition, article 64 of the Vienna Convention declared that '[if] a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.[35] More than three decades later, the ILC reaffirmed the existence of *jus cogens* in its Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ASR) by acknowledging a category of serious breaches of obligations 'arising under a peremptory norm of general international law'.[36] Since 2016, the ILC once again is engaged in a project on 'peremptory norms of general international law'. In his second report, the Special Rapporteur endorsed article 53 of the Vienna Convention as the point of departure for the identification of *jus cogens* norms.[37]

A striking feature of article 53 of the Vienna Convention is that it neither identifies any norms having peremptory status, nor clarifies the procedure whereby these norms were to be identified. The only reference to method was that the 'international community as a whole' had to identify those international law norms belonging to the category of peremptory norms.[38] The ILC Commentary to the ASR, however, did list a non-exhaustive list of obligations which, in the view of the ILC, constituted *jus cogens*. These included (a) the prohibition of aggressive use of force; (b) the prohibition of genocide; (c) the prohibition of torture; (d) the basic rules of the law of armed conflict; (e) the prohibition of slavery and the slave trade; (f) the right to self-determination; and (g) the prohibition of racial discrimination and apartheid.[39] While the ILC motivated this choice with reference to municipal and international judicial decisions and authors, it elaborated on neither its own methodology for identification, nor on the methodology of the sources it quoted.[40]

Scholars for their part have attempted to explain the method of identification as well as the origins of jus cogens with reference to private law, general principles of law, legal philosophy and religion. For example, some scholars linked peremptory norms to public policy without which the preservation of the international community as such would not be possible.[41] Another line of reasoning described jus cogens as resulting from the logic of law that required compliance with essential rules on which the system of law itself was based.[42] Others claim that peremptory obligations are not grounded in the law itself, but in metaphysical principles of justification.[43] As a manifestation of the fundamental values of the international community, peremptory norms would

[34] Vienna Convention (n 19) art 53.

[35] Vienna Convention (n 19) art 64.

[36] ILC Commentary to art 40 ASR (n 17) para 1.

[37] ILC, Second Report on jus cogens by Dire Tladi, Special Rapporteur, UN Doc A/CN.4/706 (16 March 2017) para 33; Tladi (Third Report) (n 10) para 4.

[38] Shelton (n 19) 33.

[39] See Fragmentation report (n 23) para 374; Commentary on art 40 ASR (n 17) paras 4-6.

[40] See ILC (n 17) paras 4-5.

[41] See 'Third report of the Law of Treaties by Mr GG Fitzmaurice, Special Rapporteur' A/CN.4/115, 18 March 1958 (1958) II Yearbook of the International Law 41. He claimed that jus cogens norms involved not only legal rules, but considerations of morals and of international good order. See also Shelton (n 19) 30.

[42] Shelton (n 19) 30.

[43] Glider Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83 British Yearbook of International Law 38-9.

exist independently from the will of States.[44] However, these scholarly explanations are all vulnerable to arbitrary conclusions as to what constitutes the 'essential' rules and the values of the international community underpinning them.[45] They all allow for the subjective preferences of the scholars, practitioners and judges to be elevated to 'higher law'.[46]

This (perceived) arbitrariness in the process of identification of jus cogens has provoked severe criticism. Critics of the legal construct of jus cogens fear that it facilitates the abuse of power by stronger States in the interests of a hegemonic endeavour.[47] In accordance with this reasoning, the dominant political powers of the time could deploy the notion of normative hierarchy in a manner that privileges themselves and imposes their ideological prejudices, undermining the pluralist values inherent to an international community consisting of multiple, diverse States.[48] This concern finds some support in the fact that most of the norms generally cited by authors as having a peremptory character have their roots in the Western liberal human rights tradition.

