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Droit international

João Ernesto Christófolo

Solving Antinomies Between Peremptory Norms in Public International Law

UNIVERSITÉ DE GENÈVE
FACULTÉ DE DROIT

Collection Genevoise

Schulthess
ÉDITIONS ROMANDES

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Contents

Table of cases ..... **ix**

Abbreviations ..... **xv**

Introduction **1**

Part I – The Problem of Antinomy in Law **5**

Chapter I - Antinomy in Law **7**

Section I - Identifying legal antinomies 8

Section II - Conflict of norms in public international law 10

The definition of conflict in international law 13

Chapter II - Solving legal antinomies in public international law **16**

Section I – Interpretation as a means of harmonizing conflicting norms 17

Section II – Meta-rules for solving legal antinomy in public international law 24

Section III - Insufficiency of traditional methods (meta-rules): the problem of the "hard cases" 38

Teleological-evaluative justification – one norm prevails 43

Weighing and balancing 46

Open discretion for the interpreter? 49

Section IV - The problem of "hard cases" in international law 51

Using "weighing and balancing" techniques for solving "hard cases" in international law 52

Conclusion 56

Part II - *Ius cogens* norms in public international law: Theories and Definition **59**

Chapter I - Material theories **64**

Section I – Natural Law Theories 65

A critical evaluation of Natural Law theories 69

Section II – Public Policy Theories 70

Critical evaluation of public policy theories 77

Section III – *Ius cogens* as the expression of an institutionalized international community 87

Section IV – *Ius cogens* as a material representation of *ius publicum* 90

Section V – Concluding remarks on Material theories 93

Chapter II - Hierarchical theories on *ius cogens* **94**

Section I – The UN Charter and *ius cogens* 96

Section II – Concluding remarks on hierarchical theories 100

Chapter III – Horizontal theories **103**

Section I – *Ius cogens* as a rule of horizontal collision 107

Section II – Consensual theories 111

Section III – Customary theories 115

Section IV – *Ius cogens* as the general principles of law and the principles of international law 118

Section V – Concluding remarks on horizontal theories 121
Chapter IV – Definition of *ius cogens*..... 122
Section I – The question of the sources of *ius cogens*..... 123
Section II – Non-derogability..... 125
Section III – Imperativeness 129
Section IV – Universality 134
Section V – Determination of peremptory norms..... 137
State practice..... 140
Judicial determination..... 143
Writings of scholars 146
Section VI – Concluding remarks on the definition of *ius cogens* 147

Part III – The Material Content of *Ius Cogens*..... 149
Chapter I - *Ius cogens* and the use of force 153
Section I - Historical development..... 153
The UN Charter..... 156
Section II - The prohibition of the use force as a norm of *ius cogens* 161
Effects of the ius cogens nature of the prohibition of the use of force 165
The peremptory scope of the prohibition of the use of force 169
Peaceful settlement of disputes: does it possess ius cogens nature?..... 175
Chapter II – The principle of Self-Determination 178
Section I - Historical development and the positive nature of the right to self-determination..... 178
The normative content of the principle of self-determination 182
Section II - The peremptory nature of the principle of self-determination..... 186
The peremptory scope of the principle of self-determination..... 190
Chapter III - *Ius cogens* and human rights..... 194
Section I - The peremptory nature of human rights norms..... 197
Which human rights have a ius cogens nature?..... 199
Section II – The Prohibition of Torture 206
The peremptory scope of the prohibition of torture..... 209
Section III – The Prohibition of Genocide 212
Section IV – The Prohibition of Slavery, the slave trade, and slavery-like practices.. 216
Section V – The Prohibition of Crimes against humanity..... 219
Section VI – The Prohibition of Systemic Discrimination..... 222
Section VII – The Prohibition of the most serious violations of International Humanitarian Law (IHL) 227
The peremptory nature of International Humanitarian Law (IHL) 228
The peremptory scope of IHL 233

Part IV – Antinomy Between Norms of *Ius Cogens* 239
Chapter I – Identifying a conflict between peremptory norms..... 240
Chapter II - The insufficiency of traditional meta-rules..... 243

Chapter III - Antinomy between peremptory norms: a "hard case" in international law? 246
A typology of antinomies between peremptory norms 248
Chapter IV - Conclusion 251

Part V - Collision between the prohibition of the use of force and the prohibition of the most serious human rights violations – the problem of humanitarian intervention 253
Chapter I - A lingering question: Is unilateral humanitarian intervention legally compatible with the peremptory regime on the use of force? 257
Section I – A brief historical overview of doctrine 258
Section II – Humanitarian intervention as *lex posterior*? 261
Section III – Humanitarian intervention and *ius cogens*: the perspective of the UN Charter 264
Section IV – Humanitarian intervention as *lex specialis*? 268
Section V - Conclusion on unilateral humanitarian intervention 269
Section VI - The concept of "responsibility to protect" 271
Chapter II – The accumulative process of human rights norms of a peremptory character and the prohibition of the use of force 278
Section I – Accumulation as a result of legal interpretation 279
Section II - A real or an apparent antinomy? 283
Chapter III – Solving the conflict through legal interpretation 287
Section I – Gross and systematic human rights violations as threats to international peace and security 289
Section II – A coherent operationalization of the concept of "responsibility to protect" as a result of weighing and balancing 292
Progressive approach: a requirement stemming from the application of the principles of peaceful settlement of disputes and international cooperation 293
Designing a proper mandate as a guarantee of respect for international law 295
Chapter VI - Conclusion 301

Part VI – Antinomy between the prohibition of the use of force and self-determination: the case of a peace agreement between Israel and Palestine 305
Chapter I – The illegal character of the Israeli occupation of Palestinian territories. 308
Section I - Illegal occupation of foreign territories through the use of force – an overview 308
Section II - The Israeli occupation of Palestinian territories –historical overview 311
Chapter II - Consent to international agreements as an exercise of the right to self-determination by non-self-governing territories 317
Section I - Could Palestinian consent preclude the effects of the prohibition of territorial acquisition through the use of force? 318
Section II – Consent of non-self-governing peoples and self-determination 319

Chapter III - Where the conflict lies: the real antinomy between the prohibition of territorial acquisition by the use of force (prohibition) and the principle of self-determination (permission) as a "hard case" of public international law 322
Section I – Determining whether there is an antinomy 322
Section II - A "hard case" in international law? 323
Section III – Balancing and weighing between the peremptory norms on the prohibition of the use of force and the right to self-determination 324
An end to the conflict 327
Borders as close as possible to those of 1967 328
Agreement subject to the consultation of the Palestinian people 329
Support of the organized international community 331
Conclusion 334

Conclusion 335

Bibliography 339

Table of cases

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Abbreviations

AFDI	Annuaire français de droit international
AJIL	American Journal of International Law
ASDI	Annuaire suisse de droit international
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
BYIL	British Yearbook of International Law
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
ECJ	European Court of Justice
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for the Former Yugoslavia
IIL	Institute of International Law
ILC	International Law Commission
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
PCIJ	Permanent Court of International Justice
R.C.A.D.I.	Recueil des cours de l'Académie de droit international de La Haye
RGDIP	Revue générale de droit international public
STF	Supremo Tribunal Federal (Brazilian Supreme Court)
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
WTO	World Trade Organization
YbILC	Yearbook of the International Law Commission.

Introduction

The study of peremptory norms (*ius cogens*) is a subject of great interest in international law. Although the general notion of peremptory norms was not unprecedented,[1] the codification of *ius cogens* in the 1969 Vienna Convention on the Law of Treaties[2] was followed by a significant number of studies devoted to several aspects of the newly established legal regime. Since then, the general theory of peremptory norms has covered a wide array of subjects, such as their sources, content, evidentiary elements and axiological goals. Scholars have discussed the existence of *ius cogens* norms, assessed their material normative scope and tried to determine their position in the international legal order.[3]

In spite of the large number of studies dealing with the subject of *ius cogens*,[4] it may be surprising to note that little attention has been given to possible collisions

[1] The notion of peremptory norms in international law can be found in the work of classical publicists such as Hugo Grotius, Emer de Vattel, and Christian Wolff. H. Grotius, *De Iure Belli et Pacis (On the Law of War and Peace)* (William Whewell ed. & trans.), London, John W. Parker, 2009; E. de Vattel, *Le droit des gens (ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et souverains)*, Paris, J. P. Aillaud, 1835; and C. Wolff, *Ius Gentium Methodo Scientifica Pertractorum (A scientific method for understanding the Law of Nations)* (transl. J. H. Drake and ed. J. B. Scott), Oxford, Clarendon Press, 1934. See also L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical development, criteria, present status* (1988); A. von Verdross, 'Forbidden Treaties in International Law', (1937) 31 *American Journal of International Law*, p. 571. There are also several references to *ius cogens* in decisions taken by international courts before the 1969 Vienna Convention of the Law of Treaties. In 1934, see Judge Schücking of the Permanent Court of International Justice (PCIJ) in the *Oscar Chinn* case, PCIJ. Series A/B No. 63 (1934), pp. 149-50, Judge Schücking, dissenting. Subsequent to this 1934 case, judges of the International Court of Justice (ICJ) made similar references to *ius cogens* in a number of separate and dissenting opinions. For the opinion at the ICJ, *Case concerning the application of the Convention of 1902 governing the Guardianship of Infants (Netherlands vs. Sweden)* (Judgment), ICJ Reports, 1958, Separate Opinion of Judge Moreno-Quintana; *Right of Passage Over Indian Territory (Portugal v. India)*, (Judgment) ICJ Reports 1960, Separate opinion of Judge *ad hoc* Fernandes; *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; F.R.G./Netherlands)* (Judgment), ICJ Reports 1969, Separate opinion of Judge Nervo. For a thorough discussion, see Part II, Chapter I below.

[2] Vienna Convention on the Law of Treaties opened for signature on May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

[3] This development has not occurred without noteworthy differences over the philosophical premises and the methodological approaches to that concept. Writers have disagreed over the means of identifying the essential elements of *ius cogens* norms, in determining their hierarchy, or in assessing their relationships with other competing norms in the legal system. See, e.g., I. Brownlie, *Principles of Public International* Law, Oxford Press, 3d ed., 1979, pp. 512-15; G. Schwarzenberger, *International Law and Order*, 5, 1971.

[4] On a critical note, Kolb said that "l'impérativolatrie bat aujourd'hui son comble". R. Kolb, *Théorie du ius cogens international, Essai de relecture du* concept, Publications de l'Institut Universitaire de Hautes Études Internationales, Presses Universitaires de France, 2011.

between peremptory norms themselves. Although much has been written on the hierarchical nature of peremptory norms, or on the implications of their horizontal collision with conventional obligations of general international law, the inquiry into the relationship and the conflict between peremptory norms has been virtually non-existent. But the problem of antinomies is a subject-matter inherent to any domain of legal studies. And the likelihood of antinomies is increased in international law due to, *inter alia*, its decentralized character, the existence of a variety of law-makers at the international level and the lack of compulsory adjudication for determining which norm must prevail in cases of normative conflicts.[5] The emergence of latent contradictions between different norms[6] of *ius cogens* nature in international reality therefore makes this study imperative.[7]

This PhD dissertation puts forward a theory aimed at addressing this particular gap in the general theory of *ius cogens*. The objective is to determine how legal interpreters, either a judge or a legal operator before an international court, or even diplomats and other public officers who are supposed to comply with international law in their affairs, may apply existing norms of *ius cogens* in situations in which there is an apparent or a real normative conflict between them. As it will be seen below, these antinomies may arise between the contradictory simultaneous application of the normative vectors stemming from peremptory norms such as those related to the protection of human rights, the non-use of force and self-determination.

This study is based on some premises. First, antinomies between peremptory norms are not played at the level of their normative validity. For unless a new norm of that same character emerges in accordance to articles 53 and 64 of the VCLT, peremptory norms cannot abrogate or derogate from each other in the process of solving the antinomy. Second, by assuming that traditional methods do not apply for solving antinomies between *ius cogens* norms, it as argued that the solution is to be found in existing theories of legal argumentation that aim at solving colliding principles or rules of the same hierarchical level. This is the case of "weighing and balancing" techniques that have been applied by Constitutional courts and international legal regimes. These techniques have proved to be suitable in dealing with conflicting norms when other traditional meta-rules do not apply (the so-called "hard cases"). Third, and in this same vein, the non-hierarchical relationship of precedence among peremptory norms (i.e., neither norm can be applied in an absolute manner) implies that the solution for a collision among *ius cogens* norms must be sought in the idea of optimizing their respective normative

[5] Pauwelyn also mentions the time factor, which makes international law change over time, and the multitude of lawmakers at the domestic level, which leads to a lack of coherence in how states act internationally. J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law relates to other Rules of International Law*, Cambridge University Press, 2003, pp. 13-22.

[6] Norms and rules are used interchangeably in this work.

[7] "As far as norms of international law are concerned, there are a number of variables that make conflict an even more inevitable occurrence". J. Pauwelyn, above n 5, p. 12.

commandments. Instead of derogation between peremptory norms, this method would rather imply the idea of maximizing the observance of all applicable peremptory norms to the same factual circumstance, even when a relationship of conditioned precedence is established *in casu*. Accordingly, all norms of a *ius cogens* nature must be coherently and consistently interpreted with a view to optimizing their respective application to the case under examination.

In the task of addressing these issues, this study is divided into six parts. Part I provides an account of the concept of antinomy as developed in the general theory of law and in public international law. "Conflict" is defined here in broader terms, that is, it is not circumscribed to conflicting treaty provisions; instead it encompasses all types of situations in international law in which norms can be simultaneously applied with contradictory commandments. After describing the main existing rules for solving antinomies, Part I also addresses the problem of "hard cases" in international law, and introduces, under the notion of "general principles of law", methods such as "weighing and balancing" techniques that might solve this particular type of normative conflict.

Part II aims at providing a definition of *ius cogens* as developed in doctrine, judicial decisions and treaty law. It is argued that the concept of *ius cogens* is as an essentially technical quality attached to norms of general international law[8] in the light of their three fundamental features: imperativeness, non-derogability and universality. Part III describes the three most commonly accepted norms of *ius cogens*, namely the prohibition of the use of force, the prohibition of the most serious violations of human rights and humanitarian law, and the principle of self-determination. Particular attention is paid therein to the determination of the peremptory scope of each of these norms.

Part IV introduces the core of present the study. It focuses on the specific problem of conflicting norms of *ius cogens*. It demonstrates first that the application of the traditional meta-rules (*lex posterior*, *lex specialis* and *lex superior*) has inherent limitations as a means of solving this type of antinomy, primarily due to the very imperative and non-derogable characters of peremptory norms. This assumption implies that antinomies between norms of *ius cogens* are potentially a "hard case" in public international law, the solution of which might be achieved through recourse to alternative methods such as "weighing and balancing" techniques previously discussed in Part I. This method, to be accepted as a general principle of law under Art. 38 (1) (c) of the statute of the ICJ, is thus subsequently applied to two concrete situations of antinomies between peremptory norms.

Part V deals with the conflict arising between the peremptory prohibitions on the use of force and the most serious violations of human rights and international

[8] "Le *ius cogens* international est une notion plus étroite qu'on ne la présente habituellement. Elle n'est pas un ensemble de normes fondamentales (ordre public), mais une technique juridique de non-dérogabilité s'attachant à des normes les plus diverses." R Kolb, above n 4, p. 29 and p. 119.

humanitarian law, as embodied in the notion of "humanitarian intervention." After determining that the emergence of peremptory norms in the area of human rights accumulated with the general regime on the use of force, it is argued that the conflict is an apparent antinomy only that can be solved by the harmonious interpretation of both contradicting rules. Finally, an attempt is made to balance and weigh both contradicting peremptory norms as a means of operationalizing the concept of "responsibility to protect." Part VI addresses the conflict between the peremptory prohibition of the use of force and the right to self-determination in a hypothetical Israeli-Palestinian peace agreement entailing the partial cession of occupied territories. The analysis of the interplay between these two norms shows that this is a real antinomy because their respective application would inevitably lead to contradictory consequences in such a hypothetical circumstance. An answer is thus sought in the idea of a conditioned prevalence *in casu*, in which the validity of such a hypothetical peace agreement is accepted under certain requirements stemming from the mutual carving out of both conflicting norms.

The primary goal of the present study is indeed to fulfil an existing gap in the general theory of *ius cogens* in public international law. But it should not be ignored that finding answers to the problem of conflicting peremptory norms may prove to be important not only as regards the doctrinal advancement in the field of international law, but also for practical and political purposes. Norms of *ius cogens* usually regulate sensitive and highly axiological matters. The use of force, the threats posed by gross and systematic violations of human rights, and the persisting challenges to the realization of the right to self-determination, are all norms placed at the core of several pressing topics of the international agenda. The two case studies that are dealt with in this work are outstanding examples of how the problem of antinomies between peremptory norms is related to central concerns of the international community at large. The question of how gross and systematic violations of human rights and international humanitarian law should be addressed in an appropriate and timely manner has been at the top of the international agenda in the past three decades. And the Israeli-Palestinian conflict is among the most complicated issues in international affairs, the solution of which has been the endeavour of several attempts since the establishment of the United Nations. Providing answers for the problem of conflicting peremptory norms may prove therefore to be relevant not only for the objective of fulfilling a lacuna in the theory of *ius cogens*, but also for finding options for addressing unresolved international crisis and complicated conflicts on the basis of the rule of law. Such an alternative would thus contribute to enhancing the role of public international law as a source of solutions for problems arising in inter-state relationships.

Part I – The Problem of Antinomy in Law

Whatever the legal system and its historical traditions, antinomy is a central topic in the General Theory of Law.[9] In international law, however, the concept of antinomy has been surrounded by a lack of clarity regarding its scope and means of solution. The reason is that the problem of antinomy raises a series of questions in a system in which the will of States remains as the main source of normative validity. Solving legal antinomies may cause the invalidity of one of the two conflicting norms, or set a relationship of precedence between them. But in a system that lacks both compulsory jurisdictional activities and concentrated legislative processes, arguing the inapplicability of norms expressing the will of States may be very controversial. For it runs contrary to voluntarist premises upon which international law has been built in the last two centuries. It is not surprising therefore that the question of how to solve antinomies and their effects on the legal system has been avoided as much as possible in jurisdictional activities,[10] and there are few precedents on this matter in international practice.[11]

Nonetheless, the problem of antinomy appears increasingly important in view of the growing densification of norms and the superposition of sources at the international level.[12] In the absence of an undisputable hierarchical normative

[9] The meaning and the function of the term "antinomy" is essentially the same in any legal system. It means a real or apparent contradiction between two principles or rules of law. This is the etymological sense stemming from the Greek *Αντινομία*, which was later reproduced in Roman Law as embodied in the concept of *antinomia*. Since then, the word "antinomy" has been used in legal studies as the terminological concept for addressing the question of normative conflict. This is also the meaning in Philosophy. According to Baldwin, antinomy is defined as "a logical contradiction between two accepted principles, or between conclusions drawn rightly from premises which have equal claim to objective validity". J.M. Baldwin, *Dictionary of Philosophy and psychology*, New York, Macmillan, 1901, Vo, *Antinomy*. As noted by Foriers, "Il existe donc une réelle unité de vues, tant parmi les linguistes que parmi les philosophes, pour reconnaître dans l'antinomie une opposition qui se révèle, à l'occasion d'un cas particulier, entre deux lois ou entre deux principes." P. Foriers, 'Les Antinomies en Droit', in Ch. Perelman (ed), *Les Antinomies en Droit*, Bruxelles, 1965, p. 21.

[10] C. W. Jenks, 'The Conflict of Law-Making Treaties', (1953) 30 *BYIL*, pp. 420-425.

[11] For a brief recapitulation of some "clauses célèbres", see C. W. Jenks, *idem*, pp. 407-408. Salmon also provides some examples of international practice in the light of diplomatic correspondence. J.-A. Salmon, 'Les antinomies en droit international public', in Ch. Perelman (ed.), *Les antinomies en droit*, Bruxelles, Bruylant, 1965, 285.

[12] "The possibility of the law changing is ever present." *Fisheries Jurisdiction (United Kingdom v. Iceland)* (Merits), ICJ Reports 1974, p. 19.

system,[13] in which the position of norms offers a primary criterion for solving antinomies, it is a matter of priority to determine how interpreters – judges, arbiters or whoever is in a position to apply the existing law in international reality, including politicians and diplomats - should proceed when faced with two contradictory legal commandments with a peremptory character that are simultaneously applicable to the same factual circumstance. In analysing the problem of contradictory norms, the interpreter must be provided with all necessary tools for solving the conflict. But while the examination of the several aspects related to a legal antinomy cannot be seen in isolation from their political, sociological and ideological context, this exercise must rest upon legal arguments. External considerations stemming from the domains of politics and morals are undisputedly important aspects. But the justification of the decision reached by the interpreter must remain of an essentially legal nature.

Part I provides a brief definition of the concept of antinomy in the general theory of law, as well as an overview of some of the most important features of the problem of antinomy in public international law, namely the issues of integrity and completeness of the system. It also introduces the existing rules for solving legal antinomies, and addresses the problem of the so-called "hard cases". These are defined as normative conflicts that cannot be solved through legal interpretation (harmonization) or one of the traditional "meta-rules" (*lex posterior*, *lex specialis* and *lex superior*). This type of antinomy can be solved instead on the basis of theories such as "balancing and weighing", which allow the interpreter to maximize the application of both conflicting norms, while also guaranteeing the integrity and stability of the legal system as a whole. This same approach will be taken to address the problem of conflicts in international law, and particular attention will be given to the analysis on how a conflict between peremptory norms might be a "hard case" of *ius gentium*. The reason is that the very definition of peremptory norms implies the non-application of some of the traditional methods for solving legal antinomies.[14] Not only can one not assert an undisputed hierarchical relationship between norms of that character and other rules of general international law, but one is even less able to suggest a hierarchical relationship between norms having the same *ius cogens* character.

[13] "Il n'u aurait pas de hiérarchie entre doit coutumier, droit conventionnel et principes généraux du droit." J.-A. Salmon, above n 11, p. 286. The question of a hierarchy in international law is a highly disputed one. This matter will be examined in a more detailed manner in the specific chapter on hierarchical theories on *ius cogens*. For some preliminary references, see, in favour, E. de Wet, 'The International Constitutional Order', (2006) 55 *ICLQ*, p. 57; and *per contra* P. Weil, 'Towards Relative Normativity in International Law' (1983) 77 *AJIL*, p. 413.

[14] Kolb described the legal regime of *ius cogens* as *lex specialis non derogat lex generalis*. R. Kolb, above n 4.

Chapter I - Antinomy in Law

Legal antinomy is a situation in which two valid norms are simultaneously applicable to the same regulated conduct.[15] But due to the impossibility of applying both contrary legal commandments in their entirety to that same situation, the interpreter must solve the normative conflict by either harmonizing them, or by applying one of the colliding norms in detriment of the other.

Antinomies are very frequent in legal practice.[16] They are a natural consequence of the fact that law is an open system undergoing constant change. In contrast to the ideal of an abstractly coherent and well-functioning law system, factual situations emerging from real life continuously challenge the premises of unity and coherence by requiring objective and timely responses from the legal system itself. The progressive and uninterrupted process of normative production, in which law-makers are hardly conscious of the need to produce harmonious norms *vis-à-vis* pre-existing law, impacts upon the coherence of the system and increases the likelihood of antinomies arising.[17] The existence of contradictory rules creates a tension that runs contrary to the presumed requirements of predictability and efficiency of legal systems. This tension leads to the need of solving antinomies and restoring the logical unity of the system, since the concept of legal order assumes that valid legal enunciates should not be contradictory to each other.[18] Regardless of whether the legal order is of a simple or a complex nature (multiplicity of sources, such as international law), the requirements for unity, coherence, and completeness of the system require a solution to antinomies with a view to guarantee a harmonious normative system.[19] The idea of coherence implies

[15] According to Perelman, legal antinomies concern "l'existence d'une incompatibilité entre les directives relatives à un même objet". Ch. Perelman, 'Les antinomies en droit, Essay de synthèse', in Ch. Perelman (ed.), *Les antinomies en droit*, Bruxelles, 1965, p. 393. Boland describes antinomies as "l'impossibilité d'appliquer simultanément, telles qu'elles sont énoncées, deux normes de droit positif qui sont assez précises pour être applicables en elles-mêmes et qui ne sont pas subordonnées par une disposition juridique impérative." G. Boland, 'Quelques propos sur les antinomies et pseudo-antinomies, en particulier en droit administratif,' in Ch. Perelman (ed), *Les antinomies en droit*, Bruxelles, 1965, p. 201. Alexy defines conflict as the situation in which "two norms, each taken on their own, lead to inconsistent results when applied, that is, they lead to two mutually incompatible concrete legal ought-judgments." R. Alexy, *A Theory of Constitutional Rights*, trans. by Julian Rivers, New York, Oxford University Press, 2010, p. 49.

[16] R. Kolb, 'Conflits entre normes de *jus cogens*', in *Droit du Pouvoir, Pouvoir du Droit, Mélanges offerts à Jean Salmon*, Bruxelles, Bruylant, 2007, p. 484.

[17] "Nos législations sont complexes et caractérisées par une pluralité de sources hétérogènes, dont, en outre, il n'est pas possible de contrôler au préalable la production normative, de façon à la rendre cohérente avant qu'on arrive au moment de l'application." N. Bobbio, 'Des critères pour résoudre les antinomies', in Ch. Perelman (ed), *Les antinomies en droit*, Bruxelles, 1965, p. 245.

[18] Among other features, it is considered to constitute a system of law because incompatible norms cannot be tolerated within it. N. Bobbio, *Teoria dell'ordinamento giuridico*, Torino, Giappichelli, 1960. Riedito in: Norberto Bobbio, *Teoria generale del diritto*. Torino, Giappichelli, 1993, pp. 157-295.

[19] "[T]he notions of legal stability and security are inherent in the concept of law." W. Czaplinsky & G. Danilenko, 'Conflicts of Norms in International Law', (1990) 21 *Netherlands Yearbook of International Law*, p. 4.

an element of justice within the legal order. If two conflicting norms are equally valid and may be applied indistinctively to a given circumstance, two fundamental requirements of legal systems are jeopardized, namely that of legal certainty and predictability (correspondent to the values of order and peace); and that of justice (associated to the value of equality before the law).

Closely associated to the notion of coherence, the idea of completeness relates to the character by which every legal system is expected to provide rules to be applicable to any legal relationships. It is a complete legal system because the legal interpreter can find a norm to be applied to each specific situation, i.e., no case would require a rule to be taken from outside the system in order to be solved.[20] In corollary, the judicial system is expected to solve all disputes brought before it (prohibition of *non liquet*)[21] and judicial decisions must be taken on the basis of existing and valid norms within the system.[22] In other words, and without suggesting either the hypothesis of "decisionism" by the interpreter, the idea of completeness implies that the interpreter must apply its knowledge of the existing law as a means to solve the legal antinomy.[23]

Section I - Identifying legal antinomies[24]

Identifying legal antinomies is the task of determining whether two valid norms are in contradiction and cannot be simultaneously applied to the same circumstance. But as underlined by Perelman, "il n'est pas indispensable, pour qu'il ait antinomie, que deux normes de droit positif soient simultanément inapplicables. Il faut (…) que deux directives incompatibles soient prescrites simultanément, et d'une façon également valable, pour régler une même situation."[25] This process presupposes the overlap of certain criteria that, as suggested by Bobbio, are related to the time, space, material and personal dimensions of validity of the norms in conflict.[26]

The time dimension (*ratione temporis*) implies that both norms are equally valid and applicable at that specific moment in which the normative conflict is

[20] Rather than the assumption of previously stipulated norms regulating all facts emerging from all inter-subjective relationships, the idea of completeness suggests instead that solutions for antinomies and potential lacunae must be found within the system itself.
[21] The prohibition of *non liquet* in public international law is a question of a complex nature, since it relates to the completeness of the international legal system. On this matter, see Chapter II, Section IV below.
[22] "Le juge doit dire le droit, mais sans violer les lois qu'il est chargé d'appliquer." Ch. Perelman, above n 15, p. 397.
[23] On this same issue, see Ch. Perelman, *idem*, pp. 394-395.
[24] "Les deux tâches principales d'une étude des antinomies juridiques sont: en premier lieu, celle d'établir les critères pour reconnaître les antinomies dans un discours normatif; en second lieu, celle d'établir les critères pour les résoudre." N. Bobbio, above n 17, p. 237.
[25] Ch. Perelman, above n 15, p. 399.
[26] N. Bobbio, above n 18, pp. 157-295.

acknowledged. The space criterion relates to the territorial scope application of valid norms. It requires that both norms are simultaneously applicable within a given law system. The personal criterion (*ratione personae*) requires that both norms have legal commandments creating rights or obligations for the same legal subjects. It is the subjective dimension of normative conflicts. And finally, the material criterion (*ratione materiae*) concerns the application of the material commandments to the same subject matter arising from a factual circumstance. The observance of all the aforementioned criteria indicates the existence of a legal antinomy.

As regards the scope of the normative conflict, Ross states that antinomies may be of three types, namely total-total, partial-partial or partial-total.[27] A total-total antinomy assumes that in no circumstance can a norm be simultaneously applied in its entirety with another colliding norm. All dimensions of validity (time, space, material and personal) are entirely coincident, and those contradictions are absolute and cannot be presumed.[28] A partial-partial antinomy occurs when only one or some aspects of the scope of application of norms are in conflict. In this case, the scope of application of the dimensions of validity is only partially coincident.[29] A total-partial antinomy means that the application of one norm collides in its integrity with part of another norm.[30]

Norberto Bobbio also dealt with the issue of antinomy from the standpoint of the function of norms within the legal system. According to the Italian legal-philosopher, norms can be permissive, prohibitive or imperative (command).[31] From this premise, normative conflicts may occur in three situations: (i) an antinomy between an imperative and a prohibitive norm (contrariety); (ii) an antinomy between an imperative and a permissive norm (contradiction); and (iii) an antinomy between a prohibitive and a permissive norm (contradiction). There is an antinomy, therefore, when one norm obliges and the other permits a certain conduct, or one obliges and the other prohibits, or if one prohibits and the other permits a given conduct. [32]

[27] Alf Ross, *On Law and Justice*, Berkeley & Los Angeles, 1958, pp. 128-129. This typology was used by Bobbio in his study on antinomy. Norberto Bobbio, *Teoria generale del diritto*, Torino, Editore G. Giappichelli, 1993, pp. 209-217.

[28] In the classic example, this is the case in which norm A allows smoking while norm B prohibits it.

[29] For example, norm A prohibits adults from smoking in movie theaters from 5pm to 7pm, while norm B authorizes adults to smoke in movie theaters from 5pm to 7pm.

[30] Following the example, norm A prohibits adults from smoking in movie theaters from 5pm to 7pm, while norm B prohibits adults only from smoking cigarettes in movie theaters from 5pm to 7pm.

[31] This approach is slightly different from Kelsen's description of the functions of norms. According to the Austrian professor, norms can be (i) "prescriptive" when they command and require a certain conduct ("must do" or "shall" norms); (ii) "prohibitive", when they impose an obligation not to do something ("must not do" or "shall not" norms); (iii) "exempting", when they grant a right no to do something ("need not do" norms); or (iv) "permissive", when they grant a right to do something ("may do" norms). H. Kelsen, *General Theory of Norms* (trans. Michael Hartney), Oxford, Oxford University Press, 1991.

[32] In his study regarding the problem of conflict of norms in international law, Pauwelyn says that conflicts between both mandatory norms (norm A and norm B command), or between a mandatory norm (norm A

Finally, antinomies can also be qualified as real or apparent. Apparent antinomies are those that can be solved without recourse to the specific meta-rules, i.e., without creating a relationship of precedence between conflicting norms, since a solution can be found by harmonization or conflict clauses. Effective interpretation is a classic method of solving apparent antinomies.[33] Real or genuine antinomies, on the other hand, occur when two norms are absolutely incompatible, or when there is a conflict between the criteria for solving normative conflicts.[34]

Section II - Conflict of norms in public international law[35]

Public international law also portrays legal antinomies as any other legal system. However, the problem posed by conflicting norms is even more complex at the international level, since it cannot be described as a uniform, logical-axiomatic or hierarchical system of values and sources.[36] This is so because the problem of antinomy in international law is under the influence of elements of various

command) and a prohibitive norm are situations of necessary conflict. Conflicts between a command and an exemption or between a prohibition and a permission are only cases of potential conflict. J. Pauwelyn, above n 5, p. 178.

[33] For that reason, Boland says that apparent antinomies are false antinomies. Sometimes they may seem like a conflict, but thery are only a divergence that can be solved by means of legal interpretation. G. Boland, above n 15. See also J. Pauwelyn, above n 5, p. 6.

[34] The inadequacy of those traditional criteria seems to be precisely the case of conflicts between peremptory norms in international law.

[35] Before entering into the discussion on antinomy in international law, it is important to make a few clarifications. First, only conflicts between legally binding norms are going to be considered in this study. Pre-normative processes, such as *travaux préparatoires* or the impact of soft-law, are not going to be addressed from the perspective of their potential collision. Those issues are approached, nonetheless, as important matters to the extent to which they can be used as means of interpretation. Also, the problem of conflict of laws, as observed in private international law, is not addressed. Only conflict of norms of the public international legal system is the focus (conflict of norms within the same legal system). However, this study deals not only with conflict between obligations, but also between rights, and between rights and obligations. The reason is that law is composed of rights and obligations, and, in the specific case of *ius cogens*, conflict arises mostly when obligations are contrary to rights equally valid in the international legal system. Finally, the focus does not fall over conflict between international and domestic legal systems, or on a supposed hierarchy between them. This same methodology was used by Pauwelyn, above n 5, pp. 6-11.

