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Jus Cogens as a Vision of the International Legal Order

Dr. Markus Petsche

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Articles

Jus Cogens as a Vision of the International Legal Order

Dr. Markus Petsche*

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INTRODUCTION

Since its first “official” recognition as a concept of international law in the 1969 Vienna Convention on the Law of Treaties (the “Vienna Convention”),¹ *jus cogens*² has had both a strikingly unremarkable and a highly controversial existence. On the one hand, its impact on the actual practice of international law and, more specifically, the rulings of international and domestic tribunals, has been particularly limited.³ On the other hand, however, *jus cogens* has triggered a lively debate whose controversial character resembles, in several respects, the *lex mercatoria* discussion in international commercial law.⁴

The existing literature on the topic reflects this ambivalent nature of the *jus cogens* concept. A significant portion of the—especially early—writings on this topic criticize the vagueness,⁵ emptiness,⁶ uselessness,⁷ and potential for political abuse⁸ of the *jus cogens* concept, as well as the inadequacy of its conceptual bases,⁹ thereby challenging the very

1. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331. As of 3 August 2010, 111 States were Parties to the Convention.

2. The literal translation of this Latin phrase is “compelling law.”

3. See *infra*, I.B. and I.C.

4. In fact, critics of *jus cogens* argue that this concept is vague, empty and even nonexistent in a manner that is similar to the way in which the opponents of the *lex mercatoria* doctrine object to the notion of an autonomous transnational law of international trade. The idea of a new *lex mercatoria* was first expressed by Schmitthoff and Goldman in the 1950s and 60s. For a more recent critical discussion of this doctrine, see, e.g. Vanessa L.D. Wilkinson, *The New Lex Mercatoria—Reality or Academic Fantasy?* 12 J. INT’L ARB. 103 (1995); Christopher W.O. Stoecker, *The Lex Mercatoria: To what Extent does it Exist?* 7 J. INT’L ARB. 101 (1990).

5. Georg Schwarzenberger, *International Jus Cogens?* 43 TEX. L. REV. 455, 469 (1964-1965) (stating that the application of the vague concept of *jus cogens* may be detrimental to international cooperation); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT’L L. 946 (1967).

6. A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT’L L. 1 (1995-1996).

7. See Anthony D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens*, 6 CONN. J. INT’L L. 2, 6 (1990-1991) (asking for a theory that explains “the utility of a norm of *jus cogens*”).

8. Schwelb, *supra* note 5, at 948 (referring to the “dangers” of the concept of international *jus cogens*); Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585, 591 (1987-1998) (referring to the “concealed uses” and “dangers” of *jus cogens*); Dean Adams, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 SAN DIEGO INT’L L.J. 357 (2004-2005).

9. The most frequently criticized conceptual defect of *jus cogens* is the allegedly inappropriate analogy with the concept of domestic public policy. See Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT’L L. 42, 44 (1991) (stating that “the elaboration of a coherent theory of *jus cogens* remains a predominant challenge for the international community.”); Weisburd, *supra* note 6, at 27 (concluding that “the genesis of the *jus cogens* concept rests on what must be considered

existence of the notion of *jus cogens*. Other authors, on the contrary, have sought to defend the usefulness of this concept and suggested definitions containing detailed criteria allowing the establishment of the *jus cogens* character of specific norms.¹⁰ Again, others implicitly recognize the existence and “workability” of the *jus cogens* concept in their attempts to determine the *jus cogens* nature of particular rules of international law.¹¹

More recently, the debate has shifted from the initial dispute pertaining to the usefulness and necessity of introducing the *jus cogens* concept into the realm of the law of treaties to attempts to identify novel, more appropriate, theoretical foundations¹² and discussions of a possible application beyond the scope of the Vienna Convention. In this respect, the richest and most topical debate consists of doctrinal suggestions advocating, or opposing, the unavailability of the sovereign immunity defense with respect to claims alleging *jus cogens* violations.¹³ Other suggestions include the potential impact that *jus cogens* violations may have on the law of State responsibility¹⁴ and jurisdiction.¹⁵

fundamental intellectual confusion”); Weisburd, *supra* note 6, at 51 (observing that “[a]s part of the international legal system . . . [*jus cogens*] is a source of confusion and distraction”); Christenson, *supra* note 8, at 598 (discussing the “flaws” of the municipal law analogy of public order).

10. See Walter Gangl, *The Jus Cogens Dimensions of Nuclear Technology*, 13 CORNELL INT’L. L.J. 63 (1980); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411 (1988-1989); Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 GEO. INT’L ENVTL. L. REV. 101 (1998-1999); Lisa Yarwood, *Jus Cogens: Usefool Tool or Passing Fancy? A Modest Attempt at Definition*, 38 B. L. J. 16 (2006).

11. See Gangl, *supra* note 10; Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT’L & COMP. L. 767 (1996-1997); Jean Allain, *The jus cogens Nature of non-refoulement*, 13 INT’L J. REFUGEE L. 533 (2001).

12. Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331 (2009) (rejecting positivism, natural law and the public-policy analogy as conceptual bases for the *jus cogens* doctrine).

13. Andreas Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens—Some Critical Remarks*, 16 MICH. J. INT’L L. 433 (1994-1995); Jack Alan Levy, Note, *As Between Prince and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators*, 86 GEO. L.J. 2703 (1997-1998); Lorna McGregor, *State Immunity and Jus Cogens*, 55 INT’L & COMP. L.Q. 437 (2006); Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741 (2003); Thora A. Johnson, *A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity under the Federal Sovereign Immunities Act*, 19 MD. J. INT’L L. & TRADE 259 (1995); Riccardo Pavoni & Stéphane Beaulac, *L’immunité des Etats et le jus cogens en droit international. Etude croisée Italie/Canada*, 43 R.J.T. ns 491 (2009); Xiaodong Yang, *Jus Cogens and State Immunity*, 3 N.Z. Y.B. INT’L L. 131 (2006).

14. See Alexander Orakhelashvili, *Peremptory Norms and Reparation for Internationally Wrongful Acts*, 3 BALTIC Y.B. INT’L L. 19 (2003).

All those academic discussions of *jus cogens* share a common approach, namely the fact that their criticisms of, support for, and overall analysis of *jus cogens* invariably relate to the practical usefulness of this concept, whether present or future, as a *rule* of international law. While their concern with practical meaningfulness is legitimate, it overlooks, in my opinion, that the relevance of *jus cogens* is not restricted to its application by international and domestic tribunals, or its invocation in international negotiations. On the contrary, as I will show, the true import of the recognition of the concept of *jus cogens* lies more in its “symbolic”¹⁶ value and its “vision” of international law and the international legal system.¹⁷

The fact that, in essence, *jus cogens* constitutes a statement on the nature of the international legal order does not imply that this concept is devoid of any practical significance. However, such significance does not lie in the actual application, by international or domestic tribunals, of this concept itself, but in the acceptance, by the international community, of specific features of the international legal system. In fact, agreement on those characteristics provides a theoretical foundation for the progressive implementation—in the development of international law—of the basic vision expressed by the concept of *jus cogens*. Thus, *jus cogens* should not be viewed as a *norm* of international law properly speaking, but rather as a basic idea or principle which has exercised, and continues to exercise, considerable influence on the international law-making process.

In this article, I pursue a twofold purpose. First, I aim to demonstrate that the fundamental progress achieved by the recognition of the concept of *jus cogens* lies in the implicit acceptance of a particular vision of international law, rather than in the few isolated and debatable references in the case law of international and domestic tribunals. I use the term “vision” to denote the idea that the implications of the concept of *jus cogens* have not yet fully been recognized, but are progressively

15. Some authors argue that violations of *jus cogens* norms should, irrespective of specific treaty provisions to this effect, be subject to universal jurisdiction. See, e.g., M. Cherif Bassiouni, *Accountability of International Crime and Serious Violations of Human Rights: International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63 (1996); David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219 (2004-2005); Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses Erga Omnes?* 35 NEW ENG. L. REV. 265 (2000-2001).

16. See Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 66 (1993) (stating that “[m]uch of the importance of the *jus cogens* doctrine lies not in its practical application but in its symbolic significance in the international legal process”).

17. That *jus cogens* constitutes, or is based on, a specific vision of international law is affirmed by some writers. See, e.g., Christenson, *supra* note 8, at 590.

implemented in the international law-making process. Second, I attempt to explain what this vision consists of, and how it has impacted, or at least contributed to, the post-Vienna Convention development of international law.

Accordingly, in Part One, I challenge the widely accepted perception (and fact) that *jus cogens* constitutes a *norm* of international law. I argue that several basic conceptual and theoretical flaws of *jus cogens* deprive this concept of its quality as a *rule* of international law. In support of this view, I rely on the observation that *jus cogens* is largely irrelevant for the actual practice of international law.¹⁸ In particular, I highlight the limited recourse to this concept in the context of the law of treaties, as well as the inappropriate attempts to apply *jus cogens* beyond the scope assigned to it in the Vienna Convention.

In Part Two, I explain the conceptual implications of *jus cogens* for the nature of the international legal system and argue that those implications consist of the existence of fundamental values of the international community, the necessity of a hierarchy of norms as a means to protect those values, and a (limited) rejection of the consent-based approach to the sources of international law. On the basis of this observation, I explain how this “*jus cogens* vision” of the international legal system has impacted, or contributed to, the post-Vienna Convention development of international law. More specifically, I argue that *jus cogens* has facilitated acceptance of individual rights as fundamental values of the international legal order and helped improve the judicial protection of such values, partly against State will.

I. THE INAPPROPRIATENESS OF CHARACTERIZING *JUS COGENS* AS A *RULE* OF INTERNATIONAL LAW AND THE LIMITED RELEVANCE OF *JUS COGENS* FOR THE PRACTICE OF INTERNATIONAL LAW

A. *Fundamental Conceptual and Theoretical Flaws of Jus Cogens*

1. *Origins of Jus Cogens*

If the concept of *jus cogens* was, for the first time, officially recognized in the 1969 Vienna Convention on the Law of Treaties, it had nevertheless been the subject of prior academic debate throughout the first half of the 20th century. In fact, without expressly referring to the notion of *jus cogens*, a number of writers during the 1920s discussed the

18. See, e.g., Francisco Orrego Vicuna, *Has the Nature of International Law Changed? Le Plus Ça Change*, 8 AUSTRIAN REV. INT'L & EUR. L. 221, 223 (2003).

existence of such superior norms when advancing claims that treaties, like contracts, should be void if contravening certain fundamental rules.¹⁹

The probably first comprehensive discussion of *jus cogens* consists of a 1937 article authored by Alfred von Verdross.²⁰ In this influential publication, Verdross argued that “[n]o juridical order can . . . admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community,”²¹ thereby emphasizing the “natural law” or “moral” foundation of *jus cogens* norms. In fact, according to Verdross, every legal order “has its roots in the ethics of a certain community”²² and it “cannot be understood apart from its moral basis.”²³

By 1953, the academic discussions of *jus cogens* had provided a solid enough foundation for the International Law Commission to conclude that “there exist in the general positive international law of today certain fundamental rules of international public order contrary to which States may not validly contract.”²⁴ While this finding prepared the ground for the eventual inclusion of a *jus cogens* provision in the Vienna Convention, the concept remained controversial. If, on the one hand, authors such as McNair and Fitzmaurice fervently supported the idea of *jus cogens*,²⁵ other writers, in particular Sereni and Suy, were reluctant to embrace this doctrine, opposing the submission of treaties to moral norms²⁶ and arguing that the conditions of existence of *jus cogens*, i.e. of an international public order, had not yet materialized.²⁷

Despite the controversy and uncertainties surrounding this concept, by 1966, the International Law Commission had included two provisions relating to *jus cogens* in its draft Convention on the Law of Treaties.