Another challenge common to most jus cogens theories is the difficulty in reconciling the existence of fundamental pre-existing norms with the notion of consent which has underpinned the international legal order since the nineteenth century.[49] In particular, it is not clear how in such a consent-based system, peremptory norms can bind those who object to the very idea of hierarchically superior norms, or to the idea that such norms can be identified and imposed by a large majority of States on 'persistent objectors'.[50] Modern international lawyers have attempted to explain this conundrum by emphasizing the role of State consent in the customary process by means of which peremptory norms come about.[51] In line with this reasoning, peremptory norms constitute a specific category of customary international law.[52] In order to acquire peremptory status, a norm first has to be recognized as customary international law, whereafter the international community of States as a whole further has to agree that it is a norm from which no derogation is permitted. Peremptory norms, therefore, would be subject to a process of 'double

[44] Fragmentation Report (n 23) 361.

[45] Gaja (n 29) 53-4; Kadelbach (n 20) 149; ILC, First Report on *Jus Cogens* by Dire Tladi, Special Rapporteur, 8 March 2016, A/CN.4/693, para 52.

[46] Shelton (n 19) 24; Gaja (n 29) 54. However, see Antonio Cançado Trindade, 'Jus Cogens: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case Law' in XXXV Curso de Derecho Internacional Organizado por el Comité Juridico Interamericano - 2008 (Secretaria general de la OEA, 2011), who supports the role of judges in identifying and developing jus cogens.

[47] D'Aspremont (n 18) 93. Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 European Journal of International Law 123; Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 American Journal of International Law 413.

[48] D'Aspremont (n 18) 93; Den Heijer and Van der Wilt (n 4) 15.

[49] Shelton (n 19) 32, 34.

[50] Shelton (n 19) 34.

[51] See Michael Byers, 'Conceptualizing the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nordic Journal of International Law 228.

[52] ILC Drafting Committee, Draft Conclusions (n 16) 4, 5. While Draft Conclusion 5(1) notes that customary international law is the most common basis for peremptory norms, Draft Conclusion 5(2) states that '[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)'. See also Tladi (Third Report) (n 10) para 15. Tladi conceded that within the sixth committee of the UNGA, the issue of sources generated much debate. While most States supported the notion that customary international law formed the basis of peremptory norms, several States did question the role of other sources. See also Byers (n 50) 225-6, 228. He points out that as national laws often also reflect concretizations of customary international law, general principles of law and custom would often overlap.

acceptance' by the international community of States as a whole.[53] Having consented to this process, States by implication consented to the consequence that a large majority of States can bind a dissenter to a peremptory obligation.[54] On the whole, however, the role of State consent in the formation of peremptory norms as well as the process of identification remain a bone of contention amongst scholars.[55]

3. *Jus cogens* in the practice of State executives and (international) courts

Despite the controversies pertaining to the nature, origins and identification of jus cogens, the construct has on occasion been invoked in the executive practice of States, although this does not often occur. International and domestic courts for their part have been more eager to invoke jus cogens, especially since the turn of the twentieth/twenty-first century. However, the invocation of the legal construct of jus cogens in these contexts did little to clarify the methods for identification of peremptory norms, as none of the States or judicial bodies in question explained their methodology for identifying jus cogens. At most, they appealed to the importance of the obligation in question, citing other case law and/or authors whose methodology in this regard was equally unclear.[56] In addition, the recognition of the peremptory status of the norm in question had no direct bearing on the legal outcome of the case, as is illustrated below.

As far as the invocation of jus cogens in executive practice is concerned, it occurred in relation to the potential invalidity of certain treaties.[57] It was thus invoked in the context in which jus cogens was initially developed, namely, the outlawing of immoral contracts. For example, in 1964 during a debate in the UN Security Council, Cyprus claimed that article IV of the Treaty of Guarantee of 1960, as interpreted by Turkey, violated jus cogens by allowing Turkey the right to unilateral military intervention.[58] Similarly, some Arab States argued that the Camp David Accords of September 1978[59] violated the right to self-determination of the Palestinian people, which had the status of jus cogens.[60] Also, in 1980 the United States stated that if the Treaty of Friendship between the Soviet Union and Afghanistan endorsed the type of military intervention by the Soviet Union in Afghanistan, it would be void because of a conflict with a peremptory norm of international law,

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[53] Such an explanation does find textual support in arts 53 and 64 of the Vienna Convention, which refer four times to peremptory norms as a 'norm of general international law'. See Gaja (n 29) 54-5; Vidmar (n 32) 25.