[36] "Les caractéristiques des conflits de normes en droit international sont intimement liées à la structure de la communauté des Etats. Le droit international est avant tout un droit de coordination où l'accord des sujets de droit reste le fondement de l'édifice," J.-A. Salmon, above n 11, p. 309. Jenks notes that "conflict is an unavoidable incident of the present stage of development of the international legislative process." C. W. Jenks, above n 10, p. 402. Hart affirms that international law is an example of a legal order composed only by primary rules due to the absence of a centralized power, of legal courts with compulsory jurisdiction and organized means of execution. As such, international law would not have a secondary rule that could provide it with validity and imperativeness. According to Hart, International Law would not be a legal order but just a listing of rules. Its further development could lead though to a secondary rule, such as the principle of *pacta sunt servanda*. H.L.A. Hart, *The Concept of Law*, Oxford University Press, New York, 10th impression, 1979. On the primitive nature of international law, see also H. Kelsen, *Théorie du droit international public*, (1953-III) 84 *R.C.A.D.I.,* pp. 32, 44 and 96; P. Guggenheim, *Les principes du droit international public*, (1952-I) 80 *R.C.A.D.I*, p. 27; H. Lauterpacht, *The Function of International Law in the International Community*, Oxford, 1933, p. 406; Ch. de Visscher, *Théories et réalités en droit international public,* 4.éd., Paris, Pédone, 1970; R. Kolb, above n 4, p. 460.

natures. First, the successive production of norms increases the likelihood of conflictive norms.[37] The lack of clearly established relationships of precedence in international law means that normative evolution is continuously faced with the question of the remaining validity of earlier norms. Multilateral treaties dealing with specific subject-matters can rapidly become obsolete but still remain valid as binding norms in international law. New advancements may require adjustments or the revision of specific provisions by subsequent instruments, thereby increasing the potential for conflictive new provisions.[38] Second, in a legal system characterized by co-operation and co-existence among States,[39] but still of an essentially coordinative nature in which legal norms stem primarily from the consent of States,[40] norms bind different subjects of law in different manners depending on their consent (except for *ius cogens*). As one of the results of this fragmented normative creation process,[41] the material overlap between two norms is not always clearly determined in public international law. Conflicts may arise between norms of different domains establishing contradictory prohibitions, commands or permissions applicable to the same situation.[42] In other words, the same subject-matter can be dealt with by different legal regimes,[43] which may

[37] "The real difficulties arise when we come to consider conflicts between multipartite instruments which, although concluded between identical groups of parties, operate in different functional orbits and sometimes within the framework of different international organisations, conflicts between a multipartite instrument and another instrument (multipartite or bilateral) to which some but not all of the parties of the first instrument are parties (*inter se* instruments), and conflicts between multipartite instruments the parties to which consist of groups which contain some, and in some cases a large majority of, common members but which do not coincide (a typical situation in connexion with the revision of multipartite instruments). C. W. Jenks, above n 10, p. 404. See also J.-A. Salmon, above n 11, p. 293.

[38] "[O]ne of the most important types of conflict to be considered consists of conflicts between an original and a revised instrument, or between successive revisions of an instrument which is of the same potential scope but is in fact in force for different groups of parties." C. W. Jenks, *idem*, p. 418.

[39] "International law witnessed a shift from being a law on 'co-existence' between sovereign states – dealing with issues such as territorial sovereignty, diplomatic relations, the law of war and Peace treaties – to a law regulating also the 'co-operation' between states in pursuit of common goals, such as the law created under the auspices of international trade, environmental law and human rights organisations." J. Pauwelyn, above n 5, p. 17.

[40] "Le droit des gens est un droit de coordination et non de subordination. L'accord de sujets de droit y est la seule source de droit et les normes qui résultent de cet accord de volontés sont d'égale valeur juridique." Ch. Rousseau, 'De la compatibilité des normes juridiques contradictoires dans l'ordre international', (1932) 39 *Revue Générale de Droit International Public*, pp. 150-151. See also J.-A. Salmon, above n 11, p. 289; and Christina Voigt, *Sustainable Development as a Principle of International Law - Resolving Conflicts between Climate Measures and WTO Law*, Leiden, Martinus Nijhoff Publishers, 2009, p. 195.

[41] See "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Report of the ILC on the works of its fifty-fifth session, A/CN.4/L.644, Chapter X, 2003. As noted by the ILC on its study, the main problem of this process is the assumption that there could be "self-contained islands" of international law the existence of which would be in isolation from general international law. Fragmentation is not necessarily negative. In view of the persistent deficiencies of the system, it might even be its "best justification." C. Voigt, above n 40, pp. 557-558.

[42] "The open character of sources in public international law, in contrast to the clearly defined number of source in domestic law, is a first element of uncertainty" since it "necessarily reflects on the completeness of any theory on conflict of norms derived from these sources." J. Pauwelyn, above n 5, p. 90.

[43] On the notion of "self-contained regimes", see S. Krasner, *International Regimes*, Ithaca, London, Cornell University Press, 1983.

create contradictory norms binding the same legal subjects.[44] The growing role of international organizations with different memberships in expanding the normative universe at the international level also boosts the likelihood of conflictive provisions.[45] And all that occurs within a system that lacks an authority concentrating legislative powers and compulsory jurisdictional activities.[46] Hence norms may bind indistinctively several subjects of law. And while one State may invoke one specific normative commandment from one material domain in its favour, another State may invoke another commandment from a distinct field of international law equally valid and binding *inter partes*. Consequently, States may find themselves bound by provisions deriving from several international and regional regimes with different commandments that are simultaneously applicable.[47] Consider the potential conflicts arising between rules of environmental law and international trade, rules of diplomatic immunities and human rights, or rules of intellectual property and human rights and international trade. One can imagine several situations in which norms prohibiting child labour may conflict with provisions requiring free trade, or norms prohibiting human rights violations conflict with treaty obligations providing for arm trade.[48]

With the growth of the number of norms, it is no surprise that in the past years the problem of conflicting norms has attracted increasing attention from international publicists.[49] After an initial period in which the question of antinomy was fundamentally restricted to the potential collision between treaty provisions, it

[44] In many of those instances, the criterion of *lex specialis* is not appropriated to be used as a means to solving normative conflicts precisely because "[t]oday the typical conflict between norms is, indeed, that between norms deriving from different treaty-based systems." J. Pauwelyn, above n 5, p. 18.

[45] As regards the potential to be explored in the area of consultations between different international organizations, see the role of the Administrative Committee on Co-ordination of the United Nations and the Specialized Agencies.

[46] "The world community still has no legislature and it seems improbable that anything comparable to a national legislature can be developed on a world scale in the foreseeable future." C. W. Jenks, above n 10, p. 401. See also A.D. McNair, 'International Legislation' (1934) 19 (2) *Iowa Law Review*, p. 178.

[47] As Salmon notes, "on se trouve donc en présence de réseaux d'accords quasi universels, nord-atlantique, européens, intéraméricains, moyen-orientaux, etc (…), qui s'entrecoupent et se superposent." J.-A. Salmon, above n 11, p. 305.

[48] Dealing with this gray area at the Vienna Conference, Sinclair argued that the notion of "same subject-matter" "should be construed strictly." He argued that there is no genuine conflict (*generalia specialibus non derogant*) when general provisions only indirectly touched upon a subject-matter that is dealt with in a more precise manner by another rule. As a matter of fact, he seemed to refer to the rule of *lex specialis*. Official Records of the Vienna Conference, vol. 2, p. 222, quoted in Pauwelyn, above n 5, p. 364. In a more pragmatic approach, Vierdag argued that while the determination of an overlap may be difficult in abstract terms, it is rather easy to be observed in practice. He points out that "if an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can be safely assumed that the test of sameness is satisfied." E.W. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Art. 30 of the Vienna Convention on the Law of Treaties and Related Provisions', (1989) 60 *BYIL*, p. 100. In other words, there is enough evidence of a material overlap between two conflicting norms when the simultaneous application of two norms has different results.

[49] The problem of conflict of norms was discussed by classic authors of international law such as Grotius, Pufendorf and Vattel. However, as noted by Jenks, their views on the issue "are of limited application to the contemporary problem" because "we cannot by delving back into the classics and history of international law relieve ourselves of the responsibility of thinking through afresh principles and rule which meet the needs arising from the contemporary development of the world community." C. W. Jenks, above n 10, p. 405.

became a subject of investigation also from the broader perspective of conflicts between norms deriving from all sources of international law. The problem of antinomy was then approached from the perspectives of the sources, or of an alleged hierarchy in international law, or even from the perspective of the function of norms within the international legal system.

The definition of conflict in international law

In spite of recent efforts made by several authors,[50] there is still little doctrinal consensus on how to define "normative conflict" in international law. It may relate to the role of precedence of an alleged hierarchy, to the relationship between the sources in international law, or even to the violation of norms and its effects in the area of international responsibility.[51] In other cases the term "conflict" seems to be used with no intention to refer to the specific matter of a simultaneous application of contradictory commandments stemming from valid norms within the system.

In the early decades of the 20th century, authors such as Charles Rousseau and Lauterpacht understood "conflict" in a broader sense.[52] It was used as a general term to refer to the notion of incompatibility between norms, particularly positive and negative treaty obligations.[53] Contemporary authors have also argued a wider understanding on the meaning of "conflict" in international law.[54] During the preparatory work for article 30 of the 1969 VCLT on the "Application of successive treaties relating to the same subject matter", Waldock noted that the idea of conflict "was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another". In their study on conflict of norms in international law, Czaplinsky and Danilenko also adopted a broader understanding, noting that "conflicts arise at the stage of application of the agreements."[55] Kolb also views the problem of antimony in broader terms, encompassing all situations in which diverging norms may be applied to facts in the same legal context, including partial collision between norms.[56] Other authors, such as Jenks, have focused exclusively on the meaning of conflict "in the strict sense of direct incompatibility only where a party to the two treaties cannot

[50] See W. Czaplinsky & G. Danilenko, above n 19, p. 4; and J. Pauwelyn, above n 5.
[51] M. Akehurst, 'The Hierarchy of the Sources of International Law' (1974-75) 47 *BYIL*, 273.
[52] Ch. Rousseau, above 40, p 133.
[53] See Lauterpacht's analysis of the word "inconsistency" in Art. 20 of the Covenant of the League of Nations, in H. Lauterpacht "The Covenant as the Higher Law", (1936) 17 *BYIL*, p. 58.
[54] Salmon regarded the notion of normative conflict ("antinomy") as meaning "l'existence, dans un système déterminé, de règles de droit incompatibles; de telle sorte que l'interprète ne peut appliquer les deux règles en même temps, qu'il doit choisir." J.-A. Salmon, above n 11, p. 285. He also made a distinction with reference to the incompatibility between norms of international law and norms of domestic law.
[55] W. Czaplinsky & G. Danilenko, above n 19, p. 13.
[56] R. Kolb, above n 16, pp. 483-484.

simultaneously comply with its obligations under both treaties".[57] This approach is restricted to the analysis of conflicts arising from mutually exclusive obligations.[58]

While also opting for a broader understanding of the term "conflict", Pauwelyn puts forward a far-reaching definition encompassing the notion of wrongfulness in which he equates "conflict of norms" to "breach of norms."[59] It seems correct to approach the notion of conflict in an "open and non-dogmatic" way,[60] and use the term "conflict" to refer to ideas such as "inconsistent", "incompatible", "contradictory", "colliding" or "countervailing" norms.[61] However, terms such as "breach" or "violation" convey different ideas which are associated with a different legal regime, namely that of international responsibility. These are different legal notions operating at different levels, entailing different effects within the international legal system. Rather than operating at the abstract level of legal antinomy, the question of international responsibility arises directly from the analysis of the lawfulness of concrete conducts of legal subjects in the light of applicable norms. In particular, the question of a "breach" can only be approached from the standpoint that a given actual conduct violates rights and obligations of another State, or even an obligation owed towards the international community as a whole (obligations *erga omnes*), and as such entails international responsibility. Hence the effects of a "breach" are different: instead of the invalidity or a relationship of precedence between norms, international responsibility results in specific obligations to the subjects concerned, such as the duties to cease the breach, to undo the conduct or to repair the wrongfulness that has been done. While norms are the target of the effects stemming from the problem of antinomy, subjects of law, and more specifically their respective conducts, are the target of international responsibility.[62] Of course, antinomy (conflict of norms) and international responsibility (breach of norms) are intimately connected and may arise as legal operations from the same factual circumstance. The reason is simple: the very existence of a legal antinomy may be tantamount to complying with one norm and non-complying with the other, a situation in which the "illegal" conduct

[57] C.W. Jenks, above n 10, p. 426.

[58] See Karl Wolfram, 'Conflicts Between Treaties', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1984, VII, p. 468; and H. Kelsen, above n 31. For a general criticism on this strict approach to conflict of norms in international law, see J. Pauwelyn, above n 5, pp. 169-176.

[59] Pauwelyn defines conflict as "a situation where one norm breaches, has led to or may lead to breach, of another norm." *Idem*, p. 199. He argues that "it moves the debate on "what if conflict" from the abstract relationship between two norms of international law to the more concrete and common question of "when is there a breach of a given norm?" In his view, it would turn the question of "conflict of norms" into a more "objective" subject based on the exiting norms instead of "a question of contradictory subjective 'intentions' held by one or the other state." *Ibidem*, p. 176.

[60] *Ibidem*, p. 169.

[61] For the purpose of this work, all those terms can be used interchangeably because they mean that normative commandments are contrary to each other.

[62] The difference between both legal notions – antinomy (conflict) and international responsibility (breach) – has nothing to do with a degree of less or more objectivity, but with the manner in which each notion is operationalized in the legal system, since antinomy as well implies an approach primarily based on valid rights and obligations instead of subjective judgments on the will of the parties to a treaty.

of a State may be the immediate consequence of the compliance with a conventional obligation.[63] Hence antinomy and international responsibility may be present in disputes brought before international courts, which arise "from the exercise or implementation of one norm which is, allegedly, in breach of another norm."[64] But even in these circumstances, the question of "conflict" is different from "breach". The former will serve for determining which is the applicable or the prevailing norm in that factual situation at the origin of the dispute.[65] On the basis of that analysis, the jurisdictional authority may determine which legal commandments have been violated and whether or not there would be any grounds for international responsibility. The above does not imply a strict definition of "conflict" arising only between mutually exclusive positive obligations (total-total conflicts only),[66] but simply that "conflict" and "breach" should not be confused as switchable terms. For, at least for the purposes of solving antinomy of peremptory norms in international law, the fundamental question is one of "validity" and "application", instead of "legality".

Bearing in mind this distinction, this study will adopt a broader definition of conflict, encompassing a wider notion of normative incompatibilities covering not only real or genuine conflicts but also potential divergences and inconsistent applications of normative commandments which in essence may be apparent conflicts only. Such a broader notion of conflict will allow us to address some conflictive situations that would not be covered under a narrow definition restricted only to real conflicts,[67] but which nonetheless may affect the coherence and effectiveness of international law and therefore impact negatively upon the integrity of the legal system as a whole.[68]

[63] Article 30 (5) of the VCLT states that the rule of *pacta tertiis* embodied in article 30 (4)(b) is without prejudice "to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty." See also H. Kelsen, above n 31, p. 123.

[64] J. Pauwelyn, above n 5, p. 177. Indeed, the subject-matter of a dispute usually arises when one party sues the other for breaching a given norm, while the other party may argue another norm as justification for its conduct.

[65] Pauwelyn also recognizes this situation as a type of "conflicts in the applicable law".

[66] This approach excludes the problem of rights in international law as correctly pointed out by Pauwelyn, J. Pauwelyn, above n 5, pp. 197 and ss.

[67] This broader definition is consistent with the approach adopted by the ILC on its Study Group on Fragmentation, the final report of which states that "focusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption. In fact, any decisions will involve interpretation and choice between alternative rule-formation and meanings that cannot be pressed within the model of logical reasoning." *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the ILC, 58th session, UN A/CN.4/L.682, 4 April 2006, p. 16.

[68] C. Voigt, above n 40, pp. 199-201.

Chapter II - Solving legal antinomies in public international law

Justice is the fundamental value underlying the goal of solving legal antinomies.[69] In Law, conflicts are not related to a criterion based on what is true or untrue, i.e., it is not a question of verifying the veracity of the discourse.[70] Certainty is a desirable goal in the application of a fair system of law, and objective and positive criteria are preferable, as much as possible, to discretionary powers largely hinging upon the influence of personal and subjective evaluations.[71] The determination of which norm prevails, or how conflicting norms may be harmonized must therefore take place according to objective criteria provided for the legal system itself. This premise is particularly relevant for the problem of antinomy in international law, which is a system characterized by decentralized normative creating processes and relationships of coordination between legal subjects.

The analysis of the sources is of little help for the interpreter in the process of solving antinomies in international law. In the absence of a clearly established hierarchy between the recognized sources of Art. 38 of the Statute of the ICJ, incompatibility may arise between any of the recognized sources of international law, either between a treaty or a customary norm or a general principle of law.[72] Treaties, international customary law and the general principles of law entail a mutually derogatory capacity.[73] Also, conflicts occur not only between successive treaties in different substantive domains (conflicting treaty obligations stemming from international environmental law, international human rights law and international trade law, for instance), but also between customary law and supervening treaty law, and vice versa. And the lack of a pre-established procedure for derogation is a problem in international law.[74] Customary norms may derogate from or partially modify an existing treaty regardless of the absence of a specific written procedure for that purpose.[75]

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[69] "[I]ls sont, en une formule, et je ne saurais les appeler d'une autre façon, des *présomptions de justice*, en entendant le mot « justice » dans l'acception la plus étendue, comme critère ultime d'évaluation des règles," N. Bobbio, above n 17, p. 245.

[70] "Les normes que le droit est amené à élaborer ne sont pas des assertions, dont on puisse dire qu'elles sont vraies ou fausses, mais des directives, des prescriptions concernant ce qu'il faut faire on ne pas faire, ce qui est permis ou interdit, et où les définitions, les règles de compétence et de procédure sont subordonnées, en fin de compte, à ces normes juridiques. " Ch. Perelman, 'Les antinomies en droit, Essay de synthèse', in Ch. Perelman (ed), *Les antinomies en droit*, Bruxelles, 1965, p. 393.

[71] N. Bobbio, above n 17, p. 239.

[72] Salmon noted that "on aboutit ainsi à déterminer autant de types de conflits qu'il y a de possibilité d'assembler les différents facteurs (sources)." J.-A. Salmon, above n 11, p. 292.

[73] Ch. Rousseau, *Droit international public*, Paris, Sirey, 1970, pp. 75, 77 and 80.

[74] The exception of course is the legal regime of *ius cogens*.

[75] In the case of derogation from a treaty by a supervening custom, one can also refer to the notion of desuetude. See J.-A. Salmon, above n 11, p. 285.

The above means that the incompatibility of rules in international law is also to be solved on the basis of techniques aimed at solving normative conflicts. In spite of the lack of an irrefutably codified set of methods governing the conflict of norms of *ius gentium*,[76] various rules are widely recognized in legal doctrine as valid norms to be used in the task of solving legal antinomies. Those general rules are not absolute in the sense that they can be applied without taking into consideration legal and factual elements in a given antinomy. Their application must be assessed in the light of the specificities of each situation under examination. But there is hardly a hierarchy among them, although the codification of the *lex posterior* rule by the 1969 VCLT reinforced the recourse to that rule whenever a relationship of successiveness in time between two conflicting norms is determined. Those methods may also involve situations in which the tenets of interpretation are useful for harmonizing norms of conflict (apparent conflict); or cases in which one of the two norms cease to exist, or alternatively, situations in which rules for solving the legal antinomy entail the priority of one of the norms in conflict without necessarily causing the disappearance of the other from the system.

Section I – Interpretation as a means of harmonizing conflicting norms

Legal interpretation has two fundamental roles in the task of solving normative conflicts. First, it is a conflict avoidance technique in itself, by evading conflicts through harmonizing contradictory commandments stemming from different and equally valid norms in the legal system.[77] Operating as "presumption against conflict,"[78] interpretation means that the terms of a norm should be construed in consistency with its general intention. Second, legal interpretation is a useful tool in the task of determining the limits of the scope of application of two colliding norms in cases of real antinomy. For that matter, legal interpretation can be used in the search for the meaning of the consent of States, and to verifying to what extent normative commandments can be weighed and balanced not only in the light of

[76] C. W. Jenks, above n 10, p. 403.

[77] As noted by Kolb, "le problème n'est pas nécessairement et toujours de faire prévaloir une norme sur l'autre, soit en application de la règle de la *lex posterior*, de la *lex specialis* ou de la *lex superior*". R. Kolb, above n 16, p. 484.

[78] C. W. Jenks, above n 10, pp. 427-429; and J. Pauwelyn, above n 5, pp. 244-274. As an example of the use of "presumption against conflict" at the international level, see *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011, judgment of July 7 2011. See also D. Hayim, 'L'article 103 de la Charte des Nations Unies: technique juridique ou instrument symbolique?', (2011) 44 *Revue belge de droit international*, pp. 125-168.

the material scope of application of each conflicting norm, but also in the light of other norms with a view to protect the balance of the legal system as a whole.[79]

In positive international law, the concept of legal interpretation is inscribed in articles 31 and 32 of the VCLT.[80] Within the Law of Treaties, interpretation is first and foremost a matter of definition:[81] to give the ordinary meaning "to the terms of the treaty in their context and in the light of its object and purposes."[82] It is therefore the strict act of determining the exact content and the scope of application of a given rule within the system.[83] Interpreters must take into account the teleological meaning of the normative content in order to identify the potential scope of application in a given specific circumstance, but they should never intend to create a new norm. For interpretation cannot be confused with the capacity of the interpreter to fill gaps in the existing law, or to construe a given norm in a manner that disregards its normative sense.[84] In accordance with the principle of "effective interpretation" (*ut res magis valeat quam pereat*), an interpretation cannot be contrary (*contra legem*) to or go beyond (*ultra legem*) the ordinary meaning of the

[79] "[T]he diverse parts of special international law must – at least in theory – be inter-related, connected and considered 'in unison through the prism of general international law'." C. Voigt, above n 40, p. 198. See also R. Kolb, above n 16, pp. 483-484.

[80] "*Article 31 - General rule of interpretation* - 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (*c*) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.
Article 32 - Supplementary means of interpretation - Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable."

[81] J. Pauwelyn, above n 5, p. 245, quoting the *Fisheries Jurisdiction* case, in which the ICJ declared that "the question of the existence and content of the concept within the system is a matter of definition… the question of the conformity of the act with the system is a question of legality". *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Reports, 1998, p. 460, para. 68.

[82] "When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted." Dietrich Rauschning, *The Vienna Convention on the Law of the Treaties, Travaux Préparatoires*, Frankfurt, Metzner, 1978, p. 251.

[83] "If … the meaning of a stipulation is ambiguous, the reasonable meaning is preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with generally recognized principles of International Law and with previous treaty obligations towards third States." L. Oppenheim, *International Law* (7th ed. by Lauterpacht), London/New York, Longmans, 1952, vol. I, pp. 858-859.

[84] Interpretation "will not avail itself against clear language or clear evidence of intention." C. W. Jenks, above n 10, p. 429.

norm under examination.[85] That would be illegitimate and could suggest the possibility derogating or modifying a positive and valid norm in the process of interpreting it.[86] Second, the exercise of interpreting norms in international law supposes the analysis of a legal rule in the light of other elements, such as its normative context, which includes the preamble, the annexes and other treaty provisions in the case of conventional norms, as well as other norms both of treaty and customary law.[87]

In order to have a better idea on how the notion of "effective interpretation" works, consider the case of so-called "humanitarian intervention". The peremptory prohibition of the most serious crimes against human rights undoubtedly supposes that there is an implicit duty imposed upon the international community to prevent their occurrence. This is a reasonable conclusion to be drawn on the basis of an effective interpretation of the general duty to promote and protect human rights, particularly as regards the most serious human rights violations, the prohibition of which has a peremptory character (genocide, crimes against humanity, discrimination, violations of IHL). Indeed, the prohibition alone would be pointless if there was not an implicit rule requiring the international community to cooperate to avoid the occurrence of these crimes. But the obligation to protect individuals from the most serious human rights violations does not entail an authorization (permission) or an obligation (command) for the unilateral use of force for stopping gross and systematic human rights violations. To put it differently, it does not encompass unilateral humanitarian intervention, since there is no explicit exemption for the unilateral use of force for protecting individuals from human rights violations, at least not as the exemption of self-defence, which is explicitly authorized as *lex specialis* of the general prohibition of the use of force.[88] Consequently, any measure taken in this regard should necessarily occur through the existing procedures of cooperation in international organizations, particularly in the United Nations (the General Assembly, the Human Rights

[85] In the Advisory Opinion the *Interpretation of Peace Treaties*, the ICJ noted that the principle of effectiveness "cannot justify the Court in attributing to the provisions of the settlement of disputes in the Peace Treaties a meaning which … would be contrary to their letter and spirit." For the Court, "to adopt an interpretation which run counter to the clear meaning of the terms would not be to interpret but to revise the treaty." *Interpretation of Peace Treaties*, Advisory Opinion, ICJ Reports, 1950, p. 229. This interpretation was reached by the Appellate Body of the World Trade Organisation (WTO), confirming that "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." Appellate Body Report: *US – Gasoline (Standards for Reformulated and Conventional Gasoline)*, WT/DS2 (Venezuela) and WT/DS4 (Brazil) (May 20 1996), p. 23. See, *inter alia*, Appellate Body Report: *Japan – Alcoholic Beverages* (*Taxes on Alcoholic Beverages*), WT/DS8 (European Communities), WT/DS10 (Canada) and WT/DS11 (United States) (Nov. 1st 1996), p. 12, as quoted in Pauwelyn, above n 5, p. 249.

[86] "The cardinal principle is that interpretation as a procedure seeks to clarify what has already been decided, with binding force. It must stop short of changing what has been decided, for that involves revision which is a quite separate procedure governed by separate rules." D.W. Bowett, 'Res Judicata and the Limits of Rectification of Decisions by International Tribunals' (1996) 8 *African Journal of international Law*, p 586.

[87] The interpretation of two legal rules in a harmonious way in the light of their normative context (normative universe of the subject-matter) may prove to be sufficient to solve an apparent conflict. See Art. 31 (1).

[88] Moreover, in the event that it would be an exception, it would be subject to the maxim *exceptiones sunt strictae interpretationis.*

Council and the Security Council). But some authors suggest that the unilateral use of force would be consistent with the "object and the purposes" of the UN Charter. They quote, in this regard, its preamble and article 1(3), and accordingly imply that each and every member of the international community would have the capacity (a right/permission) to intervene by the use of force in the domestic affairs of another State in order to prevent massacres from taking place. However, suggesting that the interpretation of the UN Charter as a whole in accordance with article 31 of the VCLT ("effective interpretation") allows for the unilateral use of force in accordance with the purposes and principles of the United Nations manifestly runs contrary to the "ordinary meaning" of article 2 (4) of the Charter. So for interpretative purposes only, that would be not only a *contra legem* (contrary to an explicit commandment) and *ultra legem* (a non-provided right/permission) interpretation, but also an unacceptable use of interpretative techniques, since it derogates from *ius cogens*.[89]

The historical background that led to the emergence of a treaty norm may also prove to be a useful tool in the task of interpreting norms. It helps in the search for the exact intention of the parties on the meaning and scope of norms, and helps to clarify ambiguities. Those implicit elements are relevant not only in the context of conflict avoidance techniques, but also - and potentially in an even more relevant manner - in the event of the so called "hard cases," in which norms cannot be harmoniously interpreted and other existing methods cannot be applied to a given conflict under examination. But in spite of its importance as an interpretative tool, the recourse to the *travaux préparatoires* should not be overestimated. It cannot be used as a decisive piece of argument for interpreting the scope of application and eventually the relationship of precedence between norms in conflict, particularly in the presence of an unequivocal expression of the consent of States.[90]

The rationale of interpretation established by article 31 of the VCLT also requires that a treaty is interpreted in the light of other relevant norms in the system. The requirement for taking into account rules stemming from other sources when interpreting specific treaty provisions implies the sense of integrity and completeness of the international legal system.[91] In international law, this sense of unity requires that conventional law is interpreted in the light of other norms that may be directly or indirectly applicable to a same given circumstance, in spite of their normative sources. Those other relevant rules for the interpretation of norms

[89] The question of humanitarian intervention will be examined in depth in Part V below.

[90] As pointed out by Pauwelyn, the importance of the so-called "*traxaux préparatoires* as reference material to interpret a treaty dwindled quite dramatically in the course of the twentieth century." J. Pauwelyn, above n 5, p. 252. This view has been confirmed by the ICJ in the *LaGrand* case, in which the Court decided in the light of the object and purpose of article 41 of the Statute rather that resorting to its preparatory work, in order to determine the meaning of that Article. *LaGrand* case (*Germany v. United States of America*) (Judgment) ICJ Reports 2001, para. 104.

[91] Sands affirmed that it implied a "principle of integration" and the "unity of international law". Philippe Sands, 'Treaty, Custom and the Cross-fertilization of International Law' (1998) 10 *Yale Human Rights and Development Law Journal*, p 8. See also, J. Pauwelyn, above n 5, pp. 253 and ss.

in public international law include not only positive rules of public international law (customary law, general principles of law and treaty obligations existing between the parties into a dispute), but also certain acts of international organizations that are compulsory to the parties in a dispute, and eventually the jurisprudence of international tribunals and the work of publicists as subsidiary sources of international law. This systematic notion of interpretation, which is moreover quite common in jurisdictional activities in domestic legal systems, reinforces the legal character of international law as a legal system.[92] In any event, however, "treaty interpretation with reference to other rules of international law is *not* a panacea for all problems of interplay" between norms of international law.[93] For instance, the need to take into account other rules within the system cannot lead to the assumption that those other norms, which are only of secondary importance to a certain case under examination, should prevail over the *prima facie* applicable norm. In other words, the recourse to other norms within the system as a means of interpretation is oriented towards the objective of "giving meaning" to the primarily applicable norm, and should never be construed as an acceptable piece of argument to modify the content or to halt the application of the norm under examination to that given circumstance.

Consider the progressive interpretation by the Security Council on the meaning of the notion of "threats to international peace and security", which now also encompasses situations of gross and systematic violations of human rights. This reasoning, which provides the appropriate grounds for interpreting as lawful "the use of all necessary means" for addressing human rights massacres in authorized actions by the UNSC, could not be extended for construing an interpretation sustaining that unilateral humanitarian intervention would be equally lawful, i.e., that force can be used unilaterally without the authorization of the UNSC for allegedly stopping human rights massacres. This suggestion would modify or overrule the general normative content of the general prohibition of the use of force, the corollary of which is that the unilateral use of force is a threat to international peace and security. Following this reasoning, human rights norms of general international law, such as the prohibition of genocide and crimes against humanity, can be used as a means for interpreting gross and systematic violations as threats to peace and security for the purposes of the activities of the Security Council. But they could not be used as a piece of argument for claiming, on the grounds of article 31(3)(c) of the VCLT, that unilateral humanitarian intervention is lawful under the existing law on the use of force in international law, because that interpretation would overrule the applicable norm in the area of use of force.

There are also other inherent aspects to be taken under consideration in the process of interpreting norms in public international law. The first element refers to the

[92] As declared by the ECtHR in the *Al-Adsani* case, a treaty "cannot be interpreted in a vacuum." *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI, para. 55.
[93] J. Pauwelyn, above n 5, p. 253.

principle of *pacta tertiis*, also expressed for the purposes of treaty interpretation in the adage *ejus est interpretari legem cuius est condere*.[94] Treaties to which States into a dispute have refused to sign or to adhere, or treaty provisions under the effects of reservations, or customary norms under the effect of the persistent-objector rule, cannot be used as interpretative means applicable to the parties into an international dispute (the sole exception is *ius cogens*). The second element refers to the recourse to multilateral treaties as a means of interpreting the meaning of norms of international law. The particular views of the parties, which eventually are the very expression of their expectations and interests, cannot be used alone to ascertain the meaning of treaty provisions. In this case, the *opinio iuris* of only some parties cannot be used as an authoritative piece of evidence on the common intentions of all the parties.[95] A third element is subsequent practice and other agreements related to the treaty under interpretation. In the case of integral obligations and rights, subsequent practice and subsequent agreements can only be used as interpretative tools insofar as they reflect the common intention of all parties.[96] The reason for this understanding derives precisely from the principle of *pacta tertiis*.[97]

The above is not tantamount to assuming the need for an explicit and unequivocal expression of the opinion or the practice by all parties on the meaning of the treaty under examination. When the ILC examined this matter, it concluded that "the understanding of the parties necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice".[98] An implicit common understanding on the meaning of a given treaty provision could be drawn from the absence of relevant discrepancy among the parties, for example. The practice of States in international organizations might also play an important role in determining the "understanding of the parties" on the meaning and scope of certain norms. For instance, resolutions of the General Assembly[99] may be referred to as authoritative sources of evidence of the common interpretation of States of provisions of the UN

[94] J. Pauwelyn, above n 5, p. 257.
[95] "[A]n interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration." R. Jennings & A. Watts, *Oppenheim's International Law*, London, Longmans, 1992, vol. I, p. 1268.
[96] In the preparatory work for the VCLT in the ILC, Humphrey Waldock observed that "only subsequent which clearly establishes the understanding of all the parties regarding the meaning of the treaty … is equivalent to an interpretative agreement." That would be precisely the case of the Belgium interpretion on humanitarian intervention, for example.
[97] "Recall, indeed, that the input of other rules of international law in the interpretation of a treaty norm is limited to giving meaning to explicit treaty terms. It is a question of definition and importing meaning, not one of incorporating legal rights and obligations set out in the foreign rule which are not included under the 'clear meaning of the terms' of the treaty norm under interpretation." J. Pauwelyn, above n 5, p. 262.
[98] ILC Commentary to article 31(3)(b) of the VCLT.
[99] This would be particularly the case of unanimously adopted GA resolutions.

