

Chapter 2

Sherlock Holmes and the Mystery of *Jus Cogens*

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

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2.1 Introduction

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

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

Sherlock Holmes first appeared in 1887 in Dr. John Watson's account, *A Study in Scarlet*.¹ In the century and a quarter since their first adventure, Holmes and Watson have been incarnated in print, films and television series, inspiring legions of tourists to emerge from London's Baker Street underground station to search for their apartments at 221B Baker Street. Sir Arthur Conan Doyle, who wrote the stories, tried to put an end to Sherlock Holmes during his lifetime,² but public outcry forced Conan Doyle to revive the famous detective. It is reported that during the First World War, when the author visited the allied front, a famous French general asked 'What rank does Sherlock Holmes hold in the English army, monsieur?' Conan Doyle replied that, alas, Mr. Holmes was too old for active service.³ English postal authorities continue to receive letters addressed to Holmes, asking for his assistance; surveys done in 2008⁴ and 2011⁵ found that between 21 and 58 % of Britons believe that Sherlock Holmes actually lived. In sum, the literary creation has taken on a certain reality with some impact, not unlike *jus cogens*.

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

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

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

³ Starrett 1950, at xii.

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

⁵ As of 2011, '[t]wenty per cent of Britons believe the likes of Sherlock Holmes and Blackadder are based on historical personalities.' One in five Britons think Sherlock Holmes, Miss Marple and even Blackadder were genuine historical figures, *Daily Mail Reporter*, 5 April 2011, <http://www.dailymail.co.uk/news/article-1373505/One-Brits-think-Sherlock-Holmes-Miss-Marple-Blackadder-historical-figures.html#ixzz3WEIS4ehm>. Accessed 5 April 2015.

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

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

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

The only references to peremptory norms in positive law are found in the Vienna conventions on the law of treaties.⁹ Article 53 of the 1969 Vienna Convention on the Law of Treaties (VCLT), concerning treaties between states, provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. Such a norm is defined by the VCLT as one 'accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character'. Article 64 VCLT adds that the emergence of a new peremptory norm of general international law will render void any existing treaty in conflict with the norm. Behind these provisions are the writings of classic and modern publicists proposing various sources and functions for *jus cogens*, as this chapter discusses in the two sections that follow, the first examining theories of origin and the second addressing the possible functions of *jus cogens*. Both sections reveal the cultural importance of *jus cogens*, but the very limited role played in dispute settlement or enforcement of norms.

2.2 The Origins of *Jus Cogens*

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

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

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

¹⁰ Bianchi 2008.

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

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

2.2.1 Natural Law

For most classical writers, there existed three levels of legal obligation: *jus dispositivum* or voluntary law, divine law and *jus naturale necessarium* (necessary natural law), the last mentioned being the highest category. Gentili¹² connected natural law to the law of nations, influencing Grotius who gave primary place to natural law, even over divine law:

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

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

Wolff¹⁵ and Vattel¹⁶ agreed that there existed ‘necessary law’ by which they meant it was binding and overriding of state consent. This law was natural to all states and made illegal all treaties and customs which contravened this necessary law. Wolff’s necessary law of nations¹⁷ included the immutable laws of justice, the ‘sacred law’, which nations and sovereigns are bound to respect and follow in all

¹² Gentili 1933.

¹³ Grotius 1625.

¹⁴ Ibid.

¹⁵ Wolff 1764, para 5.

¹⁶ de Vattel 1758, para 9.

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

their actions.¹⁸ Pufendorf¹⁹ and Vattel also all relied on natural law ‘no less binding on states, on men united in political society, than on individuals’.²⁰ They saw the natural law of nations as a particular science, ‘consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns’.²¹ The distinction between *jus dispositivum* and the ‘necessary principles of international law that bind all states regardless of consent’ lies in the origin of the latter in the natural law of reason.²²

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

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

2.2.2 *Logical or Legal Necessity*

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

¹⁸ Ibid., at xiii.

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

²⁰ Chitty 1849, at xi.

²¹ Ibid.

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

²³ de Vattel 1849, at 7 and 9.

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

²⁵ Ibid., at 18.

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

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

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

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

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

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

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

²⁷ Rozakis 1976, at 2.

²⁸ Carnegie Endowment for International Peace 1967, at 10.

²⁹ Ibid., at 12.

³⁰ de Page 1962, at 111.

³¹ Tomuschat 1993, at 210–211.

³² von Verdross 1937, at 574 and 576.

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

2.2.3 General Principles of Law

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

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

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

³⁴ Ibid., at 28.

³⁵ Schwarzenberger 1965, at 457.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴² Ibid., para 5.

⁴³ Ibid., para 4.

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

⁴⁵ McNair 1961, at 213–214.

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

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

2.2.4 Consent

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

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

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

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

⁴⁶ Ibid., at 215.

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

⁴⁸ Kelsen 1945, at 110 ff.