[54] Byers (n 50) 222; Vidmar (n 32) 26. The claim of the South African government that it was a persistent objector to the prohibition of racial discrimination and apartheid was universally rejected with the argument that peremptory law does not exempt persistent objectors.

[55] Kadelbach (n 20) 149.

[56] Kadelbach (n 20) 167.

[57] Tladi (Third Report) (n 10) para 31; Kadelbach (n 20) 152; Shelton 34.

[58] UNSC, 19th session, 1098th meeting, UN Doc S/PV 1098, 27 February 1964, paras 94-5.

[59] Framework for Peace in the Middle East Agreed to at Camp David, signed at Washington, DC on 17 September 1978, <https://peacemaker.un.org/sites/peacemaker.un.org/files/EG%20IL_780917_Framework%20for%20peace%20in%20the%20MiddleEast%20agreed%20at%20Camp%20David.pdf> accessed 4 May 2018.

[60] Tladi (Third Report) (n 10) para 31. See also *East Timor (Portugal v Australia), Counter-Memorial of the Government of Australia,* 1 June 1992, para 223, <http://www.icj-cij.org/files/case-related/84/6837.pdf>. Australia argued that if the ICJ were to accept the view of Portugal that the right to self-determination had peremptory status, and then found that the conclusions of the 'Timor Gap Treaty' were in conflict with this right, the treaty would be void (*Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989,* <https://trove.nla.gov.au/work/6612780?selectedversion=NBD9074525>.

namely, article 2(4) of the UN Charter.[61] However, in none of these instances did the invocation of jus cogens have any consequence for the validity of the treaty.[62]

Turning to court practice, an early reference to jus cogens can be found in the jurisprudence of the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ. In his separate opinion in the 1934 Oscar Chinn case, Judge Schücking asserted that the League of Nations would not have embarked on the codification of international law.

if it were not possible, even today, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void.[63]

The ICJ implicitly referred to peremptory norms in the 1949 Corfu Channel case, when referring to Albania's obligations with reference to well-recognized principles of humanity.[64]

As mentioned in section 1 above, the 1970 *Barcelona Traction* decision recognized the concept of obligations with an *erga omnes* effect, that is, obligations in the realization of which all States would have a legal interest.[65] As was also mentioned, the recognition that all States can in principle invoke the responsibility of a State that breached an *erga omnes* obligation (for example by protesting through diplomatic channels) is not necessarily a manifestation of the hierarchically superior status of the obligation in question. Yet, the examples of *erga omnes* obligations cited by the ICJ coincided with those generally cited by authors as having peremptory status. As mentioned, these include the prohibition of the aggressive use of force, genocide and the prohibition of slavery and racial discrimination.[66] Therefore, by referring to these specific obligations in the context of obligations that have an *erga omnes* effect, the ICJ implicitly also acknowledged the existence of *jus cogens*.[67] Subsequently in its 1986 *Nicaragua* decision, the ICJ once again implicitly endorsed the notion of *jus cogens* by referring to the prohibition of the use of force as a 'cardinal' principle of customary international law.[68] However, it took another 20 years for the ICJ to explicitly acknowledge the notion of *jus cogens* in a majority decision. In its 2006 decision on the *Armed*

[61] Memorandum of Legal Advisor of the United States' State Department, Robert B Owen to the Acting Secretary of State, Warren Christopher, dated 29 December 1979, reproduced in Marian L Nash, 'Contemporary practice of the United States relating to international law' (1980) 74 American Journal of International Law 419; Tladi (Third Report) (n 10) para 31.

[62] See Kadelbach (n 20) 152; Shelton (n 19) 34.