Charter, customary law and even international instruments adopted within the framework of the UN system.

Finally, the interpretation of norms in international law must take into account the existence of norms in time. There are basically two fundamental approaches to the matter of intertemporal law, namely the principle of contemporaneity and the evolutionary approach. The later implies that a norm must be interpreted in the light of its current meaning as well as of other existing norms within the system at the time it is under examination.[100] The principle of contemporaneity, meanwhile, requires that the interpretative process takes into account the meaning of the norm as well as other relevant rules that existed at the time of conclusion of the treaty under consideration.[101] However, in case of discrepancy between the logical consequences stemming from each of these two approaches, there is no definitive agreement among publicists as to which one should prevail.[102] As suggested by Pauwelyn, however,[103] it seems that the principle of contemporaneity should be the main path to be followed in cases of divergence. Accordingly, interpreters must first strive to determine the meaning and the intention of the parties at the time of the conclusion of the treaties, and only afterwards seek to determine the normative evolution of a given rule in the realm of international law. By proceeding this way

[100] This evolutionary approach was applied by the ICJ in cases such as in its Advisory Opinion on *Namibia*. "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant-'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned-were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. *Namibia* case (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*), Advisory Opinion, ICJ Reports 1971, p. 31. See also the *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Reports 1978, p. 3; and the *Gabcíkovo-Nagymaros Project* (*Hungary vs. Slovakia*), ICJ Reports 1997, para. 112.

[101] Article 31(3)(c) of he VCLT originally read "rules of international law in force at the time of conclusion of the treaty". The later expression was removed during the preparatory work and was not subsequently reintroduced.

[102] In the *Gabcíkovo-Nagymaros Project* case, Judge Bedjaoui argued that the contemporaneity principle should prevail. He said first that an evolutionary interpretation is subjected to Article 31 of the VCLT, which he considers as implying that the interpretation of a treaty must comply with the meaning of the term and the intentions of the parties at the time of its conclusion. He noted that the ICJ decision in the *Namibia* case, which was being used by Hungary to justify an evolutionary interpretation, also emphasized "the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion." Second, he argued that the interpretation of a treaty must not be confused with its revision, since it the exercise of interpretation could not lead to a completely different law in comparison to the one governing the meaning of a given treaty norm at the time of its conclusion. "The *'interpretation'* is not the same as the *'substitution'* of a negotiated and approved text, of a completely different text, which has neither been negotiated nor agreed. Although there is no need to abandon the *"evolutionary interpretation",* which may be useful, not to say necessary in very limited situations, it must be said that it cannot automatically be applied to any case." Separate Opinion of Judge Bedjaoui, above n 100, p. 123.

[103] Pauwelyn has espoused a different view, at least as regards the interpretation of WTO rules, in which "evolutionary interpretation becomes the rule, contemporaneous interpretation the exception." J. Pauwelyn, above n 5, p. 268.

one would be avoiding a "revision" of the treaty by the legal interpreter, while also ensuring that the interpretation of the norm would not be disconnected from the legal system at the moment of its application.

In summary, all those elements are of paramount importance for avoiding the wrong assumption that the legal interpreter possesses a discretionary power when interpreting the meaning of norms in international law. When analysing a given norm in the light of its purposes and context, or when taking into account other relevant norms within the system, or even when examining their evolution in time, interpreters are not expected to decide on the basis of their own values, interests or expectations. They must rather seek the intention of lawmakers when the norm under examination was created, and determine how a given norms has been interpreted in the practice of States and international tribunals. Otherwise, one would be admitting a capacity on the side of the legal interpreter to create norms that does not find any justification under current international law, except for situations in which the parties into a dispute have provided them with it. Notwithstanding the foregoing, treaty interpretation cannot solve the problem of real antinomies. This is not a question of interpreting norms, but actually of determining the precedence between two valid legal norms. For those circumstances, other methods are required.

Section II – Meta-rules for solving legal antinomy in public international law

When norms cannot be harmonized through legal interpretation, a situation of real antinomy must be acknowledged and recourse to other methods establishing a relationship of priority between the two simultaneously applicable norms might be necessary as a means of solving the conflict. These methods may involve the invalidity of one of the conflicting norms, or the maintenance of both as valid norms in the system after a solution to the antinomy under examination is achieved. But the reliance on those meta-rules is essentially a matter of legal technique.[104]

In the first group, the 1969 VCLT established some rules that would ultimately entail the invalidity or termination of one of the conflicting norms in the process of solving their antinomy. One can mention, in this regard, the regime operated by *ius cogens*,[105] and the termination of earlier treaties in accordance with the intention of the parties or as a consequence of its incompatibility *vis-à-vis* a later treaty. Article 59 of the VCLT establishes the priority of a later treaty over an incompatible

[104] In its report on the issue of fragmentation of international law, the ILC declared that such fundamental rules of general law were acceptable precisely because of their "substantive emptiness." ILC, Preliminary Report, 2006, p. 16.
[105] The concept and the legal regime of *ius cogens* will be dealt with separately in Part II below.

and earlier treaty dealing with the same subject matter (*ratione materiae*).[106] This narrowly construed type of the *lex posterior* rule[107] implies the termination of the earlier treaty when some specific requisites are met. First, the treaty must be incompatible in its entirety with the later instrument. As a result, the entire treaty, and not just some of its provisions, is to be terminated. Second, that all parties to the later treaty are also the same parties to the earlier instrument. Otherwise there would be a violation of the rule of *pacta tertiis*.[108]

Other methods do not necessarily entail the invalidity of one of the conflicting norms, but simply a relationship of normative precedence.[109] In some cases, the conflict might be solved on the basis of rules created beforehand aiming at establishing a relationship of precedence among norms within the system. In public international law, this is the case of the rule established by article 103 of the Charter of the United Nations, which reads that "in the event of a conflict between the obligations under the Charter and obligations under any other international agreement, the obligations under the present Charter shall prevail." By creating a relationship of precedence, article 103 institutes a method for solving conflicts of obligations flowing from norms of international law whenever they contradict obligations arising from the Charter.[110]

In cases where there are no specific and positive rules established beforehand,[111] normative conflicts might be solved by having recourse to some criteria historically developed in the realm of legal theory,[112] the applicability of which is accepted as valid under the concept of "general principles of law," as established by Art.

[106] As with the rule of *lex posterior* in general, the question of which is the "later" instrument in time is of paramount importance for terminating the earlier and incompatible treaty. See below, on *lex posterior*.

[107] "In cases of termination or suspension of treaties Article 59 is *lex specialis*" within the rule of *lex posterior*. E. W. Vierdag, above n 48, p. 92.

[108] This applies regardless of the fact that the later treaty may have new parties that are not members of the previous one.

[109] This is the case of the traditional meta-rules for solving antinomies, with the likely exception of the *lex superior* rule. For except for the law of international organisations, the rule of *lex superior* does not find any application in conflicts between norms of public international law as a consequence of (i) the lack of a hierarchy between the sources of international law, and (ii) the decentralized nature of normative creating process in at the international level and the absence of a hierarchy among its recognized sources. States, as both subjects and law-makers, are positioned at an equal level. Normative production depends essentially on the consent of States, since the lack of a hierarchy implies a major role to be played by the consent of States. For our purposes, conflict of norms cannot be solved primarily by reference to the analysis on the normative sources as it is usually the case in domestic law. As pointed out by Czaplinsky & G. Danilenko, the formula contained in Art. 38 "expresses different degrees of clarity and specialty of norms originating from different sources." See W. Czaplinsky & G. Danilenko, above n 19, p. 7. Nonetheless, several authors argue that the legal regime of *ius cogens* would be the sole exception for the non-application of the rule of *lex superior* when dealing with the problem of antinomy in international law. This view, which espouses the notion of a hierarchy entailed by the legal regime of *ius cogens* will be dealt in depth in Part II below.

[110] On explicit conclict clauses in international law, see J. Pauwelyn, above n 5, pp. 172-174.

[111] According to some authors these cases should not even be considered antinomies. Boland says that those cases are « false antinomies ». G. Boland, above n 15, p. 184.

[112] "Ces trois critères pour la solution des antinomies peuvent être approchés de la catégorie de présomptions, c'est-à-dire, de cette forme d'argumentation qui, selon les juristes, en tirant du *quod plerumque accidit* un principe valable aussi dans les cas futurs non examinés, permet le passage du connu à l'inconnu." N. Bobbio, above n 17, p. 244.

38(1)(c) of the Statute of the ICJ. These so-called "meta-rules" are founded in the very idea of legal reasoning, and suggest that a solution for real antinomies may be found on the basis of chronological (*lex posterior derogat priori*), hierarchical (*lex superior derogat inferiori*) and speciality (*lex specialis*) criteria.[113] Whenever there is an antinomy between two norms, so the argument goes, these meta-rules determine that (i) the superior norm shall prevail over the inferior one; (ii) the posterior norm shall prevail over the previous one; and (iii) the particular norm shall prevail over the general one.

The chronological criterion assumes that a supervening will freely expressed by subjects of law may derogate from or abrogate their own previous will on that same subject-matter. The hierarchical criterion implies the existence of distinct normative levels within the legal system. The existence of a hierarchy implies that inferior norms cannot derogate from superior norms within the system. The criterion of specialization assumes the existence of a norm which is a valid exception derogating from a larger normative content established by a general rule. The special norm can partially subtract or entirely derogate from the general one and thus change the normative commandments on that same subject-matter.[114]

The first two criteria differ from the last one precisely by evading an analysis of the subject-matter of the norms in conflict. They operate fundamentally at the structural level of the legal system. The chronological criterion is based on the factual observance of a supervening valid norm replacing a previously existing one,[115] and the hierarchical criterion, while leaving some room for discussing the existence of a relationship of hierarchical subordination between rules, is quite objective by focusing on the formal existence of a given norm within the structure of the legal system. In principle though, both criteria do not imply an interpretation on the materiality of the conflicting norms. The criterion of specialization, in turn, hinges upon the legal interpretation of the materiality of legally regulated conducts. But rather than implying an axiological approach, so an assumed lesser objectivity, the criterion of specialization aims at narrowing down the scope of application of the material commandments stemming from conflicting rules, particularly as regards the criteria of material and personal validity of the norms under examination (the criterion of time and space are not enough to establish a relationship of specialization between norms).[116]

These techniques have in common the fact that they do not necessarily entail the removal of one of the conflicting norms from the legal system. Both norms remain legally valid and binding, and the sole effect stemming from the application of

[113] "On sait que les critères dont on se sert le plus souvent sont: le *chronologique*, le *hiérarchique* et celui de *spécialité*." N. Bobbio, *idem*, p. 241.
[114] In cases of partial subtraction, the special norm can only nullify the contradictory part of the general norm.
[115] "Le critère chronologique se rapporte à un fait naturel, et une simple vérification est suffisante pour pouvoir l'employer." *Ibidem*, p. 243.
[116] *Ibidem*, p. 244.

these methods is the solution of the normative conflict *in casu* on the basis of a rule of priority. As both norms continue to exist as valid rules within the system, those rules of priority are related to premises firmly grounded in general international law,[117] such as the principles of contractual freedom of states, *pacta sunt servanda*[118] and *pacta tertiis nec nocent nec prosunt*.[119] The bottom-line is the determination of the expression of the will of States, and how it relates in time (latest expression of intention or previously established conflict clauses), in substance (speciality of the norms if conflict) and in scope (effects on third parties). Each of those meta-rules will be examined below, after a quick look at explicit conflict clauses.

Conflict clauses explicitly established in international instruments

Antinomies in international law can be solved through the recourse to explicit conflict clauses.[120] Also known as "compatibility clauses,"[121] they are an essentially preventive method for solving antinomies[122] that can only be applied to apparent conflicts, which are solved without touching upon the materiality of the two incompatible normative commandments.[123]

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[117] "Les règles générales de l'effet obligatoire des traités et des coutumes: *pacta sunt servanda*, *rs inter alios acta*, etc … restent le centre de toute théorie de solution des conflits; elles sont la conséquence naturelle d'un système de coordination." J.-A. Salmon, above n 11, p. 312.

[118] VCLT, *Article 26 - "Pacta sunt servanda"*: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[119] "*Article 34 - General rule regarding third States* - A treaty does not create either obligations or rights for a third State without its consent.
Article 35 - Treaties providing for obligations for third States - An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.
Article 36 - Treaties providing for rights for third States - 1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides. 2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.
Article 37- Revocation or modification of obligations or rights of third States - 1. When an obligation has arisen for a third State in conformity with article 35, the obligation may be revoked or modified only with the consent of the parties to the treaty and of the third State, unless it is established that they had otherwise agreed. 2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.
Article 38 - Rules in a treaty becoming binding on third States through international custom
Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such."

[120] As any other norm of public international law, conflict clauses are subject to the legal regimes operated by *ius cogens*, and the principles of *pacta tertiis* and contractual freedom of States.

[121] W. Czaplinsky & G. Danilenko, above n 19, pp. 13-18.

[122] "The best way of avoiding conflicts between treaties is to include compatibility clauses in the treaty texts." W. Czaplinsky & G. Danilenko, *idem*, p. 13. See also J.-A. Salmon, above n 11, p. 293.

[123] Pauwelyn notes that these explicit treaty-based conflict clauses can relate to (i) pre-existing treaties; (ii) to future treaties; and (iii) to the regulation of norms within a same treaty. J. Pauwelyn, above n 5, p. 328.

The first type of incompatibility clauses is found in supervening treaties. They establish which treaty – an earlier or a later – should have priority as between the parties thereto.[124] Article 311(1) of the UNCLOS is commonly mentioned as an example of an explicit treaty-based conflict clause establishing its priority as a later instrument over an earlier treaty dealing with the same subject-matter.[125] These clauses can not only provide for the derogation of a later treaty from an earlier instrument, but also imply the denunciation of the previous agreement.[126] Supervening treaty-based compatibility clauses can also provide for the priority of the earlier treaty over the later, which is an implicit exception for the *lex posterior* rule equally based on the contractual freedom of States, according to article 30(2) of the VCLT.[127] This is the most common type of clauses related to pre-existing treaties, and there are several examples in the practice of States. They are frequently used in human rights instruments as a means of safeguarding the existing framework for the promotion and protection of human rights,[128] under the rationale that new treaties can only expand that protective framework. These clauses can also be useful for defining the operation of regional or bilateral treaties in the light of provisions stemming from multilateral instruments on the same subject-matter.[129] Its main purpose is to protect and not to infringe upon existing rights and obligations of the parties under other previous international instruments, or to ensure the applicability of an instrument with a wider scope of application, for example.[130]

A second category of explicit conflict clauses relates to norms established in earlier treaties providing for their priority over all other future treaties. Also an exception to the *lex posterior* rule (and an exception to *lex specialis* as well), the actual operationalization of this type of "open-ended" clause is surrounded by scepticism because it suggests an *a priori* limitation on the contractual freedom of states. The assumption that the free will of States can be limited beforehand contradicts the

[124] According to Salmon, these clauses "présentent une très grande utilité afin d'adapter les normes dépassées par les événements, de suivre le rythme de la vie, d'assurer le 'peaceful change'." J.-A. Salmon, above n 11, p. 297.

[125] It explicitly establishes the priority of UNCLOS over the 1958 Geneva Conventions of the Law of the Sea.

[126] Czaplinsky and Danilenko also mention, as examples of compatibility clauses, articles 80-83 of the Chicago Convention of 1944 on international aviation in respect of the Paris Convention of 1919 and the Havana Convention of 1928. See W. Czaplinsky & G. Danilenko, above n 19, p. 14.

[127] "*Article 30 - Application of successive treaties relating to the same subject matter* (…) 2. When a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of that other treaty prevail."

[128] Article 60 of the European Convention on Human Rights, for instance, states "[N]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

[129] The most common type of this clause relates to provisions establishing that the treaty does not intend to impair or prejudice in any way the provisions of the Charter of the United Nations.

[130] As noted by Jenks, those clauses can be equally very helpful in instruments dealing with "highly technical regulations when it is desired to make it clear that an instrument dealing with some subject as a whole or from some new angle is not intended to deal with some particular aspect of the subject which has already been dealt with in another connexion by an earlier instrument." C. W. Jenks, above n 10, p. 432.

centrality of the principle of contractual freedom of States. Its efficacy is therefore severely jeopardized. The only recourse for supporting the priority of this type of clause over future treaties is to be found in the principles of *pacta sunt servanda* and good faith. However, that relationship of priority could be overruled on grounds of the contractual freedom of States, and the remaining question of non-compliance could be left to its analysis under international responsibility. To put it differently, nothing actually prevents the parties from changing by common agreement their will on a given subject-matter and then contracting out from an earlier treaty, regardless of the existence of a clause establishing the priority of the first instrument. That would be the case even in the event that the later treaty does not explicitly include a clause of priority over a previously existing instrument.[131]

Article 103 of the UN Charter is one of the widely accepted and recognized rules[132] establishing the priority of an earlier treaty over future agreements.[133] Reproducing the same rationale once established by Art. 20 of the 1919 Covenant of the League of Nations,[134] Art. 103 puts forward in explicit and unequivocal terms the prevalence of the obligations stemming from the Charter in the event of a conflict with obligations "under any other international agreement."[135] Article 30 (1) of the VCLT reinforced that provision by expressly referring to it as an exception to the rule of *lex posterior*: Art. 103 prevails over "the rights and obligations of States parties to successive treaties." The priority rule set out in Art. 103 covers not only the very provisions of the Charter, but also the legal regimes deriving from the Charter, such as the Resolutions of the UN Security Council[136] and the decisions of the ICJ alike, since the Statute of the Court is an integral part of the UN Charter in accordance with Art. 92.

The second possibility of conflict clauses relates to future agreements and establishes the priority of later treaties dealing with the same subject-matter. Those rules are quite common in international practice and are a simple confirmation of

[131] J. Pauwelyn, above n 5, p. 336.
[132] One should also mention the respective clauses of the 1949 Geneva Conventions.
[133] For a slightly different view, see Jenks and Salmon who identified Art. 103 of the UN Charter as a specific rule of *lex superior*. C. W. Jenks, above n 10, pp. 436-442; and J.-A. Salmon, above n 11, pp. 291-292.
[134] "Article 20 - The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof."
[135] The priority set out by Art. 103 apply indistinctively to earlier and to future international agreements, as well as to rights and obligations provided for other sources of international law, such as customary international law.
[136] In a landmark decision on the relationship of priority of the UN Charter over rights and obligations under other international agreements, the ICJ confirmed in the *Lockerbie* cases that the obligation to accept and carry out the decisions of the Security Council in accordance with article 25 prevails over provisions under other treaties in the case of conflict. As a matter of fact, the ICJ recognized in the *Lockerbie* cases that the rule of priority embodied in Art. 103 of the UN Charter should prevail over other methods of solving antinomy in international law, such as the rules of *lex posterior* and *lex specialis*. *Lockerbie* cases (Provisional Measures), ICJ Reports 1992, para. 42. As noted by Pauwelyn the ICJ rejected the allegations presented by Lybia that the 1971 Montreal Convention should prevail over the UN Charter as both *lex posterior* and *lex specialis*, and decided that the obligations imposed upon all UN Members in respect to Art. 103 prevail over their obligations under any other treaty, including the Montreal Convention. J. Pauwelyn, above n 5, pp. 386-387.

the contractual freedom of States. Multilateral treaties usually have this type of provision as a manner to create some room for bilateral treaties supplementing the former while also protecting their integrity. For that reason, these rules of priority are largely a positive expression of the rules of *lex posterior* and *lex specialis* in corollary of the contractual freedom of States.

Prior tempore potior iure

The rule of *lex prior* assumes that an earlier norm should prevail over a later norm dealing with the same subject-matter. It aims at the protection of the integrity of an earlier legal regime, particularly those of a multilateral nature. This rule traces its origins in Private Law, and was reflected in the draft on the law of treaties prepared in 1935 by the Harvard Research in International Law,[137] and was also reflected in the proposals of H. Lauterpacht in his 1953 report on the Law of Treaties, in which the issue was approached from the perspective of "illegal" treaties.[138]

This regime can be applied both to bilateral or reciprocal legal relationships (AB/AC treaties), as well as to multilateral or integral relationships. In the first case, later treaties concluded by one of the parties (A) contradicts rights and obligations provided by an earlier instrument with another State (C) that is not party to the earlier treaty with B. As an effect of the *lex prior* rule, the legal rights and obligations established by the earlier treaty (A/B) must take priority over the later treaty (A/C). The rule of *lex prior* is applied because the conflicting norms do not oblige the same legal subjects. For B, which is not a party to the later treaty, this instrument is only *res inter alios acta*.[139] This rule reinforces the principle according to which a treaty (A/B) cannot be modified on a unilateral basis (A). As the practice of States is not necessarily coherent over the course of time, there are several examples of this type of normative conflict in international practice and the matter has been dealt with in international adjudication in various circumstances.[140] The application of the *lex prior* as a rule of priority does not

[137] The draft enounced the rule of *lex prior* in the following terms: "If a State assumes by a Treaty with another State an obligation which is in conflict with an obligation which it has assumed by an earlier treaty with a third State, the obligation assumed by the earlier treaty takes priority over the obligation assumed by the later treaty." *American Journal of International Law*, 1935, supplement, p. 1024.
[138] YbILC, 1953, pp. 198-208.
[139] J.-A. Salmon, above n 11, pp. 291-292. He mentions several examples of state practice in this regard.
[140] See, *inter alia*, PCIJ Advisory Opinion on *Customs Regime Between Germany and Austria*, PCIJ, Series A/B, No. 41 (1931); *Costa Rica v. Nicaragua* case, Judgment of the *Central American Court of Justice, reprinted in (1917) 11 AJIL, 181-229*; *Mavromatis Palestine Concessions* (Jurisdiction), PCIJ, Series A, No. 2 (1924), pp. 30-31; and *Zone franches de la Haute-Savoie et du Pays de Gex*, PCIJ, Série A/B, No. 46 (1932), p. 142.

necessarily impact, however, on the validity of the later treaty, rights and obligations of which continue to exist between A and C.[141]

Another type of application of the *lex prior* rule is found in cases in which later provisions are explicitly prohibited by earlier norms established in multilateral treaties. Article 41[142] and 58[143] of the VCLT specifically stipulated compulsory limits for subsequent agreements modifying, suspending or contracting out of an earlier multilateral treaty. These provisions are relatively common in multilateral treaties,[144] since they aim at protecting the integrity of the legal regime that could be jeopardized by subsequent agreements between only some of the parties to the earlier multilateral instrument.

The principles of *pacta sunt servanda*, *pacta tertiis* and good-faith are at the basis of the rationale beneath the rule of *lex prior*.[145] These principles provide the required lawfulness for limiting the particular and later will of States in subsequent *inter se* agreements, and a justification for the application of the *lex prior* instead of the *lex posterior*. The application of the rule *lex prior* as a logical corollary of those general principles of law can be found in the case of conflicts between successive multilateral treaties with different Parties.[146] As a result of the criterion *ratione personae*, any modification or derogation from an earlier treaty can only be

[141] *Per contra*, see the dissenting opinion of judges Van Eysinga and Schücking, who felt that the PCIJ should declare as void *ex officio* a subsequent agreement (Convention of St. Germain relating to the Congo Basain) on the ground that it modified an earlier treaty (General Act of Berlin of 1885) without the consent of all the parties thereto. PCIJ, Series A/B, No. 63, pp. 131-150.

[142] *Article 41 - Agreements to modify multilateral treaties between certain of the parties only* - 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (*a*) the possibility of such a modification is provided for by the treaty; or (*b*) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. 2. Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides."

[143] *Article 58 - Suspension of the operation of a multilateral treaty by agreement between certain of the parties only:* 1.Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if: (*a*) the possibility of such a suspension is provided for by the treaty; or (*b*) the suspension in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) is not incompatible with the object and purpose of the treaty. 2.Unless in a case falling under paragraph 1 (*a*) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend."

[144] See, for example, article 31 of UNCLOS; article 20(1) of the League of Nations; or article XXIV of GATT, which related to regional trade arrangements *vis-à-vis* the MFN clause (Art. 1 of GATT).

[145] Salmon said that more than a result stemming from the rule *prior in tempore potior in ius*, the priority of the earlier norm over the later norm would rather be a logical effect of a technical nature of the rules of *pacta sunt servanda* and *res inter alios acta*. In his view, "[a]u delà de l'expression technique c'est dans la règle de fond qu'il convient de chercher le critère de solution du conflit." J.-A. Salmon, above n 11, p. 304.

[146] In general, the rule of *lex prior* is not adequate for dealing with a conflict between multilateral treaties precisely because of the complexity surrounding the determination of the exact moment in which those instruments have come into force for its various parties. On this issue, see the next sub-chapter below on the rule of *lex posterior*. See also C.W.Jenks, above n 10, pp. 444-445; and J.-A. Salmon, *idem*, p. 304.

admitted in so far it reflects the consent of all the parties to the earlier instrument. In this case, the rule of *lex posterior* can only be lawfully applied to the parties to the new instrument, while the rule of *lex prior* will be applied to the States that are not parties to the later instrument. In principle, and except for a conflicting norm of *ius cogens*, any different conclusion requires the interested party (*actori incumbit probatio*) to prove that the subsequent instrument would equally bind non-parties.

One of the main aspects to bear in mind with this type of normative conflict is that, while the rule of *lex prior* determines the priority of the earlier norm over the later, there remains the question of international responsibility arising from non-compliance with the obligations validly established under the later treaty. The rule of priority (*lex prior*) does not necessarily entail the invalidity of the later treaty and therefore leaves the door open for a claim of compensation by the State (C) that has suffered any loss from the non-compliance with the provision of the later but equally valid treaty. In other words, the application of the *lex prior* rule will also involve the subject of international responsibility, which is potentially the main interest of the parties to a dispute related to this type of normative conflict.[147]

Finally, one should bear in mind that the primary role of the rule of *lex prior* is to guarantee the stability and effectiveness of the international legal system, which could be disrupted on exclusively voluntarist grounds. In other words, it reflects the necessary balance between the principles of contractual freedom of States and *pacta sunt servanda*, both which are placed among the foundations upon which the international legal system is built. But the existence of the rule of *lex prior* should not be construed as a means of hampering the necessary and welcome development of international law,[148] since it is not an absolute rule and its existence does not imply any fixed priority over the other meta-rules.[149]

Lex posterior derogat legi priori

Article 30[150] of the VCLT reflects the widely accepted rule of *lex posterior derogat legi priori*.[151] This rule reflects the assumption that a later expression of intention

[147] For a thorough analysis on this issue, see J. Pauwelyn, above n 5, pp. 298-326.

[148] Here it is worth recalling H. Lauterpacht, who said it is necessary "to prevent a beneficent legal principle from becoming a source of absurdity and of obstruction of the peaceful process of international change." H. Lauterpacht, 'Contracts to Break a Contract', (1936) *Law Quarterly Review*, p. 529.

[149] Actually, for Czaplinsky and Danilenko, "modern international law rejects the rule of the primacy of the earlier treaty in the case of conflict," W. Czaplinsky & G. Danilenko, above n 19, p. 20.

[150] "*Article 30 - Application of successive treaties relating to the same subject matter* - 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. 2. When a treaty specifies that it is subject to an earlier or later treaty, or is not to be considered incompatible with it, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are also parties to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4. When the parties

should prevail over a previous intention when expressed by the same legal subjects. In the absence of a hierarchy between the sources in international law, it would be logical to assume that the rule of *lex posterior derogat priori* would be a natural and adequate criterion for solving normative conflicts in international law, which is a legal system in which the will of the subjects play a decisive role in determining the existence and the interplay of norms.[152] This rationale was embodied in article 30 of VCLT, but is not applied only to conflicting treaties; it also applies to a collision between customary and successive treaty provisions.[153] The only exception to that rule would be the legal regime operated by *ius cogens*, which interdicts any derogation from peremptory norms either by means of treaty or customary law. But as a rule of priority to be used in conflicts between two applicable norms, the rule of *lex posterior* does not enter into the subject of the validity of the overruled norm.

The most important element for the application of the rule of *lex posterior* is the notion of succession in time between two valid norms within the international legal system. Conflicting norms may arise not only as a result of different approaches to a same subject-matter, or as a consequence of different compositions of memberships with partial overlaps, but also from the progressive development of international law in time. As a consequence, it is decisive to determine the exact point in time in which a given norm has come into existence as a valid source of rights and obligations. In contrast to domestic law though, the determination of the exact point in time in which a norm becomes existent and valid is not always so clear in international law.[154] Except for treaty law, customary law and general principles of law are hardly discernible as regards their emergence in time as binding norms.[155] Customary norms are the result of normative processes extended over time, what makes it rather difficult to apply a criterion based on

to the later treaty do not include all the parties to the earlier one: (*a*) as between States Parties to both treaties the same rule applies as in paragraph 3; (*b*) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty."

[151] "Writers unanimously accept this rule." W. Czaplinsky & G. Danilenko, above n 19, p. 19.

[152] Writing before the codification of the rule of *lex posterior* by the 1969 VCLT, Jenks had a different view. He wrote that "[t]he scope for applying the *lex posterior* principle to the conflict of law-making treaties also appears to be limited." C. W. Jenks, above n 10, p. 445.

[153] "The theory of *acte contraire*, by which a norm could only be modified by another norm originating from the same source, is not known in international law." "An exception to the absence of *acte contraire* in international law is *jus cogens*." J. Pauwelyn, above n 5, p. 97.

[154] E. W. Vierdag, above n 48, pp. 92 and ss.

[155] "[T]he process of change in the existing law via custom is much more difficult. Customary law is essentially based on the practice of States. Therefore, the change in existing customary law by custom presupposes the emergence of new State practice which conflicts with the established rules and is accompanied by new *opinio* juris. New claims may encounter serious opposition from States whose interests and existing rights are adversely affected, and in such situations it may be extremely difficult to ascertain the actual position of the law in a given moment." W. Czaplinsky & G. Danilenko, above n 19, p. 29.

time normativity as a means to solve legal conflicts involving these normative sources.[156] Also, as noted by Pauwelyn, the *lex posterior* rule assumes that the same lawmaker consented to the two conflicting norms, which makes it possible for the legal interpreter to identify a clear shift in the will of the concerned State. Otherwise, the later treaty should be interpreted under the principle *res inter alios acta*.[157] But this is rarely the case in international law, where "divergent law-making processes exist and overlap,"[158] and consent sometimes is only assumed, as in the normative making process of customary international law. As a consequence, the transposition of the *lex posterior* rule to international is not necessarily successful in all circumstances.

As regards international agreements, it is generally accepted that the timing of a treaty is determined by the date of its conclusion.[159] Preference was thus given to the moment in which the intention of the parties was expressed rather than the moment at which the international agreement was opened for signature, ratified or entered into force. However, the rule of *lex posterior* can only be applied as a conflict technique when the treaty has come into force to the parties into a dispute. Yet, if there is no doubt as regards successive treaties to which no parties have acceded subsequently, the question is much more complex when successive treaties have the accession of additional parties, or when subsequent regional, bilateral or multilateral agreements dealing with different general subject-matters may nonetheless overlap *ratione materiae* in some specific issues (environment and trade, for example).[160] In those cases it is very difficult to refer to the date of conclusion of a treaty as a proper piece of evidence of the intention of the lawmaker. In multilateral treaties the subsequent accession by other parties, a possibility that is placed among the very purposes of this type of treaties, hinders the determination of a single point in time that can be used as the date of conclusion indistinctively for all the parties.[161] This issue raised several doubts during the Vienna Conference and the question is still unclear as far as some publicists are concerned.[162] But the above is not tantamount to suggesting that

[156] In general, there is a tendency to apply an earlier customary rule. *Idem*, p. 34-35.
[157] J.-A. Salmon, above n 11, pp. 309-310.
[158] J. Pauwelyn, above n 5, p. 97.
[159] *Idem*, p. 370. *Per contra*, see Sørensen, who opted for the date of entry into force. M. Sørensen, 'Le problème dit du droit intertemporel dans l'ordre international', (1973) 55 *A.I.D.I.*, p. 54.
[160] E. W. Vierdag, above n 48, p. 92.
[161] As regards multilateral treaties, Salmon affirms that "[L]e droit international, dans sa structure actuelle, ne se prête pas à l'application de ce principe." Mainly concerned therefore with conflict between treaties, he argues, *inter alia*, that "ce principe ne s'applique que dans les relations entre Etats ayant ratifié la convention originaire et la convention nouvelle. (…) La révision des conventions multilatérales se présente cependant rarement dans des circonstances aussi favorables". J.-A. Salmon, above n 11, p. 309. In this same sense, Jenks said that "[I]n the case of law-making treaties it may be particularly difficult to determine the material dates for the purpose of evaluating priority of obligation." C. W. Jenks, above n 10, p. 444.
[162] See, for example, the comments of Sinclair on the relationship between an earlier multilateral treaty to which A is an original party and B only adhered after the conclusion of another bilateral treaty between A and B. In this situation, it is not clear which treaty is later from the perspectives of A and B. *Official Records of the Vienna Conference*, vol. 1, p. 165. See also C. W. Jenks, *idem*, p. 404. Pauwelyn says that there are basically

treaties do not have a time of conclusion, or that they are necessarily subject to the *lex posterior* rule, but simply that the criterion of successive norms does not necessarily provide the answer in all situations, in which other criteria may prove to be more useful for achieving the goal of solving the legal antinomy.