19. Those authors include notably Hyde, Hall and McNair. See George D. Haimbaugh, Jr., *Jus Cogens: Root and Branch (an Inventory)*, 3 *TOURO L. REV.* 203, 208-09 (1986-1987).

20. Alfred von Verdross, *Forbidden Treaties in International Law*, 31 *AM. J. INT'L L.* 571 (1937).

21. *Id.* at 572.

22. *Id.* at 576.

23. *Id.*

24. Rep. of the Int'l Comm'n, 15th Sess. Nov. 6, 1963, U.N. Doc. A/5601, para 18, GAOR, 18th Sess. (1963).

25. See A. MCNAIR, *LAW OF TREATIES* 215 (1961) (stating that “[t]here are, however, many rules of customary international law which stand in a higher category and which cannot be set aside or modified by contracting States”); Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rules of Law*, 92 *RECUEIL DES COURS* 89, 120 (1957) (referring to *jus cogens* norms as “obligations of an absolute character, compliance with which is not dependent on corresponding compliance by others, but is requisite in all circumstances”).

26. See Marjorie M. Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 *GA. J. INT'L & COMP. L.* 609, 615 (1977).

27. Carnegie Endowment for International Peace, Conference on International Law, Lagonissi, April 3-8, 1966, Papers and Proceedings, *The Concept of Jus Cogens in Public International Law* 85 (1967) (Summary Record).

Those provisions were based on the idea that, since *jus cogens* norms prevail over “ordinary” norms of international law, treaty provisions (or entire treaties) which are contrary to such superior norms are void. Two possible scenarios of conflicts between a treaty and a “peremptory norm of international law” (this expression being synonymous to *jus cogens*), which is defined 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,” were contemplated: first, incompatibility at the time of the conclusion of the treaty (Article 37)²⁸ and, second, the emergence of an incompatible *jus cogens* norm subsequent to the conclusion of the treaty (Article 45).²⁹

The drafters considered this definition of *jus cogens* norms insufficient, notably because it did not include any indication of the means by which the existence of a *jus cogens* norm could be established in practice. From a more theoretical point of view, they expressed dissatisfaction with the lack of anchorage of *jus cogens* in actual State practice (positivism) and an unclear distinction of the legal concept of *jus cogens* from purely moral rules. The drafters sought to remedy these shortcomings by requiring that, in order for a rule to qualify as a peremptory norm of international law, its non-derogable character and aptitude to be modified only by a subsequent *jus cogens* norm be “accepted and recognized by the international community of States as a whole.”³⁰

While this amendment helped to improve, to some extent, the clarity of the concept of *jus cogens*, the notion of a peremptory norm of international law remained far from unambiguous and “useable.” It is true that the International Law Commission provided additional guidance by offering several examples of treaties that would be contrary to *jus cogens*,³¹ which notably included treaties contemplating an unlawful use of force and treaties involving the performance of international crimes such as slavery and piracy. However, those examples do not remove basic interpretive obstacles caused by tautology (a peremptory norm is a

28. *Revised Draft Articles*, [1966] 2 Y.B. INT'L LAW COMM'N 112, 120, U.N. Doc. A/CN.4/L.117/Add.1. Article 50 provides that: “A treaty is void if it conflicts with a peremptory norm of general international law. . . .”

29. *Revised Draft Articles*, [1966] 2 Y.B. INT'L LAW COMM'N 112, 122, U.N. Doc. A/CN.4/L.117/Add.1. Article 45 provides that: “If a new peremptory norm of general international law . . . is established, any existing treaty which is incompatible with that norm becomes void and terminates.” This provision has been adopted without changes and can be found in Article 64 of the Vienna Convention.

30. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

31. *International Law Commission Report*, [1966] 2 Y.B. INT'L L. COMM'N 169, 247-49; 61 AM. J. INT'L L. 263, 409 (1967).

norm that is recognized as peremptory) and overall—though deliberate and probably unavoidable—vagueness.

One major uncertainty arises in relation to the meaning and role of “the international community of States as a whole.” As one of the delegates pointed out during the Conference’s second session in 1969,³² it is unclear whether acceptance by the international community as a whole requires unanimous consent of all States or, alternatively, acceptance by a mere qualified majority. In particular, given the analogy with the formation of “ordinary” rules of customary international law, the question arises as to whether it would be possible for a persistent objector not to be bound by a particular *jus cogens* norm.³³

The lack of clarity of the requirement of “acceptance by the international community” and the more general definitional inadequacy of the *jus cogens* concept leave vital questions pertaining to its content, sources and formation largely unanswered and pose seemingly insurmountable problems for its application in practice.³⁴ Also, considering the nature of arguably established *jus cogens* norms (such as the prohibition of the use of force and the prohibition of slavery and torture), it appears highly unlikely that States should enter into agreements in violation of such norms or, at the very least, that they should seize an international tribunal of possible violations of such hypothetical agreements. It is thus not surprising that, in the course of the thirty years following the entry into force of the Vienna Convention in 1980, violations of *jus cogens* have rarely, and never successfully, been relied upon in order to challenge the validity of a treaty.

Numerous defects of the concept of *jus cogens* and, more particularly, its definition in the Vienna Convention have been pointed out. Those defects refer, on the one hand, to the fact that the definition of *jus cogens* gives rise to serious difficulties for its application in practice (this is its “conceptual” weakness), both with regard to the determination of its substance and with regard to the procedure by which it is established. On the other hand, they refer to the absence of a theoretical foundation of this concept, i.e. the fact that scholars fail to agree on the assumption, approach, principle or idea on which it is based (this is its “theoretical” weakness).

32. United Nations Conference on the Law of Treaties, Apr. 9-May 22, 1969, *Summary Records of the Plenary Meeting*, 94 ¶ 11, U.N. Doc. (A/CONF.39/11/Add.1).

33. See Andreas L. Paulus, *Jus Cogens in a Time of Hegemony and Fragmentation—An Attempt at a Reappraisal*, 74 NORDIC J. INT’L L. 297, 308 (2005) (At the Conference, the French delegate formulated a proposal to insist on the possibility of persistent objection but failed to find meaningful support.).

34. See Conference, *THE CONCEPT OF JUS COGENS IN INTERNATIONAL LAW*, *Lagonissi Conference on Int’l L.*, (1966) (comment made by Georges Abi-Saab).

2. *Jus Cogens* as a Set of Norms Lacking Substance

The concept of *jus cogens*, such as it has been formulated in the Vienna Convention on the Law of Treaties, fundamentally lacks a substantive definition. Article 53 of the Convention, which defines a *jus cogens* rule as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm . . . having the same character,” “defines” *jus cogens* by reference to the consequences deriving from the *jus cogens* character of a norm, namely the fact that such norm cannot be derogated from and not be superseded by another norm, except for a newly-established *jus cogens* rule. Such a definition does not offer any useful indication as to the substance of *jus cogens*.

Insofar as it provides, in essence, that a peremptory norm is a norm that is considered as peremptory, Article 53 is also largely tautological. No references to specific interests or values of the international community of States such as peace, security, and the protection of human rights, for example, are contained in the definition of the Vienna Convention. Also, although the International Law Commission’s commentary includes a few illustrations of *jus cogens* norms,³⁵ no “official” examples of such norms have been provided in the Convention.

Admittedly, it is a difficult task to draft a substantive definition of the concept of *jus cogens*.³⁶ Moreover, it may be undesirable to adopt a definition by reference to specific interests or rights to be protected, as this may lead to an undue confinement of the concept of “peremptory norm.” In fact, similarly to the notion of domestic public policy, the contents of *jus cogens* presumably evolve, and it would thus be inappropriate—and largely counterproductive—to establish conceptual boundaries that would hinder the “natural” evolution of the concept of *jus cogens*.

Whether the absence of any substance of the notion of peremptory norm is deliberate or merely the result of failure to agree on a more detailed definition, it seriously undermines attempts to apply this concept

35. *Id.*

36. See Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 291 (2006). Solving the problem of adequately defining *jus cogens* as a rule of international law constitutes a task that is specific to the international legal system. In fact, in the domestic legal order, the non-derogable character or “superiority” of a norm, if it is not expressly provided for, generally derives from the nature of its source and is thus easily ascertained. Thus, norms that are enshrined in the Constitution prevail over “ordinary” laws; in the context of the European Union, norms decreed by the European Council prevail over the laws of the Member States.

in a meaningful and coherent fashion. It is thus understandable that a number of scholars should have focused their attention on narrowing down, or substantiating, *jus cogens*. While some authors have—rightly—pointed out the basic interests that *jus cogens* norms seek to preserve,³⁷ others have suggested sets of criteria that a rule must satisfy in order to qualify as such a norm.³⁸

Regrettably, those few legal scholars who have attempted to define *jus cogens* by reference to a set of specific criteria or requirements do not agree on a single definition, notably because they fail to agree on whether to include the actual non-derogability of peremptory norms as a definitional criterion. Moreover, several of the suggested criteria are either vague (“a foundation in morality”) or do not clarify the meaning of certain expressions used in the Vienna Convention (“acceptance by the international community of States” is not explained satisfactorily). Thus, no generally accepted and workable definition of *jus cogens* exists, nor is such a definition likely to emerge in the near future.

3. *Jus Cogens* as a Set of Norms Lacking a Procedure for Its Determination

As it does not include any substantive definition of the concept of *jus cogens*, Article 53 of the Vienna Convention necessarily focuses on its “procedural” dimension, i.e. the process by which *jus cogens* norms are determined. Indeed, Article 53 lays down the requirement—sometimes referred to as “double consent”³⁹—according to which a peremptory norm of international law must be accepted by the international community of States. Such acceptance, although it can be expressed as a single requirement, has a twofold aspect: acceptance of a given rule as a norm of international law and acceptance as a norm of *jus cogens* (i.e. acceptance of its non-derogable character and limited replace-ability).

While Article 53 emphasizes the crucial role of the international community of States, it nevertheless remains silent with regard to the

37. See Haimbaugh, *supra* note 19, at 212 (The author distinguishes two main branches of *jus cogens* norms: security and independence of States on the one hand, and individual rights on the other).