[63] *Oscar Chinn* case, Judgment, PCIJ [1934] Series A/B No 63, Separate opinion of Judge Schücking, 149-150; Shelton (n 19) 32-3; see D'Aspremont (n 18) 90.

[64] *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)* (Judgment) [1949] ICJ Rep 4, 22; Shelton (n 19) 31.

[65] *Barcelona Traction* decision (n 11) 32. Subsequently the ICJ has reaffirmed the notion on several occasions. It was also endorsed in the ASR (n 17). In arts 42 and 48, the ILC drew a distinction between breaches of bilateral obligations and obligations of a collective (community) interest nature, which include obligations towards the international community as a whole.

[66] *Barcelona Traction* decision (n 11) para 34; Gaja (n 29) 25, 55; Hernández (n 42) 41ff; Jochen A Frowein 'Collective Enforcement of International Obligations' (1987) 47 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 71.

[67] All peremptory norms, therefore, have an *erga omnes* effect, even though not all obligations *erga omnes* would necessarily have the status of *jus cogens*. Gaja (n 29) 56; Dupuy (n 10) 385.

[68] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 4, para 190.

Activities in the Congo, the ICJ confirmed the peremptory status of the prohibition of genocide,[69] a position which it has since reaffirmed.[70] In 2012, it also acknowledged the peremptory status of the prohibition of torture in the Habre case.[71]

At this juncture, it is worth noting that these endorsements of the peremptory status of the obligations in question were merely declaratory and not decisive for the respective cases. First, the ICJ did not accept that the jus cogens status of an obligation in and of itself provides jurisdiction before it, nor does it have any other 'automatic' effect. The question whether the ICJ has jurisdiction instead depends on whether the relevant States have accepted the ICJ's jurisdiction as provided for in article 36 of the Court's Statute.[72] The fact that the violation of a peremptory obligation was at issue does not in and of itself compensate for the absence of such consent.[73] In addition, the ICJ has consistently refrained from attaching any overriding consequences to jus cogens norms, as inter alia became clear in the decision of Jurisdictional Immunities *of the State*.[74]

This case had its origins in the *Ferrini* case in which the Italian domestic courts attached significant weight to the values underpinning peremptory obligations and the need for effectively enforcing these obligations and the values that they represent.[75] However, when the *Ferrini* case subsequently culminated in proceedings between Germany and Italy before the ICJ in 2012, the ICJ explicitly rejected this line of argument. It saw no basis for the proposition that a rule lacking the status of a peremptory norm may not be applied even if that would hinder the enforcement of a peremptory norm.[76] While this decision remains controversial in Italy,[77] domestic and international

[69] See Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility) (Judgment) [2006] ICJ Rep 6, para 46.

[70] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment) [2007] ICJ Rep 43, para 161.

[71] Belgium v Senegal decision (n 11) paras 99-100; Kadelbach (n 20) 155.

[72] Armed Activities in the Congo decision (n 68) paras 67, 69.

[73] See also Jure Vidmar, 'Rethinking Jus Cogens after Germany v Italy: Back to Article 53?' 2013 (60) Netherlands International Law Review 14ff.

[74] Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening) [2012] ICJ Rep 99, para 95; Armed Activities on the Territory of the Congo (n 68) paras 64, 125. See also Kadelbach (n 20) 155; Hernández (n 42); Stefan Talmon, 'Jus Cogens after Germany v Italy: Substantive and Procedural Rules Distinguished' (2012) 25 Leiden Journal of International Law 979-1002, 987ff. See also Vidmar (n 72) 1-25, 14ff.

[75] Ferrini v Germany No 5044/04 (2004) 87 Rivista di diritto internazionale 539, ILDC 19 (IT 2004), 128 ILR 659 (11 March 2004); Criminal Proceedings against Milde, No 1072/09, (2009) Rivista di diritto internazionale 618, ILDC 1224 (IT 2009); Lozano v Italy, Appeal Judgment Case No 31171/2008, ILDC 1085 (IT 2008); see also Lord Millet in R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 3) [2000] 1 AC 147, [1999] 2 All ER 97, 177. See also Riccardo Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations' in De Wet and Vidmar (n 32) 86-7.