Lex specialis derogat legi generali

In circumstances in which the rule of *lex posterior* does not find any application, or when it proves to be insufficient for addressing the situation under examination, other rules deriving from the general theory of law can be used as a means of solving normative conflicts. This is the case of the rule *lex specialis derogat legi generali*, according to which a special norm should have priority over a contrary general norm whenever both norms deal with the same subject-matter (overlap *ratione materiae*) and are binding the same legal subjects (overlap *ratione personae*).[163]

The rule of *lex specialis* was not expressly codified in the 1969 VCLT as a rule of priority between conventional obligations. One may suggest it was expressed implicitly in several provisions of the VCLT, such as "unless the treaty so provides" or "unless the treaty provides it otherwise", or even "unless it is prohibited by the treaty" in order to express legal relationships closely related to the idea of speciality.[164] But its legal existence as a valid rule of public international law is first and foremost as a general principle of law[165] and as a norm of customary international law. It was expressly referred to in the 2001 Draft Articles

two possible approaches to be used in those circumstances: the search for the "time of convergence of state consent" and the notion of "continuing" or "living" treaties. In the first approach, the question would not depend on the date of conclusion of a given treaty as an abstract and independent instrument itself, but rather on when the free will of States has actually converged. What matters here is the latest date that should be used as the time in which both parties have consented to the treaty under examination. But this radical and strict use of the *lex posterior* rule could lead to undesirable situations in practice, such as the possibility that a regional or a bilateral treaties contracting out of a multilateral treaty would prevail over the later, at least as regards the parties to the former (*pacta tertiis*), exclusively on the grounds that it is successive in time. Also, it would inevitably lead to a myriad of possibilities depending on the exact time to which each of the parties have acceded to a multilateral treaty, a scenario that would run contrary to the goal of stability and predictability of legal relationships in international law. The second approach is more pragmatic and realistic by recognizing the inherent limitations of the *lex posterior* rule as a method for solving legal antinomies in international law. It assumes that there are situations in which States may have divergent views on which is the earlier or the later norm. In those circumstances, recourse must be made to other rules to solve normative conflicts, such as *lex specialis*. According to Pauwelyn, these types of "continuing" or "living" treaties are in a continuous evolving process and the intention of States cannot be restricted to that specific point of time in which the treaty was concluded. J. Pauwelyn, above n 5, pp. 378-380.

[163] J.-A. Salmon, above n 11, p. 304.

[164] See articles 5, 19 (a), 20 (1), 28, 29, 30 (2) and 40 (1).

[165] "The *lex specialis* and *lex posterior* rules in respect of the conflict of international agreements are not applied simply as rules of interpretation but rather as general rules of law accepted by all legal systems." W. Czaplinsky & G. Danilenko, above n 19, p. 21.

on State Responsibility[166] and, in the context of judicial decisions[167] and the writing of scholars,[168] as a rule to be used when solving conflicts of norms based on the assumption that a more specific expression of the intention of the law-makers should prevail over a general one.

The rule of *lex specialis* aims primarily at determining the correct expression of State consent, pursuant to the principle of contractual freedom of States. For that purpose, the analysis of the materiality ("subject-matter") of the norms in conflict is paramount for determining a potential relationship of speciality between the two conflictive normative commandments.[169] For example, the rules of the 1966 ICCPR are more specific than those of the Universal Declaration of Human Rights; and the two 1977 Geneva Additional Protocols provisions are more specific than those of the 1949 Geneva Conventions (e.g., the Fourth Geneva Convention does not contain rules on the effects of hostilities and the protection of civilians in that context, which is one of the main advancements introduced by the First 1977 Additional Protocol).[170]

The question of *lex specialis* can also be approached from the standpoint of the membership of treaties. When States are parties to two international treaties dealing with the same subject-matter, the rule of *lex specialis* appears as a perfect method for determining which instrument should prevail in the circumstance under examination. This would be the case of conflicting provisions stemming from multilateral and regional or bilateral instruments in which States are parties to both types of treaties. In the absence of an explicit conflict clause, recourse to the rule of *lex specialis* may prove to be very useful.[171]

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[166] "Art. 55 – *Lex Specialis*: These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."

[167] See, for exemple, the reference made by the ICJ in the *Gabcíkovo-Nagymaros Project* case, above n 100, para. 132. See also the *Ambatielos* case (jurisdiction), ICJ Reports, 1952, p. 58.

[168] References to the rule of *lex specialis* can be found as early as in the writings of the founders of modern international law such as Grotius, Vattel and Puffendorf. See H. Grotius, above n 1; E. de Vattel, above n 1; and S. Pufendorf, *On the Duty of Man and Citizen*, Cambridge University Press, 1991; S. Pufendorf, *Law of Nature and Nations* (ed. J. Roland), Oxford Press, 2003, book V, chapters XII-XXIII.

[169] "The difficulty of avoiding inconsistency and conflict between statements of general principle which cannot, by their very nature, contain the qualifications and exceptions necessary to make them workable in practice and the detailed instruments on the subject which embody such reservations and exceptions is considerable." C. W. Jenks, above n 10, pp. 409-410.

[170] The Fourht Geneva Convention "only protects civilians against arbitrary enemy action, and not - except in the specific case of the wounded, hospitals and medical personnel and material - against the effects of hostilities." Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987.

[171] There are several examples in international practiceof regional instruments dealing with specific issues in a more detailed manner, usually with a view to expanding the scope of application of a given material normative domain, such as in the area of human rights. Although, in general, human rights treaties have explicit conflict clauses in this regard, one should not deny the possibility of resorting to the *lex specialis* rule as justification for accepting the application of a more specified protective normative universe rather than a more general and potentially less protective norm. This interpretation would be coherent with the very intention of the parties. One could mention, in this regard, the more specific legal regimes of protection established within the

The application of the rule of *lex specialis* has consequences for the relationships between the sources of international law when they deal with the same subject-matter. Rather than a formal hierarchical relationship, it suggests a priority of application according to the rule of *lex specialis* between the recognized sources.[172] The first and generally accepted one is that special treaty-law should prevail over general international law, and that both treaty and customary law, arguably more specialized norms, should have priority over the general principles of law. The central idea is the level of precision and clarity in which a certain subject-matter has been dealt with by one of the conflictive norms.[173] The same relationship of priority is to be applied as between two conflicting customary norms,[174] as well as between two provisions of a same treaty, this later a situation in which the rule of *lex posterior* falls short of providing an adequate solution for the conflict of norms for obvious reasons. Finally, in accordance with the principle of *lex posterior*, supervening custom is expected to prevail over an earlier treaty whenever it can be proved that the emerging custom is later in time. The only exception for the application of the *lex posterior* rule in favour of customary law would be an earlier conventional norm that continues to exist *inter partes* as *lex specialis*.[175]

It is not clear, however, whether the *lex specialis* should prevail over the *lex posterior* and vice-versa, in the event that both criteria can be used to address the same normative situation of conflict A/B, but their respective consequences would be different, i.e., the recourse of *lex specialis* would determine the priority of norm A while *lex posterior* would determine the priority of norm B. Aufricht, for example, alluded to the adage *generalia specialibus non derogant* in order to support the priority of *lex specialis* over *lex posterior* in the case of a later treaty has more general provisions when compared to those or an earlier instrument dealing with the same

European Union and the international system. For instance, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances provides in unequivocal terms the abolishion of the death penalty and the prohibition of any derogation therefrom, while even the European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1966 ICCPR respectively accept death penalty "in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law" (Article 2(1) of the European Convention) and "imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime" and "carried out pursuant to a final judgement rendered by a competent court" (article 6(2) of the ICCPR). In case of a conflict between European States, the interpreter should give priority to the rights and obligations stemming from the regional instrument in so far they will provide a wider spectrum of protection for individuals. Between human rights treaties, the main rule of interpretation to be held is that the criteria of speciality is used as a means of guaranteeing the application of the norm with the most favourable and the wider scope of protection for the concerned individuals.

[172] W. Czaplinsky & G. Danilenko, above n 19, pp. 5-9.

[173] Jean Salmon has even identified a *de facto* hierarchy among the sources of international law as a result of "leur sûreté et de leur précision." J.-A. Salmon, above n 11, p. 288.

[174] In the *Right of Passage* case the ICJ declared that the right of transit of private individuals through Indian territory as a particular and clearly established practice, should prevail over any general rules. *Right of Passage* case, above n 1, p. 40.

[175] This interpretation was held by the Iran-US Claims Tribunal, in which the arbitral tribunal decided that the Treaty of Amity between the two countries should prevail over custom as general international law. Award of 12 August 1985, 8 IRAN-US CTR 373, at 379, as quoted in Pauwelyn, above n 5, p. 393.

subject-matter.[176] However, in spite of the difficulties related to the application of the rule of *lex posterior* in cases of conflict involving multilateral treaties to which other parties have subsequently acceded, and to which the parties have continuously reaffirmed their consent, one could hardly admit that the *lex specialis* rule should always prevail over the *lex posterior*, particularly because it has not been expressly codified in the VCLT. The adage *generalia specialibus non derogant* is part of international customary law or a general principle of law, but its application could only be acceptable in cases in which the material overlap would be severely hindered by the very generality of the later norm in time. In summary, the application of the *lex specialis* in detriment of *lex posterior* could occur "only in case it is impossible or would be absurd to put one single or definite time-label on either of the two norms,"[177] a very specific situation in which the very idea of successive treaties as suggested in Art. 30 would not apply.

Finally, one should envisage the possibility of applying the rule of *lex specialis* not only as a method of solving legal antinomies in international law, but also as an important element in legal interpretation. Indeed, the *lex specialis* norm may accumulate with the general norm, and thus help the interpreter in determining the scope of application of the *lex generalis*. A special treaty or custom provision may supplement a general principle of law, for example.[178] This approach was used by the ICJ in its Advisory Opinion on the *Threat or Use of Nuclear Weapons*, in which the Court applied as *lex specialis* the law of the use of force, more specifically the lawful use of force for self-defence, and humanitarian international law, while interpreting the Art. 6 of the ICCPR (right not to be arbitrarily deprived of one's life) as *lex generalis*, the application of which would be subject to the specific circumstances of the law of armed conflicts.[179]

Section III - Insufficiency of traditional methods (meta-rules): the problem of the "hard cases"

In spite of the relevance of the aforementioned criteria, there may be situations in which these meta-rules are insufficient to solve real antinomies, that is, circumstances in which it is not possible to establish relationships of specialization, succession in time or hierarchy between conflicting norms. That may cause the impossibility of complying with both valid legal commandments without incurring in an unlawful act. This case, in which the interpreter cannot have recourse to these criteria mentioned above, is considered a "hard case".

[176] Hans Aufricht, 'Supersession of Treaties in International Law', (1952) 37 *Cornell Law Quaterly*, p. 698.
[177] J. Pauwelyn, above n 5, p. 407.
[178] As noted by Pauwelyn, "a *lex specialis* supplementing a *lex generalis* must always be interpreted in the light of the *lex generalis*, and vice-versa." J. Pauwelyn, *idem*, p. 410.
[179] ICJ Reports 1996, para. 34.

In domestic legal regimes, a conflict as such may be found in the application of the constitutional norms prohibiting racism and similar practices, on the one hand, and the rule of freedom of expression on the other. While the former may prohibit racist speeches and similar behaviours, the later protects the right of persons to express themselves freely insofar as the exercise of this right does not constitute incitement to discrimination, hostility or violence.[180] At the abstract level, they are perfectly compatible within the legal system. But the actual occurrence of hatred speech unveils a potential antinomy between them. However, as both norms aim at regulating different domains in a general manner, it is not possible to establish a relationship of specialization, hierarchy or succession in time between them.[181]

Several theories have been developed in the realm of legal studies to address the problem of antinomies that cannot be solved through any of the traditional methods described above. Generally, these theories aim at providing a legal justification for the decision of the interpreter in "hard cases." The traditional positivist approach suggests that it is up to the interpreter to decide a case either way, that is, by favouring one of the conflicting norms or the other whenever a particular case cannot be brought under a pre-established rule of law. As put forward by Hart, the interpreter would be in a position to create a new norm to be applied retrospectively to that specific circumstance of normative antinomy in the light of the "open-texture" of the conflicting rules.[182] His views imply a relationship of proportionality between the discretion of the interpreter and the extent of indeterminacy of the applicable conflicting rules.

Bobbio suggests some possible approaches in situations of two conflicting norms of general character in which it is not possible to have recourse to either of the aforementioned criteria (two rules of the same legal instrument, for instance). First,

[180] See articles 19 and 20 of the ICCPR.

[181] Some authors have even suggested that some of the traditional criteria mentioned above would not necessarily bind in all circumstances, even when it is possible to establish relationships of a material, personal, time and speciality nature. Foriers, for instance, admits that the legal interpreter may choose to apply the more general norm in detriment of a more specific provision on grounds of Morality and Justice. So regardless of a clearly established relationship of specialty *vis-à-vis* a general norm equally applicable in that given situation, the rule of *lex specialis* would not apply. This would be particularly the case if the legally protected interest relates to the need of safeguarding the life and the physical and mental integrity of individuals. If those interests are jeopardized in the case of an abstention, even if assumedly in accordance with a valid normative commandment, the antinomy should be solved in favour of the conduct aiming at safeguarding those interests. Foriers refers to a situation in which a "sorcerer" saves the life of a person, although that practice may be prohibited in a given system of law. In that circumstance, the duty of assistance prevails over the unlawful character of medical practice. That would be a specific method of legal reasoning, namely "la pesée objective des intérêts protégés par des lois incompatibles et la préférence donnée à la norme qui assure la protection d'intérêts essentiels liés à la sauvegarde de la vie humaine (*favor humanitatis*)." In this openly axiological approach, the bottom-line of the criterion to determine the precedence between colliding rules is not based on whether a norm is hierarchically superior, successive in time or more specific than the other as regards the regulated subject-matter, but rather related to the analysis on whether a given norm is objectively more "humane" in that concrete situation. P. Foriers, above n 9. pp. 31-33.

[182] H.L.A. Hart, above n 36, p. 144, and pp. 121-132. Dworkin criticizes this approach by saying that "in reality he has legislated new legal rights, and then applied them retrospectively to the case at hand." R. Dworkin, *Taking Rights Seriously,* Cambridge, Harvard University Press, 1978, p. 81.

he argues that the solution may be found in the formal character of rules, i.e., by qualifying them as imperative, prohibitive and permissive. In a conflict between a permissive norm and an imperative or a prohibitive norm, the permissive norm should prevail in corollary of the principle that the most favourable interpretation should prevail in detriment of the most odious (*odiosa restringenda, favorabilia amplianda*, which is complemented by the adagio *semper in dubiis benigniora praeferenda sunt*).[183] However, contemporary hermeneutics suggests that such a distinction between legal provisions is hard to draw in certain situations, such as those in which norms aim at the protection of rights and the limitations of the capacities of public entities. A judgment on what is more benign or objectionable is subjective by its very nature and may differ according to the political and ideological background of the interpreter.[184] In the other possibility, a conflict may arise between an imperative and a prohibitive norm, a situation in which there would be an excluding incompatibility between conflicting norms that would redound in the permission of the conduct as the final solution.

Bobbio also argues that there are three possible results stemming from a solution of antinomies: (i) the elimination of one norm by applying the other; (ii) the elimination of both norms by applying a third equally valid norm within the system; or (iii) the maintainance of the two valid norms. The first hypothesis implies a derogative operation. This is observed when one of the norms is placed as *sedes materiae* while the other is not. The norm placed at *sedes materiae* would prevail over the other as a consequence of its place in the normative context, which would be indicative of the importance attached to it by the lawmaker. In public international law, that would be the case of the purposes and principles of the United Nations as embodied in Chapter I of the Charter. The second hypothesis ends at the mutual elimination or non-observance of both conflicting norms as a consequence of a frontal and irreconcilable solution. Finally, the third and last hypothesis allows for the conservation of the two colliding norms by removing their mutual incongruences. In these cases, legal interpreters seek to harmonize them by means of carving out the incompatible dimensions in each of the conflicting norms through an exercise of legal interpretation.[185]

[183] It is interesting to note, however, that Vattel and Grotius have suggested the opposite in the case of international law. Vattel argued that "Dans tous les cas où ce qui est seulement permis se trouve incompatible avec ce qui est prescrit; ce dernier l'emporte…de même, la Loi, ou le Traité qui permet doit céder à la Loi, ou au Traité qui défend… Toutes choses d'ailleurs égales, la Loi ou le Traité qui ordonne cède à la Loi, ou le Traité qui défend." E. de Vattel, above n 1, book II, chapter XVII, paras. 312-313.

[184] Bobbio himself recognized that reality is much more subjective, and added that this exit out consisted in evaluating what is more just to be protected. N. Bobbio, above n 18, pp. 157-295.

[185] This last scenario of real antinomy is of special importance to the study of *ius cogens*, since it implies that none of the norms in conflict is expected to be derogated from by each other. In this event, it is the duty of the interpreter to compare and to seek the reconciliation between the several dispositions simultaneously applicable to the same subject-matter. From that harmonization, the interpreter may deduce the sense and the scope of each one of them in order either to apply both of them in a compatible manner, or to optimize their mutual application.

The Italian scholar admits, however, the hypothesis in which it is simply impossible to justify the prevalence of one conflicting norm over the other. This would be the case of norms embodying equally important values, such as those of positive and negative liberties, or individual freedom and social justice. In those cases the interpreter could have recourse to "l'esprit du système" or the general principles of law.[186] But he warns against the recourse to "l'esprit du système" whenever a solution can be found otherwise, because "c'est celui qui le plus facilement ouvre l'accès aux preferences personnelles, à l'idéologie dite du juge."

While seeking a response to a concrete case,[187] other lines of legal reasoning attempt to avoid what could be considered a literal application of a rule, or a simplistic assumption implying a necessary hierarchy among norms, or even the acceptance that the legal interpreter would be endowed with an absolute discretionary capacity to decide on the basis of her/his own personal evaluation disregarding the positive commandments of existing norms within the system ("decisionism"). Contemporary theories are instead based on techniques such as weighing and balancing, teleological-evaluative methods and logical-systematic approaches, which aim at providing an actual solution for the problem of antinomy, while also guaranteeing the predictability, unity and coherence of the legal system as a whole.

The rationale is that in those hard-cases, a contradiction between two axiological-teleological commandments lies at the centre of normative conflict. This is a normal consequence of the plurality of values in any legal system, in which rights

[186] N. Bobbio, above n 18.

[187] The impossibility of *non liquet* is a question of a complex nature in public international law. Some authors take the view that the international legal system is a complete one. They argue, in this regard, the existence of the "residual negative principle" recognized by the PCIJ in the *SS Lotus* case ("[e]verything which is not expressly prohibited is allowed", *SS Lotus* (France v. Turkey), PCIJ, Series A, No. 10 (1927), quoted in Pauwelyn, above n 5, p. 150.) or the integrative role to be played by the general principles of law, which would have the capacity to fill the gaps of positive international law (among other authors favouring the completeness of the international legal system, see Julius Stone, 'Non Liquet and the Function of Law in the International Community', (1959) 35 *BYIL*, p. 135, and the Dissenting Opinion of Judge Shahabuddeen (Part I, para. 6, p. 866) in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 66 (request by the WHO), p. 226 (request by the UN General Assembly)). On the other hand, several other internationalists recognize that the declaration of *non liquet* is a concrete possibility in the work of international adjudication, either in the exercise of contentious or advisory jurisdiction. See Hersch Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law", in *Symbolae Verzijl*, The Hague, Nijhoff, 1958, p. 196. Prosper Weil admits the declaration of *non-liquet* in advisory procedures, but not in contentious procedures. P. Weil, 'The Court Cannot Conclude Definitively … *Non Liquet* Revisited', (1997) 36 *Columbia Journal of Transnational Law*, p. 109. In general, they consider that international law is not a "complete system" of an essentially primitive or incomplete nature, particularly as a result of the open-character of its sources. Salmon, for instance, rejects the notion of "intégrité" of the international legal system. J.-A. Salmon, above n 11. And the 1996 *Nuclear Weapons* case is usually mentioned as an example of *non liquet* in contemporary international law. In view of the continuing deficiencies of the international legal system, the possibility of *non-liquet* is indeed an undesirable but actual possibility in international adjudication whenever it is not possible to find which norm is to be applied in case of conflicting norms of international law. However, as it will be suggested below, there is a fundamental role to be played by the general principles of law as a means of integration of public international law, the recourse to which should always be available for the legal interpreter in order to avoid a *non liquet*.

and obligations are created as a result of the variety of interests and ideological backgrounds exerting influence over the law-making process. The ethical plurality placed at the centre of any normative creation process is translated into contradictory commandments under axiological and teleological perspectives of the same "importance."[188] This is the case of the potential contradiction between fundamental freedoms and the duty to maintain public order, or between the freedom of expression and the right to privacy of individuals, which are classical examples of axiological-teleological conflicts.[189] And this plurality of values challenges a simplified representation of the legal system as a finished and closed system in which solutions to antinomies can always be solved by the prevalence of one rule over the other.

Champeil-Desplats characterizes this type of "axiological-teleological" by four particular features when compared to other traditional types of antinomies: (i) they are of the "partial-partial" type; (ii) they occur *in concreto*; (iii) traditional meta-rules are not applicable; and (iv) the solution for the normative conflict does not necessarily entail the nullity of one of the colliding norms.[190]

The first aspect relates to categories of antinomies, as first suggested by Ross.[191] The partial-partial type implies that normative commandments are not contradictory in their entirety, but only as regards one or some specific dimensions of their respective scope of application. This is usually the case of conflicts between norms of general international law. They are hardly presented as an objective rule, but rather in the structure of principles allowing by their very nature a non-restrictive interpretation. The second aspect indicates that axiological-teleological antinomies occur *in concreto*, that is, at the actual moment in which there is a need for deciding which solution is to be taken in the face of two colliding norms. It differs from antinomies *in abstracto*, which are solved by a logical relationship established on the basis of the very formal structure of norms in conflict. In the former case, the process of solving the antinomy requires the interpretation of the scope and the content of the norms in conflict, while this is not necessarily the case in the latter one. The third aspect implies that the traditional meta-rules for solving antinomy are not useful or are insufficient for finding a solution to the normative conflict under examination. As mentioned above, these are situations in which it is not possible to establish relationships of hierarchy, speciality or anteriority between the colliding norms. In general, those conflicts occur between norms such as constitutional norms, which are all placed at the same hierarchical level, deal

[188] On teleological conflicts, Bobbio says that when there is an incompatibility between the goals stemming from one norm and the means prescribed by the other for obtaining those same objectives (one rule obstructs the application of the other and vice-versa). In this case, there is a teleological antinomy, which is considered by Bobbio as a problem of lacunae.

[189] V. Champeil-Desplats, 'Raisonnement juridique et pluralité des valeurs: les conflits axio-téléologiques de normes', in P. Commanducci et R. Guastini (dir.), *Analisi e diritto*, 2001, p. 60.

[190] *Idem*, pp. 60-61.

[191] See Chapter I, Section I above.

with different subject-matters in a general manner and have been established at the same point in time. In the case of public international law, one could draw an analogy with the fundamental principles of the UN Charter, among which it is not possible to determine a relationship of precedence by using any of the aforementioned meta-rules, since they are usually contemporary in time, of the same degree of generality, and are placed at the same hierarchical level.[192] The fourth and last aspect implies that axiological-teleological normative conflicts do not involve the nullity of one of the norms in conflict.[193] In these circumstances, the scope of application of each of the conflicting norms is practically limited by the introduction of specific exceptions to each of the normative commandments, with a view to reconciling as much as possible two norms of the same axiological-teleological importance.

Several lines of legal reasoning have been put forward as alternatives for solving the problem of real antinomies from the standpoint of the recognition of the existence of teleological conflicts, or the so-called "hard cases". There are basically two possibilities for approaching the matter: the interpreter may choose to justify the decision either on the basis of applying only one norm in an integral and absolute manner, or on the partial and optimized application of each one of the normative commandments, even under a decision that establishes the conditioned prevalence of one of the conflicting norms.

Teleological-evaluative justification – one norm prevails

Teleological-evaluative justification is often used to avoid a strictly literal application of a rule as a means of doing more justice to the goals and values that that rule is intended to realize, such as those embodied in the concepts of justice or public good. Various authors[194] in legal philosophy contend that the interpreter should apply legal rules in such a way that the consequences are conducive to realizing such a goals and values. The application of a rule that would lead to consequences that are contrary to its purposes, so the argument goes, would be undesirable. Those theories usually lead to decisions based on the discretionary choice of the interpreter, who would be in a position to favour the application of one norm in an absolute manner in detriment of the other, although without causing the nullity of the non-applicable norm.

[192] Champeil-Desplats refers to the example of the the three categories of principles mentioned in the French Constitution, namely the 1789 Declaration of Rights, the fundamental principles recognized by the law of the Republic, and the social and economic principles enumerated by the pramble. V. Champeil-Desplats, above n 189, pp. 62-63.

[193] In the realm of Constitutional law, the reason is that there is no hierarchical relationship between conflicting norms that could justify the nullity of an equally valid norm within the system.

[194] J. Bell, *Policy arguments in judicial decisions*, Oxford, Clarendon Press, 1983; R. Nozick, *The nature of rationality*, Princeton, Princeton University Press, 1993, pp. 133 and ss.

In this model of absolute normative preference, the choice between contradictory norms of an axiological-teleological nature can be made by reference to predetermined criteria or in a casuistic manner.[195] The first option suggests that the interpreter would first establish the criteria for solving the antinomy in an unconditioned manner, that is, in all cases in which these norms are in conflict. It therefore implies a "fixed axiological hierarchy" among norms in which the interpreter attaches a priority of precedence to certain norms in detriment of others. For instance, certain authors describe civil and political rights as "unconditionally" more important than social and economic rights.[196] The second option admits that both norms can indistinctively be applied by the legal interpreter in accordance with the specificities of the circumstance under examination. In this case, the norm to be chosen as the legal foundation for the decision taken by the interpreter will be applied in that specific circumstance only. Consequently, in an apparently equal circumstance the interpreter may decide that the other conflicting norm prevails in the light of what is to be considered more adequate or just in that specific case. This type of solution is called "conditioned prevalence"[197] or "mobile axiological hierarchy".[198]

Ronald Dworkin dealt with this specific type of axiological-teleological normative conflict from the standpoint of conflicts between principles. His model is based on the assumption that the legal system is composed of "rules" and "principles" that can be distinguished by a variety of characteristics. First, rules prescribe a precise solution for the conduct they aim to regulate. Consequently, they cannot be partially applied; they must be applied in an "all-or-nothing" manner. Principles, in their turn, provide general objectives and orientations that should be observed by legal subjects in their acts and in the process of creation of rules, because they are ultimately the expression of justice and fairness in a legal system. Second, if two rules provide contradictory solutions to the same circumstance, one of them is forcibly invalid, unless it can be perceived as an exception (*lex specialis*) to the other. In international law, that would be the case of the general prohibition of the use of force (article 2 (4) of the UN Charter) and the exception of self-defence (article 51 of the Charter). Principles operate in a different manner though. For they are not attached to a specific legally regulated conduct, and the solution for a normative conflict between them does not entail the nullity of the conflicting principle. Rather, the solution is to be found in the analysis of the specific importance and moral weight of their respective normative commandments, through a process that would enable the interpreter to choose one of the conflicting

[195] V. Champeil-Desplats, above n 189, pp. 65-66.
[196] These views are unacceptable in the light of 1993 UN Vienna Conference, which established that all human rights are interdependent, inter-related and mutually reinforcing. For an analysis on this question, see Part III, Chapter III, Section I, pp. 203-204 below.
[197] R. Alexy, above n 15, pp. 64-68.
[198] R. Guastini, 'Principi di diritto e discrezionalità giudiziale', (1998) 3 *Diritto pubblico*.

principles without necessarily nullifying the other.[199] Dworkin contends, however, that the interpreter does not have full discretion to decide which principle should prevail in a concrete case, at least as discretion is understood by legal positivism.[200] He suggests instead that, at least as regards conflicting principles, the construction of a scheme of justification must be based on the weighing of the arguments of principles underlying the legal system (fairness).[201] So instead of creating a new rule that is applied retrospectively to the case under examination, the interpreter must identify the prevailing principle and then justify its application on the basis of its weight *vis-à-vis* the other principle in that specific circumstance.

For Perelman, who also takes the view that there is a lacuna when traditional methods cannot be used for solving antinomies,[202] the problem can be approached from the analogy between the justification of a rule and the explanation of a natural norm. The later is justified by referring to extra-positive notions such as the values of justice and morality. A positive norm should be justified in the light of a more general principle within the system, from which one can deduce what treatment should be given to rules from other categories in conflict. As Perelman himself acknowledges, this approach is fundamentally subjective and arbitrary since it implies an ultimate unjustified principle based on which the decision on which rule must prevail should be taken.[203] Bobbio criticizes this idea, saying that this analogy lacks the much-needed objectivity for attaining the ideal of justice that is translated into the need for ensuring uniformity and predictability in all legal decisions.[204] He concedes that "la justification d'une règle aboutit à des valeurs ultimes pas ultérieurement justifiables". However, the Italian jus-philosopher recalls that legal systems are not "ethically unitary systems" founded on only one

[199] R. Dworkin, above n 182, pp. 23 and ss.

[200] Dworkin's work is a consequence of his criticism of H.L.A. Hart's legal positivism, in which logical-literal argumentation based on primary and secondary norms would suffice, in principle, to solve the problem of colliding rules. Dworkin says that discretion in a case in which "a judge has no duty to decide either way" by having recourse to "extra-legal standards" because it is wrong to assume that principles do not apply, or are not binding or obligatory. *Idem*, p. 35.

[201] He says that if the interpreter "can show, by arguments of history or by appeal to some sense of the community, that a particular principle, though it once had sufficient appeal to persuade a legislature or court to a legal decision, has now so little force tha it is unlikely to generate any further such decisions, then the argument from fairness that supports that principle is undercut. If he can show by arguments of political morality that such a principle, apart from its popularity, is unjust, then the argument from fairness that supports tha principle is overridden." *Ibidem*, pp. 122-123. See R R. Dworkin, *A Matter of Principle*, Clarendon Press, Oxford, 1986; R. Dworkin, *Law's Empire*, London, Fontana Press, 1986; R. Dworkin, 'Judicial Discretion', (1963) 60 (21) *The Journal of Philosophy*, pp. 624-638; and R. Dworkin, 'Hard Cases', (1965) 88 (6) *Harvard Law Review*, pp. 1057-1109.

[202] "Il y lieu, à mon avis, de distinguer ces cas de ceux où le juge, placé devant une antinomie résultant de deux directives incompatibles du droit positif, et ne disposant pas de règle méthodologique pour écarter ou limiter l'une d'elles au profit de l'autre se trouve devant une véritable lacune quant à la solution de l'antinomie. Il ne lui reste que la possibilité de se référer à l'intérêt prépondérant pour decider de la loi applicable". Ch. Perelman, above n 15, p. 401.

[203] "Notre effort de justification des règles pour en éliminer, dans la mesure du possible, l'arbitraire, doit s'arrêter à un principe injustifié, à une valeur arbitraire. Un système de justice, si poussé qu'il soit, ne peut éliminer tout arbitraire." Ch. Perelman, *De la justice*, Bruxelles, Université libre de Bruxelles, 1945. p. 72.

[204] N. Bobbio, above n 17, pp. 239-240.

axiological premise or a group of coherent postulates, but are rather normative systems having a variety of values which might be contradictory in several circumstances, such as the values of negative freedom and positive equality.[205] Suggesting therefore a simple justification of rules in the light of axiological considerations as a means for solving antinomy is not enough for dealing with circumstances in which there are contradictory values which can be equally used as justifications for the interpreter to decide which rule should prevail.