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

⁵⁰ Oppenheim 1905, at 528.

⁵¹ Hall 1924, at 382.

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

Peremptory norms/*jus cogens* came into positive law with the Vienna treaties on treaties.⁵³ Of the four ILC *Special Rapporteurs* on the law of treaties two of them, Brierly⁵⁴ and Lauterpacht,⁵⁵ supported of the notion of peremptory norms in international law,⁵⁶ but during ILC work on the law of treaties, most of its members joined Sir Humphrey Waldock, the ILC's fourth special rapporteur on treaty law, in seeking to reconcile *jus cogens* with the doctrine of positivism,²⁶ without spending much time speculating on the origin of *jus cogens*. The final ILC draft on the law of treaties was produced by Waldock.

In the ILC report submitted to the Vienna Conference, the ILC stated that it had become increasingly difficult to sustain that there is no rule of international law from which states cannot at their own free will contract out. The law of treaties thus must accept that there are certain rules from which states are not competent to derogate, and which may be changed only by another rule of the same character. The ILC also stated that although there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*, the particular nature of the subject-matter with which it deals that may give it the character of *jus cogens*.⁵⁷ The final version of Article 53 VCLT⁵⁸ was adopted by a majority of 87 votes in favour, with 8 votes against,⁵⁹ and 12 abstentions.⁶⁰ René-Jean Dupuy, at the time a member of the Holy See's delegation to the Vienna Conference, noted that the inclusion of Article 53 in the VCLT sanctioned the 'positivization' of natural law.⁶¹

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

⁵³ Schwarzenberger 1965, at 477.

⁵⁴ Brierly 1936, at 218–219.

⁵⁵ Lauterpacht 1937, at 153 ff.

⁵⁶ *Ibid.*, at 306–307.

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

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

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

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

⁶¹ Sztucki 1974, at 158.

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

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

2.3 Functions of *Jus Cogens*

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

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

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

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

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

⁶⁶ See Sztucki 1974, at 97.

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

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

National and international tribunals have begun to address some of the possible consequences deriving from the identification of *jus cogens* norms, such as the impact of peremptory norms on state and official immunities and the immunity of international organizations, as well as in judging the legality of Security Council resolutions and incompatible domestic laws. Various studies of the ILC, in particular the commentary to Article 26 of the Articles on State Responsibility⁶⁸ as well as Section E of the Report of the Study Group Fragmentation, provide some insights as well.⁶⁹ Nonetheless, in the absence of more jurisprudence and state practice, the effects and consequences of *jus cogens* remain primarily theoretical.

2.3.1 Functions in the Law of Treaties

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

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

⁶⁹ Fragmentation of international law, paras 329–409.

⁷⁰ von Verdross 1937, at 574.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid., at 575.

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

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

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

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

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

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

⁷⁷ *Ibid.*, para 56.

⁷⁸ *Ibid.*, para 57.

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

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

2.3.2 Accountability

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

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

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

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

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

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

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

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

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

⁸⁴ With respect to national court decisions, in *Jurisdictional Immunities of the State* the Court cited to decisions in Canada, Greece, New Zealand, Poland, Slovenia, and the United Kingdom where sovereign immunity was acknowledged even in the face of allegations of *jus cogens* violations. *Jurisdictional Immunities of the State*, para 96. For the United States, intermediate courts have rejected an implied exception to sovereign immunity where the foreign State was accused of violating *jus cogens* norms. See *Siderman de Blake v. Argentina*; *Princz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1997); and *Sampson v. Germany*, 250 F.3d 1145, (7th Cir. 2001). For immunity of officials, compare *Ye v. Zemin*, 7383 F.3d 620, (7th Cir. 2004), at 625-627; *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), at 14-15; *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012) (acknowledging immunity of foreign government officials despite allegations of *jus cogens* violations), with *Yousuf v. Samantar*, USSC, No. 08-1555, 1 June 2010.

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

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

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

2.3.3 Resolving Priorities Between Conflicting Norms

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

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

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

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

⁸⁹ Koskeniemi 1997.

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

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

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

⁹⁰ Dupuy 1995, at 14–16.

⁹¹ Salcedo 1997, at 588.

⁹² Fragmentation of international law, paras 31–32.

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

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

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

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

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

⁹⁵ *Ibid.*, para 80.

⁹⁶ *Ibid.*, para 84.

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

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

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

2.3.4 Declaring Fundamental Values

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

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

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

¹⁰⁰ Henkin 1981, at 15; Sohn 1982.

¹⁰¹ Bianchi 2008, at 496.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁹ Maia 2009, at 277.

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

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

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

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

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

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

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

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

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

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

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

2.4 Conclusions

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

¹¹⁶ Bianchi 2008, at 507.

¹¹⁷ Ibid., at 504.

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

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

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

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

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

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

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

¹²¹ Draft Articles on State Responsibility, para 3.

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

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

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

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

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

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