[76] Jurisdictional Immunities of the State decision (n 73) para 95. See also Philippa Webb, 'Human Rights and the Immunities of State Officials' in De Wet and Vidmar (n 32) 6, 122-3. Only on one occasion did the ICJ, in an obiter dictum fashion, allude to consequences of peremptory norms. See Independence of Kosovo Advisory Opinion (n 11) para 8. It noted that that condemnations by the UNSC of the unilateral declarations of independence by Southern Rhodesia, Northern Cyprus and Republika Srpska were not concerned with the illegality of the unilateral character of these declarations as such. Instead, they concerned the unlawful use of force or other egregious violations of international law, including those of a peremptory nature. See also Kadelbach (n 20) 155.

[77] In October 2014, the Italian Constitutional Court quashed legislation which the Italian government had adopted to give effect to the ICJ judgment. In the view of the Constitutional Court, the legislation did not give due consideration to Italian constitutional provisions pertaining to access to justice. Christian Tams, 'Let the Games Continue: Immunity for War Crimes Before the Italian Constitutional Court' EJIL:Talk! (24 October 2014), <www.ejiltalk.org/let-the-games-continue-immunity-for-war-crimes-before-the-italian-supreme-court/>. Recently, in February 2017, one of the judges of the United Kingdom Supreme Court also suggested that the domestic public policy exceptions to the foreign act of State doctrine should be interpreted in light of

courts on the whole remain reluctant to waive jurisdictional immunities of States, State officials and international organizations for alleged human rights violations that constitute peremptory prohibitions under international law.[78] This is exemplified by the Al-Adsani decision of the European Court of Human Rights (ECtHR) of 2001[79], as well as several subsequent decisions. [80]

At the beginning of the twenty-first century and lasting for almost a decade, the jurisprudence of the Inter-American Court of Human Rights (IACtHR) – due to its particular composition at the time – displayed an activist rhetoric towards jus cogens.[81] Whereas the ICJ and the ECtHR have attributed peremptory status to a small category of norms, notably the prohibition of torture and genocide, the IACtHR declared various norms as representing fundamental values and therefore having peremptory status.[82] This included the principle of non-discrimination, for being intrinsically related to the right to equal protection before the law and the dignity of the individual.[83] In addition, the IACtHR used *jus cogens* as an argument to stress the particularly grave character of certain human rights violations and the need to prosecute and punish the perpetrators thereof.[84] It held so in cases of widespread and consistent practice of extrajudicial executions, torture, rape, slavery and involuntary servitude, as well as in a large number of decisions with respect to enforced disappearance.[85]

Despite this activist rhetoric, closer scrutiny reveals that thus far the references in the IACtHR's jurisprudence to the peremptory character of the human rights obligations in question have merely been declaratory.[86] The various legal consequences to which the Court referred, such as the positive obligation to revert existing discriminatory situations, as well as to prosecute the perpetrators of widespread human rights violations, in any case were encompassed by the

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international jus cogens. See Belhaj & Another v Straw & Others (Rev 1) [2017] UKSC 3 (17 January 2017), paras 249-280 (Lord Sumption).

[78] See also Riccardo Pavoni, 'The Law of International Immunities after Germany v Italy, Mothers of Srebrenica and Jones: The Best is Yet to Come' ESIL Newsletter (13 March 2014), <http://esil-sedi.eu/sites/default/files/March%202014.pdf>.

[79] ECtHR, Al-Adsani v United Kingdom (Appl No 35763/97), Judgment (Grand Chamber), 21 November 2001, Reports 2001-XI. A minority of seven judges (against the majority of eight), however, did favour the value-driven argument that resulted in the lifting of the immunity in the Ferrini. See Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic. See also the dissenting opinions of Judges Cançado Trindade and Yusuf in Jurisdictional Immunities of the State (n 73).