Weighing and balancing

Other methods for solving "hard cases" assume that the interpreter may be able to apply both contradictory commandments not in their entirety, but in a partial or conditioned manner. Rather than a rule of absolute priority, the idea is to optimize the application of both normative commandments as much as possible. Those models, which imply a plurality of normative justifications for the interpreter's decision,[206] suggest the recourse to methods of conciliation or "weighing and balancing" aimed at addressing situations in which it is not possible to rely absolutely on one of the conflicting norms. This type of solution takes place only in a case-by-case analysis in the light of the specific legal and factual circumstances of each normative conflict.[207]

In the theory of the German philosopher Robert Alexy,[208] "weighing and balancing" techniques are used to deal with conflicts between fundamental norms of the legal system, such as principles. Departing from the previous work of Dworkin, Alexy also understands that the collision of principles cannot be solved in the same manner as conflicting rules, since the answer to the problem of contradicting principles does not hinge upon the question of their validity. He also agrees that the contradiction between principles does not arise at the abstract level of their mutual normative existence within a system of law but rather as a consequence of their simultaneous application to the same factual circumstance. Alexy distinguishes, nonetheless, two situations of axiological-teleological conflicts: circumstances in which norms can be reconciled through legal interpretation (one could call them apparent antinomies), and situations in which contradictory norms cannot be harmonized (hard cases of real antinomies). In those later cases, he sustains that one norm might prevail in accordance with the

[205] *Idem*, p. 240-241.
[206] On the "modèle de pluralité des fondements normatifs", see V. Champeil-Desplats, above n 189, pp. 66-67.
[207] Afonso da Silva recalls that "balancing implies a comparison among goods, values, principles and rights that cannot be ranked on a single scale of measurement, i.e., there is no unequivocal measuring unit applicable to all of them." V. Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision', (2011) 31(2) *Oxford Journal of Legal Studies,* pp. 273-301.
[208] In his work, Alexy built upon the research previously carried out by Ronald Dworkin.

notion of "conditioned prevalence".[209] In both cases though, both normative commandments must be optimized. As noted by Alexy, fundamental norms in a given legal system such as principles require that something be realized to the greatest extent in the light of the specificities of factual and legal circumstances.[210] The "scope of the legally and factually possible," which sets boundary conditions to the optimization process, is determined by the opposition between each of those norms in the light of the specificities of the antinomy under examination.[211]

The basis of the theory of weighing and balancing is the principle of proportionality,[212] according to which the interpreter must determine which aspects of both conflicting norms should have more weight than others when dealing with a particular case. The objective of balancing must be both to solve alleged conflicts and to aid the interpreter in the task of properly optimizing commands emanating from countervailing principles.[213] By means of applying balancing techniques the interpreter justifies why this is the case by specifying first the weighing rule, on the basis of which such a weighing can be justified. The weighing rule must be applied in concrete cases and the result of this application has to be demonstrated on the basis of certain steps.[214] This amounts to specifying what the interests are and the relative weights of each specific interest.[215] The principle of proportionality is divided in a three steps analysis: suitability, necessity and proportionality *stricto sensu*. The test of suitability aims to avoid that measures incapable of achieving the pursued objective encroach on a countervailing and equally valid principle. The necessity step requires that the means employed to achieve the objective pursued by one principle be the least intrusive with regard to the countervailing principle. Whenever there is a choice between different suitable measures, the least intrusive must be employed. But the

[209] "So each principle on its own leads to a contradiction. This means that each limits the legal possibility of satisfying the other. This situation is not resolved by declaring one of the principles invalid and hence excluding it from the legal system. It is also not resolved by building an exception into one of the principles, such that this principle is in all further cases to be seen as a rule that is either satisfied or not. Rather, the solution of the competition consists in establishing a conditional relation of precedence between the principles in the light of the circumstances of the case. The relation of precedence is conditional because in the context of the case conditions are laid down under which one of the principles takes precedence. Given other conditions, the issue of precedence might be reversed." R. Alexy, above n 15, p. 52.

[210] R. Alexy, *idem,* p. 57.

[211] R. Alexy, *ibidem*, p. 50.

[212] "The nature of principles implies the principle of proportionality and vice-versa. That the nature of principles implies the principle of proportionality means that the principle of proportionality with its three sub-principles of suitability, necessity (least intrusive means), and proportionality in its narrow sense (that is, the balancing requirement) logically follows from the nature of principles; it can be deduced from them." *Ibidem*, p. 66.

[213] "Conflict of rules are played out at the level of validity; since only valid principles can compete; competitions between principles are played out in the dimension of weight instead." He adds that "the tension between two competing principles was not to be resolved by giving one of these duties absolute precedence, for neither principle enjoyed precedence *per se*. On the contrary, the conflict was to be resolved by balancing the conflicting interests. The question in this balancing process was, which of the requirements having *equal status in the abstract* had the greater weight in the concrete case." *Ibidem*, p. 50-51.

[214] *Ibidem*, pp. 64-68. See also R. Alexy, 'On the Structure of Legal Principles' (2000) 13:3 *Ratio Juris*, 294.

[215] R. Alexy, above n 15, pp. 64-68.

broadest question on whether any measure should be chosen at all in order to pursue a certain objective is not part of the necessity analysis. This step involves a true balancing of the colliding principles at the final stage of the proportionality analysis. The process of weighing and balancing is called proportionality in its narrow sense (proportionality *stricto sensu*).[216]

The method of "weighing and balancing" has been used by several courts at both international and domestic levels for addressing the problem of antinomy between norms of the same hierarchical level and of equal value to the system.[217] Among the most important ones, the German Federal Constitutional Court has referred to the method of "weighing and balancing" principles on several occasions, such as when dealing with the tension "between the duty of the state to maintain a properly functioning criminal justice and the interest of the accused in his constitutionally guaranteed rights,"[218] and in the Lebach Judgment, when dealing with the "tension between the protection of personality" and "the freedom of media."[219] From its conceptual origins in Germany,[220] the proportionality approach has spread across all continents and has been absorbed by as many different legal systems such as those of Commonwealth states (Canada,[221] New Zealand[222] and South Africa[223]), Europe (France and Spain)[224] and Latin America (Brazil)[225]. Among other issues, constitutional courts have resorted to this method when

[216] "Principles are optimization requirements relative to what is legally and factually possible. The principle of proportionality in its narrow sense, that is, the requirement of balancing, derives from its relation to the legally possible." If "a principle competes with another principle, then the legal possibilities for realizing that norm depend on the competing principle. To reach a decision, one needs to engage in a balancing exercise." *Ibidem*, p. 67.

[217] "Over the past fifty years, proportionality analysis has widely difused. It is today an overarching principle of constitutional adjudication, the preferred procedure for managing disputes involving an alleged conflict between two rights claim, or between a rights provision and a legitimate state or public interest." Alec Stone Sweet and Jud Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008-2009) 47 *Columbia Journal of Transnational Law*, p. 73.

[218] BVerfGE 51, p 324.

[219] BVerfGE 35, p. 202. For a thorough analysis of these cases, see R. Alexy, above n 15.

[220] For the "German genealogy" of proportionality balancing, see A.S. Sweet and J. Matthews, above n 217, pp. 97-111.

[221] See *Regina v. Oakes*, [1986] 1 S.C.R. 103 (Can.), a "landmark case" that dealt with the subject-matter of reverse onus within conflict between the right to the presumption of innocence and the duty to combat drug trafficking as a matter of public policy. According to Sweet and Matthews, "the Oakes proportionality framework has had a pervasive impact on the rights review practice of Canada's Supreme Court" and "has been cited in nearly two hundred decisions of the Court." A.S. Sweet and J. Matthews, above n 217, p. 73.

[222] *Moonen v. Film and Literature Bd. of Review* [2000] 2 N.Z.L.R. 9, 17 (C.A.).

[223] *State v. Makwannyane & Another* 1995 (3) SA 391 (CC) at 436 (S. Afr.), which dealt with a challenge to the constitutionality of death penalty as expressed in the conflict between the prohibition of cruel, inhuman and degrading punishments and the goals of deterrence, prevention and retribution of criminal law.

[224] For examples in France and Spain, see V. Champeil-Desplats, above n 189, pp. 67-68.

[225] In Brazil, the principle of proportionality has been employed by Brazilian courts as decision criteria for solving contradicting principles in a number of occasions. Issues varied a lot, from rendering void laws imposing unbalanced costs to a right (STF, ADI-MC 855-2-PR. DJU 01.10.93. Justice Sepúlveda Pertence) or establishing disproportionate advantages to civil officers (STF, ADI-MC 1.185-8-AM. DJU 01.10.93. Justice Celso de Mello); to cases involving the legality of DNA paternity tests (STF, HC 71.373-4-RS. DJU 22.11.96. Justice Franscisco Rezek) or the conditioned prevalence of the prohibition of racism over the freedom of the press regarding anti-Semitic material (STF, HC 82.424-2-RS. DJU 19.03.2004. Justice Moreira Alves).

addressing antinomy between constitutional norms such as the conflict arising from workers' right to strike and the duty to maintain public services, or the balance between individual liberties and the maintenance of public order. Today, it is widely recognized as a general principle of law of universal application as a means of legal integration.[226]

Open discretion for the interpreter?

The choice between which method is more appropriate for dealing with normative conflicts of an axiological-teleological nature has aroused a great deal of controversy in both legal practice[227] and literature. For decisions on this matter relate to the level of discretion of the interpreter. In the absence of clearly established mandates by the legal system, some authors suggested that the interpreter would be in a position to decide in accordance with considerations of a political or moral nature. That would imply almost absolute power for the interpreter. Habermas, for example, puts forward two main objections to Alexy's theory from the standpoint of that piece of criticism. First, he maintained that the balancing approach would downgrade principles (constitutional rights) to the level of goals, policies, and values, and would deprive the former of their normative power (strict priority).[228] He added that this "watering down" of principles might be accompanied by "the danger of irrational rulings."[229] Second, Habermas challenges the premises that weighing and balancing techniques can be justified, pointing out that they take place in the realm defined by concepts like adequate and inadequate, and discretion.[230] As Alexy himself recognizes, "[t]his second objection is at least as serious as the first one. It amounts to the thesis that the loss of category of correctness is the price to be paid for balancing or weighing."[231] As noted by Sweet and Mathews, however, proportionality analysis "is an analytical procedure – it does not, in itself, produce substantive outcomes,"[232] and therefore cannot be confused with positivist decisionism. Indeed, Alexy provides a rational

[226] Beatty maintains that proportionality deserves universal acceptance, and points out that its diffusion provides evidence of its univesalitic potential as a "neutral principle." David M. Beatty, *The Ultimate Rule of Law*, Oxford, Oxford University Press, 2004, p. 159.

[227] The practice of Constitutional courts indicates that there is a tendency to melt both possibilities depending on the specific circumstances at hand.

[228] "For if cases of collision *all* reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses." J. Habermas, *Between Facts and Norms*. Cambridge, Mass., MIT Press, 1996, pp. 256-258.

[229] "Because there are not rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies." *Idem*, p. 259.

[230] "Weighing of values" is said to be able to yield a judgment as to its '*results*', but is not able to '*justify*' that result: The court's judgment is then *itself* a value judgment that more or less adequately reflects a form of life articulating itself in the framework of a concrete order of values. But this judgment is no longer related to the alternatives of a right or wrong decision. J. Habermas, *Ibidem*, p. 259.

[231] R. Alexy, above n 15, p. 135.

[232] A.S. Sweet and J. Matthews, above n 217, p. 76.

procedure of balancing and weighing contradicting principles. He acknowledges, however, that the respective weight the interpreters should give to each of the opposed norms falls completely outside his theory.[233] For precisely that reason, however, he underlines that interpreters are placed under an obligation to justify their decisions in the light of the other contradicting principle as well.

In other cases, the legal system itself sets forth some constraints as a means to orient the decision of the interpreter, such as the composition of the competent authority: if it is an individual authority or an assembly of experts, politicians or judges. An assembly will most likely prefer to justify the decision on the basis of a plurality of normative grounds through the use of methods such as "weighing and balancing", while homogenous authorities are likely to justify the decision on exclusively normative grounds.[234]

In any event, the choice between a "fixed axiological hierarchy" and a circumstantial approach of a "case-by-case" nature has implications for the manner in which those norms are to be applied in the legal system. For the sake of coherence in the system, the first option would have the effect of constraining interpreters to apply that same model of hierarchy in subsequent decisions whenever faced again with that same normative conflict. The non-observance of this corollary would lead to a situation of uncertainty contrary to the premises of a functioning legal system: not only legal interpreters but ultimately all legal subjects would have the capacity to decide in whatsoever manner they deem it appropriate in analogous circumstances. On the other hand, choosing a "case-by-case" approach presumably results in less predictable solutions, at least insofar as those decisions are not under control of unified or coordinated jurisdictional entities. But it is reasonable to assume also that the continuous practice could progressively create a corpus of state practice and jurisprudence embodying the applicable interpretation whenever those normative conflicts take place in the actual world.

Moreover, methods such as "weighing and balancing" techniques seem to be more adequate addressing conflicting values such as in "hard cases" in the light of the ideals that inspired the lawmaker at the moment of the normative creation process. By aiming at optimizing all applicable norms, they may comply, at least in a partial manner, with the compulsory commandments stemming from both colliding norms. The variety of equally important existing values within the legal system is therefore protected in a manner that avoids a result that could ultimately amount to a derogation from one of the equally valid norms of the system. As put forward by Champeil-Desplats,[235] under these methods the interpreter would be acting as an *interprète démocrate* instead of a "monarchical" figure, and thus avoiding a

[233] R. Alexy, above n 15, pp. 100 and 105.
[234] V. Champeil-Desplats, above n 189, p. 68-69.
[235] *Idem*, p. 70.

"monisme des valeurs" in the expression of Perelman[236] that could be different from the original *mens legis* of the lawmaker. These methods, which will be further analysed at a later stage, will be applied to the problem of conflicting norms of *ius cogens* precisely because these norms not only embody equally relevant values within the international community, but also because the absolute application of one norm would disregard the equally imperative and non-derogable character of the non-applicable norm.[237]

Section IV - The problem of "hard cases" in international law

In international law, there are also situations in which the traditional meta-rules described in Section II above do not offer an adequate solution to the problem of conflicting norms.[238] In those exceptional circumstances, the norms in conflict are equally valid and binding at the abstract level, but it is not possible either to evade the antinomy by having recourse to legal interpretation, or to determine any relationship of priority on the basis of the rules of *lex prior*, *lex posterior*, *lex specialis*, or pursuant to explicit conflict clauses.

Some authors have argued that those "hard cases" in international law are essentially a problem of lacuna, in which the interpreter should declare *non liquet* as a result of the absence of established rules for solving normative conflicts.[239] The justification for accepting *non liquet* in international law is usually presented in terms that the legal interpreter is not entitled to decide arbitrarily which of the norms should prevail. Except for specific jurisdictional activities, such as in the European Court of Justice, the interpreter can only apply the existing law and should not create new law to be applied retrospectively. The mandate of the interpreter in international law, particularly judges and arbiters, would therefore be very strict.[240] Of course there are many lacunae in international law, including in the domain of legal antinomy. As was seen above, this is a concern that touches

[236] C. Perelman, L. Olbrechts-Tyteca, *Traité de l'argumentation*, Bruxelles, Éditions de l'Université de Bruxelles, 1986, p. 110.
[237] See Parts IV, V and VI below.
[238] "Certainly, while these maxims are important legal means of addressing normative conflicts, they do not lead to workable results in all situations." C. Voigt, above n 40, p. 197. As noted by Jenks, "we shall be constrained to recognize that, useful and indeed essential as such principles may be to guide us to the reasonable conclusions in particular cases, they have no absolute validity." C. W. Jenks, above n 10, p. 407.
[239] Salmon says that these situations imply a "lacune de règle de solution d'antinomie." J.-A. Salmon, above n 11, p. 449. Pauwelyn, for his part, recognizes this possibility whenever "international law offers no solution as to which norm must prevail." In his view, the responsibility to fulfill the gaps in existing applicable norms is mainly a consequence of the "schizophrenic behavior of states", and it would rest upon the states the responsibility to legislate with a view to fulfill the existing lacuna. "It would be for the states themselves to bring their act together and solve the conflict at a law-making level," J. Pauwelyn, above n 5, p. 422.
[240] Pauwelyn says that in the event that judges wish to create their own conflict rules, they would most likely "cover this solution under the all-embracing approach of … 'teleological interpretation'." J. Pauwelyn, above n 5, p. 420.

upon not only international law but on Law in general. However, in spite of the recognition of existing gaps in international law, the conclusion that the existence of a lacuna should lead the interpreter to declare *non liquet* does not seem to be appropriate. Particularly regarding the context of conflict of norms, the problem does not rest upon the lack of an applicable norm, but actually on the existence of more than one norm simultaneously applicable within the system.

Using "weighing and balancing" techniques for solving "hard cases" in international law

Bearing in mind that the idea of *non liquet* runs contrary to the idea of integrity of international law as a legal system,[241] one should search for other tools in order to solve those hard-cases, such as through the recourse to methods such as "weighing and balancing". As described in Chapter II, Section II above, these methods have been widely applied to the problem of conflicting principles within domestic legal systems, and have already being applied in some international legal regimes. The window of overture for the application of such techniques in the international system is provided for by the notion of "general principles of law" inscribed in Art. 38(1)(c) of the Statute of the ICJ.[242] The rationale reads as follows: Since methods aiming at solving antinomy between principles such as the "proportionality approach" have attained the status of general principles of law, they could be validly transposed to international law as a means of solving normative conflicts and thus guaranteeing the integrity of the legal system.[243]

The concept of "general principles of law" as a recognized source of public international law has been a contentious issue in doctrine.[244] In the past, the so-called Soviet doctrine denied their existence as a distinct source of international law. More recently, however, there has been a growing consensus among international publicists on its importance precisely as a means of integrating international law.[245] Materially speaking, the concept of "general principles law" also encompasses some norms stemming from domestic and regional legal systems that can be validly transposed to international law. Those principles *in foro domestico* are usually related to the general rules used in judicial proceedings, such as those rules regulating the burden of proof, *res judicata*, and even some general

[241] C. W. Jenks, above n 10, p. 404.
[242] Pauwelyn himself recognizes that "the secondary or subsidiary nature of general principles of law is based on their broad character and main function of 'filling gaps' left open by treaty and custom," J. Pauwelyn, above n 5, p. 128.
[243] See Chapter II, Section II above.
[244] See, for example, the criticisms made by Jennings and Virally, in R.Y. Jennings, 'What is International Law and how do we tell when we see it?' (1981) 37 *Annuaire Suisse*, p. 59; and M. Virally, 'Panorama du droit international contemporain', (1983) 183 *R.C.A.D.I.*, p. 171.
[245] "This situation makes it necessary to envisage international law as a whole. It requires the development of a coherent framework of international law." C. Voigt, above n 40, p. 197.

principles related to civil responsibility. The very rules of *lex posterior* and *lex specialis*, as well as other rules such as *pacta sunt servanda* and *pacta tertiis*, are first and foremost recognized as general principles of law, the existence of which is inherent to any system of law.[246] Accordingly, the concept of "general principles of law" also refers to the fundamental rules of legal logic, such as the rules for solving normative conflicts (*lex superior*, *lex posterior* and *lex specialis*),[247] and even to those methods first developed in the realm of Constitutional Law for dealing with the so-called "hard cases," such as proportionality techniques.[248] Cases of lacuna in the applicable law can be approached therefore by having recourse to the "general principles of law,"[249] particularly as regards the principles of law stemming from legal systems such as the very principles of legal logic providing the interpreter with legal tools that can be used for solving normative conflicts.[250]

As a matter of fact, techniques such as "weighing and balancing" have already been transposed to international adjudication in several international regimes.[251] The proportionality approach has been used in the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR) and the Appellate Body of the World Trade Organization (WTO) as a means of balancing equally placed norms as regards their levels of validity and axiology in each of those international regimes. The principle of proportionality is now one of the fundamental principles governing adjudication in the European Union (EU)[252] and has exerted a pivotal role in the process of laying down the foundations of ECJ's interpretation on the application of the main principles set forth by the Treaty of Rome, particularly as

[246] General principles of law are "rules of law that have an inherent and necessary validity, in whose absence no system of law at all can exist or be originated". G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in J. H. W. *Verzijl* (ed.), *Symbolae Verzijl*, The Hague, Martinus Nijhoff, 1958, p. 164. Koskenniemi called them "meta-principles", in Martii Koskenniemi, 'General Principles: Reflections on Constructionist Thinking in International Law' (1985) 18 *Oikevstiede-Jurisprudentia*, p. 133. See also W. Czaplinsky & G. Danilenko, above n 19, p. 21. C. W. Jenks, above n 10, p. 404.

[247] The ICJ has referred to this type of "general principle of law" as "equity principles." *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* ICJ Reports 1982, p. 60, para. 71. According to Pauwelyn, one should also include among the category of fundamental rules of legal logic the canons of legal interpretation, "often considered to be logical devices to be weighed against each other rather than absolute legal rules." J. Pauwelyn, above n 5, p. 126.

[248] "Proportionality analysis is a doctrinal construction: it emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice." A.S. Sweet and J. Matthews, above n 217, p. 73.

[249] Voigt also supports the recourse to the concept of general principles as a means of integration when addressing normative conflicts. However, she suggests the recourse to the fundamental material general principles of international law. She says that their "meta-rationality" "firstly informs and guides the international community and Second shows where the individual pieces belong in the international legal system." Her main objective is the application of the principle of sustainable development as means of guaranteeing a coherent framework of international law. C. Voigt, above n 40, pp. 195-201.

[250] This possibility has been expressly suggested by Jenks. See C. W. Jenks, above n 10, p. 406.

[251] "Proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism, if global constitutionalism can be said to exist at all." A.S. Sweet and J. Matthews, above n 217, p. 74.

[252] "Today proportionality governs lawmaking and adjudication in virtually all important domains of law established by the Treaty of Rome." A.S. Sweet and J. Matthews, *idem*, p. 139. They argue also that "the emergence of proportionality balancing as a master technique of judicial governance is the most important innovation in the history of the European legal integration." *Ibidem*, p. 141.

regards fundamental rights. Indeed, within the European Communities (EC), the principle of proportionality is recognized as a "general principle of law". In the view of some authors it is the very "expression of rule of law" in the EU legal regime.[253] Its importance within the European legal system has been translated by its codification in Art. 52 of the Charter of Fundamental Rights of the European Union, which became legally binding on EU Member States with the entry into force of the Treaty of Lisbon, in December 2009.[254]

The ECJ had recourse to the principle of proportionality on a number of occasions as a means of asserting the priority of obligations arising from European law over national regulatory frameworks. The 1974 *Dassonville* case is a landmark in this regard, in which the ECJ declared the as a general rule the presumed illegality of any rule "capable of hindering directly or indirectly, actually or potentially" trade between EC Members States by recognizing the priority of EC Law (observance of article 28 of the Treaty of Rome that prohibits non-tariff barriers) over the capacity of national authorities to legislate on that same subject-matter. Accordingly, derogations (national regulations concerning public morality, public policy, public security, health, cultural heritage, consumer protection, the protection of working conditions, and environmental protection) from that general rule should be dealt with on a case-by-case basis under the principle of proportionality, in which each situation of conditioned prevalence of national legislation over communitarian obligations should be analysed in the light of the legally and factually possible.[255] This case has since served as a precedent for weighing and balancing the tensions between rights and freedoms, and the powers of the EU and Member States.

The ECtHR also applied the principle of proportionality in a number of cases as a means of establishing relationships of conditioned prevalence between equally valid and applicable fundamental rights.[256] In a number of cases the ECtHR was faced with conflicts in which no *prima facie* priority could be established at the abstract level of their mutual existence in the legal system,[257] since contradicting

[253] Jürgen Schwarze, 'The Role of General Principles of Administrative Law in the Process of Europeanization of National Law', in Luis Ortega Alvarez (ed.), *Studies on European Public Law*, 24, p. 37.

[254] "*Article 52* - Scope and interpretation of rights and principles: 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

[255] Case 8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, 1974 E.C.R., p 837.

[256] "Under the Court's supervision, PA [proportionality approach] is now in the process of diffusing to every national legal order in Europe, where it will typically be absorbed as a *constitutional* principle". A.S. Sweet and J. Matthews, above n 217, p. 150. See also R. Kolb, 'Les droit fondamentaux de l'individu comme principes normatifs d'optimisation de valeurs et d'intérêts sociaux (Dix exemples tirés de la jurisprudence de la Cour européenne des droits de l'homme)', (1999) 11 (No 4-6) *RUDH*, pp. 125 and ss.

[257] 'Nul part ailleurs moins qu'ici, il ne peut y avoir de solution precise, "mathématique", déterminée par des critères juridiques tout seuls defines *a priori*. La jurisprudence sur les droits de l'homme est l'oeuvre d'un auditoire s'employant à peser des droit et d'intérêts dans un système ouvert en vue d'atteindre le consensus le plus large possible sur les priorités raisonnables dans le contexte et selon l'ordre des valeurs promues par l'ensemble du système de droits fondamentaux', *Idem*, p. 135.

principles were all either fundamental rights equally protected under the European Convention on Human Rights, or fundamental norms within the European legal system. Accordingly, the ECtHR judges proceeded with an exercise of weighing and balancing the reciprocal application of each of the conflicting principles under specific legal and factual possibilities, and reached different decisions applied in a circumstantial manner (*in casu*). The *Handyside* case was one of the first cases in which the ECtHR relied on the principle of proportionality as a means of weighing and balancing conflicting fundamental rights protected under international and European law.[258] In that case, the Court dealt with the "margin of appreciation" of British authorities in censoring a book on moral grounds (contradiction between freedom of expression and public policy). Since then, the proportionality approach has been used to weigh principles in various other factual situations, such as in circumstances of conflicts between the freedom of expression and the religious freedom,[259] freedom of expression and public interest (capacity of military defence of a Member State),[260] freedom of expression (press) and human dignity (individual honour),[261] freedom of opinion and constitutional rule of law,[262] freedom of the press and presumption of innocence,[263] freedom of expression and fairness of the electoral process,[264] freedom of sexual orientation and public policy (unlawful discrimination against homosexuals in the armed services),[265] or freedom of the press and right to intimacy (unlawful broadcasting of closed circuit camera footage).[266] In all those cases, the essential task of the ECtHR was that of weighing and optimizing equally applicable fundamental interests and values embodied by principles in factual circumstances, and thus guaranteeing the integrity of the European legal system by avoiding *non liquet*.

The Appellate Body of the WTO also provides important evidence of practice on the use of "weighing and balancing" techniques in international adjudication. In WTO's adjudication, particular attention has been given to the second step of the proportionality principle, namely that concerning the least-restrictive means ("necessity").[267] As occurred in the ECJ, the principle of proportionality has been used in the WTO as a means of balancing the limits of national authorities in legislating on matters related to the "general exceptions" set forth by Art. XX of

[258] *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24.
[259] *Otto-Preminger-Institut v. Austria*, 20 September 1994, Series A no. 295-A, p. 463.
[260] *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, Series A no. 302.
[261] *Prager and Oberschlick v. Austria*, 26 April 1995, Series A no. 313 and *Oberschlick v. Austria (no. 2)*, 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, n. 42, pp. 1266 and ss.
[262] *Vogt v. Germany*, 26 September 1995, Series A no. 323, p. 314.
[263] *Worm v. Austria*, 29 August 1997, *Reports of Judgments and Decisions* 1997-V, n. 45, pp. 1534 and ss.
[264] *Bowman v. the United Kingdom*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I, n. 63, pp. 175 and ss.
[265] *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI.
[266] *Peck v. the United Kingdom*, no. 44647/98, ECHR 2003-I.
[267] For an overview on the use of the proportionality principle in the WTO dispute settlement system, see Mads Antenas and Stefan Zleptnig, 'Proportionality: WTO Law in Comparative Perspective,' (2007) 42 *Texas International Law Journal*, 317.

GATT, which allow for Members States to impose measures deemed necessary to protect public morals; and human, animal, plan life or health; to secure compliance with "customs enforcement" and "the protection of patents, trademarks and copyrights, and the prevention of deceptive practices"; and other measures related to "the conservation of exhaustible natural resources" and "the products of prison labour."[268] The main precedent in this area was set in the pre-WTO dispute settlement system, in the case *U.S.-Section 337 of the Tariff Act of 1937 (*1989), in which the Panel decided that any measure inconsistent with another provision stemming from GATT-1947 should be demonstrated as "necessary", that is, as the least restrictive under international trade law ('reasonably available").[269] Other cases worthy of mention are *Thai Cigarettes* (1990)[270] and *Korea-Beef* (2001),[271] in which national authorities imposed measures related to public health as a means to waive the application of their obligations under GATT.

Conclusion

Having recourse to "weighing and balancing" techniques as "general principles of law" does not imply that these methods should have priority over more specific rules of treaty and customary law whenever these later are either applicable or more adequate for solving normative conflicts. Rather, it simply accepts the recourse to the "proportionality approach" as a complementary means that contributes to safeguarding the integrity of the international legal system when there are no other applicable and adequate rules for solving legal antinomies. These are the so-called "hard cases" in international law, in which no priority can

[268] "In a regime otherwise dominated by free trade values and legislative inertia, adjudicating Article XX has become the main "forum" in the WTO for deliberating countervailing interests and values." A.S. Sweet and J. Matthews, above n 217, p. 154.

[269] GATT Panel Report: United States – Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (L/6439-36S/345 36th Supp.), recital 5.26. Sweet and Matthews note that the three-member Panel included a former ECJ Judge Pierre Pescatore, who supported the proportionality approach. A.S. Sweet and J. Matthews, *idem*, p. 156.

[270] In this case, Thailand failed to prove that the measures (over taxation of imported cigarretes) were necessary (less restrictive and reasonable) alternatives under GATT. GATT Panel Report: Thailand – Restrictions on Importation of and Internal Taxes on Cigarretes, Nov. 7, 1990, GATT B.I.S.D. (DS10/R-37S/200).

[271] The WTO Appelate Body explicitly referred to the proportionality principle in its report: "[t]he more vital or important … the common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument. There are other aspects of the enforcement measure to be considered in evaluating that measure as "necessary." One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be "necessary." The determination of whether a measure is necessary "involves in every case a process of weighing and balancing a series of factors [that] include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports." See Appelate Body Report: *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161 (Dec. 11, 2000), paras. 162-166.

be set at the abstract level and the solution of the antinomy does not imply the invalidity of any of the conflicting norms. This alternative has the effect of avoiding a declaration of *non liquet* and therefore of guaranteeing compliance with the premises, at least as desirable goals, of integrity and completeness of the international legal system.[272] If this solution is accepted, there seems to be nothing hindering the application of these methods to the problem of conflicting norms of *ius cogens*.[273]

Following this reasoning, it might be said that the proportionality approach can be applied to the problem of antinomies between peremptory norms, the main subject of this study. These premises will later be used when addressing the conflict between the peremptory prohibitions on the use of force and the most serious human rights violations; and between the prohibition of the use of force and the right to self-determination, as developed in Parts IV, V and VI below. Before entering into the discussion on how "weighing and balancing" techniques may be applied to the problem of conflicting peremptory provisions, the following Parts II and III will attempt to provide a definition of the concept of *ius cogens* and a description of the most commonly accepted and recognized peremptory norms in public international law.

[272] "The measure of success which is achieved in eliminating and resolving conflicts between law-making treaties will have a major bearing on the prospect of developing, despite the imperfections of the international legislative process, a coherent law of nations adequate to modern needs." See C.W. Jenks, above n 10, p. 453. As a matter of fact, Pauwelyn himself recognizes that one of the intended functions of general principles of law is precisely that "of filling the gaps left open by treaty and custom with the objective of avoiding a *non-liquet*." J. Pauwelyn, above n 5, p. 129.

[273] See Chapter II, Section II above, in particular the description of Alexy's suggested techniques of "weighing and balancing" as applied to constitutional principles.

Part II - *Ius cogens* norms in public international law: Theories and Definition

The debate on the concept of *ius cogens* has been both prolific and contentious. In spite of a meaningful conceptual dialogue on the topic, it is remarkable to note ultimately the existence of differing and indeed, in some cases, divergent perceptions regarding the essential features and substantive scope of the concept of peremptory norms.[274] While some lines of legal reasoning place doubts on the very admissibility of peremptory norms,[275] others seek evidence, in the concept of *ius cogens*, of the very foundations of the international legal order.[276] Various authors have catalogued lists of peremptory norms, but their respective material content varies as much as the several theoretical approaches on the matter.[277] As a

[274] "The one focal point of agreement to emerge from the debates is that certain rules of present-day international law possess *jus cogens* character. Opinions diverged, however, on the content, sources and means of determination and application of these rules and on the origins, role and sociological significance of *jus cogens* in contemporary international law and society," G. Abi-Saab, 'Introduction,' *The Concept of Jus Cogens in International Law*, vol. 2, Lagonissi Conference on International Law, 3–8 April 1966, IUHEI, Geneva, 1967, pp. 8-9. "In spite of the fact that the Vienna Convention stressed the positive, consensual character of international *jus cogens*, there is an important disagreement among scholars regarding the legal nature, sources and content of international *jus cogens*," L. Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law' (1981-III) 172 *R.C.A.D.I.*, p. 232. At the XXth Session of the General Assembly in 1965, the Chairman of the XVII th session of the ILC declared that "the expression of *jus cogens* did not represent the same idea for all with regard to what constituted modern positive international law at any given time," Mr. Bartos, 851st meeting of the Sixth Committee.

[275] "The question how far international law recognizes the existence within its legal order of rules having the character of *jus cogens* is controversial," commentary on article 13 of the report of the International Law Commission, YbILC, 1963-II, p. 52. See also G. Schwarzenberger, 'International Jus Cogens?' (1964-1965) 43 *Texas Law Review*, p. 469; A. M. Weisburd, 'The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina', (1995-1996) 17 *Michigan Journal of International Law,* p. 1; A. D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens', (1990-1991) 6 *Connecticut Journal of International Law*, p. 6; G.A. Christenson, '*Jus Cogens*: Guarding Insterests Fundamental to International Society', (1988) 28 *Virginia Journal of International Law*, p. 591.

[276] See Chapter I, Section II below on public international order theories.

[277] Hannikainen identified norms of *ius cogens* including "the prohibition of aggressive armed force between States," "basic human rights," "order and viability of sea, air, and space areas outside national jurisdiction," and "the law of war," in L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical development, Criteria, Present Status*, Helsinki, 1981. Weisburd noted that state delegations at the Vienna Conference "offered widely differing lists of rules meeting the requirements of jus cogens; of the twenty-six

result, to this date none of the leading theories on the issue has been able to provide a definite and undisputable definition of the concept of peremptory norms,[278] in spite of the virtual unanimous acceptance of its existence by states,[279] doctrine[280] and international courts.[281]

Such an environment of uncertainty over its theoretical foundations is reflected in the manner in which the concept of *ius cogens* has been dealt with in international practice.[282] Doubts regarding the legal character of peremptory norms resulted in little influence of the concept in international disputes.[283] In the 2006 judgment in

delegations (...) no more than thirteen agreed with respect to any one rule," in A. Mark Weisburd, 'American Judges and International Law', (2003) 36 *Vanderbilt Journal of Transnational Law*, p. 1493.