38. See Gangl, *supra* note 10, at 64 (According to this author, a *jus cogens* norm is characterized by (1) a foundation in morality; (2) importance to international peace and order; (3) general acceptance in the international community of States; and (4) the fact that it serves global interests rather than interests of individual State). See also Uhlmann, *supra* note 10, at 104 (This author includes the legal regime governing *jus cogens* norms in her definition. She claims that a peremptory norm of international law must (i) protect an interest of the community of States, (ii) be founded in morality, (iii) have an “absolute” character, and (iv) be accepted by the international community.).

39. See Uhlmann, *supra* note 10, at 112.

modalities and the extent of the required “acceptance.” A basic question that has been posed in this respect relates to the “source” of peremptory norms of international law. In fact, considering the similarity between the procedural aspect of *jus cogens* and the requirements of State practice and *opinio juris*, i.e. the constitutive elements of customary international law, many authors claim or assume that *jus cogens* norms are necessarily rooted in custom. However, it is not inconceivable for *jus cogens* norms to derive from treaties or general principles of law; nor can it be excluded that such norms may derive from non-traditional sources of international law which are not listed in Article 38 of the ICJ Statute.⁴⁰

As has been mentioned, another fundamental question that arises in relation to the process envisaged in Article 53 pertains to the extent of the required acceptance by the international community of States. In particular, it is debatable whether, in order to qualify as *jus cogens*, a norm must be accepted by all States of the international community (universal acceptance) or merely by a (presumably large) majority of those States (majority acceptance). For reasons that are not entirely clear, and at least in part on the basis of an analogy with the process by which customary rules of international law emerge, most scholars assume that majority acceptance is sufficient.⁴¹ However, the opposite view may be, and has been, argued, especially in light of the fact that the “absolute” character of a *jus cogens* norm suggests a higher threshold of consent than the one applying to customary rules.

Lastly, although Article 53 conditions the *jus cogens* nature of a norm upon State acceptance, the relevant determinations will ultimately occur in the context of the judicial process. In other words, whether a rule constitutes a *jus cogens* norm or not will need to be decided by a (more often than not international) tribunal and, most frequently, the ICJ. Such decisions give rise to the classical legitimacy concerns voiced with respect to judicial lawmaking, a criticism that is particularly relevant in relation to norms which, unlike customary international law rules, potentially bind persistent objectors.

40. It may, in fact, be argued that *jus cogens*, inasmuch as it is not based on State consent, constitutes a distinct source of international law, independent of treaties, custom, and general principles of law.

41. See *infra*, II.A.3.

4. *Jus Cogens* as a Set of Norms Lacking a Proper Theoretical Basis

The uncertainties affecting the definition of the concept of *jus cogens* norms are rooted, at least in part, in the absence of a solid theoretical foundation. In fact, the general recognition of a specific theory underlying the concept and effects of *jus cogens* would provide answers to a number of questions that remain, at present, unsolved. If, for example, the theoretical basis for *jus cogens* were to be found in the actual or presumed *consent* of States, then this might lead to the conclusion that universal acceptance is required for a *jus cogens* norm to be established or, alternatively, that a non-consenting State is not bound by a particular peremptory norm of international law.

The absence of a proper theoretical basis of *jus cogens* can be traced back to the negotiating and drafting history of the Vienna Convention. During the Conference, the major dividing line separated the supporters of a natural law approach, i.e. of the idea that certain fundamental rules are derived from reason or “nature” and need not expressly be “adopted” in order to constitute law, from the positivists who essentially equate law with rules that are enacted through the formal channels of the lawmaking process. Understandably, the positivists objected to the very concept of *jus cogens*, rejecting the inappropriateness of merging law with morality and criticizing the vagueness of natural law concepts. Arguably, the final version of Article 53, which incorporates a “positivist” reference to the acceptance of *jus cogens* by the international community of States, represents a compromise between the two approaches.⁴²

In addition to natural law and positivism, the idea of an international public order has often been put forward as a theoretical basis for *jus cogens*. Proceeding from an analogy with the domestic legal order, such theory posits that the international community of States, like the subjects of the domestic legal system, shares a number of common (moral) beliefs and basic interests which constitute the basis of the normative system. Although submittedly accurate, the international public order theory is frequently criticized on the grounds that the analogy with domestic public policy is flawed in several ways.⁴³

As a result of the perceived inadequacy of natural law, positivism and the domestic public order analogy, some authors have attempted to

42. See Haimbaugh, *supra* note 19, at 205.

43. See, e.g., Weisburd, *supra* note 6, at 25-26 (mentioning, *inter alia*, the lack of an institutional structure of the international legal system permitting coherent formulation and enforcement of *jus cogens* norms and the specificities deriving from the fact that the subjects of international law are States and not individuals).

suggest new theoretical approaches explaining the various alleged effects of *jus cogens*. The most prominent such attempt consists of the fiduciary theory of *jus cogens* argued by Criddle and Fox-Decent. According to the authors, the State and its institutions, as a consequence of the powers vested in them by the subjects of the domestic legal system, owe a corresponding fiduciary duty to those subjects. One of the principal obligations included in this duty arguably consists of compliance with *jus cogens*.

To date, the fiduciary theory, regardless of its potential merits, has not had a noticeable impact on scholarship or legal practice. Disagreement on whether, and the extent to which, *jus cogens* is based on natural law, positivist or public order approaches continues to compromise not only a basic understanding of this doctrine, but also its coherent application in practice.

B. The Limited Relevance of Jus Cogens for the Law of Treaties: Rare and Unsuccessful Reliance on Jus Cogens in the Context of International Disputes Relating to the Validity of a Treaty

An empirical study of the application of the concept of *jus cogens* by international (or domestic) tribunals as a grounds invalidating a treaty requires, as a preliminary matter, a general understanding of the nature of potential *jus cogens* “issues” that may arise, as well as of the probable *fora* in which the relevant disputes may be heard. In fact, though this possibility is not expressly provided for in any international instrument, the concept of *jus cogens* may be, and is, relied upon in a variety of contexts.⁴⁴ Also, while it is rather unproblematic to assume that disputes pertaining to the validity of a treaty, which are essentially public international law disputes, are generally brought before the ICJ, disputes involving violations of individual “*jus cogens* rights” are more likely to be argued in domestic courts and/or international human rights tribunals.

Also, it is worth clarifying that *jus cogens* “cases” do not always involve resort to the concept of *jus cogens*. Domestic or international tribunals may have recourse to similar notions such as fundamental rules, international public order or obligations *erga omnes*. This latter category of norms was established by the ICJ in its 1970 decision in *Barcelona Traction* in which the Court defined obligations *erga omnes* as those that are owed “towards the international community as a whole”.⁴⁵ In light of the fundamental nature of such obligations, the alleged consequences flowing from their *erga omnes* quality, and the examples provided by the

44. See *infra*, I.C.

45. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment [1970] I.C.J. 3, 32, ¶ 34 (Feb. 5).

Court, it is safe to conclude that the concepts of *jus cogens* norms and *erga omnes* obligations are related and overlapping,⁴⁶ a recent decision of the ICJ even suggests that they are identical.⁴⁷ Also, the ICJ may deliberately avoid using the controversial term *jus cogens*, as it did in its Advisory Opinion in the *Nuclear Weapons* case, which referred to “intransgressible principles of international customary law,”⁴⁸ rather than *jus cogens* norms.

Essentially, one can distinguish three types of cases involving the application, or rather, a reference to the concept of *jus cogens*. The first category includes those cases in which a court or tribunal refers, often in an *obiter dictum*, to a specific rule as being a *jus cogens* rule, without any direct effect on the actual outcome. The second group of decisions includes those cases in which the alleged *jus cogens* character of a norm is relied upon to seek a result different from a holding of invalidity of a treaty. The third category, which is directly relevant for the present analysis, comprises the very few cases where the validity of a treaty, or a treaty provision, is challenged on the grounds of an alleged *jus cogens* violation.

The probably best-known example of a case falling within the first category is the ICJ’s decision in *Military and Paramilitary Activities in and Against Nicaragua*.⁴⁹ In this case, Nicaragua argued that the United States, by supporting the operations and activities of a paramilitary rebel group in Nicaragua, had violated the international law rule prohibiting the use of force between States. When examining the question of whether the prohibition of the use of force in fact constituted a norm of international law, the ICJ relied upon the *jus cogens* character of the said prohibition, as an *a fortiori* argument establishing its status as a rule of customary international law.⁵⁰ It is unclear whether, in addition to the

46. See Michael Byers, *Conceptualizing the Relationship between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT’L L. 211 (1997) (One author recently suggested that all *jus cogens* norms are necessarily also *erga omnes* obligations, while the opposite is not true.).

47. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion 2004 ICJ43; see also Andrea Bianchi, *Dismantling the Wall: the ICJ’s Advisory Opinion and its Likely Impact on International Law*, 47 GERMAN YBK. INT’L L. 343 (2004).

48. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ 226, ¶ 79.

49. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

50. *Id.* at 100-01, 113-15 (opinion of the Court).

prohibition of the use of force, any other rule of international law has been labeled a *jus cogens* norm by the ICJ.⁵¹

As far as the second category is concerned, the majority of the relevant cases, which are mostly brought before domestic courts, involve allegations of human rights violations and the legal argument that the *jus cogens* nature of the rights at stake should entail a waiver of the sovereign immunity of the defendant State. While the courts of most countries, as well as the European Court of Human Rights, have refused to waive sovereign immunity in the face of such allegations, the courts of other countries, including Greece and Italy, have been more receptive to such arguments.⁵²

The third category of cases, which is of particular relevance for the argument developed in this Section, comprises a handful of disputes in which the invalidity of a treaty or treaty provision was alleged, or at least contemplated, on the basis of a *jus cogens* violation. Amongst those are at least two early cases, i.e. cases related to disputes that have arisen (well) before the adoption of the Vienna Convention. As early as 1923, a judge of the PCIJ, in his dissenting opinion in the *S.S. Wimbledon* case,⁵³ took the view that a provision of the Peace Treaty of Versailles of 1919 was not valid since it violated the right of third parties—those rights being arguably of *jus cogens* nature.⁵⁴ The second dispute, which did not give rise to a judicial ruling, consisted of allegations made by Cyprus that certain provisions of a treaty it had concluded with Greece, Turkey and the United Kingdom, insofar as they established a right of unilateral, possibly armed, intervention in Cyprus, violated the *jus cogens* norm prohibiting the use of force.⁵⁵

In the post-Vienna Convention era, apparently only one decision of the ICJ addresses the invalidity of a treaty provision on the grounds of an alleged *jus cogens* violation. In *Armed Activities in the Territory of the Congo between the Democratic Republic of the Congo and Rwanda*,⁵⁶ the ICJ had to rule on the Congo's argument that Rwanda's reservation to Article IX of the Genocide Convention—which provides for jurisdiction of the ICJ—was invalid since it violated the prohibition of

51. See Haimbaugh, *supra* note 19, at 223. The *jus cogens* nature of a number of other rules has been discussed or accepted, mainly in dissenting and separate opinions of individual judges of the ICJ.