[80] See eg EctHR, Stichting Mothers of Srebrenica v The Netherlands (Appl No 65542/12), Decision (Third Chamber), 11 June 2013; ECtHR, Jones v *UK* (Appl Nos 34356/06 and 40528/06), Judgment (Fourth Section), 14 January 2014.

[81] Shelton (n 19) 43.

[82] Shelton (n 19) 43.

[83] *Juridical Condition and Rights of the Undocumented Migrants*, IACtHR, Advisory Opinion Series A No 18, 17 September 2003, 95-6, 101. The IACtHR also recognized the fundamental nature of the right to life. See *Gomez Paquiauri Brothers v Peru*, Merits, Reparations and Costs, Series C No 110, Judgment of 8 July 2004, para 8. The Inter-American Commission on Human Rights has declared the right to life to be a norm of *jus cogens* in *Victims of the Tugboat '13 de Marzo' v Cuba*, IACHR, Case 11.436, Report No 47/96, OEA/Ser.L/V/II.95 Doc 7 rev 1997, 146-7. See also Shelton (n 19) 43-4, 157; Kadelbach (n 20) 6.

[84] See also Tladi (Third Report) (n 10) para 115, who concludes that there is a duty to prosecute international crimes of a peremptory nature.

[85] See *La Cantuta et al v Peru*, IACtHR, Merits, Reparations and Costs, 29 November 2006; *Bayarri v Argentina*, IACtHR, Preliminary Objection, Merits, Reparations and Costs, Series C No 187, Judgment of 30 October 2008, para 81; *Velez Loor v Panama, IACtHR*, Preliminary Objections, Merits, Reparations and Costs, Series C N0 218, Judgment of 23 November 2010, para 248; Shelton (n 19); Kadelbach (n 20) 158.

[86] Shelton (n 19) 44.

applicable treaty obligations. As a consequence, any contrary municipal law would in any case violate the applicable international law.[87] It also remains to be seen whether the IACtHR's elevating of the duty to prosecute various widespread human rights abuses to jus cogens status will result in the waiving of sovereign immunity. The question so far has not arisen before it.[88]

The declaratory rhetoric of the IACtHR to some extent has been reiterated by that of criminal courts and tribunals.[89] The International Criminal Tribunal for the Former Yugoslavia (ICTY), the first international tribunal to explicitly invoke *jus cogens*,[90] declared the prohibition of torture as having peremptory status. The ICTY underscored the importance of the values underpinning *jus cogens*, as a result of which it enjoyed a higher rank than treaty and 'ordinary' customary law.[91] Similarly, the International Criminal Court (ICC) underscored the gravity of international crimes with reference to their peremptory character. The ICC further justified the need for contravening domestic law to be set aside with the overriding character of peremptory norms.[92] Once again, these references added little from a legal perspective, as it is a general principle of treaty law that States cannot invoke the contravention of domestic law to justify the non-performance of an international obligation.[93] In addition, the statements by the ICC neither had any direct bearing on the outcome of the trials, nor on the type of punishment imposed.[94]

4. Limited impact of *jus cogens* on stabilisation of norms

It is fair to conclude from the above analysis that the main added value of the invocation of jus cogens during executive practice and, in particular, during court proceedings has been the strengthening of the moral appeal of the (underpinning values of the) obligations in question.[95] By appealing to the fundamental nature of the values at stake, the invocation of peremptory norms can increase the burden of the argument on those who are on the opposing side.[96] It further intensifies the political (moral) pressure on law makers to give due consideration to the effective implementation of the obligations at stake and the values underpinning them.[97] Interestingly, this

[87] Shelton (n 19) 42.

[88] Shelton (n 19) 38.

[89] D'Aspremont (n 18) 96.