[278] "Scholars, however, disagree as to what constitutes a peremptory norm and how a given norm rises to that level. The basic reasons for this disagreement are the significant differences in philosophical premises and methodologies of the views of scholarly protagonists. These differences apply to sources, content (the positive or norm-creating elements), evidentiary elements (such as whether universality is appropriate or less will suffice), and value-oriented goals (for example, preservation of world order and safeguarding of fundamental human rights). Furthermore, there is no scholarly consensus on the methods by which to ascertain the existence of a peremptory norm, nor to assess its significance or determine its content. Scholars also disagree as to the means to identify the elements of a peremptory norm, to determine its priority over other competing or conflicting norms or principles, to assess the significance and outcomes of prior application, and to gauge its future applicability in light of the value-oriented goals sought to be achieved." M. Cherif Bassioni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, *Law and Contemporary Problems - Accountability for International Crimes and Serious Violations of Fundamental Rights*, Vol. 59 ", No. 4, (Autumn 1996), pp. 63-74. "Although numerous publications have been devoted to this concept, it is still far from clear. It could eve be called an 'international legal Yeti'- everyone talks about it, the majority of authors believe in its existence, but very few have recognized it beyond doubt!", W. Czaplinsky & G. Danilenko, above n 19, p. 8. The theoretical indeterminacy of *ius cogens* has also been characterized as a "conceptual aporia" or a "mystery" respectively by Kahn and Sinclair, see P. W. Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', (2000) *Faculty Scholarship Series,* paper 329, available at http://digitalcommons.law.yale.edu; and I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester, Manchester University Press, 2d ed. 1984, p. 224, to whom "the mystery of jus cogens remains a mystery."

[279] G.M. Danilenko, 'International *Jus Cogens*: Issues of Law-Making,' (1991) 2 *EJIL*, 1991, p. 43. As os October 26, 2012, the Vienna Convention has achieved 112 ratifications. See https://treaties.un.org.

[280] "In both East and West, writers on international law are virtually unanimous in their acceptance of the idea of an international *jus cogens*," E. Suy, 'The Concept of *Jus Cogens* in Public International Law,' in *The Concept of Jus Cogens in International Law*, 2 Lagonissi Conference on International Law, 3–8 April 1966 (IUHEI, Geneva, 1967), p. 18.

[281] See *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992), in which torture is rcognized as a violation of *ius cogens*; *Armed Activities on the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application (Democratic Republic of the Congo v. Rwanda)*, ICJ Reports 2006, p. 30, para 64, which recognizes the prohibition of genocide as a *ius cogens* norm; and *Nicaragua* case (*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.)* (Merits), ICJ Reports 1986, p. 100, which recognizes the general prohibition of the use of force in international law as peremptory.

[282] "Lack of consensus as regards the basic parameters of the law-making process leading to the emergence of peremptory rules inevitably opens the door for the political misuse of the concept," G.M. Danilenko, above n 279, p. 43. See also Dinah Shelton, *Normative Hierarchy in International Law*, (2006) 100 *American Journal of International Law*, pp. 305-17. Controversy over the scope and content of jus cogens persisted during the ILC's drafting of the 1986 Vienna Convention on the Law of Treaties Between States and International Organizations. *See* D. Shelton, *idem*, pp. 300-01.

[283] "There 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, or in which an international political organ made a decision or recommendation to this effect, or where, in settling a dispute, governments have agreed on such a proposition," E. Schwelb, 'Some Aspects of International *Jus Cogens* as formulated by the International Law Commission,' (1967) 61 *American Journal of International Law*, p. 950.

the *Congo v. Rwanda* case, the ICJ fully recognized the existence of the concept of *ius cogens* as such but did not clarify its legal status or suggest any criteria for identifying norms of that character, and also hesitated to resort to the concept of *ius cogens* in cases in which there was a collision with other well established principles of public international law. [284] As pointed out by Cançado Trindade, "the Court has not shown much familiarity with, nor strong disposition to, elaborate on *jus cogens*; it has taken more than six decades for it to acknowledge its existence *tout court*, in spite of its being one of the central features of contemporary international law."[285] For its part, the ECtHR has addressed *ius cogens*, but nonetheless rejected claims that violations of peremptory norms would necessarily outlaw claims based on state sovereignty.[286]

For our purposes, the uncertainties surrounding the notion of peremptory norms[287] and the variety of views and doctrinal approaches on the issue represent a practical problem: how to reach a definition of the concept that may be used as the theoretical basis for the problem of colliding peremptory norms of public international law?[288] If sometimes these lines of reasoning appear to be mutually exclusive, they may also intermingle in their vertical or horizontal approaches, or as to their respective understanding on the importance of the materiality of norms for the determination of *ius cogens*.[289] This Part aims precisely at analysing the several aspects related to the concept of *ius cogens* as developed by the leading

[284] The Court declined to use *ius cogens* as sufficient grounds to establish its jurisdiction over a case. See *Armed Activities on the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application*, above n 281, pp 30-32. See also the separate opinion of Judge *ad hoc* Dugard, *idem*, pp. 86-91, citing Arrest Warrant of Apr. 11, 2000 (Dem. Rep. of Congo v. Belg.), 2002 I.C.J. 121 (Feb. 14)); *East Timor* case, above n 947; *Namibia* case, above n 100.

[285] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) ICJ Reports 2012, Separate Opinion of Judge Cançado Trindade, p. 550, para. 159.

[286] *Al Adsani* case, above n 92, paras. 59-61. Cançado Trindade describes the case in his Dissenting Opinion on the case of *Jurisdictional Immunities of the State*: "[i]n its judgment of 21 November 2001, the ECHR (Grand Chamber), while accepting that the prohibition of torture has acquired the status of a norm of *jus cogens* in international law, nevertheless found itself unable to discern any firm basis for the conclusion that a State "no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged". This decision of the ECHR (Grand Chamber) was taken by nine votes to eight. The shortcomings of the majority's reasoning are well formulated in the joint dissenting opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić; they rightly concluded that, when there is a conflict between a *jus cogens* norm and any other rule of international law, the former prevails, with the consequence that the conflicting rule does not have legal effects which contradict the content of the peremptory rule." *Jurisdictional Immunities of the State (Germany* v. *Italy Greece intervening)* (Judgment), ICJ Reports 2012*,* Dissenting Opinion of Judge Cançado Trindade*, I.C.J. Reports 2012*, p. 229, para. 131. For a more detailed discussion on the *Al-Adsani* case, see D. Shelton, above n 282, p. 309.

[287] "While a majority of jurists support by now this concept, a wide range of opinions continues to prevail as to its specific content, every individual or group being convinced that their subjective understanding of this content represents an objective and universally recognized reality," J. Sztucki, *Jus cogens and the Vienna Convention on the Law of Treaties*, Wien - New York, 1974, p. 62.

[288] "Tous ces facteurs se conjuguent pour interdire à l'heure actuelle encore – plus de vingt ans…après la Convention de Vienne – toute identification, même approximative, des règles de jus cogens." P. Weil, 'Cours général: *le droit international en quête de son identité'*, (1992-VI) 237 *R.C.A.D.I.*, p. 271.

[289] For instance, Delbez merges public policy premises (unlawfulness of immoral treaties) with a positivist-voluntarist approach (unlawfulness of rules contradicting prior conventional obligations and customary law). L. Delbez, *Les principes généraux du droit international public*, 3rd. ed., Paris, LGDJ, 1964, pp. 317-318.

theories on the issue, namely material, horizontal and hierarchical theories. Without attempting to introduce new theoretical foundations for the study on *ius cogens*, the primary purpose is to provide a critical overview of the existing literature and the international practice related to the issue, in order to reach a definition of the concept of *ius cogens* before attempting to solve circumstances of colliding peremptory norms.

From a historical perspective, the work of the International Legal Commission (ILC) for the Vienna Convention on the Law of Treaties (VCLT) represents the contemporary landmark in the codification of the concept of peremptory norms. Since then, discussions on *ius cogens* have significantly evolved.[290] After the heat of the debate in the 1960s and the 1980s,[291] discussions have progressively shifted towards the analysis of the relationship of peremptory norms with other domains of public international law, such as those related to sovereign immunity,[292] state responsibility[293] and universal jurisdiction.[294] Bearing in mind that many have criticized the result of the work of the ILC and highlighted the fact that the codified norm[295] is limited to the recognition of the existence of peremptory norms without establishing a precise definition or a material content,[296] Article 53 of the VCLT stands nonetheless as the pivotal reference for any effort dealing with *ius cogens*:[297]

[290] "The discussion in the scholarly legal literature has by no means ended with the signing of the Convention," J. Sztucki, above n 287, p. 4.

[291] "An outburst of special writings on *jus cogens* in the second half of the 1960-ies seems to reflect, first of all, yielding to the development of positive conventional law, when it became clear that the category of *jus cogens* was to become part of that law," J. Sztucki, *idem*, p. 58.

[292] For instance, the concept of *ius cogens* was used by the British House of Lords in the *Pinochet case* for not granting immunity. See also A. Zimmermann, 'Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks', (1994-1995) 16 *Michigan Journal of International Law*, 433; Lee M. Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory', (2003) 97 *American Journal of International Law*, 741; Riccardo Pavoni & Stéphane Beaulac, 'L'immunité des Etats et le *jus cogens* en droit international. Etude croisée Italie/Canada', (2009) 43 *R.J.T.*, p. 491; and Xiaodong Yang, '*Jus Cogens* and State Immunity', (2006) 3 *New Zeland Yearbook of International Law*, 131.

[293] The concept was included into the ILC Draft Articles on State responsibility by means of the establishment of a special régime for "serious breaches of obligations under peremptory norms of general international law," *Responsibility of States for Internationally Wrongful Acts*, UN GA Res. 56/83, 28 Jan. 2002, Annex. See also in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries,* Cambridge, Cambridge University Press, 2002, p. 61; J.H.H. Weiler, A. Cassese, M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on States Responsibility*, Berlin, New York, De Gruyter, 1989; A. Orakhelashvili, 'Peremptory Norms and Reparation for Internationally Wrongful Acts,' (2003) 3 *Baltic Yearbook of International Law,* p. 19; G.M. Danilenko, above n 279, p. 42.

[294] M. Cherif Bassiouni, M. Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', (1996) 59 (4) *Law and Contemporary Problems - Accountability for International Crimes and Serious Violations of Fundamental Rights*, 63; David S. Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine', (2004-2005) 15 *Duke Journal of Comparative & International Law*, p. 219.

[295] Instead of codification, Sztucki argues that Article 53 has actually contributed to "progressively develop" the concept of *ius cogens*. See J. Sztucki, above n 287, pp. 124 and ss.

[296] E. Schwelb, above n 283, p. 96. On the vagueness of the concept of *jus cogens*, see G. Schwarzenberger, above n 275, p. 469; and A.M. Weisburd, above n 275.

[297] M. Virally, 'Reflexions sur le "jus cogens"', (1966) 12 *Annuaire français de droit international*, pp. 5 and 8, on the then draft article presented by the ILC "qui doit être le point de départ de toute discussion, si on ne veut pas se livrer à un exercise purement académique ». See also *Condición jurídica y derechos de los*

> *Article 53: Treaties conflicting with a peremptory norm of general international law (jus cogens) - A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*[298]

From the codified norm in the 1969 VCLT, three essential premises can be drawn with regard to the concept of peremptory norms. First, the recognition that certain norms of general international law may have the quality of *ius cogens*. Second, this quality is translated into the existence of certain essential features, namely its universal scope of application, its peremptory character and non-derogable nature. Third, much of the task related to the concept of *ius cogens* rests upon the process of determining which existing and valid norms within the international system might have such a peremptory character. The author anticipates the following assertions with regard to these three premises:

(i) *ius cogens* is defined as a technical feature attached to norms of general international law;
(ii) *ius cogens* is an aspect of an existing norm of international law characterized by its universal imperativeness[299] and non-derogability in inter-state relationships;
(iii) the imperative character qualifies obligations arising from of *ius cogens* norms as of a universal scope and literally *erga omnes* nature (dissociated from the notion of international responsibility);
(iv) the non-derogable aspect operates at the level of the relationship of validity between peremptory norms and other rules of the international legal system (*lex specialis non derogat generalis*);
(v) *ius cogens* is not tantamount to a new source of international law. As a quality, it may be attached to any existing norm of *ius gentium* originating from the recognized sources of international law; and
(vi) the attribution of the quality of *ius cogens* to existing norms is to be developed by the practice of states, as further confirmed by the jurisdictional activities of international courts and the work of doctrine.

After analysing the main features of each of the main theoretical approaches to the concept of *ius cogens*, these assertions will be re-examined in depth in the end of this Part, with a view to providing a concluding definition of the concept that will be subsequently used for the subject of colliding peremptory norms.

migrantes indocumentados, Opinión Consultiva OC-18/03, 17 de septiembre de 2003, Serie A No. 18, Corte Interamericana de Derechos Humanos (CIDH), voto razonado del juez Antonio Augusto Cançado Trindade, par. 66; A. Gomez-Robledo, 'Le *Ius Cogens* International: Sa Genèse, Sa Nature, Ses Fonctions' (1981-III) 172 *R.C.A.D.I.*, p. 167.

[298] Vienna Convention on the Law of Treaties (VCLT).

[299] The alleged existence of regional *ius cogens* will be dealt with in Chapter IV of Section IV, on the universal character of peremptory norms.

Chapter I - Material theories

Several authors approached the existence and the functioning of *ius cogens* norms from the standpoint of their normative content.[300] In general, these theories advocate that the legal regime of *ius cogens* provided enough evidence of the existence of a particular *corpus iuris* within the international order, or alternatively, the proofs of fundamental values or general interests inherent to the international legal system that are not subject to the exclusive willpower of States. Those publicists, who are the majority in this debate,[301] assert that the role of peremptory norms is to protect certain common values and interests that could be jeopardized by particular transactions among States.[302]

Material theories usually depict *ius cogens* as an essential and inherent regime in every legal system. Its transposition to the realm of international law is thus just a logical corollary drawing from the analogy with the general theory of Law, particularly as regards the opposition between dispositive and imperative rules in domestic legal systems. From this analogy follows the corollary prescribing that certain imperative rules are necessary and their integrity must be protected, since their non-observance would affect the very essence or foundations of the entire legal system.[303] Accordingly, material theories are usually formulated in terms of the conceptual opposition between *ius cogens* and *ius dispositivum*. Peremptory norms are assumed to exist as a means of protecting overriding interests and values of the international community materially contained in the normative objects contained in *ius cogens* norms, which cannot be derogated from by particular agreements.[304] Article 53 of the VCLT would have codified the purposes of protecting the general interests of the international community as a whole, in opposition to the individual interests of States, and consequently would have objectively imposed a material limitation to the discretionary sovereign will of States.[305] In other words, it is the supremacy of the collective interest over the individual one (states) on the basis of fundamental values, or the general and public interest.[306]

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[300] Rosenne argued that "the question how far a rule was to be regarded as *jus cogens* might require specific determination in the light of the material context in which the rule was placed," YbILC, 1963-I, p. 64.
[301] "The majority of writers have examined the problem of *jus cogens* within the framework of the law of treaties and particularly in connection with the question of the object of treaties," E. Suy, above n 280, p. 49.
[302] L. Hannikainen, above n 277, p. 1; Christos L. Rozakis, *The Concept of Jus Cogens in the Law of* Treaties, Amsterdam, New York, Oxford, North Holland Publ. Co., 1976, pp. 1-2; E. Suy, *idem*, pp. 18-22; J. Sztucki, above n 287, pp. 6-11; L. Alexidze, above n 274, pp. 233-235; and E. Schwelb, above n 283, pp. 948-9.
[303] G. Abi-Saab, above n 274, pp. 8-9.
[304] E. Suy, above n 280, p. 18.
[305] E. Suy, *idem*, p. 49.
[306] On the justification on the grounds of "general interest" and "ethical value" for the prohibitions imposed by *ius cogens* on the will of states, see M. Virally, above n 297, p. 11.

The material essence of *ius cogens* was expressed by the ILC in a commentary to Article 50 (now Article 53) of the Draft on the Law of Treaties, which states that "it is not the form of a general rule of international law, but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*."[307] Although Commission did not specify any criteria for determining the existence of peremptory norms, the ILC implicitly attached the concept of *ius cogens* to a necessary material content.[308]

In short, material theories on *ius cogens* are essentially defined by the attempt to explain the existence of *ius cogens* as per the inherent content of peremptory norms. Although material theories may differ in their understanding of the functioning or the operational scope of peremptory norms, the theories developed by Natural Law, Public Policy, institutionalized international community or *ius publicum* approaches all emphasize the content of peremptory norms when describing the legal regime entailed by *ius cogens*.

Section I – Natural Law Theories[309]

The term "Natural Law" has multiple meanings.[310] For the purposes of this study, the most important dimension derives from the legal-philosophical line of reasoning based on the assumption that certain behaviours are acceptable while others are unacceptable as a consequence of human nature.[311] The ancient origins of Natural Law are to be found in the works of Plato,[312] Aristotle,[313] Cicero[314] and

[307] YbILC, 1966-II, p. 247.

[308] Several States, and a majority of scholars, have interpreted that passage as corresponding to the recognition of a peremptory and non-derogable legal regime that protects the material interests of the international community as a whole *vis-à-vis* the particular interests of States. In the ICJ, Judge Guerrero supported this perception on the material normativity of certain norms of public international law in rhetorical terms when he asked "whether the unilateral will of one state can have priority over the collective will." And his answer to his own question was negative: "it is not possible to establish a system of law if each State reserves to itself the power to decide what the law is." *Certain Norwegian Loans (France vs. Norway)* (Judgment), ICJ Reports 1957, p. 69.

[309] *Ius naturae* or *ius naturale*.

[310] The term at hand assumes multiple connotations stemming from the very notions of "natural" and "law." In the work of jusnaturalists, "natural" can refer either to human nature or to the nature of the universe in general, or both. "Law", on its turn, has been similarly contested. It has been interpreted either literally, i.e., as an inter-subjective rule compelling a necessary obedience; or completely metaphorically, by choosing some standard in natural phenomena which governs behaviour through entirely internal means as a consequence of human reason; or ultimately, and potentially more important for a study on the Law of Nature, as reflecting what is just. Indeed, the idea of natural law implies a deep association with certain material principles of justice.

[311] N. Bobbio, *Giusnaturalismo e positivismo giuridico*. Milano, Comunità, 1965; N. Bobbio, *Il giusnaturalismo moderno*, a cura di T. Greco, Torino, Giappichelli, 2009.

[312] Plato, *Laws*, in *Plato Complete Works* (transl. J. M. Cooper), Hackett, Indiana, 1997, book IV, 715b.

[313] "[T]here is in nature a common principle of the just and unjust that all people in some way divine [i.e., discern], even if they have no association or commerce with each other," Aristotle, *On Rhetoric*, I:13:102; and Nichomachean Ethics, VIII 4, 1157a 30-33, in Aristotle, *The Complete Works of Aristotle* (trans. by W.D. Ross, ed. J. Barnes), Princeton University Press, 1984.

Seneca[315], among others.[316] Natural law doctrine was also deeply influenced by the works of Augustine[317] and Thomas Aquinas,[318] in particular as regards their views on Justice[319] and the human nature of sociability. Until the emergence of rationalist authors such as Emmanuel Kant, classical Natural Law tradition played a dominant role in the doctrinal evolution of ethics, politics and law.[320] And even after Natural Law theory fell into disrupt with the rise of legal positivism in the nineteenth century, the classical notion of necessary norms continued to influence international legal theory well into the modern era, and as such has been central in the development of the concept of peremptory norms. Bearing in mind that a thorough analysis of the general theory of the Law of Nature falls way beyond the scope of this study,[321] since it would require a broader evaluation on the work of a wider array of authors,[322] an analysis of its fundamental features is nonetheless necessary due to the influence of *ius naturale* over the evolution of the general doctrine of peremptory norms,[323] in which the contribution of naturalists such as Vitoria,[324] Grotius,[325] Wolff[326] and Vattel[327] remains central to the contemporary debate on peremptory norms.[328]

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[314] Cicero, *The republic (De republica)* (C. W. Keyes, Trans. and Ed.), London, Loeb Classical Library, 1951.
[315] Seneca, *De beneficiis*, Lib. VII. Cap. I.
[316] In the 4th-century B.C., Sophocles wrote the play 'Antigone,' in which he depicts an immutable and eternal law. In the play, Antigone testifies to Creon that the principles of natural law are rooted in Nature and knowable by the power of reason: "These laws are not for now or for yesterday, they are alive forever; and no one knows when they were shown to us first." Sophocles, *Antigone* (R. E. Braun, Trans.), Oxford, Oxford University Press, 1973, pp. 38-39.
[317] *De civitate Dei* IV, 4.
[318] T. Aquinas, *Summa Theologicae* (translated by Fathers of the English Dominican Province), Benziger Bros. edition, 1947.
[319] Once again, the ontological comprehensiveness of a subject such as the concept of Justice, even when analyzed within the parameters of Law and, more specifically, international law, goes beyond the immediate objective of our work.
[320] H. Knud, 'Hugo Grotius and the History of Political Thought', (1985) 13 *Political Theory*, pp. 239–265; J. Finnis, *Natural Law and Natural Rights,* Oxford, Clarendon Press, 1980.
[321] As pointed out by R. Kolb on discussing the general features of natural law in his work on *ius cogens* "ce n'est évidemment pas le lieu de tenter même de s'approcher d'une orientation sur le problème le plus tourmenté et le plus profonde auquel l'esprit humain face au droit: la question du droit naturel," see R. Kolb, above n 4, pp. 59-60.
[322] See T. Hobbes *De Cive* (On the Citizen, ed. R. Tuck), Cambridge University Press, 1998; and T. Hobbes, *Leviathan*, London, Penguin Classics, 1983; S. Pufendorf, *On the Duty of Man and Citizen*, Cambridge University Press, 1991; and S. Pufendorf, *Law of Nature and Nations* (ed. J. Roland), Oxford Press, 2003.
[323] "A common misconception among international lawyers is the notion that peremptory norms represent a twentieth-century innovation without meaningful precedent in international legal theory," Evan J. Criddle & Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens', (2009) 134 *Yale Journal of International Law*, 331.
[324] F. de Vitoria, *Sobre el poder civil, Sobre los indios, Sobre el derecho de la guerra* (transl. Luis Frayle Delgado), Madrid, Tecnos, 2007. See also A. Truyol y Serra, "Victoria en la Perspectiva de nuestro tiempo", in L. Pereña y J.M. Pérez Prendes (eds.) *Corpus Hispanorum de Pace*, vol. V, *Francisco de Vitoria, Relectio de Indis*, Madrid, CSIC, 1967, p. CXLVI.
[325] H. Grotius, above n 1, Prolegomena, paragraph XVI, and book I,I, X, 5. See also H. Lauterpacht, 'The Grotian Tradition', in H. Lauterpacht, *International Law, Collected Papers* (ed. E. Lauterpacht), vol. 2, Cambridge University Press, 2009, pp. 333-336, and A. Gómez Robledo, *El Ius Cogens Internacional, Estudio histórico-crítico*, México, Universidad Nacional Autónoma de México, 2003, p. 11-12.
[326] Wolf divides his theory of international law (*ius gentium*) into four different classes: *ius gentium naturale*, *ius gentium voluntarium* (as resting on the *consensus praesumptus* of the nations), the *ius pactitium* (resting

The Natural Law paradigm provided the theoretical foundations of international law in its early days.[329] In the works of Victoria, Suarez, Grotius, Wolff and Vattel, Thomasine ideas of Justice and civil society as depicted in *Summa Theologicae*[330] played a key role in the development of notions such as *totus orbis* and "necessity" as a consequence of Natural Law. The first masters of modern *ius gentium* developed theories to a great extent circumscribed within the parameters of Natural Law, such as its peremptory character, its immutable nature, its rationally apprehended norms and its presumed universal scope of application. Another central element in the work of these authors is the lack of a clear distinction between the subjects of Law, Politics and Moral. Those subjects were mingled into norms that were ultimately based on, or derived from, or supplied by nature, and rationally apprehended as a consequence of the intrinsic nature of human beings.[331] The distinctive element is the understanding that there is an immutable, universal, necessary and hierarchically superior normative universe binding all subjects of law regardless of their individual consent. Since such a normative universe would be rationally apprehended by human nature and founded in principles of Justice, it would be common to all.[332]

The concept of *ius necessarium* has been paramount to the contemporary development of the notion of peremptory norms.[333] *Ius necessarium* as formulated in the work of authors such as Vattel, amounts to the existence of a material limitation imposed upon the sphere of the sovereign will of States.[334]

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on the *consensus expressus*), and the *ius consuetudinarium* (on the *consensus tacitus*). Wolff's idea on the law of nations is thus one of an enlarged normative universe in which the natural law of nations is furthered in its process of application by the will of states as reflected in voluntary law or, more precisely, positive law. See C. Wolff, above n 1, Prolegomena, paras. 4, 5, 6 and 26.

[327] "[N]ous appelons droit des gens nécessaire … parce que les Nations sont absolument obligées à l'observer." and "[i]l est des choses justes et permises par le droit des gens nécessaire, dont les Nations peuvent convenir entre elles, ou qu'elles peuvent consacrer et fortifier par les moeurs et la coutume. Il en est d'indifférentes, sur lesquelles les peuples peuvent s'arranger comme il leur plait, par des traités, ou introduire telle coutume, tel usage qu'ils trouvent à propos. Mais tous les traités, toutes les coutumes qui vont contre ce que le droit des gens nécessaire prescrit ou défend, sont illégitimes." E. de Vattel, above n 1, Préface, p. 90.

[328] For a discussion on the validity and ongoing importance of natural law, see A. P. d'Entrèves, *Natural Law*, London, Hutchinson's University Library, 1951; P. Piovani, *Giusnaturalismo ed Etica Moderna*, Bari, Laterza, 1961; J. Finnis, above n 320.

[329] Lauterpacht says that Grotius overwhelms "reader with a mass of ancient authorities while neglecting those nearer home", "for this was the custom of the time". H. Lauterpacht, above n 325, p. 311.

[330] T. Aquinas, above n 318.

[331] For a discussion on the relationship among those subjects in the work of the first authors of Natural Law, see B. P. Vermeulen, "*Grotius' methodology and system of international law*", (1983) 30 *Netherlands International Law Review*, pp. 324–382; W. Whewell, "Editor's Preface," in William Whewell, ed. and trans., (1853), *Hugonis Grotii de iure belli ac pacis* (Cambridge: Cambridge University Press): iii–xvi.

[332] R. Nieto-Navia, 'International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law', in *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio Cassese*, 2003, The Hague, Kluwer Law International, p. 634.

[333] "It is well known that the doctrine of international *jus cogens* was developed under a strong influence of natural law concepts." G.M. Danilenko, above n 279, p. 43. Classical natural law doctrine did not use the term *ius cogens* though.

[334] As previously said, the notion of Justice among naturalist authors is under the influence of T. Aquinas. Above n 318, II–II, q. 104, a. 6, ad 3.

Contemporary naturalist authors perceived the evolution of the concept of *ius cogens* as embodying this long tradition of Natural Law,[335] which was then used to advocate against an absolutely freedom of states in establishing inter-subjective arrangements. From a legal-philosophical perspective therefore, natural law provided a justification on extra-positive basis to the existence of norms of general international law that cannot be derogated from by the particular will of States.[336]

These natural law premises exerted a pivotal influence over the codification process of *ius cogens*, not only among the members of the ILC[337] and other internationalists,[338] but also among state representatives during the intergovernmental negotiations for the 1969 VCLT.[339] Even after the Vienna Conference, the essential elements of natural law doctrine continued to enjoy some degree of support among internationalists in the context of the debate on *ius cogens*.[340] The new status of the concept of *ius cogens* as established in the 1969 VCLT would therefore not only fall within this progressive development of natural limits imposed upon the sovereign will of States, but potentially represent its ultimate element of demonstration.[341]

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[335] "Entre el *ius cogens*, en efecto, y el *ius naturale*, se da el estrecho parentesco de ser ambos normas superiores y en lo más alta de la escala jerárquica, y se, ambos también, inderogables por toda convención particular en contrario." The only difference will be that of a possible derogability established in article 53 as a consequence of a subsequent norm of the same character, a "version positivista" of the legal concept. A. Gómez Robledo, *El Ius Cogens Internacional, Estudio histórico-crítico*, México, Universidad Nacional Autónoma de México, 2003, p. 8.

[336] Von der Heydte, for instance, expressly contrasted *ius cogens* to positive law on the basis of Natural Law premises. For him, Natural Law reasoning would be the only manner to ensure respect for certain fundamental norms of international law in an international legal order deprived of any supranational authority. F.A. Von der Heydte, *Völkerrecht*, Koln, 1958, p. 23.

[337] In 1963, during the deliberations of the ILC, Bartos argued that the concept of *ius cogens* was "hitherto regarded as belonging to the so-called rational law rather than to positive law." On his turn, De Luna affirmed that "the essence of *jus cogens* was best defined *a contrario sensu* by the concept of *jus dispositivum*." YbILC, 1969-I, p. 72.

[338] At the Lagonissi Conference, Siotis affirmed that the discussion on the topic "revealed some confusion between *jus cogens* and natural law." J. Siotis, in G. Abi-Saab, above n 409, p. 109.

[339] During the negotiations of the VCLT, several states alluded to the fact that *ius cogens* derived from natural law. See, for example, the statements of the representatives of Mexico (United Nations Conference on the Law of Treaties, Official Records, First Session, p. 294, 1969), Italy (*Idem*, p. 311), Ecuador (*Idem*, p. 320), and Monaco (p. 324).

[340] Janis, for example, argued that the concept of *ius cogens* is to be blended "into traditional notions of natural law." Mark W. Janis, 'The Nature of *Jus Cogens*,' (1988) 3 *Connecticut Journal of International Law*, p. 361. Cançado Trindade places *ius cogens* at the center of his advocacy of a new *ius gentium*. He is one of the main supporters of the application of natural law rationale to the concept of *ius cogens*. In a fierce criticism to legal positivism, the Brazilian Judge of the ICJ contends that "*jus cogens* flourished and asserted itself, and has had its material content expanded, due to the awakening of the universal juridical conscience, and the firm support it has received from a lucid trend of international legal thinking. This latter has promptly discarded the limitations and shortsightedness (in space and time) of legal positivism, and has further dismissed the myopia and fallacy of so-called "realism"." *Question relating to the Obligation to Prosecute or Extradite*, Separate Opinion of Judge Cançado Trindade, above n 285, p. 52, para. 183.

[341] For Gomez-Robledo, natural law provisions anticipated the rationale of article 53 of the VCLT. Above n 335, p. 9. Charles de Visscher claimed, nonetheless, that the normative framework provided for by article 53 of the VCLT was not enough to guarantee the incorporation of supreme norms of *ius cogens* into positive international law (lack of precise definition, indeterminate content and non-compulsory judicial adjudication). In his view, it was necessary to "passer du plan des sources formelles à celui du fondement moral et social du

A critical evaluation of Natural Law theories

The contemporary evolution of the concept of peremptory norms has been significantly influenced by the parallel between the ideas of *ius necessarium* and *ius dispositivum*, even when internationalists do not use a rationale strictly built upon Natural Law premises.[342] Nonetheless, the use of Natural Law premises as a theoretical basis for the concept of *ius cogens* is questionable and limited. Differences over substance and scope make it inappropriate to circumscribe the concept of *ius cogens* within the ontological parameters of Natural Law.

Formal and material differences over the general conception of the Law of Nature and *ius cogens* make it incorrect to draw such parallels. First, the conceptual scope of the notion of Natural Law is much wider than that of *ius cogens*. The scope and the very understanding of *ius naturale* among the first naturalists were entirely different from the central aspects of the legal regime operated by peremptory norms.[343] Natural Law in the work of those writers refers much more to the foundations of the compulsory nature of international law, or to the relationship between natural and positive law, than to the central aspects of the concept of *ius cogens* as formulated by the 1969 VCLT.[344] Second, *ius naturale* encompasses not only the necessary laws of nature (*ius necessarium*) but also dispositive norms of positive law, since *ius voluntarium* stems from the rational process of application of rationally apprehended norms of *ius naturale*. Third, differently from *ius cogens*, *ius naturale* is ultimately the criterion of validity of all norms within the system and not only for those of *ius necessarium*. Finally, the compulsory aspect of necessary natural law does not arise from "inter-state" relations, but from a rational process of apprehension Law that exists *per se*. As such, there is a clear differentiation with *ius cogens* not only as regards the legal relationship created by peremptory norms, but also with regard to the process of modification of norms of that character.[345]

droit. Car on ne peut isoler la recherche des normes du plus haut rang de ce qui est la justification dernière du droit. Qu'on le veuille ou non, on parvient au seuil de "l'irreductible droit naturel." Ch. de Visscher, 'Positivisme et *Jus Cogens*,' (1971) 75 *Revue générale de Droit international public*, 3éme série, Tomes XL-LXXV, Paris, Pédone, pp. 7-8. Lauterpacht states that in modern times more and more importance is being accorded to concepts of natural law. H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, London, Longmans, 1927.