52. The impact of the concept of *jus cogens* on the availability of the sovereign immunity defense is examined in more detail *infra*, I.C.3.

53. See Case of the *S.S. "Wimbledon"* (U.K., Fr., It., & Japan v. Ger.), 1923 P.C.I.J. (Series A) No. 1.

54. See Schwelb, *supra* note 5, at 950.

55. *Id.* at 952.

56. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 37 (May 28) (on jurisdiction and admissibility).

genocide, allegedly a *jus cogens* norm. While not denying such *jus cogens* character of the norm at stake, the Court held that it did not suffice to found the Court's jurisdiction, which is always based on the States' consent.⁵⁷

More than forty years after Schwelb's observation that "[t]here appears to be no case on record in which an international court or arbitral tribunal decided that an international treaty was void because of repugnancy to a peremptory rule,"⁵⁸ the *status quo* evoked by this author has remained unchanged. In reality, the limited relevance of *jus cogens* for the law of treaties is hardly surprising. First of all, as I have mentioned, the conclusion of treaties violating fundamental norms of the international community is rather implausible; violations of such norms are more likely to be caused by other acts attributable to a State. In addition, the uncertainties regarding the sources and content of *jus cogens*, which create a risk of unpredictable, incoherent and arbitrary decisions, explain the reluctance of international tribunals to apply this concept.

C. *The Inappropriate Attempts to Extend the Reach of the Jus Cogens Concept Beyond the Scope of the Law of Treaties*

Although the notion of *jus cogens* has only been expressly recognized in the context of the law of treaties, attempts have been made to apply this concept by analogy in other areas of international law. In part, this is due to the lack of any significant impact on the practice of the law of treaties. To a considerable extent, however, attempts to extend the scope of application of *jus cogens* aim to draw "logical" consequences from the superior normative status of *jus cogens* rules. Thus, they are based on the idea that, in addition to their non-derogability in the law of treaties, norms of *jus cogens* need to benefit from other forms of enhanced protection.

More specifically, attempts to apply the concept of *jus cogens* by analogy have been made in relation to at least three categories of issues. In fact, *jus cogens* has notably been relied upon as (i) a justification for the exercise of universal jurisdiction, (ii) the underlying rationale for the adoption of specific norms governing State responsibility, and (iii) a grounds upon which a State's sovereign immunity defense may or should be waived.

57. *Id.* ¶ 64.

58. See Schwelb, *supra* note 5, at 949-50.

As I will explain, most of these attempts have been largely unsuccessful. To the extent that they were, at least in part, successful, I submit that those efforts were nevertheless uncalled for.

In fact, the conceptual and theoretical defects of the notion of *jus cogens*—which partly account for the lack of recourse to this concept as a rule of the law of treaties—inevitably affect the workability of any conceivable *jus cogens*-based rule, regardless of its particular field of application.

Yet, it is necessary to clarify that principles such as universal jurisdiction or specific rules on State responsibility are not inadequate. On the contrary, they may be desirable and in conformity with the purposes of, and “vision” expressed by, the concept of *jus cogens*. However, due to its inherent vagueness and ambiguity, *jus cogens* does not constitute the adequate “tool” or “vehicle” for the introduction of a specific, particularly protective, legal regime applying to such fundamental norms. Properly understood as a symbolic concept carrying a particular vision of the international legal order, *jus cogens* should not be viewed as a legal rule, but rather as a theoretical and ideological basis for the further development of international law.

1. Inappropriateness of Asserting Universal Jurisdiction over *Jus Cogens* Violations

The principle of universal jurisdiction (or universality principle), similarly to the passive personality and protective principles, constitutes an exceptional basis for a State’s exercise of adjudicatory (essentially criminal)⁵⁹ jurisdiction. It is justified by the perceived practical necessity to ensure that particularly “serious” or “grave” offenses do not remain unpunished,⁶⁰ an otherwise probable scenario when the place of commission of a crime does not fall within the territorial sovereignty of any State⁶¹ or when the crimes perpetrated are, for political reasons,

59. However, it is sometimes argued that the principle of universal jurisdiction should be extended to cover civil claims based on “heinous conduct proscribed by international law”. See Donald Francis Donovan & Anthea Roberts, *Notes and Comments—The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142 (2006).

60. See Georges Abi-Saab, *The Proper Role of Universal Jurisdiction*, 1 J. INT’L CRIM. JUST. 596, 599 (2003) (stating that universal jurisdiction has traditionally been regarded as a “jurisdiction of last resort, a fail-safe solution called for by urgency and necessity.”).

61. This problem most frequently arises in relation to cases involving piracy. See, e.g., *id.* at 599: “Piracy is a criminal act that takes place in a space where there is no overall territorial sovereignty. A State [which captures a pirate] may have no other connecting factor with the acts of piracy or the pirate . . . except for being the place of capture.”

unlikely to be prosecuted in the country where they have been committed.⁶² From a more theoretical point of view, the principle of universal jurisdiction finds support in the idea that the crimes concerned are so “serious” that they offend not just the national or territorial States, but the international community as a whole.⁶³

Considering the nature of the legal violations that arguably give rise to universal jurisdiction,⁶⁴ it is easily understandable that this type of jurisdiction should have been linked to the concept of *jus cogens*. In fact, a number of scholars seem to support the proposition that *jus cogens* violations are subject to universal jurisdiction.⁶⁵ Taking a more nuanced position, some writers argue that only *some* peremptory norms of international law justify the exercise of universal jurisdiction, while others do not.⁶⁶

However, as far as the actual practice is concerned, there seem to be very few—or no—cases in which domestic courts have expressly based their jurisdiction on the idea that the *jus cogens* nature of the alleged violations justifies resort to the universality principle. In part, this is due to the fact that it is generally not necessary to invoke *jus cogens* in order to establish jurisdiction over specific acts. In fact, not only do many courts affirm universal jurisdiction over a variety of acts such as piracy, war crimes, genocide, crimes against humanity, and torture (i.e. it is not necessary to rely on the broad concept of *jus cogens*), but it is also frequently unnecessary to claim *universal* jurisdiction insofar as jurisdiction may be established on the basis of other principles.⁶⁷

Another factor calling into question the necessity of claiming universal jurisdiction over *jus cogens* violations consists of the availability of a growing number of international conventions providing for quasi-universal jurisdiction over crimes falling within their scope of

62. *Id.* at 600.

63. See Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 383 (2001) (stating that according to a generally accepted view, the commission of such crimes renders their offenders “enemies of all humankind”).

64. The identification of those acts or crimes that give rise to universal jurisdiction under customary international law is a matter of some debate. While most authors agree that piracy, slave trading, genocide, war crimes, and crimes against humanity fall within the scope of this doctrine, the applicability of the universal jurisdiction principle to acts such as terrorism and drug-trafficking is not uncontroversial.

65. See, e.g., Bassiouni, *supra* note 15; Mitchell, *supra* note 15; and Rubin, *supra* note 15. See also MALCOLM N. SHAW, *INTERNATIONAL LAW* 673 (6th ed. 2008) (stating that “[t]he view is sometimes put forward that where a norm of *jus cogens* exists, particularly where the offence is regarded as especially serious, universal jurisdiction as such may be created”).

66. See, e.g., Mitchell, *supra* note 15, at 230-31.

67. In particular, jurisdiction may be claimed on the basis of the passive-personality principle which confers jurisdiction on the national State of the victim(s).

application. Those conventions cover a variety of offenses including, for example, hijacking,⁶⁸ hostage-taking,⁶⁹ and torture.⁷⁰ In addition, a number of substantive *jus cogens* violations have been, and can be, brought before *ad hoc* international criminal tribunals and the International Criminal Court.⁷¹

Not only is reliance on the concept of *jus cogens* frequently unnecessary in order to establish jurisdiction over specific crimes, but it is also detrimental to the predictability and coherence of domestic court decisions. In fact, the inherent conceptual flaws and vagueness of *jus cogens* invite an arbitrary exercise of jurisdiction, a particularly serious risk considering the political nature of many cases involving “*jus cogens* crimes”.

2. Doubtful Usefulness of Establishing Specific Rules of State Responsibility for *Jus Cogens* Violations

Scholars have put forward a variety of views on the impact that the notion of *jus cogens* may have on the law of State responsibility. Orakhelashvili, for example, has discussed its effect on the three principle forms of reparation, i.e. restitution, compensation and satisfaction.⁷² As far as the International Law Commission is concerned, it has, in its Draft Articles on State Responsibility (the “Draft Articles”),⁷³ formulated specific rules on the law of State responsibility aimed at ensuring heightened protection of *jus cogens* norms.

Those specific rules relate to a variety of issues and notably comprise a rule prohibiting reliance on “circumstances precluding wrongfulness” in an attempt to exclude the wrongfulness of *jus cogens* violations,⁷⁴ rules establishing a specific regime applying to serious *jus*

68. See Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177.

69. See International Convention against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205.

70. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

71. See *infra*, Part II.B.2.

72. See Orakhelashvili, *supra* note 15.

73. Responsibility of States for Internationally Wrongful Acts, Rep. of Int’l Law Comm’n, 53d sess, Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 59th Sess., Supp. No. 10 (2001).

74. See *id.* at Art. 26 (stating that “[n]othing in this Chapter [relating to circumstances precluding wrongfulness] precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”).

cogens breaches,⁷⁵ a provision conferring the right to invoke another State's responsibility in the event of the violation of an obligation owed to the international community as a whole,⁷⁶ and a norm prohibiting the violation of *jus cogens* norms by way of a countermeasure.⁷⁷

Although the objective of enhanced protection of *jus cogens* norms is sensible, the specific rules laid down by the ILC in its Draft Articles are, due to the conceptual and theoretical flaws of *jus cogens*, problematic. In addition to the general problems resulting from the vagueness of *jus cogens*, the provisions contained in the Draft Articles suffer from "debatable positions," encounter reluctance from international and domestic courts and are, at times, of questionable necessity.

First of all, some of the rules adopted in the ILC's Draft Articles are debatable. Though this question may not arise frequently in practice, it can be asked whether certain *jus cogens* violations should not be tolerated in circumstances involving "necessity." As Spiermann has argued, the use of force may be justified, in specific circumstances, by the "necessity" of humanitarian intervention.⁷⁸ More generally, one may wonder to what extent the view expressed in Article 26 of the Draft Articles takes account of the fact that the interests that a State claiming necessity seeks to safeguard may themselves have a *jus cogens* character.⁷⁹

Second, the practical impact of some of the provisions of the Draft Articles may be limited due to a lack of proper acceptance and application by domestic and international tribunals. The specific legal regime applying to serious breaches of peremptory norms of international law established in Articles 40 and 41, for example, has been the subject of a rather confusing application by the ICJ. In fact, in its *Advisory Opinion on the Israeli Wall*,⁸⁰ the Court, although it endorsed

75. See *id.* at Art. 40 and Art. 41 (Under those provisions, in the event of a serious breach of *jus cogens*, "States shall cooperate to bring [such breach] to an end" (Article 41(1)) and "[n]o State shall recognize as lawful a situation created by [such a] breach" (Article 41(2)).).