[90] At Nuremberg there were implicit references to the peremptory character of certain norms. For example, in the Krupp trial, one of the five indictments concerned forced labour of French prisoners of war in weapon factories, in contravention of the Geneva Convention Relative to the Treatment of Prisoners of War of 27 July 1929 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=0BDEDDD046FDEBA9C12563CD002D69B1>. The counsel for defendants invoked a treaty between Germany and the Vichy regime, facilitating such use, but without proof of its existence. The Military Tribunal held that even if such a treaty had existed, it would have been 'manifestly contra bones mores and hence void'. See Case No 58: The Krupp Trial, US Military Tribunal, Judgment of 31 July 1948, UN War Crimes Commission, Law Reports of Trials of War Criminals X, 144. See also Kadelbach (n 20) 153.

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

[92] Kadelbach (n 20) 160. See also Tladi (Third Report) (n 10) para 132, according to whom immunity *ratione materiae* does not apply to any offence prohibited by a peremptory norm of general international law. In addition, he submits that States have a duty to exercise jurisdiction over offences concerning peremptory norms of international law (*jus cogens)*, where the offences were committed by the nationals of that State or the territory under its jurisdiction.

[93] Vienna Convention (n 19), art 27.

[94] Shelton (n 19) 45.

[95] Shelton (n 19) 34-5, 44, who notes that it was also driven by the natural law theories underpinning the reasoning of one particular judge on the court at the time.

[96] Kadelbach (n 20) 169.

[97] Shelton (n 19) 46; Kadelbach (n 20) 169.

strategy is predominantly deployed in situations where State responsibility for human rights violations was at issue, or individual criminal responsibility for the commission of an international crime. This means that the invocation of jus cogens predominantly occurs beyond the context for which it was not originally intended, namely, the invalidation of immoral treaties.[98]

As far as the limited legal impact of the invocation of jus cogens is concerned, it is arguable that that this relates to the uncertain content (scope) of these norms. First, it remains uncertain whether the scope of those peremptory norms which have found their way into court decisions extends beyond the prohibition of the conduct in question (that is, the negative obligation).[99] Despite the activist approach of the IACtHR in this regard, ancillary (positive) obligations that would enhance the enforcement of the respective peremptory prohibition are not broadly cited as having peremptory status. Second, even the scope of the respective negative obligations remains contested, including in those instances where the prohibition is absolute, as is the case with the prohibition of torture. The fact that no derogation from the obligation is allowed does not in and of itself clarify the scope of the prohibition as it is still up to States to determine the conduct that would amount to torture.[100]

That being said, the uncertainty regarding the scope of a peremptory prohibition is likely to be even more pronounced where the prohibition allows for certain exceptions, as this provides additional avenues for the erosion of the scope of the obligation. This would, for example, be the case with the prohibition of the use of force in international relations in accordance with article 2(4) of the UN Charter and customary international law. A prominent exception to this prohibition is the right of States to resort to individual or collective self-defence in response to an armed attack.[101] Ever since the ICJ's *Nicaragua* decision in 1986, the threshold requirements for the right to self-defence have remained highly contested amongst authors and in executive State practice.[102] This, in turn, has placed the scope of the prohibition under pressure, as an increasingly flexible interpretation of the exception to the prohibition implies less room for the application of the prohibition in the first place.[103]

In light of this vague nature of peremptory norms and the different interpretations as to their scope, some authors regard them as too elementary to preserve unity within and stability of the international legal order.[104] This, in turn, suggests that the notion of core values of the international community aspires to more unity than the highly-diverse international legal order

[98] See extensively Gaja (n 29) 47ff. He *inter alia* mentions that it is the invocation of the concept in other areas of international law that has resulted in the identification of a limited number of peremptory norms by judicial bodies. See also Erika de Wet, 'The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law' (2004) 15 European Journal of International Law 98-9.

[99] Vidmar (n 32) 33-4.

[100] For example, in *R (on the Application of Bary) v Secretary of State for the Home Department* [2009] WL 2392232; the House of Lords did not, under the circumstances, accept harsh prison conditions combined with the possibility of life without parole in a Florida prison as a bar to extradition.