[342] See A. von Verdross, 'Jus Dispositivum and Jus Cogens in International Law,' (1966) 60 *American Journal of International Law*, p. 56.

[343] See Kolb, who distinguishes *ius cogens* from natural law by asserting that the former is given by the non-derogability of a general legal regime. R. Kolb, 'Théorie du *ius cogens* international', (2003/1) *Revue belge de droit international*, p. 14.

[344] The notions of *ius necessarium* and *ius dispositivum* offered a remote origin and almost perfect parallel for those interested in opposing the virtual hegemony of positivist and voluntarist theories in public international law in the last century. In this regard, the analogy with ancient theories of natural law would provide a suitable reasoning for the imposition of limits to the sovereign will of states. Such a comprehensive characteristic of *ius naturale* is also at the center of the debate on *ius cogens* as hierarchically superior norms within the international legal system.

[345] Kolb described the distinction between natural law and *ius cogens* on the basis of how both concepts operate *vis-à-vis* the process of modification of the law. "A une limite méta-positive (*überpositiv*) s'oppose une

In any event, Natural Law doctrine exerted an undeniable role in the development of the concept of peremptory norms, particularly with regard to the emphasis on the validity aspect of both legal regimes. [346] Based on ideas of Justice and Equity, natural law doctrine was also pivotal for strengthening the international legal system in areas such as human rights, peaceful co-existence among nations and international humanitarian law. However, efforts aiming at associating the concept of *ius cogens* with notions such as *ius necessarium* are not appropriate. This confusion seems to be due mainly to the existence of purposes that go beyond the strict discussion on peremptory norms, such as the need to address the persisting deficiencies of the international legal order.[347] In the absence of a centralized legislative power and of a compulsory supranational judicial authority, the idea of a necessary legal domain serves the interests of those aiming at establishing some sort of universally binding legal order beyond the will of States.[348] Particularly in the XXth century, the very attractive possibility of laying the remote roots of *ius cogens* in the distinction between *ius necessarium* and *ius dispositivum* offered an exit out of posivitist-voluntarist tenets, by recognizing existing boundaries to the unlimited will of States.[349]

Section II – Public Policy Theories[350]

The evolution of the theory of *ius cogens* was also deeply associated with the notion of international public policy.[351] This approach suggests the existence of a normative domain protecting the integrity of the international legal system. Under this premise, *ius cogens* norms are perceived as evidence of the existence of an

limite intra-positive, addressées chacune à des sujets différents", R. Kolb, above n 4, p. 67. Natural law would imply limitations to the creation or modification of legal norms as a consequence of a minimum normative universe indispensable to human inter-relations, whereas *ius cogens* prohibits the derogation of norms from a "régime juridique général."

[346] J. Sztucki, above n 287, p. 61.

[347] If one takes the debate between Wolff and Vattel, for example, it is possible to identify central aspects of the still existing discussion on the foundations of public international law. Natural law would be the logical answer for such a decentralized legal order by providing a binding normative basis of universal scope. In this regard, the distinction made between "imperfect" and "perfect" obligations within "voluntary law" could also be interpreted, in today's debate, as an effort made by authors such as Wolff and Vattel to respond to the intrinsically decentralized nature of international legal order.

[348] Such would be the case, for example, of those depictions of *ius cogens* as an indispensable normative minimum in the international legal system as developed by neojusnaturalists. P. Fauchile, *Traité de droit international public*, Paris, 1922; H. Mosler, 'Ius cogens im Völkerrecht', (1968) 25 *A.S.D.I.*, p. 37.

[349] G. Abi-Saab, above n 274, 12-13.

[350] "The notion of public policy (*ordre public*) is also known to common law which uses that term (not to be confused with "public order" which means the maintenance of law and order)," E. Suy, above n 280, p. 21.

[351] The concept of public policy is an "indispensable instrument of the interpretation, application and development of the law." Separate Opinion of Judge Lauterpacht, ICJ Reports, 1958, 456; "There is a leading tendency among authors writing on law to identify peremptory rules or *jus cogens* with the notion of *ordre public* or public policy," L. Alexidze, above n 274, p. 237; "The idea of inseparability of these two notions ('public policy' and '*jus cogens*') is inherent and predominant both in the scholarly writings and official statements prior to the conclusion of the Vienna Convention," J. Sztucki, above n 287, p. 9.

international public policy hierarchically superior[352] to voluntary law (treaty and customary law),[353] and essential to the integrity of international law as a legal system.[354] For restrictive theories, the legal regime of *ius cogens* operates as a criterion to determine the legality of the object of treaty law or, in an alternative and broader sense, as a guarantee against derogation from certain norms of general interest by conventional law. For extensive theories, the recognition of peremptory norms reflects the consolidation of a legal regime that protects the fundamental values of the international community as a whole.[355] In both cases, international public policy theories are based on the idea of reproducing in public international law the concept of *ordre public* that exists in domestic legislations.[356]

Planiol asserts that the notion of *ordre public* has two distinct dimensions. First, *ordre public* is understood as encompassing all norms pertaining to the domain of Public Law, i.e., all norms constituting a legal regime above the will of private subjects of law. These rules are related to the organization of the State, the political regime (presidential or parliamentarian), the division of powers, and other norms representing the social contract in a given country. Second, Planiol also admitted that norms of Private Law could be of *ordre public* when motivated by considerations of general interest that would be compromised if private actors were free to change or to derogate from in private transactions (rules related to heritage, marriage and family in general, as well as other norms such as those regulating the legality of the object of a contract).[357] Material contents may differ in

[352] "Alors que le droit naturel de naguère était conçu comme extérieur et supérieur au droit positif, le jus cogens d'aujourd'hui fait partie intégrante du système, puisque c'est le droit international lui-même qui définit certaines normes de rang supérieur auxquelles la volonté des Etats ne peut déroger," P. Weil, above n 288, pp. 266–267. *Per contra*, see M. Virally, above n 297, p. 18.

[353] *Ius cogens* as developed by puplic policy theories is defined in opposition to the notion of *ius dispositivum*, understood as the normative universe of rules that yield to the general interest. E. Schwelb, above n 283, p. 948.

[354] "Les auteurs qui rapprochent ou qui identifient le *ius cogens* à un *ordre publique internationale* ne se comptent plus," R. Kolb, above n 4. Schwarzenberger asserted, in a restrictive and critic perception of the concept, that "international *jus cogens* and international public policy are synonyms" and contests that the application of a "vague" concept of *ius cogens* may be detrimental to international cooperation, G. Schwarzenberger, above n 275, p 455.

[355] "The purpose of *jus cogens* is to safeguard the predominant and overriding interests and values of the international community as a whole," A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, 2006, p. 46. See also the interpretation reached by the German Federal Constitutional Court (*Bundesverfassungsgericht*) on *ius cogens*, in Stefan A. Riesenfeld, 'Jus Dispositivum *and* Jus Cogens *in International Law: In the Light of a Recent Decision of the German Supreme Constitutional Court'*, (1966) 60 *American Journal of International Law*, p. 513.

[356] On the existence of "certain fundamental principles which must be complied with absolutely", Suy said that "this conclusion to which we are led by the study of national legal systems is also valid for the international legal system. The non-observance of these fundamental principles affects the very existence of a legal system," E. Suy, above n 280, p. 70. Schwarzenberger says that "terms such as international *jus cogens*, international public policy, international public order, and *ordre international publique* are analogies from municipal law," above n 275, p. 456. In this same reasoning, Virally affirms that "En vue de donner une idée plus frappante de ce que serait le *jus cogens*, certains auteurs l'ont associé à des notions voisines, empruntées au droit interne, telles que celles d'ordre public (au sens du droit romain) ou encore de droit constitutionnel", M. Virally, above n 297, p. 7.

[357] M. Planiol & G. Ripert, *Traité elémentaire du droit civil*, Paris, 11th edn, LGDI, 1928, t. I, p. 114.

different countries,[358] but the legal regime of public policy implies the same rationale: nullity as the legal sanction applied to provisions stemming from private arrangements contrary to norms portraying fundamental values of a given legal system. The objective of this regime of "public policy" is therefore to preserve the integrity and protect fundamental values of a given legal order.[359]

The reasoning of public policy theories on *ius cogens* is based on the analogy with the regime of *ordre public* and how it relates to private law in domestic legal systems.[360] The underlying objective is the need to protect the material integrity of the international legal order, and primarily of its fundamental values.[361] This analogy implies that norms of *ius cogens* are the expression of an international public policy, and as such they would be essentially characterized by the material limitations imposed upon the autonomous will of States[362] on grounds of judging what is "moral" and *bonne mœurs* and "general interest" in international law.[363]

The codification of the concept of *ius cogens* in 1969 was preceded by an embryonic academic debate under the strong influence of public policy theories.[364] Early in

[358] "The definition of public order ("policy") is largely dependent on the opinion prevailing in the relevant country", *Serbian Loans Issued in France*, PCIJ, Series A, Nos. 20/21 (1929), p. 46.
[359] G. Jaenicke, 'International Public Order,' (1984) 7 *EPIL*, Amsterdam, pp. 314-8.
[360] When analyzing the analogy between *ius cogens* and public policy, Suy adverts that in the field of private law, "preference is given to the expression "public policy", as the *jus cogens* comprises the aggregate of 'the laws which concern public policy and good morals' (*Code Civil*, Art. 6)," E. Suy, above n 280, p. 18.
[361] Most of international public policy doctrine resembles to classical natural law theories in several of their most common aspects (an exception will be fundamentally those of restrictive conceptions of "international public order" associated with the legality of treaties). Both argue the existence of a necessary, universal and hierarchically superior normative domain which norms cannot be derogated from by the will of States. The main difference between international public policy doctrine and some natural law theories concerns the mutability of peremptory norms: some natural law theories presume an immutable normative realm expressed in *ius necessarium*, while international public policy theories admit their mutability. Yasseen argued that "*jus cogens* was not immutable and the concept of public order must be free to evolve", Yasseen, in YbILC, 1963-I, p. 63. Bartos affirmed that the difference of international public policy with natural law was "namely that of mutability." *Idem*, p. 71. See also M. Virally, above n 297, p. 15. Public policy theories on *ius cogens* therefore represent a reaction to the positivist predominance of the early XXth century without reverting to classical Natural Law doctrine. During the negotiations for the VCLT, several delegations expressed views according to which the acceptance of *ius cogens* would represent a "reconsideration of the positivist theory." In this regard, see the statement of the representative of the Federal Republic of Germany, United Nations Conference of the Law of Treaties (UNCLOT), Official Records, 2nd session, 1970, 95. Danilenko asserts that "Post-Conference scholarly discussions of *jus cogens* were marked by a revival of natural law thinking," G. M. Danilenko, above n 279, p. 44. See also Shelton describing "universal norms" in international law as "a matter of necessity", D. Shelton, above n 282, p. 323.
[362] In his comments in the General Assembly, the representative of the Netherlands interpreted draft article 50 as representing "modern ideas" according to which the will of the contracting parties is no longer the sole criterion by which to determine what can be lawfully contracted, in Comments by governments, Annex to 18th Report, p. 143.
[363] Most authors supportive of Natural Law and/or public policy approaches for the concept of *ius cogens* also base their theories on criteria of Morality. "It is widely accepted that the concept of public order is based on morality and its function is to outlaw the acts and transactions offending against the morality accepted in the given legal system." A. Orakhelashvili, above n 355, p. 48.
[364] In his presentation to the ILC in 1963, the then special rapporteur Humphrey Waldock said that "for a lack of a better, he had used the term *jus cogens*, which was an not entirely new concept in international law and was touched upon in the work of certain writers, including McNair, but had not yet been at fully developed," in YbILC, 1963-I, p. 62. See also J.C. Bluntschli, *Le Droit International Codifié* (translated from the second

the last century, this debate was launched by the discussion on the legality of treaties.[365] Certain norms would be regarded as universal and non-derogable by treaties,[366] i.e., "as valid independently of the will of states."[367] Such rules, which were depicted as fundamental to the international order, would operate as a criterion of validity for positive law with the consequent sanction of nullity imposed to conflicting voluntary norms.[368]

In 1937, Verdross argued that there were norms in international law with which treaties must not conflict,[369] i.e., "norms of general international law restricting the freedom of states to conclude treaties."[370] Based on an analogy with domestic legal systems, in which courts could declare as void a private contract *contra bonos mores*, he argued that "no juridical order can recognize the validity of contracts obviously in contradiction to the ethics of a certain community."[371] In international law, States would have imperative obligations to accomplish certain "moral tasks" *vis-à-vis* the international community,[372] since these compulsory norms represented "the ethical minimum recognized by all the states of the international community."[373]

German edition by C. Lardy), Paris, 1874, pp. 238-240; P. Fauchille, *Traité de Droit International Public,* Vol. I, 1ère partie (1922), p. 22.

[365] "Prior to the discussion in the ILC, Authors who supported the concept of an international *jus cogens*, or any similar concept of the legality of treaties, seemed to ake it for granted that it is the object which is decisive when judging upon the lawfulness of a treaty," J. Sztucki, above n 287, pp. 76-77.

[366] "The concept of jus cogens had existed in international law for a long time, even if in inchoate form. There were, however, profound differences of opinion as to the reasons for its existence and the foundations on which it rested; some based it on positive law, others on natural law, while yet others attributed to it a higher or even divine origin." Rosenne, in *YBILC*, vol. I, 1963, p. 73; and "While it was true that some writers of the nineteenth and even of the early twentieth century had inclined to the view that in international law every rule was a dispositive rule, and while there was no doubt that the peremptory nature of certain principles had been affirmed mainly in recent times, he did not think that the concept of jus cogens or peremptory norms had been unknown to international law before the first world war." R. Ago, idem, p. 75. According to McNair, "[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," A.D. McNair, *The Law of Treaties* (2nd ed.), Oxford, Clarendon Press, 1961, p. 213. Hall asserted that "fundamental principles of international law" may "invalidate (…), or at least render voidable," conflicting international agreements, in W.E. Hall, *A Treatise on International Law*, Oxford, Clarendon Press, 1924, pp. 382-83.

[367] A. von Verdross, above n 1, p. 572.

[368] In a dissenting opinion at the Permanent Court of International Justice (PCIJ) in 1934, judge Schücking asserted the existence of *ius cogens* norms that could not be modified by States, and further declared that everything contrary to such obligations would be null and void. He referred to treaties *contra bonos mores* and suggested that the idea of an "international public order" should determinate the judge's decision in such a case. Judge Schücking interpreted Article 20 of the League of Nations as follows "The Covenant of the League of Nations, as a whole, and more particularly its Article 20 (…), would possess little value unless treaties concluded in violation of that undertaking were to be regarded as absolutely null and void, that is to say, as being automatically void. And I can hardly believe that the League of Nations would have already 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 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." *Oscar Chinn* case, above n 1, pp. 149-50.

[369] A. von Verdross, above n 1, p. 572.

[370] A. von Verdross, above n 342, p. 55.

[371] A. von Verdross, *idem*, p. 61.

[372] For Schwarzenberger's criticism on Verdross article, see the Chapter on horizontal theories.

[373] To illustrate this idea, the Austrian scholar affirmed that treaties would be inconsistent ("he would call them as "immoral") with peremptory norms when "binding a state to reduce its police or its organization of courts in

This regime was conveyed by customary rules such as the general principles of law recognized by civilized nations,[374] which are compulsory and non-derogable, and could cause the nullity of contradicting norms.[375]

The preparatory work of the ILC furthered those discussions based on the materiality of *ius cogens*[376] under the influence of notions of international public policy.[377] In 1963, the ILC concluded that "there exist in the general positive international law of today certain fundamental rules of international public policy contrary to which States may not validly contract."[378] While accepting the inclusion of a provision on peremptory norms,[379] the debates of the ILC also showed the reluctance of several of its Members to submit positive law to moral imperatives 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" or obligating "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 un-ploughed, or in other ways to expose its population to distress." A. von Verdross, above n 1, pp. 574-575. In his 'Jus Dispositivum and Jus Cogens in International Law,' Verdross would classify examples of *ius cogens* in groups corresponding to (i) the rights of third states, (ii) to humanitarian purposes, and (iii) to those introduced by the UN Charter. In a historical perspective, he was mainly concerned with the cases of treaties imposed by force or its threat (such a concern would be expressly prohibited by article 52 of the 1969 VCLT, after a thorough debate in the ILC and among States or that could amount to a disproportionate burden for contracting parties. In particular, Verdross main target was the 1919 Versailles Peace Agreement of World War I and the imposition of heavy burdens on Germany.

[374] A. von Verdross, above n 1, p. 573.

[375] Verdross expressly aimed to prove "the absurd consequences of that pseudo-positivistic doctrine which denies the prohibition of immoral treaties in international law and pretends that international treaties may contain any stipulations whatsoever." A. von Verdross, *idem*, p. 576. This perception was further reinforced by his response to Schwarzenberger in 1966, in his article 'Jus Dispositivum and Jus Cogens in International Law,' above n 342, p. 58. Although he acknowledged how difficul it was to indicate any criterion by which rules of *ius cogens* could be distinguished from other rules of general international law, Verdross pointed out the "higher interest of the whole international community" as the reason by which those norms were absolute and non-derogable. The concern of Verdross in *Forbidden Treaties* was also mainly presented as per the issue of violations of general international law as a result of states' transactions. Yepes also dealt with the issue of *ius cogens* from the perspective of the legality of treaties as developed by anti-positivists. The Colombian scholar advocated that the object of a treaty would be unlawful when contrary to the principles of public international law of good morals. As a sanction to be applied to illegal treaties, he claimed that conflicting treaties should not be registered by the UN Secretariat. According to Yepes, this regime derived from the idea that the will of States should not be considered the only source of international law, since "en dehors et au-dessus de la volonté de l'Etat il y a d'autres principes – d'une origine plus noble – que l'Etat doit respecter parce qu'ils sont antérieurs et supérieurs à l'Etat." YbILC, 1963-II, pp. 165-166.

[376] "It is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens.*" YbILC, 1966-II, p. 248; and YbILC, 1976-II, p. 85.

[377] Many of the ILC Members favoured not only a necessary and logical relationship between both concepts, but also a relationship of cause and consequence. According to the Rapporteur Waldock, the nullity as a consequence of treaties conflicting with peremptory norms "presupposes the existence of an international public order containing rules having the character of *ius cogens*." Fitzmaurice referred to *ius 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," in G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rules of Law', (1957-II) 92 *R.C.A.D.I.*, p. 120.

[378] Report of the Sixth Committee to the General Assembly, Doc. A/5601, para. 18 (1963).

[379] See L. Hannikainen, above n 277, pp. 160-61 (noting that none of the twenty five members of the ILC in 1963 denied the existence of jus cogens or contested the inclusion of an article on jus cogens in the VCLT).

order to assert the existence of an international public policy.[380] Nonetheless, the idea that norms of *ordre public* operate as a protection for the material integrity of the whole legal system still exerted a pivotal influence in the deliberations of the ILC on the articles on *ius cogens*.[381] The bottom-line was the idea of an international public policy expressed by certain peremptory norms of public international law.[382] By the session of 1963, the introduction of the terminology of *ius cogens* as a limitation and a criterion of validity for international treaties had already assembled an important level of support among the members of the ILC, regardless of their respective doctrinal alignments.[383] However, due to conceptual divergences over the issue,[384] the final report submitted in 1966 to the UN General Assembly adopted a pragmatic solution and references to "international public order" were deleted. During intergovernmental negotiations, the issue of international public policy also did not gather enough support and the concept was simply ignored in the 1969 VCLT. Without reaching a material definition of *ius cogens*, the concept was then defined by its legal effects and non-derogability.[385]

[380] In the 1958 YbILC, there was also a specific provision on the "Ethics of the object - The unethical character of a treaty which is not actually illegal by virtue of the provisions of articles 16 to 19 above, cannot per se be a ground of invalidity as between the parties which have concluded it (and has in any case no force as against non-parties). Nevertheless an international tribunal may refuse to take' cognizance of or apply it (even as between the parties, and even if its invalidity has not been claimed) in those cases in which the treaty is clearly contrary to humanity, good morals, or to international good order or the recognized ethics of international behavior," YbILC, 1958-II, pp. 28 and 49.

[381] The focus progressively evolved from the domain of the legality of the object of treaties to that of the condition of their validity. In 1953, the special rapporteur Hersch Lauterpacht presented a draft article in which he argued that "a treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so by the International Court of Justice." He was mainly concerned with the incompatibility and consequent nullity of treaties (illegal treaties) with the superior principles of international law considered principles of international public policy. 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. 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." Hersch Lauterpacht, Law of Treaties: Report by Special Rapporteur, YbILC, 1953-II, pp. 90, 93, 155 and 218. In 1958, the then special rapporteur Fitzmaurice changed the formulation by affirming that "it is essential to the validity of a treaty that it should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of *jus cogens*." Nullity should apply to a treaty in conflict with or departing from imperative rules or prohibitions of international law. YbILC, 1958-II, p. 26.

[382] "[A] feature common to them, or to a great many of them, evidently is that they envolve not only legal rules but considerations of morals and of international good order", *idem*, p. 41.

[383] The notion of international public policy was still central to that discussion. Tabibi, Rosenne, Pal ("public order should comprise a system of law which replaced a sense of obligation based on expediency by a higher allegiance to the principle of justice," *idem*, p. 65), Bartos, Amado, Cadieux and Waldock clearly supported the intrinsic attachment of the concept of *ius cogens* to the idea of an international *ordre public*.

[384] Other members also accepted the idea of public order, but rather as a consequence of positive law. The report of the ILC expressed such divergent views on *jus cogens* by stating that rules of *ius cogens* "must not only be accepted by a large number of states, but must also be found necessary to international life and deeply rooted in the international conscience," while also affirming that "the concept of an international public order was justified not merely, or even necessarily, by considerations of natural law; it derived from positive law, from the whole body of rules in force." *Idem*, p. 63.

[385] Tunkin asked for the deletion of the expression "international public order." Nonetheless, the commentary to provisional article 45 in the 1963 final report of the ILC stated that "Article 37, as explained in the commentary to it, is based upon the hypothesis that in international law today there are a certain number ot

In spite of the codified norms in the VCLT,[386] public policy approaches continued to influence internationalists on the issue of *ius cogens*. At the Lagonissi Conference, Suy considered that the practice of the ICJ amounted to a "clear and unequivocal stand in favour of the existence of an international public policy of a group of rules and principles – very few in number – of absolute authority and force."[387] He quoted ICJ's judgments such as those made in the *Corfu Channel Case,*[388] the Advisory Opinion concerning *Reservations to the Genocide Convention*,[389] the *South West Africa Cases,*[390] which would have embodied the idea of an objective international legal order containing absolute rules, in spite of the fact that the Court had not referred expressly to the concepts of *ius cogens* or international public policy.[391] Suy also alluded, as pieces of evidence, to international agreements containing provisions in which States agree not to conclude treaties contrary to their provisions[392] or treaties with principles of international public policy that granted all parties with a right to intervene without a material or direct interest.[393] Besides the possibility of abrogating previous conventional obligations, those treaties would have *ius cogens* character.[394] Authors such as McNair,[395] Moreno-Quintana,[396] Rolin,[397]Van der Meersch,[398] Jaenicke,[399] Meron,[400] Dupuy[401]

fundamental rules of international public order from which no State may derogate even by agreement with another State," YbILC, 1963-II, p. 211.

[386] See Chapter III below on horizontal theories.

[387] E. Suy, above n 280, p. 60.

[388] ICJ Reports 1949, Merits, p. 22.

[389] "The principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation," ICJ Reports, 1951, pp. 23-24.

[390] ICJ Reports, Preliminary Objections, 1962, p. 332, particularly on the admission that Liberia and Ethiopia had a *jus standi* before the Court even without having a direct and material interest in the case.

[391] E. Suy, above n 280, pp. 61-62. The decision of the Military Tribunal at Nuremberg in the *Krupp* case (which declared as void an agreement between Germany and France obliging French prisoners to work at German arms factories on grounds that it was contrary to good morals) was also mentioned by Suy as another piece of evidence on existing international practice in favour of an international public policy. *Military Tribunal at Nuremberg,* case no. 58, Law Reports of Trials of War Criminals, vol. X, London, 1949, p. 141.

[392] In particular, Article 20 of the Convenant of the League of Nations and Article 103 of the UN Charter.

[393] See, for example, Article 62 of the Statute of the ICJ and Article 26 of th Constitution of the International Labour Organization. In E. Suy, above n 280, p. 67.

[394] Jenks balances the admission of an existing international public policy by adding that it does not necessarily imply all the effects of *ius cogens*, namely the impossibility of any derogation from. He says, nonetheless, that it should not be excluded that "international public policy may increasingly have the effect of a *jus cogens* precluding the consent of states to agreements or wrongs inconsistent with international public policy." C. W. Jenks, *The Prospects of International Adjudication*, London, Stevens, Dobbs Ferry, N.Y., Oceana Publications, 1964, p. 458.

[395] A.D. McNair, above n 366, pp. 213-214.

[396] Public policy contains "certain principles such as the general principles of the law of nations and the fundamental rights of States, respect for which is indispensable to the legal co-existence of the political units which make up the international community", since it represents "[t]he whole body of laws and legal instruments whose legal principles cannot be set at naught either by special conventions or by foreign law," *Guardianship of Infants* case, above n 1, pp. 105-107.

[397] When envisaging the rights of third States to intervene in cases where rules of public policy are being violated, Rolin argues that "cet intérêt qui, en pareil cas, anime l'Etat demandeur, ce n'est autre chose que l'intérêt public ou l'intérêt de chacun au maintien de l'ordre public instauré par la Convention." H. Rolin, 'Vers un ordre public réellement international', in *Hommage d'une génération des Juristes au Président Basdevant*, Paris, Pédone, 1961, p. 459. See also H. Rolin, 'Les principes du droit international public', (1950) 77 *R.C.A.D.I.*, p. 434.

and Orakhelashvili[402] have also advocated that the concept of *ius cogens* and international public policy are inextricably connected due to their underlying features, namely their absolute nature imposing limits on the contractual freedom of States and their non-derogable character. More importantly, they assume that any legal order requires an axiological or ethical minimum normative universe imposed upon all subjects of law as a matter of necessity, regardless of consent.[403] An international public policy common to all nations would be a natural consequence of the fact that international law is a legal system, and as such requires a set of imperative legal provisions with exceptional legal effects. By representing the material expression of the *ordre public*, *ius cogens* rules would thus constitute the "irreducible minimum of public international law," binding all States regardless of their individual will.[404] Emphasis is placed on the prohibition of the autonomous sphere of free will of States, as occurs in the sphere of national law with certain capacities of individuals, for "the primary consideration is to protect the integrity of the legal system from certain unacceptable acts, whatever their formal character."[405]

Critical evaluation of public policy theories

One of the problems resulting from the identification between *ius cogens* and international public policy, or in some cases their overlapping redundancy,[406] is due to the analogy that portrays international public policy operating in a similar manner to public policies in national legal systems, i.e., protecting "the

[398] "L'ordre public international au sens du droit des gens c'est l'ordre public qui domaine les relations des Etats entre eux et limite, pour des raisons tenant à leur objet, le droit de conclure des conventions interantionales," G. van der Meersch, 'La convention européenne de sauvegarde des droits de l'Homme a-t-elle, dans le cadre du droit interne, une valeurs d'ordre public ?' in *Rapport pour le colloque international sur la Convention européenne des droits de l'Homme*, Vienna, Doc. H/Coll. 1965, p. 16 ; and G. Van der Meersch, 'Does the Convention have the Power of 'Ordre Public' in Municipal Law?,' in Robertson (ed.), *Human Rights in National and International Law,* 1968, pp. 99-101.

[399] G. Jaenicke, above n 359, p. 315.

[400] T. Meron, *Human Rights Law-Making in the United Nations,* Oxford University Press, 1986, p. 198.

[401] P.M. Dupuy, 'L'unité de l'ordre juridique international, Cours général de droit international', (2002) 297 *R.C.A.D.I.*, pp. 282-283.

[402] A. Orakhelashvili, above n 355, pp. 1-30.

[403] "Harmonious relations between the subjects of law must be based on a solid substratum, i.e., on public policy. … Without that minimum of public policy the State could not play its part." E. Suy, above n 280, p. 70. As asserted by McNair, "in every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements… The society of States … forms no exception to the principles stated above." A.D. McNair, above n 366, pp. 213-214. *Per contra*, "the assumption that *ubi jus*, *ibi jus cogens* appears to be too aprioristic and too much influenced by reasoning in terms of municipal legal systems in which, again the notion of public policy is built in," J. Sztucki, above n 287, p. 10.

[404] G. Abi-Saab, above n 274, p. 9.

[405] A. Orakhelashvili, above n 355, p. 23.

[406] De Luna asserted that "a rule was peremptory meant that it was a rule of public order," YbILC, 1963-I, p. 213.

fundamental interests of the international community" and "determining the validity of conflicting norms, acts and transactions."[407] While in principle both legal concepts are based on the legal recognition of fundamental values within a given society that cannot be overridden by private arrangements, the former hardly operates as a legal regime with the same effects and the same specificities of the latter,[408] particularly as regards how norms of Private Law operate.[409]

Some authors assume that if norms are peremptory in domestic systems due to their overriding material importance as norms of public policy, they could be equally peremptory at the international level depending on their level of acceptance and recognition.[410] Lauterpacht,[411] for instance, suggested that the material content of international public policy could derive, on the basis of an inductive process, from domestic public policies.[412] Verdross took the view that the

[407] A. Orakhelashvili, above n 355, p. 27.

[408] Many authors whose conceptions on *ius cogens* are based on the analogy with domestic public policies, particularly French Law, are silent on the fact that in France the normative scope of "ordre public" encompasses only "le bon ordre, la sécurité, la salubrité et la tranquillité publique," leaving outside "la dignité de la personne humaine", which counts with a specific norm in the 1946 French Constitution. The protection of the notion of "ordre public" is nonetheless understood as "nécessaire à la sauvegarde de droits de valeur constitutionnelle."

[409] "The concept of *jus cogens* is taken from municipal legal systems and its reception in international law shares the possible pitfalls inherent in municipal law analogies," E. Schwelb, above n 283, p. 948. "[U]ne analyse du *jus cogens* en droit international doit, pour éviter les faux problèmes, partir du droit international lui-même, et non de concepts empruntés au droit interne," M. Virally, above n 297, p. 8. Tunkin said that "when one spoke of *jus cogens* in international law, one meant precisely that, and whatever the influence of private law analogies, one should bear in mind that one was dealing specifically with international law," and Bystricky said that "it was very important to avoid easy analogies with private law. For example, in municipal law there was a difference between *jus cogens* and *jus imperativum* (imperative rules), a difference which did not exist in international law," in G. Abi-Saab, 'Summary Record of the Discussion on the Concept of *Jus Cogens* in Public International Law,' *The Concept of Jus Cogens in International Law*, 2 Lagonissi Conference on International Law, 3–8 April 1966, Geneva, IUHEI, 1967, p. 86. See also G.M. Danilenko, above n 279, p. 44, stating that "the elaboration of a coherent theory of jus cogens remains a predominant challenge for the international community"; A.M. Weisburd, above n 275, concluding that "the genesis of the jus cogens concept rests on what must be considered fundamental intellectual confusion" (p. 27) and observing that "[a]s part of the international legal system… [*ius cogens*] is a source of confusion and distraction" (p. 51); G.A. Christenson, above 275, p 598, analyzing the "flaws" of the municipal law analogy of public order; and J. Sztucki, above n 287, pp. 9 and 63; and G. Schwarzenberger, above n 275, p. 456. In the Sixth Committee of the GA, the British representative pointed out that the existence of domestic public policy did not "justify the establishment of comparable rules in public international law," 18th Session of the Sixth Committee of the GA, 1963, Summary Records, p. 25.

[410] "It is widely accepted that the concept of public order is based on morality and its function is to outlaw the acts and transactions offending against the morality accepted in the given legal system." A. Orakhelashvili, above n 355, p. 48.

[411] After World War II, Lauterpacht completely changed his opinion on the existence of an international public policy. First, in 1937, the British author spoke negatively on the reproduction of public policies in the international level. At that time, his main concern was to counter arguments advanced by German authors on the legality (or immorality, as put by Verdross) of the Treaty of Versailles. H. Lauterpacht, 'Règles générales du droit de la paix,' (1937) 62 *R.C.A.D.I.*, p. 306. Later on, Lauterpacht would agree that "immoral obligations cannot be the object of an international treaty" and that the same regime could be applied to "obligations which are at variance with universally recognized principles of International Law," in L. Oppenheim, above n 83, pp. 896-897.

[412] He argued that the determination of the content of international public policy would be done "by reference to practice and experience of the municipal law of civilized countries," as established in Art. 38(1)(c) of the

invalidity of immoral treaties is applicable as a rule of international public policy because it consists of a principle recognized in every national legal order.[413] Rolin argued that if norms of public policy of private law are identical in different States, international tribunals could verify the conformity of national laws with public international law, and more particularly with those rules derived from the general principles of law.[414]

Notwithstanding the intrinsic value of certain norms, these authors overlook the substance, scope and functioning of the regime of public policy in different domestic legal systems.[415] First and foremost, the material content of public policy rules varies in different States and they operate differently in their relations to other obligations within domestic systems. Unless one still admits the anachronism of any criteria based on degrees of "civilization,"[416] a public policy stemming primarily from national legal systems would have to reflect the common universe of general principles of law deriving from the analysis of each or at least an expressive and diverse majority of all legal systems in the world. This is simply unreasonable. The actual normative universe of public policy varies enormously between countries, and between eras,[417] mostly because it hinges upon extra-positive considerations on morals, religion, ideology and political orientation.[418]

Statute of the ICJ. *Guardianship of Infants* case, above n 1, p. 92. On a rejection of the *ius cogens* status of general principles of law such as *pacta sunt servanda* and good-faith, see M. Virally, above n 297, p. 10.