76. See *id.* at Art. 48 (providing that, in the event of a breach of an obligation owed to the international community as a whole, "[a]ny State . . . is entitled to invoke the responsibility of [the breaching State]").).

77. See *id.* at Art. 50(1).

78. Ole Spiermann, *Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens*, 71 NORDIC J. INT'L L. 523, 543 (2002) (arguing that "necessity should not, in advance and as a matter of principle, be rejected as an international law justification for humanitarian intervention or other uses of force").

79. See Jorge E. Vinuales, *State of Necessity and Peremptory Norms in International Investment Law*, 14 LAW & BUS. REV. AM. 79 (2008).

80. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion [2004] ICJ 200 (July 9).

the concept and consequences of the regime established in the Draft Articles, considered that such regime applied to *erga omnes* obligations and not *jus cogens* norms,⁸¹ thereby casting considerable doubts on the scope of application of the relevant provisions.

The courts' reluctance to follow some of the provisions of the Draft Articles may also be due to a certain lack of political "realism." In fact, the provisions establishing a universal right to invoke another State's responsibility for breaches of obligations that "are owed to the international community as a whole" may encounter resistance from international courts and, in particular, the ICJ. Moreover, the utility of the right to invoke another State's responsibility in such circumstances is severely limited by the consensual basis of the ICJ's jurisdiction.

Lastly, in various scenarios contemplated in the relevant norms of the Draft Articles, it is not necessary to have recourse to the concept of peremptory norms. For example, with regard to both the plea of necessity under Article 25 and the taking of countermeasures in accordance with Articles 49 to 51, the customary and conventional requirement of proportionality excludes violations of *jus cogens* norms (and notably the use of force), at least as a response to non-compliance with "ordinary" norms of international law. Also, the proposition that "no State shall recognize as lawful a situation created by a serious breach" of a *jus cogens* norm is implicit in a number of principles of customary law.⁸²

3. Inappropriateness of Denying Sovereign Immunity in the Face of Alleged *Jus Cogens* Violations

In addition to the areas of jurisdiction and State responsibility, the concept of *jus cogens* has been relied upon in relation to the issue of sovereign immunity. According to the proponents of the application of *jus cogens* in this particular field, (allegations of) *jus cogens* violations should lead to the unavailability of the sovereign immunity defense of a defendant State. Thus, for example, a State should not be allowed to "hide" behind its sovereign immunity in cases involving allegations of serious human rights violations.

The theoretical basis of this theory—which its partisans refer to as the "normative hierarchy" theory or the "abrogation" theory—lies principally in the idea of the normative superiority of *jus cogens* norms vis-à-vis the "ordinary" international law rule laying down the principle of sovereign immunity of States and certain State-entities. Whether in

81. *Id.* ¶ 159.

82. It is, for example, implicitly recognized by the rule prohibiting acquisition of territory by unlawful occupation.

connection with, or independently of, the argument of normative superiority, some scholars argue that, where a State violates *jus cogens* norms, it thereby waives its right to rely on sovereign immunity. Depending on the specific context in which such conflicts between *jus cogens* and State immunity arise, constitutional law arguments may also be put forward in support of this theory.⁸³

Interestingly, most writers who have published on this question are proponents of the theory advocating the preemptive effect of *jus cogens* on sovereign immunity. Those authors, who notably include Levy,⁸⁴ McGregor,⁸⁵ Johnson,⁸⁶ and Pavoni & Beaulac,⁸⁷ express their views in the form of a critical discussion of cases having denied such effect or, on the contrary, in their approval of those—few—cases in which courts have followed this doctrine.

To date, the courts of two countries, namely Italy and Greece, have embraced the abrogation theory. In *Ferrini v. The Federal Republic of Germany*,⁸⁸ Mr. Ferrini, an Italian national, brought a claim for reparation against the Federal Republic of Germany, alleging his forceful deportation from Italy and being made subject to forced labor during World War II. The Court, considering that the prohibition of forced labor constitutes a peremptory norm of international law, held that such norm trumped the “ordinary” customary international law rule of State immunity and that, therefore, it had jurisdiction to hear Mr. Ferrini’s claim.

In *Prefecture of Voiotia v. the Federal Republic of Germany*,⁸⁹ a case involving a similar fact pattern, the Greek Supreme Court also held that the defense of sovereign immunity could not successfully be invoked by the Federal Republic of Germany. Contrary to the decision in *Ferrini*, however, the Greek Supreme Court based its decision not on the normative superiority of the allegedly violated norms, but on the idea that a State which violates peremptory norms of international law must be considered to have waived its right to rely on sovereign immunity in relation to such violations.

83. See, e.g., Levy, *supra* note 13.

84. *Id.*

85. See McGregor, *supra* note 13.

86. See Johnson, *supra* note 13.

87. See Pavoni & Beaulac, *supra* note 13.

88. Cass Sez Un 5044/04, 11 Mar. 2004, reproduced in the original Italian text in 87 RIVISTA DI DIRITTO INTERNAZIONALE 539 (2004).

89. Areios Pagos [A.P.] [Supreme Court] 11/2000, (Greece); Bernard H. Oxman, Maria Gavouneli & Ilias Banterkas, *Sovereign Immunity—Tort Exception—Jus Cogens Violations—World War II Reparations—International Humanitarian Law*, 95 AM. J. INT’L L. 198, 200-01 (2001) (translating the judgment of the Court).

Not only is the precedential value of the case decided by the Greek Supreme Court uncertain in light of the Court's subsequent case law,⁹⁰ but also, and more importantly, the courts of numerous other jurisdictions have taken the view that allegations involving the violation of peremptory norms of international law do not "trump", or entail a waiver of, sovereign immunity. Those jurisdictions notably include the United States,⁹¹ Canada⁹² and the UK.⁹³ A similar view has been taken by the European Court of Human Rights.⁹⁴ Lastly, additional evidence for the limited recognition of the "abrogation" or "normative hierarchy" theory is provided by the position adopted by the International Law Commission.⁹⁵

A number of reasons can be, and have been, invoked in support of decisions denying the abrogative effect of *jus cogens* norms, beyond the basic objection to the very concept of *jus cogens*. One author has expressed the view that the idea of a conflict between *jus cogens* and State immunity is inaccurate, since the latter rule is not properly speaking an international, but a domestic law norm.⁹⁶ Other writers have emphasized the fact that the abrogation theory would entail a misconstruction and distortion of the applicable domestic Statute.⁹⁷

Several opponents of the application of the *jus cogens* concept in relation to sovereign immunity have highlighted the incompatibility of such a claim with international law,⁹⁸ arguing that there simply is no

90. See *Areios Pagos* [A.P.] [Supreme Court] 6/2002, (Greece) (ruling that, according to a general norm of customary international law, a claim against a state for tortures committed by its armed forces is inadmissible); see also McGregor, *supra* note 13.

91. See, e.g., *Princz v. Fed. Republic of Ger.*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995).

92. See, e.g., *Bouzari v. Iran*, [2004] D.L.R. (4th) 406 (Can.).

93. See, e.g., *Al-Adsani v. Gov't of Kuwait*, (1996), 107 I.L.R. 536 (1996).

94. See, e.g., *Al-Adsani v. U.K.*, 35763/97 Eur. Ct. H.R. (2001).

95. U.N. Chairman of the Working Group, *Convention on jurisdictional immunities of States and their property*, ¶ 47, U.N. Doc. A/C.6/54/L.12 (Nov. 12, 1999) (stating that the interaction between immunity and *jus cogens* norms "did not seem to be ripe enough for the Working Group to engage in a codification exercise over it").

96. Caplan, *supra* note 13, at 765 (explaining that "[t]he common law countries, with their skepticism about state immunity's broad reach under international law, generally prefer to regulate state immunities through the application of domestic regulation").

97. See Johnson, *supra* note 13. While this author is in favor of the abrogation theory, she implicitly admits that such a solution would be incompatible with the 1976 Foreign Sovereign Immunities Act when she concludes that this piece of legislation needs amending.

98. See, e.g., Zimmermann, *supra* note 13, at 433 (stating that the "denial of immunity through amendment to U.S. statutes eliminating the granting of sovereign immunity in cases of purported violations of international human rights would be . . . illegal under current public international law"(internal footnote omitted)).

basis for the proposition that a controversial theory should prevail over an established international law norm such as the principle of State immunity. Also, some authors have stressed that, from a practical point of view, the denial of a State's sovereign immunity would be politically "unwise."⁹⁹ Finally, some commentators have rightly considered that the abrogation theory does not constitute a practical necessity, as a variety of alternative procedural avenues including claims commissions, the exercise of diplomatic protection and the seizure of an international human rights tribunal, may be available.¹⁰⁰

Though fundamental, one objection to an application by analogy of the *jus cogens* concept as a bar to reliance on State immunity has not been put forward. Such objection is based on the fact that the two allegedly "conflicting" rules, i.e. the norm prohibiting the violation of peremptory norms of international law and the norm conferring sovereign immunity upon States, cannot, from an intellectual point of view, possibly be "in conflict." The inappropriateness of terming the relationship between those two norms as a *conflict* is not due to the fact that one constitutes an international and the other a domestic law norm—as has been suggested—but to the fact that those two norms are not of the same "nature." More specifically, the norm prescribing compliance with *jus cogens* constitutes a "substantive" norm pertaining to the content of a legal obligation, while the sovereign immunity rule constitutes a "procedural" rule restricting the scope of admissible claims. Logically, the nature or seriousness of the violation of a substantive rule should not have any bearing on the issue of jurisdiction, which is a distinct preliminary question.

In light of the conceptual vagueness of *jus cogens*, the theoretical weakness of the abrogation theory, and the practical reservations one may raise as an objection to this theory, its limited practical success does not surprise. The fact that, to date, the principle of sovereign immunity remains largely unaffected by *jus cogens* provides another illustration of the basic argument of this article, namely the idea that *jus cogens* should not be viewed, and cannot efficiently be applied, as a *rule* of international law.

99. *Id.*

100. *Id.* at 435 (discussing, in relation to *Princz v. Fed. Republic of Ger.*, 26 F.3d 1166 (D.C. Cir. 1994), the availability of a fund established in order to compensate Holocaust victims that have not yet received adequate compensation).

II. *JUS COGENS* AS A VISION OF THE INTERNATIONAL LEGAL ORDER AND ITS IMPACT ON THE POST-VIENNA CONVENTION DEVELOPMENT OF INTERNATIONAL LAW

In Part One, I showed that, due to its conceptual and theoretical defects, *jus cogens* has had a limited impact on the actual practice of international law. In the context of the law of treaties, it has largely remained a theoretical construct. In other areas, and for similar reasons, its application has been highly controversial and/or incoherent. This does not mean, however, that the concept of *jus cogens* is useless. On the contrary, although admittedly vague, it is the vehicle of a particular “vision” of the international legal order and international law. By the same token, it has considerably influenced, and continues to influence, the post-Vienna Convention evolution of international law.