[101] The Charter of the United Nations of 26 June 1945, art 51, determines that '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security …'

[102] See Dissenting Opinion of Judge Sir Robert Jennings, *Nicaragua Decision* (n 67) 543; similarly, Dissenting Opinion of Judge Schwebel, *Nicaragua decision* (n 67) 268-9, 332ff.

[103] See extensively Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (Cambridge University Press 2010).

[104] Kadelbach (n 20) 167.

can accommodate.[105] A different but related criticism relates to the fact that the elevation of certain norms to a hierarchical superior may inadvertently lead to a devaluation of (the values underpinning) other obligations under international law.[106] For example, only a narrow category of human rights obligations (mainly prohibitions) have been recognized as peremptory. This raises the question as to whether other internationally-recognized human rights obligations are of lesser importance. This, in turn, could result in the erosion of respect for these obligations and undermine their enforcement.[107] In summary, therefore, not only is the concept of peremptory norms too rudimentary to protect certain norms from erosion, but by elevating certain norms to a hierarchically superior position, the erosion of 'ordinary norms' is implicitly encouraged.

5. Conclusion

The concept of jus cogens is firmly established in international scholarship, the work of expert bodies of the UN, as well as in decisions of international and domestic courts. Yet, it remains an infrequent tool in the executive practice of States. It also remains unclear if and to what extent its invocation, either by the executive or by judicial bodies, has yielded concrete legal results. This modest impact of the notion of peremptory norms of international law almost 50 years after its endorsement in the Vienna Convention suggests a lingering reluctance by State executives as well as courts to embrace the notion of a hierarchy of norms in international law.

This reluctance is not necessarily openly expressed by, for example, denying the jus cogens character of the prohibition of torture or genocide as such. It is more often than not implied by the unwillingness of governments to invoke the concept in their international relations, or by the refusal by most courts to attach any concrete consequences to peremptory obligations of international law. Stated differently, through a process of 'contestation by omission', States have expressed a reluctance to establish a well-developed hierarchy of norms in international law. This reluctance may in part be rooted in the uncertainties pertaining to the process of identification. It is also likely to be a reflection of the lack of consensus of the scope of peremptory norms and the values underpinning them. While these uncertainties and differences may in recent times have become more visible, in part due to the increased invocation of peremptory norms in litigation since the turn of the twentieth/twenty-first century, they have been ever present in the scholarly debate pertaining to jus cogens.

[105] Kadelbach (n 20) 169.

[106] De Wet (n 97) 118-9.

[107] De Wet (n 97) 119.

The Author

Since January 2016 Erika de Wet is the SARChI Professor of International Constitutional Law in the Faculty of Law, University of Pretoria, South Africa. Since July 2015 she is also Honorary Professor in the Faculty of Law, University of Bonn, Germany. Between 2011 and 2015 she was founding Co-Director of the Institute for International and Comparative Law in Africa and Professor of International Law in the Faculty of Law of the University of Pretoria. Between 2004 and 2010 she was tenured Professor of International Constitutional Law at the Amsterdam Center for International Law, University of Amsterdam, a position which she thereafter held part-time until December 2013. During the early years of her career, she also held positions at the International Labor Organization (Geneva), the Swiss Institute of Comparative Law (Lausanne) and Leiden University (Leiden). She was further involved in part-time teaching at the University of Zurich and Brandeis University, as well as Extraordinary Professor at the North-West University (Potchefstroom campus). In March 2017 she was visiting Professor at the University of Vienna, Austria.

Erika De Wet completed her B. Iur and LL.B as well as her LL.D at the University of the Free State (South Africa). She holds an LL.M from Harvard University and completed her *Habilitationsschrift* at the University of Zurich (Switzerland) in December 2002. It was published with Hart Publishing in 2004 under the title 'The Chapter VII Powers of the United Nations Security Council'. Her work has since been widely cited, including by the International Court of Justice, the International Criminal Court, the European Court of Human Rights, the South African Supreme Court of Appeal and the United Kingdom Supreme Court. For further information see www.icl.sarchi.co.za.

The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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