A. *Jus Cogens as a Vision of the International Legal Order*

Jus cogens is based on the idea that the international legal system recognizes, or should recognize, a set of fundamental values. As a consequence of this particular characteristic, the international legal order envisioned by *jus cogens* presents two additional features. First, in order for the underlying values of *jus cogens* norms to be adequately protected, the idea of their normative superiority needs to be recognized through the acceptance of a hierarchy of norms of international law. Second, the efficient protection of *jus cogens* values also requires that those values be upheld, where necessary, against State will. Through its vision of international law as a hierarchical system which is not (exclusively) based on State consent, *jus cogens* informs two long-lasting and controversial debates on the nature and sources of international law.

1. *Jus Cogens* as an Affirmation of the Existence of Fundamental Values of the International Community

a) The concept of Fundamental Values

Legal writings habitually discuss fundamental “norms” or “rules”, rather than values. If I prefer the concept of fundamental *values*, it is because I believe it to be the more meaningful one. The greater significance of the concept of value can be explained on the basis of the relationships established between values, norms and rights. Values constitute the underlying foundation of the normative system of any given society or community (and arguably a nation-State) and are, therefore, more “fundamental” than norms, i.e. they have a greater sociological ability to define a society or community. If values give rise

to norms, those norms, in turn, generate specific rights. Thus, for example, the prohibition of degrading treatment (a norm) is based on the dignity of the human person (a value) and gives rise to the corresponding individual right not to be made subject to such treatment.

Being the underlying foundation of the normative system, values are frequently not expressed as such; they are merely incorporated into legal rules. Those legal rules that are aimed at ensuring the protection of fundamental values are, by way of a consequence, termed “fundamental norms.” However, one and the same fundamental value may be incorporated into, or taken into account by, several or numerous legal norms. The fact that the latter may sometimes be in conflict illustrates that “fundamentality” is primarily an attribute of a value, rather than a norm. The prohibition of the use of force (a generally acknowledged *jus cogens* norm), for example conflicts with the legitimate exercise of a State’s right of self-defense, even though both norms are largely based on the same value(s).

When ascertaining the existence of fundamental values, it is necessary, from a practical point of view, to identify fundamental “norms” expressing such values. The existence of fundamental norms implies that other norms (most norms) are devoid of this characteristic, i.e. they are not fundamental, but merely “ordinary.” The co-existence of fundamental and ordinary norms gives rise to a relationship of normative superiority of the former with regard to the latter.¹⁰¹

Simply put, in the international legal system, there are two main approaches by which fundamental values may be determined. First of all, such values may be derived from the observation of the actual practice of States. In other words, a value will be fundamental if it is shared, and considered as fundamental, by all or most States of the international community. Insofar as it focuses on the actual “reality,” i.e. on “how things are,” such an approach can be termed a realist or positivist approach. Its emphasis on shared perceptions of individual States further suggests that this approach is “subjective,” rather than “objective.”

According to the second approach, certain values are fundamental because reason dictates such character, regardless of whether States actually recognize their fundamental nature. For example, it could be said that the value of human life, or of gender and racial equality, do not need to be recognized or “confirmed” by individual States; they are derived from reason, i.e. from the rational analysis of the conditions of

101. It is debatable to what extent such superiority is merely “relative” (fundamental norms derive their superiority from the comparison with ordinary norms) or “absolute” (the very nature of the value/norm requires superiority).

human existence. Thus, the fundamental nature of a value does not depend on State practice or "consent," the latter being merely the logical consequence of the universality of human reason. Under such an approach, State behavior is not constitutive of fundamental values; it merely illustrates, and provides evidence for, the accuracy of the claim that such values are derived from reason.

b) *Jus Cogens* and Fundamental Values

The notion of *jus cogens*, as envisaged by the drafters of the Vienna Convention and relied upon before international and domestic tribunals, unmistakably affirms the existence of fundamental values and norms. This is evidenced, first of all, by the positivist aspect of the very definition of the concept of *jus cogens*. As we have seen, under the Vienna Convention, a *jus cogens* norm is defined as a rule that is "accepted and recognized [as a *jus cogens* norm] by the international community of States as a whole."¹⁰² By emphasizing the necessity that a norm of *jus cogens* be accepted as such by the international community, the Vienna Convention thus arguably adopts a "realist" or "subjective" conception of fundamental values.¹⁰³

The recognition of fundamental values by the Vienna Convention is not only implied in its definition of the concept of *jus cogens* but can also be deduced from the legal regime of normative superiority it establishes. In fact, under the Convention, *jus cogens* norms are non-derogable, i.e. States may not enter into treaties that would be in violation of such norms.¹⁰⁴ *Jus cogens* norms, therefore, enjoy normative superiority with regard to the other rules of international law. Such superiority derives from their "fundamental" character and, as I will explain below, the necessity effectively to safeguard the underlying values.

If the definition of *jus cogens* found in the Vienna Convention expresses, to some extent, a positivist approach of fundamental values, the two other "official" theoretical foundations of *jus cogens* also support the idea of the existence of fundamental values. First, the notion of fundamental values is inherent in the natural law approach.¹⁰⁵ Indeed, natural law thinkers argue that the existence of legal rules, or at least of some of them, does not depend upon their formal recognition through the

102. Vienna Convention on the Law of Treaties, art. 53, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679.

103. See Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, 172, RECUEIL DES COURS 275, 284 (1981).

104. See Vienna Convention, *supra* note 102.

105. See Verdross, *supra* note 20, at 572-73.

established channels of the law-making process. Instead, they can be derived from “reason” and the observation of the “rules of nature.”

Fundamental values also form part of the theories that equate *jus cogens* with the existence of international public order.¹⁰⁶ Although it is frequently criticized, the analogy with domestic public order or “public policy” adequately explains the essential function of *jus cogens* in the international legal order. In fact, the concept of public policy, as it applies in the domestic legal system, refers to rules that are, due to their fundamental nature, non-derogable and thus beyond the reach of contracting parties.

2. *Jus Cogens* and the Necessity of a Hierarchy of Norms in International Law

As a legal concept, the term “hierarchy” may be used in a broad and in a narrow sense. The broad notion of hierarchy refers to a variety of relationships that can be established between the different rules of a given normative system and to the ways in which those rules can be classified.¹⁰⁷ The narrow concept of hierarchy—which is relevant for our discussion—merely relates to one particular relationship between norms: superiority (or inferiority).

The debate on whether international law is a hierarchical system, i.e. a normative system that comprises rules situated at different hierarchical levels (superior and inferior rules), has largely been conducted in the context of the controversy between voluntarists and natural law proponents regarding the sources of international law. Indeed, one of the principal arguments against the existence of a hierarchy of norms consists of the (voluntarist) allegation that all norms of international law are derived from the will of sovereign States and that, therefore, those norms are necessarily “equal.”¹⁰⁸ Very similar ideas have been expressed by those authors who rely on the traditional perception of international law as a “horizontal” system in order to establish the horizontality (i.e. equality) of the rules of this system.

106. See Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT’L L. 55 (1966).

107. See Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT’L L. 566, 567 (1997). Although Koskenniemi views the question of normative superiority as the central aspect of legal hierarchy, he nevertheless contemplates alternative, though related, hierarchies (good and bad, valid and invalid, working and not working).

108. PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 14-16 (3d ed. 1995). See also Prosper Weil, *Towards Normative Relativity in International Law?* 77 AM. J. INT’L L. 413 (1983).

In recent years, the idea of the existence of a hierarchy in international law has been widely accepted and the debate has lost its momentum.¹⁰⁹ This is due to at least three reasons. First of all, it can hardly be denied that States can create hierarchies between the various international law obligations they assume. In fact, as early as 1945, the UN Charter specified that its provisions prevail over incompatible “ordinary” norms of international law.¹¹⁰ While one could take issue with the fact that such a hierarchy is merely “contractual” (i.e. only binding upon signatories of the Charter), it cannot be doubted that the Charter does, indeed, establish a valid normative hierarchy.

Second, the emergence of so-called “soft law” arguably suggests the existence of a hierarchy of international law norms.¹¹¹ Soft law refers to a variety of legal instruments which, due to their particular wording and in light of their drafters’ intent, are non-binding. According to a number of writers, soft law, insofar as it contains normative statements, must be regarded as law. However, since it is not, strictly speaking, legally binding, it is hierarchically inferior to other norms of international law. This inferiority vis-à-vis “ordinary” rules of international law thus arguably establishes the existence of a hierarchy of international law norms.

The most convincing, and for our purposes most relevant, argument in support of the existence of an international law hierarchy is based on the concept of *jus cogens*.¹¹² Constituting by definition non-derogable and superior norms, rules of *jus cogens* are situated at the highest level of the international law hierarchy.¹¹³ Regardless of whether *jus cogens* norms actually exist, their acceptance as part of the international legal order necessarily implies recognition of the idea of a hierarchy of norms in international law.

Such a hierarchy is, in fact, necessary to safeguard the underlying fundamental values that *jus cogens* norms seek to protect. This hierarchy of norms thus places *jus cogens* above other norms of international law and, most importantly, beyond the reach of (possibly incompatible)

109. See, e.g., J.H.H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?* 8 EUR. J. INT’L L. 545 (1997). The authors show that, regardless of the particular approach followed, the quasi-totality of international law scholars accepts the idea of a hierarchy of norms in international law.

110. See U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

111. See Shelton, *supra* note 36, at 319-22.

112. See *id.* at 297-319. See also Weiler & Paulus, *supra* note 109, at 559.

113. See Koskeniemi, *supra* note 107.

treaties. The necessity to ensure that *jus cogens* norms are not derogated from by treaties reveals significant similarities between *jus cogens* and the domestic public policy concept.¹¹⁴ In fact, both “rules” essentially operate to limit the freedom of the subjects of the legal system to enter into, and conceive, agreements. While the public policy rule limits the “contractual freedom” of physical and legal persons of a given domestic legal system, *jus cogens* imposes similar restrictions on the ability of States to enter into, and design, treaties.

If the concept of *jus cogens* necessarily implies the existence of a hierarchy of norms in international law, the relative uncertainty pertaining to the “origins” of the fundamental values which *jus cogens* norms aim to protect¹¹⁵ extends to the theoretical foundation of this very hierarchy. It is thus debatable whether the hierarchy of international law is based on the will of States or whether it exists independently of such will. However, as I will show below, it is clear that consent can no longer be considered as the unique source of a hierarchical normative system of international law.

3. *Jus Cogens* as a Limited Refutation of the Consent-based Approach to the Sources of International Law

As several other writers have rightly observed, the recognition of the concept of *jus cogens* informs the debate regarding whether State consent can be regarded as the ultimate source of, or basis for, all norms of international law (a view that is habitually referred to as “consensualism” or “voluntarism”).¹¹⁶ Naturally, the basic idea of *jus cogens* contradicts, rather than supports, a consensualist approach of international law.¹¹⁷ However, the claims put forward by a number of

114. See, e.g., Christenson, *supra* note 8, at 598. Although this author is critical of the municipal public order analogy of *jus cogens*, he admits that “[a]t first glance,” *jus cogens* “resembles the override of private arrangements contrary to the public order in municipal systems.” He also acknowledges that such analogy constitutes the basis of the *jus cogens* theories of several writers including Lauterpacht, McNair and Mosler.

115. See *supra*, II.A.1.

116. See Danilenko, *supra* note 9 (regarding the specific question of whether customary international law is ultimately based on State consent); see Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT’L & COMP. L.Q. 501 (1995) (assimilating the requirement of *opinio juris* to State consent).

117. See Danilenko, *supra* note 9, at 47 (referring to the “apparent contradictions between the idea of *jus cogens* and the consensual nature of the formation of international law”); see also Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, 8 EUR. J. INT’L L. 583, 591 (1997) (stating that “the introduction of the notion of *jus cogens* into treaty law has had the effect of causing two antagonistic and perhaps even irreconcilable logics to coexist within the international legal order: the traditional one of the subjectivism of horizontal relationships among

authors according to which consent is largely (or entirely) irrelevant for the formation of international law rules¹¹⁸ are excessive. As I will show, State consent may not be the only basis of international law, but it undeniably plays a vital role in the creation of international law, even as far as the establishment of *jus cogens* norms is concerned.

a) The Debate on the Significance of State Consent: Voluntarism Versus Natural Law

The controversy surrounding the “sources” of international law has for a long time been associated with the confrontation between voluntarists and supporters of a natural law approach.¹¹⁹ Although those two approaches do not constitute the only theories relating to the sources and, more generally, the process of creation or identification of international law,¹²⁰ their antagonistic views, which are centered on the relative importance of State consent, are particularly insightful for our analysis.

According to the voluntarist theory, international law is entirely a creation of States, i.e. the members of the international community.¹²¹ International law being a horizontal system in which the legal subjects are also the legislator(s), no alternative source of international law and, more particularly, international legal obligations, can be conceived of. Also, attempts to identify such alternative sources are inappropriate. The natural law approach, for instance, not only unduly confuses law and morality, but also lacks a scientific foundation.¹²²

equally sovereign states; and the revolutionary one of the objectivism inherent in the notion of binding norms imposed on states”).

118. See Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTL. Y.B. INT’L L. 22, 25 (1988-89) (observing, based on his agreement with social theories of law, that “not only is State will no the basis of international law, but . . . it is a very misleading explanation of how international law actually works”).

119. *Id.*

120. Alternative theories are sometimes referred to under the label “social theories of law.” See *id.* See, e.g., Oscar Schachter, *The Evolving International Law of Development*, 15 COLUM. J. TRANSNAT’L L. 1 (1976) (one of the first applications of social theory to the field of international law).

121. See José A. Cabranes, *International Law by Consent of the Governed*, 42 VAL. U. L. REV. 119, 132 (2007) (stating that “consent lies at the heart of the making of customary international law, just as it does with respect to treaty-based law”). See also *id.* at 140 (criticizing the fact that the “indeterminacy [of *jus cogens*] invites development or expansion that ignores the basic principle that a *jus cogens* norm must be based on authentic systemic consensus”, internal quotation marks omitted).

122. See Criddle & Fox-Decent, *supra* note 12, at 343 (observing that “[p]ositivists argue that natural law theories of *jus cogens* artificially conflate law and morality, confusing parochial and relativistic ethical norms with objective principles of legal right and obligation.”).

Under a natural law approach, on the other hand, international law is not based on State consent, but primarily on “reason.”¹²³ In other words, the rules governing inter-State relations and the obligations of States vis-à-vis each other can be derived, at least to a significant extent, from rules of “reason.” There is no need for States to create law, as it suffices to “uncover” the universally valid rules of nature. The only role that State consent can possibly play is to provide evidence of the existence of a given rule of “natural law.”

At first sight, the natural law approach may appear unrealistic: one may wonder how every single norm of international law can possibly be based on reason alone. However, to expect such “wonders” from natural law would be a misconstruction of this doctrine. In fact, natural law thinkers do not claim that any given provision contained in a treaty concluded between two States necessarily derives from reason. Rather, they argue that the legal validity and binding nature of such provisions cannot be explained on the basis of consent and that only a principle of natural law (such as *pacta sunt servanda*) can provide the necessary theoretical foundation.

In a sense, natural law and voluntarism have both been able to explain, and legitimize, specific developments of international law. Natural law has, in the early stages of international law, served as a useful theoretical underpinning of basic principles of the law of treaties. Arguably, voluntarism appropriately describes international law in an era of steady proliferation of treaties and other international agreements. In more recent years, a variety of other theories explaining the origin and validity of rules of international law—generally rejecting consensualist approaches—have been elaborated.¹²⁴

De lege lata, the consensualist doctrine, appears convincing. In fact, the most authoritative definition of the sources of international law (Article 38 of the ICJ Statute) can easily be regarded as a confirmation of the consensualist theory. Indeed, the three main sources of international law under Article 38 (treaties, custom and general principles) can each be explained on the basis of State consent. If the consensual nature of treaties is particularly evident, the consent-based character of customary rules (which are “generally accepted” by States)¹²⁵ and general principles

123. *Id.* The authors refer to Vattel’s perception of natural law as “a universal natural law of reason.”

124. See Pellet, *supra* note 118, at 25. Those approaches are generally referred to as “social” or “realist” theories.

125. See ICJ Stat. art. 38(1)(b) (referring to customary law as “evidence of a general practice accepted as law”).

(which are “recognized by [all or a large number of] civilized nations”)¹²⁶ can hardly be denied.

The ICJ’s case law—which can be attributed to the ICJ—similarly supports the consensualist approach. In the 1927 *Lotus* case (prior to the adoption of the ICJ’s Statute), the PCIJ, in an *obiter dictum*, formulated its views on the origin of rules of international law. It observed that “[t]he rules of law binding upon States [i.e. international law rules] . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.”¹²⁷

If Article 38 of the ICJ Statute and the PCIJ’s observation in the *Lotus* case both provide support for the consensualist approach, a number of developments in the second half of the 20th century—both doctrinal and practical—have altered the terms of the debate and called into question the preeminence of consent as the source of international law. Whether it is sociological, “realist” approaches of international law¹²⁸ or theories undermining traditional perceptions of State sovereignty,¹²⁹ they all have contributed to the view that the will of States does not form the (only) basis for rules of international law.

b) The Impact of *Jus Cogens* on Consensualism: A Limited Rejection

The fact that most authors agree that the concept of *jus cogens* entails, in some way or another, a rejection of the voluntarist approach of international law does not surprise. The prevailing view is, in fact, that *jus cogens* need not be universally accepted—acceptance by a mere majority will suffice—and that it therefore binds non-consenting States.¹³⁰ *Jus cogens* is thus incompatible with consensualism.

126. *Id.* at art. 38(1)(c).

127. 1927 PCIJ (ser A), No 10, at 18.

128. See, e.g., Pellet, *supra* note 116, at 25. Adopting a social theory approach, this author argues that consent is largely irrelevant for the formation of international law. In particular, he claims that consent is often unnecessary (“obligation without will”), *id.* at 33, and that conversely, consent is sometimes not sufficient to create law (“will without obligation”) *id.* at 27.

129. See, e.g., John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT’L L. J. 433, 452-56 (1997).

130. See Gangl, *supra* note 10, at 76 (stating that “[A]rticle 53 [of the Vienna Convention] does not require universal acceptance”); Danilenko, *supra* note 9, at 49 (concluding and deploring the fact that Article 53 of the Vienna Convention creates “majority rule-making in the framework of the established sources [of international law]”); Uhlmann, *supra* note 10, at 112 (observing that “[i]dentifying a norm as *jus cogens* does not require recognition by each and every member of the international community, but only the consent of a very large majority reflecting the essential components of the international community.”).

More specifically, such a view can lead to two possible conclusions. First of all, one may consider that while *jus cogens* itself is not based on State consent, this does not affect the consensual nature of the other components or “sources” of international law (treaties, custom, general principles). More radically, one could argue that the example of *jus cogens* illustrates that, as a general matter, international is not based on consent. It is not always clear whether specific writers subscribe to the first or the second interpretation.

Arguing—as most scholars do—that a rule of *jus cogens* does not require State consent (all States’ consent) makes sense from a practical point of view. In fact, the (un)declared purpose of the concept of *jus cogens* lies precisely in its ability to impose specific duties on States without the need to have those States accept the duties concerned. As some authors have observed, if States are only bound by what they have consented to, then one can hardly speak of “law.”¹³¹ This observation applies *a fortiori* to *jus cogens*.

However, it would be exaggerated and wrong to conclude that consent plays no role in the establishment of *jus cogens* norms. If *jus cogens* constitutes, indeed, a rejection of consensualism, then such rejection has limits. First of all, the impossibility for States to derogate from *jus cogens* norms cannot be equated with a refusal of consent as the basis for international law. In fact, the regime of non-derogability is a *consequence* of a norm’s *jus cogens* character and not an explanation of its *source*. In other words, it would be illogical to state that, since *jus cogens* norms may not be derogated from, and since they therefore prevail over contrary agreements between States, *jus cogens* is not based on consent.

Second, the idea that *jus cogens* norms are “accepted . . . by the international community of States as a whole” strongly suggests that a rule cannot be considered as *jus cogens* if it is not recognized as such by at least a significant number of States. While the reference to the international community as a whole does not necessarily imply acceptance by all States, it nevertheless seems to require the approval of a (significant) majority of them.¹³² Thus, a universally valid norm of *jus cogens* would be based on the consent of a large majority of States. Therefore, *jus cogens* is non consent-based only insofar as the will of a majority of States binds the dissenting minority.

131. See Anthony A. D’Amato, *Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law*, 10 VA. J. INT’L L. 1, 3 (1969) (stating that “[i]f the only way a defendant state can be held accountable to law is by proving that that state *consented* to the *particular* rule in question, hardly any case could ever be won by a plaintiff state.”).

132. See Paulus, *supra* note 33, at 308.

In reality, the determination of the true relevance of State consent for the creation of *jus cogens* norms and international law more generally encounters a fundamental obstacle. In fact, it is unclear, and almost impossible to assess, to what extent State consent constitutes the cause or merely the effect of the existence of a particular (*jus cogens*) norm. Does the acceptance of a specific norm by the international community “generate” such norm or does it merely provide evidence of its existence (as a norm of natural law)?

While a final answer to this question may not be found without solving, somewhat arbitrarily, the basic controversy between positivist and natural law partisans, one fundamental conclusion can be drawn from the confrontation of *jus cogens* and consensualism: *jus cogens* implies the possibility for a State to be bound by a norm that it has not accepted and, significantly (and in this respect *jus cogens* differs from ordinary customary law), which it has expressly objected to.

B. The Impact of the “Jus Cogens Vision” on the Post-Vienna Convention Development of International Law

The effects and repercussions of the vision of international law contained in the concept of *jus cogens* are manifold. I do not claim to provide an exhaustive and detailed examination of any of them; instead, I will briefly review the main developments that can be considered as having been facilitated by the acceptance of such vision.

It would probably be erroneous to link specific developments to one particular aspect of the international legal order as it is envisioned by *jus cogens*. Thus, rather than attempting to associate specific developments with either the recognition of fundamental values, the existence of a hierarchy of norms, or the possibility for States to be bound against their consent, it is more sensible to adopt a holistic approach of the impact of *jus cogens*.

1. The Recognition of Individual Rights as Fundamental Values of the International Legal Order

When the Vienna Convention on the Law of Treaties was adopted in 1969, it was neither established that the inclusion of a *jus cogens* provision was aimed at the protection of fundamental “values,” nor clear what such values could possibly consist of—even though the International Law Commission provided a few illustrations of *jus cogens* norms (or rather treaties that would be in violation of such norms).¹³³ On the contrary, doctrinal articles sometimes contained misleading

133. See Haimbaugh, *supra* note 19, at 206.

comments, apparently assimilating peremptory norms of international law to general principles of law.¹³⁴

However, the idea that the concept of *jus cogens* essentially aims to protect individual rights has progressively found acceptance among scholars. Academic writings on *jus cogens* have increasingly focused on the protection of specific individual rights,¹³⁵ or human rights more generally.¹³⁶ Thus, the initial State-centered approach of peremptory norms of international law, which emphasized the need to preserve vital State interests,¹³⁷ has given way to a more individual-centered notion of *jus cogens*.

At the same time, scholars have started to understand that even State-centered *jus cogens* rules, i.e. *jus cogens* norms that govern relationships between States, ultimately affect individual rights. If, for example, the prohibition of the use of force aims to preserve a State's security and independence,¹³⁸ such rule also protects the lives and health of a State's citizens. Similarly, the classical examples of State-centered norms such as the prohibition of colonialism and non-intervention in the domestic affairs of other States¹³⁹ encompass a significant individual rights aspect.

More generally, the *jus cogens* debate has generated increased awareness of the fact that those who are ultimately affected by international law and the conduct of international relations are individuals. This awareness is closely linked with the realization of the largely fictitious character of the State as an entity independent of its population. Wars, international disputes or economic sanctions between States ultimately affect not the State as an abstract entity, but the

134. See Gangl, *supra* note 10, at 72 (stating that *jus cogens* norms are "generally seen as those most basic to the international community, such as the principle of *pacta sunt servanda*").

135. See, e.g., Allain, *supra* note 11; Spiermann, *supra* note 78; Stephanie L. Williams, "Your Honor, I am here today requesting the Court's permission to torture Mr. Doe": *The Legality of Torture as a Means to and End v. The Illegality of Torture as a Violation of Jus Cogens Norms under Customary International Law*, 12 U. MIAMI INT'L & COMP. L. REV. 301 (2004); Mitchell, *supra* note 15.

136. Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?* 22 WIS. INT'L L.J. 245 (2004); Andrea Bianchi, *supra* note 47; Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUST. YBIL 82 (1992); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411 (1988-1989).

137. See Haimbaugh, *supra* note 19, at 216 (referring to a study conducted by Sztucki which shows, *inter alia*, that the initial "official" list of *jus cogens* norms was State-centered).

138. *Id.* at 212.

139. *Id.* at 213.

people.¹⁴⁰ In a sense, this understanding has allowed the “veil” of Statehood in international law to be lifted.

Over the past three decades, the subject of individual rights has been addressed in numerous international conventions and agreements. As a result, the status and rights of individuals are increasingly governed by international law, rather than merely domestic law. Thus, international law has played a pivotal role in raising the level of protection of individual rights across the globe, and efforts have been made to impose compliance with such “international” standards by all States, whether with or without their consent.

2. The Enhanced Judicial Protection of Individual Rights

The recognition of individual rights as fundamental values of the international legal system and the resulting idea of the existence of a hierarchy of international law norms inescapably lead to the necessity of providing for heightened protection of those rights. Due to its deterring effect, the most significant feature of such protection consists of the possibility to prosecute and try authors of “international crimes.”¹⁴¹ Significantly, it must be noted that, to some extent, the punishment of international crimes has taken place without, and even against, the will of the States concerned.

Enhanced judicial protection of individual rights under international law comprises two aspects. First of all, it is based on the possibility for domestic courts to exercise universal or quasi-universal jurisdiction over certain crimes. As I have shown, although it is inappropriate directly to apply the theory (and customary international law rule) of universal jurisdiction to *jus cogens* violations, the principle of universal jurisdiction is useful as such. In fact, it ensures that particularly serious violations of individual rights will be punished whenever the acts at stake are not captured by the traditional jurisdictional rules based on territory and nationality or when the courts asserting jurisdiction unduly acquit the alleged offender(s).¹⁴²

It would of course be a distortion of reality to claim that universal jurisdiction *results* from the acceptance of the *jus cogens* vision of international law. Chronologically, the principle of universal jurisdiction undeniably precedes the “official” recognition of *jus cogens* in the Vienna Convention. However, in light of its basic implications, it cannot be doubted that the idea of *jus cogens* has at least contributed to the

140. States do not die, suffer or starve; people do.

141. SHAW, *supra* note 65, at 430-40 (for an explanation of the meaning of “international crimes”).

142. See *supra*, I.C.1.

growing acceptance of, and recourse to, as a matter of international lawmaking, the notion of universal jurisdiction. In fact, as I have already mentioned, a number of international conventions adopted after the entry into force of the Vienna Convention establish quasi-universal jurisdictional regimes. Also, the failed (and inappropriate) attempts to associate *jus cogens* and universal jurisdiction have, interestingly, had a beneficial impact on the acceptance of universal jurisdiction. Although those attempts have not led to the requested broadening of the scope of application of universal jurisdiction, the intense academic discussions of this question have improved the perceived legitimacy of the universality principle.

Universal jurisdiction is, of course, not an ideal rule, but rather a rule of “necessity.” In fact, as has been rightly pointed out, it constitutes a “last resort” rule of jurisdiction, when all others fail.¹⁴³ More importantly, the exercise of universal jurisdiction entails the possibility of undesirable “conflicts of jurisdiction,” i.e. situations where the courts of two or several countries claim jurisdiction over particular acts. This, in turn, leads—at least in theory—to a violation of the double jeopardy principle insofar as an accused may face a trial in country B after having been acquitted in country A.

Since universal jurisdiction exercised by domestic courts does not constitute an ideal means of enhancing the judicial protection of individual rights, one must resort to alternative tools. Unsurprisingly, those consist of the establishment of international tribunals enjoying centralized jurisdiction with regard to specific acts (and/or events). Here again, due to its wide and frequent discussion in relation to the creation of such international criminal tribunals,¹⁴⁴ the concept of *jus cogens* has been instrumental as a justification of such endeavors.

Historically, as is well known, the first examples of international criminal tribunals are the Tokyo and Nuremberg Tribunals set up in the aftermath of World War II. Having had as their principal task the prosecution and punishment of genocide, war crimes and crimes against humanity perpetrated by the German Nazi regime and the Japanese armed forces during World War II, those pioneer tribunals have sometimes been criticized for representing an illegitimate exercise of “victor’s justice.”¹⁴⁵ In fact, not only were the authority and jurisdiction of these tribunals doubtful, but also, and more importantly, the very acts which they set out to punish did not, at that time, constitute established

143. See Abi-Saab, *supra* note 60, at 600.

144. See Shaw, *supra* note 65, at 126 (noting that “the rise of individual responsibility directly for international crimes marks a further step in the development of *jus cogens* rules”).

145. See ANTONIO CASSESE, *INTERNATIONAL LAW* 454 (2005).

norms of international law. Thus, the basic mission of those tribunals implied a violation of the cardinal criminal law principle of *nullum crimen, nulla poena sine lege*.

However, interestingly, no one (neither the authors of the crimes concerned, nor German or Japanese officials at that time or more recently) seriously challenged the legitimacy of the Tokyo and Nuremberg Tribunals, even though they had been set up without, and most probably against, the consent of the defeated nations. This lack of opposition reflects the quasi-universal acceptance of the atrociousness of the crimes perpetrated by the German and Japanese militaries as being contrary to basic *jus cogens* norms of international law.

Another useful illustration of how international criminal justice disposes of the requirement of consent of the (national State of the) accused is provided by the *ad hoc* tribunals for Rwanda and the former Yugoslavia. Set up with a view to prosecute and punish serious violations of humanitarian law having occurred during the respective conflicts, both tribunals have been established by Security Council resolutions,¹⁴⁶ rather than international treaties, thereby rendering unnecessary the consent of the States or entities concerned.¹⁴⁷

As far as the International Criminal Court is concerned, it is well known that it does not enjoy universal jurisdiction over the crimes falling within its competence,¹⁴⁸ even though the possibility of such jurisdiction was envisaged during the negotiations of the Court's Statute. However, the fact that the courts of any signatory of the Rome Statute may validly exercise jurisdiction over acts committed in the territory of any (other) signatory State or by a national of any such State significantly widens the scope of jurisdiction of domestic courts. Also, it should not to be forgotten that the International Criminal Court may be seized of a matter by the Security Council acting under Chapter VII of the U.N. Charter and that, in such circumstances, the national or territorial State does not need to be a signatory of the Statute.¹⁴⁹

146. See S.C. Res. 808, U.N. SCOR, U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 827, U.N. SCOR, U.N. Doc. S/RES/827 (May 25, 1993) (as far as the International Criminal Tribunal for the Former Yugoslavia is concerned). See S.C. Res. 955, U.N. SCOR, U.N. Doc. S/RES/955 (Nov. 8, 1994) (as far as the International Criminal Tribunal for Rwanda is concerned).

147. See SHAW, *supra* note 65, at 403 (explaining that the reason those tribunals were set up by Security Council Resolutions was "to ensure that the parties most closely associated with the subject matter of the war crimes alleged should be bound in a manner not dependent on their consent").

148. *Id.* at 412.

149. See Rome Statute, I.C.C. Stat. art. 13(b), U.N. Doc. A/CONF.183/9 (Jul. 1, 2002).

CONCLUSION

As I have shown, due largely to a number of conceptual and theoretical defects, *jus cogens* is of limited relevance for the actual practice of international law. Thus, *jus cogens* does not properly speaking constitute a (functioning) rule of international law. Rather, its usefulness lies in the way it envisions the international legal order. Such vision, as we have seen, consists of a normative system based on fundamental values, characterized by a hierarchy of norms, and not entirely dependent on the consent of the subjects of international law. This vision has had a noticeable impact on the post-Vienna Convention development of international law. Two examples of such impact are the fundamental role played by individual rights and the growing judicial protection of those rights.

In this article, I have only been able to sketch the effects of *jus cogens* on the post-Vienna Convention evolution of international law. Various other consequences, including heightened protection of human rights (and notably the creation of human rights commissions and tribunals) and humanitarian intervention without the consent of the territorial State, have not been examined. The inclusion of such issues would, in fact, have exceeded the scope of this contribution.