[413] A. von Verdross, above n 1, p. 573.

[414] H. Rolin, above n 397, p. 448.

[415] "The scope of public policy (...) and other synonyms on the national level differs from country to country, and the legal effects of rules in this category similarly vary," G. Schwarzenberger, above n 275, p. 456. See also 3rd Committee, Summary Records 237 (1959). In the case of *Payment in Gold of the Brazilian Federal Loans Contracted in France*, PCIJ, Series A, No. 15 (1929), p. 125 (129), the Court stated that the definition of national public policy "in any particular country is largely dependent on the opinion prevailing at any given time in such country itself."

[416] The discussion on the law of civilized nations is a contentious issue in international law. We can find such references in Grotius ("we have called them the more civilized nations, and not without reason. For, as Porphyry well observes, some nations are so strange that no fair judgment of human nature can be formed from them, for it would be erroneous", in H. Grotius, above n 1, I.I.XII, p. 8) until the statute of the Permanent Court of International Justice (the Belgian lawyer Edouard Descamps, who is recognized as the person who introduced the idea of principles of "civilized nations", was also a fierce defender of Belgian "civilizing mission" in Congo, see M. Koskenniemi, *Gentle Civilizer of Nations, The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2011, pp. 159-160). On our days, it is unacceptable to claim any social and even less any legal construction based on the idea of a "civilizational" hierarchy. According to Bassiouni, "it would appear, at least in the post-United Nations era, that a presumption exists that all Member-States of the United Nations are "civilized"", in M. C. Bassiouni, 'A Functional Approach to "General Principles of International Law"' (1989-1990) 11 *Michigan Journal of International Law*, 768. See also L. Alexidze, above n 274, pp. 248-251. For a sociological, historical and political analysis on "civilizational" approaches and its effects to peoples under "civilizational processes", see Edward Said, *Orientalism*, London, Clarendon Press, 2001. *Per contra*, see N. Fergusson, Empire, London, 2002.

[417] Public policy vary because "the definition of which in any particular country is largely dependent on the opinion prevailing at any given time in such country itself," *Case of the Serbian and Brazilian Loans*, PCIJ, Series A, No. 20/21, p. 46. See also E. Suy, above n 280, pp. 20-21.

[418] Orakhelashvili acknowledges that domestic public orders are not *per se* part of public international law and have no inherent normative value as international obligations of public international law. He recalls the rule provided for by Article 27 of the VCLT, according to which provisions of internal law cannot be invoked as justification for not complying with treaty obligations. In order to solve the problem, he argues the idea of "necessity" explained in terms of the need for a public policy that "protects the fundamental interests of the

Instead of such a herculean task likely to produce results which are liable to be disputed, it would be more appropriate to seek the material content of an alleged public policy in the principles and norms of positive international law, such as those provided for the UN Charter, General Assembly resolutions, Universal Declarations and multilateral treaties of virtual universal membership.

Second, the analogy runs contrary to the general principle of international law establishing that domestic legislations are not a valid argument to limit the scope of or to avoid the compliance with international obligations.[419] The question can be formulated as follows: could an international tribunal accept a claim in which one of the Parties argues that a treaty should not be complied with because it should be considered null and void on grounds of contradicting principles of domestic public policy allegedly of the interest of the international community as a whole? Suy, himself a supporter of an international public policy identified with *ius cogens*, argued that "from the fact that all national systems recognize the principle of public policy one should not automatically draw the conclusion that there exists a public policy in international law."[420] Indeed, the only reasonable possibility of admitting such a claim would be in the hypothesis of a rule of public policy deriving from domestic legal systems that is accepted *inter partes*. But yet it would hardly constitute a *ius cogens* norm of a universal nature, one of the distinctive features of a peremptory norm of general international law. Also, norms of public policy in domestic legal systems are either expressly determined *a priori*, or their character is declared *a posteriori* through judicial decisions. But with the exception of binding judicial decisions, the distinction between public policy and *ius dispositivum* is hardly as clear in international law as it assumedly is in domestic legal system.[421]

Third, the identification of public policy with *ius cogens* implies that the derogatory operation is the same in both regimes. But both domestically and internationally, norms of public policy are not necessarily non-derogable or only derogable by other norms of that same character. Domestic public policy norms can be derogated from or abrogated by ordinary norms, i.e., not only by other norms of the same "peremptory character" of public policy.[422] In many countries, such

international community, qualifies the scope and affects the validity of conflicting norms, acts and transactions." But his idea on necessity still does not solve the problem of creating a material content for *ius cogens* norms reflecting an alleged public policy. By assuming that such an order would necessarily stem out of the fundamental values of the international community, he retreats to reasoning based on the premise that certain material contents are fundamental to the functioning of international law, so an essentially extra-positive reasoning that depends on the *a priori* positioning of the interpreter on the philosophical foundations of international law. A. Orakhelashvili, above n 355, pp. 27-28.

[419] *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ Series A, No. 7 (1926), p. 9; *Free Zones*, PCIJ Series A/B, No. 46, p. 167.

[420] E. Suy, above n 280, p. 74.

[421] E. Schwelb, above n 283, p. 948.

[422] "In domestic legal systems, norms of *jus cogens* may be modified and, indeed, are being modified. It is public authority which through legislation or changing judicial practice carries out a modification of *jus cogens*

would be the case of a shift in the legislation concerning marriage and divorce, children custody, heritage, or cases attempting against *bonne mœurs* and other prohibitions of *ordre public* in several domestic legal systems in connection with private law (same sex marriage or polygamy, for example), all of which could be modified or derogated from by another norm without the need of a special legislative process or the emergence of another norm of the same character of public policy, as required by articles 53 and 64 of the VCLT on *ius cogens*.[423] Nor does the analogy with *ius cogens* apply to public policy norms in public international law.[424] Rules of a hypothetical international public policy can be derogated from by the will of states in inter-state transactions without being subject to the regime of *ius cogens*. By taking as an example the principle of non-intervention, which would certainly belong to a contemporary "international public policy,"[425] States may create a particular regime (*lex specialis*) in which the rule of non-intervention does not apply in cases of violations of human rights.[426] The strict application of public policy theories advocating an overriding analogy between international public policy and *ius cogens* would reject that possibility.

Another problem related to public policy theories is the common association (and confusion in many cases) between international public policy, *ius cogens* and fundamental values of the international community.[427] Most of these theories give pre-eminence to concepts such as the "universal conscience"[428] the "interests of the international community as a whole,"[429] fundamental ethical principles[430] and so on [431] in the attempt to demonstrate that *ius cogens* norms are evidence (potentially the ultimate one) of the existence of an international public policy.[432] But assuming

norms. However, an analogy to this process would hardly work in the system of international law," J. Sztucki, above n 287, p. 110.

[423] Alexidze argued that the notion of an *ordre public international* belongs to private international law and could not be applied to the problem of *ius cogens* in public international law. L. Alexidze, above n 274, p. 238.

[424] M. Virally, above n 297, p. 9.

[425] As a matter of fact, the principle of non-intervention has been mentioned in several occasions as an example of a *ius cogens* norm. "States may renounce their independence or give each other the right to intervene in their internal affairs. Such agreements would only be null and void – as violating international public policy – of they would envisage an intervention into the international affairs of a third State of is they would envisage aim at undermining the independence of such a State," E. Suy, above n 280, p. 73.

[426] See the example of the African Union.

[427] A. von Verdross, above n 342, p. 55.

[428] Rossene states that *jus cogens* was as an evidence that "the legal conscience of the international community had progressed", YbILC, 1963-I, p. 75. A similar conclusion was reached by R.Y. Jennings, 'Nullity and Effectiveness in International Law', in D.W. Bowett et al. (eds), *Cambridge Essays in International Law, Essays in Honour of Lord McNair*, London, Stevens & Sons, 1965, p. 74.

[429] The notion of "community interest" was used by the first rapporteurs of the ILC on the issue; after first appearing in J.M. Yepes' report in 1950, it appeared in the reports of J.L. Brierly and Lauterpacht, was absent in G. Fitzmaurice and reappeared in H. Waldock, the last rapporteur.

[430] "[D]ie tragenden ethischen Prinzipien," F. Berber, *Lehrbuch des Völkerrechts*, vol. I., Beck, München, 1960, p. 439.

[431] For a compilation of the most varied terms used in this regard, see R. Kolb, above n 4, pp. 73-74.

[432] For many, the acceptance of the *jus cogens* doctrine in the VCLT "was perceived as a major crisis of legal positivism," G.M. Danilenko, above n 279, p. 44. For an overview of the criticism on international public theories in the context of *ius cogens*, see J. Dugard, *Recognition and the United* Nations, Cambridge, Grotius, 1987; and M. Virally, above n 297, p. 10.

that there is a necessary and automatic conceptual identity between *ius cogens* and the fundamental values of international community amounting to an international public policy implies, *ipso facto*, that all recognized fundamental values translated into the fundamental principles of public international law are peremptory norms.[433] However, fundamental values encompass a larger normative universe than that of *ius cogens*.[434] They may ultimately and will probably coincide in some material examples, as in the case of the prohibition of the use of force and the protection against the most serious human rights violations. But norms embodying fundamental values are not necessarily peremptory. This is the case with all remaining fundamental principles of public international law that have not been unanimously recognized as *ius cogens*. As such, these are different legal concepts with distinct functions, scopes and definition. Most importantly, *ius cogens* is a feature attached to existing norms such as, but not exclusively, fundamental principles and values.

Deficiencies stemming from most of public policy theories[435] seem to be a consequence of an essentially moral perception of or extra-positive considerations on the functioning of the international legal system.[436] Essentially moral reasoning has served for several scholars to assert the existence of peremptory norms as a legal regime in international law, without bothering to justify those assertions on any other legal grounds.[437] This is a problem of different perceptions as per *lex lata* and *lex ferenda*.[438] For many authors, *ius cogens* would necessarily embody, beyond its role of validity when conflicting with other norms, a moral minimum of morality within the system that does not fall within the absolute discretion of states.[439] The problem, as noted by the representative of the United Kingdom

[433] "The notion of 'international *legal order* (which is a reality) should not be identified with that of 'international *public order*' which nowadays exists at best in an inchoate form and has not yet developed to the point at which it could acquire the quality of effectiveness," J. Sztucki, above n 287, p. 165.

[434] "N'ayant à l'esprit que le *ius cogens* protecteur des valeurs fondamentales, l'on déduit que toute autre expression d'impérativité ne peut pas relever d'un concept réel de *ius cogens* international. Le vice du raisonnement saute aux yeux si l'on prend soin de bien éclairer la base d'induction ou de déduction," R. Kolb, above n 4, p. 174.

[435] For the ILC Spanish member of the ILC de Luna, *ius cogens* "satisfied moral, economic and socio-logical requirements which were essential for the existence of an international society, and were therefore imperative and absolute", in YbILC, 1963-I, p. 72.

[436] See generally, N. Politis, *La Morale International*, Neuchatel, Editions de la Baconniere, 1943. Virally argues the need for resorting to material considerations of ethics and politics, while also recognizing that "une telle appréciation est nécessairement subjective et, par conséquent, ne répond pas à des critères très stricts," M. Virally, above n 297, p. 19.

[437] "A survey of both the older and the more recent literature shows, however, that the writings on the subject [*ius cogens* as related to international public order] have been theoretical statements by learned authors not substantiated by references to rulings of international courts or tribunals, to less authoritative state practice, or to diplomatic proceedings and correspondence," E. Schwelb, above n 283, p. 949. As noted by Danilenko, "a preoccupation with broad natural and moral foundations of *jus cogens* may explain the clear disregard of fundamental questions of legal form characteristic for the process of the elaboration of the new concept of general international law." G.M. Danilenko, above n 279, p. 44.

[438] M. Virally, above n 297, p. 19.

[439] "The law of civilized states starts with the idea which demands the establishment of a juridical order guaranteeing the rational and moral coexistence of the members," A. von Verdross, above n 1, p. 574; "la

during the negotiations for the VCLT, is that "what might be *jus cogens* for one state would not necessarily be *jus cogens* for another."[440] With the exception of international jurisdictional activities,[441] the first question to be made, if one takes as a premise the denial of the will of States in the debate on *ius cogens*, is who determines what is moral or immoral in international law.[442] The answer to this question impacts directly on the potential use of this type of legal reasoning before international courts, for example.[443] Defining morality in international law is potentially even more contentious than international public policy due to the intrinsic multicultural[444] and diverse political components of the international community.[445] But international law, and particularly *ius cogens*, cannot be entirely subject or fully explained by the morality of their material content.[446] Some sort of "acceptance" and "recognition" are non-dissociable elements of any normative law-making process in public international law.[447]

Moreover, existing limits are not an exclusive consequence of moral imperatives. One cannot dispute the need to protect fundamental values in any given legal order.[448] This is also needed – indeed, probably even more so – in the case of the

norme impérative procède directement d'un jugement de valeur morale ou sociale," Ch. de Visscher, above n 341, p. 9. See also M.W. Janis, above n 340, p. 361.

[440] UNCLOT, 1st session, p. 305.

[441] See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 23.

[442] Even Virally, who understands *ius cogens* norms as "étant l'expression d'un intérêt commun à la société internationale toute entière ou d'une prescription éthique reconnue universellement," acknowledges that the lack of a necessary international jurisdiction is a problem for the determination of peremptory norms. M. Virally, above n 297, p. 22.

[443] J. Pauwelyn, above n 5, p. 8.

[444] On multiculturalism, see C. Lévi-Strauss, *Race et Histoire*, Paris, UNESCO, 1956. The author does not argue, however the possibility of cultural relativism as an excuse for violations of international obligations, such as those related to international human rights law. In this case, the cultural relativism is simply flawed because those rights and obligations do exist and are universally binding as recognized norms of international law either as treaty or customary obligations. In any case, there is no need to resort to extra-juridical reasoning.

[445] Acording to Hart, classifying international law as to its intrinsic 'morality' "is to invite to confusion." He argued that regardless of their moral appeal, what predominates in international law arguments "are references to precedents, treaties and juristic writings; often no mention is made of moral right or wrong, good or bad." H.L.A. Hart, above n 36, pp. 222-223.

[446] H.L.A. Hart, *idem*, p. 223. "[M]oral factors in contemporary international law play a great role in imparting to certain norms of international law the nature of general human values and in strengthening their legal compulsory nature; however, such factors cannot replace legal rules within the international legal order," L. Alexidze, above n 274, p. 252. "Alors que le droit naturel de naguère était conçu comme extérieur et supérieur au droit positif, le jus cogens d'aujourd'hui fait partie intégrante du système, puisque c'est le droit international lui-même qui définit certaines normes de rang supérieur auxquelles la volonté des Etats ne peut déroger." P. Weil, above n 288, pp. 266–267.

[447] "One should not confuse the moral and political precepts of progressive humanity with legal norms which impart a legally obligatory nature to them. Until the moral norms are fixed in law they, with all their effectiveness as factors influencing the behavior of States, cannot serve as a source of law," L. Alexidze, *idem*, p. 252. See also the statement of the representative of Brazil, UNCLOT I, p. 317; and G.M. Danilenko, above n 279, p. 46.

[448] On its advisory opinion on the Genocide Convention, the ICJ stated that "its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the Contracting States do not have any interests of

international legal order, which lacks a supranational authority that exclusively concentrates legislative activities and essential functions of Justice.[449] While we seem far from an undisputable "social contract" or a "cosmopolitan condition" among states in international law, it is certainly desirable and necessary to envisage that there are fundamental values inscribed within the international legal order that need to be realized and guaranteed in inter-subjective relationships.[450] Such values can be found, for example, in the fundamental principles of public international law expressed in the UN Charter, or intergovernmental deliberations further reinforced by doctrine. But without advocating for an "amoral" or, even worse, an "immoral" international legal system, or proposing an unethical theory of inter-states relations, the whole discussion on morality in international law seems to fall beyond a study focused primarily on the essential features of *ius cogens*. As a matter of fact, relevant developments in contemporary international law have been achieved by overcoming moral or ideological arguments, while also providing for positive obligations in the various fields.[451] The very codification of *ius cogens* is explained, from a legal-sociological perspective, as a response for the growing demand for some sort of limitation for the Hegelian notions of an absolute and sovereign will of states.[452] But in public international law, it

their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d'être of the convention (…).The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of its provisions." *Reservations to the Genocide Convention* case, above n 441, p. 23.

[449] "The view that it is only possible to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law," Opinion of the Judge Winiarsky, *Effect of Awards of Compensation Made by the UN Administrative Tribunal*, Advisory Opinion, ICJ Reports 1954, p. 65. See also R. Jennings, above n 428, p. 74. Per *contra*, see P. Guggenheim, 'La validité et la nullité des actes juridiques internationaux, (1949-I) 74 *R.C.A.D.I*, pp. 207-208, on the need for an institutional body to declare nullity in international law.

[450] Brierly regretted that a public policy "n'a encore été possible en droit international et ne paraît probable dans un prochain avenir." He recognized that there is no positive restriction to the object of agreements bewteen states and concluded his thought by saying that "tant que les Etats s'attacheront à cette liberté presque illimitée, tant qu'ils refuseront de coopérer à la formation d'un principe d'ordre public international, leurs traités continueront à mener à des situations dont le maintien pourra mettre en péril la paix du monde," J. Brierly, 'Régles générales du droit de la paix,' (1936) 58 *R.C.A.D.I.*, p. 219.

[451] "Le développement contemporain de la société internationale nous rend témoins d'un rapprochement des conceptions éthico-juridiques des Etats qui la composent, malgré les oppositions idéologiques qui continuent de les diviser," M. Virally, above n 297, p. 24. Indeed, in 1972, in the Stockholm Conference, multilateral negotiations started from Malthusian theories according to which limitations should be imposed upon developing countries in their use of their natural resources due to their population growth. Twenty years after, in the 1992 Rio Conference, the concept of "sustainable development" was finally accepted, based on the recognition of "common but differentiated responsibilities." It also worth mentioning the role that has been played by the Universal Periodic Review (UPR) of the Human Rights Council, which, for the first time in the multilateral system, has established a review of each specific human rights situation of all Member States of the United Nations. And it is on issues still under a great deal of influence of extra-legal notions such as "morality" and "civilization" that that we find more controversy due to selectivity and politicization. See the debate on responsibility to protect as described in Part V below.

[452] "[A]lthough (…) most of these norms derive from ethical or sociological considerations, their character derives from within international law and from the will of States." R. Nieto-Navia, above n 332, p. 636. Also, the Report of the Sixth Committee of the General Assembly at its XVIIIth Session states that "the evolution of the international community in recent years, above all with impetus of the Charter, helped to turn the notion of *jus cogens* into a positive rule of international law," Doc. A/5601, para. 18, 6 November 1963.

fundamentally represents a positive law-making process that still hinges upon its recognition by a valid source of international law.[453]

Finally, peremptory norms are not defined only by the material limitations imposed upon the contractual freedom of States. Consider the prohibition of genocide, for example, which is widely recognized as a norm of *ius cogens* nature under international law. Any treaty or arrangement allowing or establishing measures aimed at causing genocide must be considered null and void. But the imperative and non-derogable aspects of the prohibition of genocide, that is its *ius cogens* nature, do not stem primarily from the material limitation it imposes to treaty law. It is a peremptory and non-derogable prohibition because state practice, international judicial decisions and doctrine have unanimously expressed the international repulse and unacceptability of such a behaviour in international inter-subjective relationships, rather than the expression of the need to curb the autonomous sphere of the will of states in the exclusive context of the Law of Treaties. Indeed, this issue would hardly fall within a material scope of a "private" arrangement among states in contemporary reality, unless for further extending its scope of application.[454] Of course this norm reflects fundamental values within the international community, but instead of its alleged extra-positive existence as a

[453] "The call for positive validation of peremptory norms through the 'acceptance' and 'recognition' by the community of states clearly brought the concept of *jus cogens* into the realm of positive law," G.M. Danilenko, above n 279, p. 46.

[454] Although the risk of states committing this heinous crime is still a sad reality in contemporary world, it is hard to conceive on these days an international agreement, even one of a secret nature, setting common objectives and responsibilities on how to willingly exterminate a certain group of people. "It is rather improbable that two states which intend to pursue a policy of genocide would put this intention down in black and white in a treaty and that, if one of them subsequently backed out, the other would sue it in an international tribunal. The treaty would, in the writer's view, be certainly illegal and unenforceable. It would clearly be in conflict with the obligations arising from articles 53 and 56 of the Charter, which, under Article 103, would prevail over it. It may be asked, therefore, whether the recourse to the construction of a *jus cogens* rule of customary law having miraculously emerged between 1946 and 1948 is necessary to cover a situation of this kind," E. Schwelb, above n 283, p. 955. One should ask rather whether treaties granting immunity for state representatives accountable for crimes considered *ius cogens* should not be considered null and void in the light of article 53 of the VCLT. Several countries have signed agreements not to surrender or transfer nationals to the International Criminal Court (ICC) with regard to prosecution for genocide, crimes against humanity and war crimes; according to Human Rights Watch, "the most important [signatories of the U.S. agreement] include Israel, India, Egypt, Romania, and the Philippines." By July 1, 2003, 48 countries had have signed such an agreement with the United States, most of them small and least developed countries which have not ratified the ICC Rome Statute either. Alternatively, it should be asked whether there is a conflict with *ius cogens* in the case of arms trade agreements, or any other treaty that may contribute to the continuity of facts on the ground, in which, on grounds of complying with the principles of *pacta sunt servanda*, states may voluntarily provide arms to other states in which gross and systematic human rights and humanitarian violations are taking place. But even in this specific case, the *prima facie* violation of *ius cogens* would be the occurrence of genocide itself. Only at a secondary level one could determine if an arm flow had contributed to it and how the provisions of such a treaty would cause its nullity. Determining the absolute nullity of such a type of treaty exclusively on grounds of contradicting a peremptory norm would depend on the existence of a cause-and-effect relationship of facts on the ground (the systematic use of arms provided for a certain agreement), something still very complex to be determined. In any case, the prohibition of genocide is not primarily recognized as *ius cogens* because of the limits it imposes to States' transactions (treaty law), but rather because of the universal recognition of its imperative prohibitory character. *Per contra*, see Michael Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' (1997) 66 *Nordic Journal of International Law*, p. 214.

norm of public policy, it is rather its "positive" existence in the international legal system (acceptance and recognition of the *ius cogens* nature of certain aspects of provisions stemming from treaty and customary law in the area of genocide) that provides it with a *ius cogens* nature.[455]

In conclusion, and beyond the very discussion on the actual existence of an international public policy,[456] the concept of *ius cogens* cannot be explained on the basis of its overriding identity with *ordre public*.[457] These are different concepts, with different material scopes and functions.[458] Peremptory norms guarantee only their own integrity and their own non-derogability. They do not exist as a guarantee of the material integrity of the whole normative universe corresponding to the "general interest" of the international community. Public policy and even constitutional regimes, on the other hand, guarantee the validity and integrity of all norms in a given legal system, including those resulting from private transactions. At the material level, peremptory norms can eventually pertain to the domains of both "international public policy" and *ius cogens*.[459] But it is inaccurate to explain the existence of peremptory norms on the basis of an alleged material identity with *ordre public* in the international legal system. Instead of the ultimate evidence of their inextricable identity, these are just common aspects to both concepts. An overriding identity between domestic and international public policies is therefore not only erroneous, what hinders a proper analogy, but also overlooks the fact that *ius cogens* and public policy norms have different natures and scopes, as well as operate differently within legal systems.

[455] Suy recognized that "*jus cogens* principles were positive law norms," in G. Abi-Saab, above n 409, p. 112.

[456] See, for instance, I. Sinclair, above n 278, p. 139; Ch. Rousseau, above n 73, p. 150-151. In his revaluation of public policy theories, Kolb favours the existence of an international *ordre public* but rejects its automatic identity and overlapping normative redundancy with the concept of *ius cogens*. While recognizing that an international public policy must be perceived as the expression of superior, fundamental and constitutional rules of international law ("aéropage normatif"), he argues that *ius cogens* could only be understood as a subcategory of the former concept (*genus ad species*). R. Kolb, above n 4, pp. 188-189.

[457] The initial negative reaction from positivism to the debate on premptory norms seems have been primarily due to the natural law and public policy premises upon which those theories have first addressed the concept of *ius cogens*. In Sztucki's opinion, "[t]his is why an attempt has been made to set the modern concept of an international *jus cogens* into a framework of 'positive law'," J. Sztucki, above n 287, p. 62.

[458] "The concepts of *ordre public* or public policy, which are known to the civil law and to the common law systems, do not entirely coincide with the concept of *jus cogens*," E. Schwelb, above n 283, p. 948. "Under the circumstances one may doubt whether it is realistic to-day to speak of an international public policy of a universal content and application; and consequently, whether sufficient premises exist for the operation of an international *jus cogens*," J. Sztucki, above n 287, p. 9. On domestic and international public policies, Virally stated that "les analogies utilisées ici, plutôt que d'éclairer la notion qu'on cherche à définir, ont pour effet de susciter des obstacles artificiels à son introduction dans le droit international." M. Virally, above n 297, p. 7.

[459] "La cause du *ius cogens* n'est pas simplement l'ordre public… Il s'attache donc à d'autres normes non-dérogeables en dehors de l'ordre public. Dès lors, non seulement il n'est pas identique avec l'ordre public, mais de plus in n'est pas exclusif aux normes d'ordre public. L'ordre public n'étant qu'un confluent du *ius cogens*, il ne peut fournir le fondement exclusif de sa définition. " R. Kolb, above n 4, p. 83. According to Alexidze, "*jus cogens* differs from *ordre public* by its scope – all rules of public policy belong to *jus cogens*, but not every rule of *jus cogens* is of *ordre public* nature." L. Alexidze, above n 274, p. 241. This opinion is similar to van der Meersch's, who affirmed that a rule of *ius cogens* does not predetermine the public policy, since public policy is not identical with *jus cogens*. Accordingly, the object of a rule of *jus cogens* does not necessarily relate to public policy, while rules of public policy belong to *jus cogens*. G. van der Meersch, above n 398, p. 10.

Section III – *Ius cogens* as the expression of an institutionalized international community

The concept of *ius cogens* was also developed by theories associating the existence of peremptory norms to the institutional character of the international community.[460] For the study on *ius cogens,* the idea of a legally organized international community derives directly from the language used in article 53 of the VCLT, which establishes that "a peremptory norm of general international law is a norm accepted and recognized by *the international community of States as a whole*."[461] Generally rooted in premises stemming from public policy theories (fundamental values and material limitations upon the will of States), several authors have argued that the codification of *ius cogens* would have represented the emerging legal order of the so-called "international community."[462] *Ius cogens*

[460] Ancient origins of a normative or institutional "international community" can be found in classical Natural Law doctrine, such as in the works of Vitoria (*totius orbis*), F. de Vitoria, above n 324. Suarez ("unity of mankind") or Wolff (*civitas maxima*). According to Wolff, the limits of the sovereign will of the *civitas maxima* would be determined by its very end, i.e., the common welfare ("the rights of nations as a whole over individual nations cannot be extended beyond the purpose of the supreme state into which nature herself has combined them"). By that, Wolff intends to demonstrate the existence of such sovereign rights of the supreme states over individual nations on the basis of an analogy with domestic legal system, in which a certain sovereignty over individuals belongs to the whole in a state. But such a right entitled to the community of states as a whole is not to be confused with the final result of the will of all states individually taken. Wolff states that *ius voluntarium* is "considered to have been laid down by its fictitious ruler and so to have proceeded from the will of nations. The voluntary law of the nations if therefore equivalent to the civil law, consequently it is derived in the same manner from the necessary law of nations." See C. Wolff, above n 1, Prolegomena, paras. 14-15, p. 15. Contemporarily, in a Declaration as the ICJ's President, the Algerian Judge Mohammed Bedjaoui took the view that "although the concept of an international community is of course very old it was much developed after the Second World War, and especially during the last part of the Twentieth Century." Not fortuitously, such a reference was made in the context of argumentation supporting the existence of values and interests common to the international community as a whole as opposed to the specific and particular interests of individual states. *See* the Declaration of President, *Nuclear Weapons* case, above n 187, para. 13.

[461] On the question of "double consent" of states as per the recognition of *ius cogens* norms, see Chapter IV below on the definition of the concept.

[462] Virally asserted that the notion of *ius cogens* as codified by the VCLT would be conducive to a "société internationalle universelle" "à laquelle les Etats ne sont pas libres de s'ouvrir ou de se refuser." M. Virally, above n 297, p. 14. For Christos Rozakis, the concept of *ius cogens* norms as codified in article 53 of the VCLT means that a peremptory norm is obligatory for the whole international community, regardless of a state opposition or the demonstration that there was no acceptation and recognition of such a norm, or even if a given state has expressly denied its existence as such. He is implicitly denying, therefore, the possibility of an open contradiction as it may happen with international customary law, for the highest interests of the international community as a whole are placed under the protection of norms *iuris cogentis*. C. Rozakis, above n 302, p. 78. Abi-Saab takes the view that the emergence of *ius cogens* represents a "turning-point from unorganized to organized international society", for "such *ius cogens* aims at the protection of the interests of the international society as a whole rather than those of individual States." G. Abi-Saab, above n 274, p. 13. Hannikainen asserts that the peremptory character is presumed when it protects overriding interests or values of the international community, which would be jeopardized by its derogation. L. Hannikainen, above n 277, p. 207. In this same reasoning, Tomuschat affirms that the recognition of a distinct category of norms, namely that of *ius cogens*, is the most tangible evidence of an international community founded on axiomatic premises different from the idea of state sovereign. Christian Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law' (1999) 281 *R.C.A.D.I.*, p. 307. See also R-J Dupuy, 'Communauté Internationale et Disparités de Developpement, Cours général' (1979-

would thus be defined as an institutional guarantee for the priority of the general interests of the international community over the particular interests of States.[463]

References to an institutionalized international community in the context of *ius cogens* are usually related to the central role of international organizations in this area. The institutional functions of the normative universe of certain organizations, particularly the United Nations, would provide the framework for the operationalization of the legal regime of peremptory norms *vis-à-vis* other norms within the international system, in particular the pre-eminence of the general interest over the particular.[464] Peremptory norms would consequently operate as a means of applying and protecting the integrity of the constitutive normative principles of the institutionalized international community.[465] *Ius cogens* norms, such as the prohibition of the use of force and racial discrimination, or the principle of self-determination, would at once reflect, reinforce and protect the integrity of the fundamental principles of the organized international community

IV) 165 *R.C.A.D.I.*, pp. 9 and ss; J.A. Carrillo Salcedo, 'Droit international et souveraineté des Etats. Cours général de droit international public', (1996) 257 *R.C.A.D.I.*, 132; A. Gómez Robledo, above n 297, p. 204; A. Gómez Robledo, above n 335, pp. 60-78; E.P. Nicoloudis, *La nullité de* ius cogens *et le développement contemporain du droit international public*, Athens, 1974, p. 10.

[463] In his study on *ius cogens*, Kolb differentiates doctrinal views on the issue between those authors who advocate a "necessary community" ("communauté nécessaire") from those who perceive it as a "specific community" (communauté spécifique"). In the first case, the community is a consequence of the existence of international law, as developed by the institutionalist school in the general theory of Law. See S. Romano, *L'ordinamento giuridico*, Pisa, Mariotti, 1917; G. del Vecchio, 'Moderni concezioni del diritto', (1927) 1 *Rivista Internazionale di filosofia del diritto*, 1921, p. 191. In the context of *ius cogens*, Yasseen expressed such a perception of a necessary international community during the deliberations of the ILC. Although slight differently, i.e., by highlighting an idea of a minimum necessary normative universe of norms for the international community, Bartos also said in the ILC that he was convinced that "the international public order was merely the superstructure of the international community which resulted from the evolution of the international society. It was the minimum of rules of conduct necessary to make orderly international relations possible." YbILC, 1963-I, p. 76. De Luna also asserted that *ius cogens* represented the "minimum framework of law which the international community regarded as essential to its existence," *idem*, p. 77. The second type of an institutionalized "international community" is based on the "Grotian" idea of common good or specific solidarities instead of necessity. See R. Kolb, above n 4, pp. 77-80.

[464] There would be a logical identity, therefore, between international organizations of a universal character, such as the UN, and the so-called institutionalized international community. See A Gómez Robledo, above n 335, p. 20; B. Conforti, *Diritto* internazionale, 4ed. Napoli, 1992. pp. 180-6. In his response to Schwarzenberger denial of the existence of an organized international community serving as a basis for *ius cogens* norms, Verdross, for instance, contested that the principles of the UN Charter would be applicable to the entire international community precisely as a consequence of the competences of the UN Security Council, as provided for by article 39. The Charter and its fundamental principles would represent "the most important part of the constitutional law of the present international community." Hannikainhen argued that "at present it can be said that the United Nations . . . acts on behalf of 'the international community of States as a whole" on the basis of Article 53 of the U.N. Charter, in L. Hannikainen, above n 277, p. 5.

[465] Such a perception was also conveyed by Judge Ammoun in his separate opinion in the *Barcelona Traction* case, in which he claimed that "through an already lengthy practice of the United Nations, the concept of *jus cogens* obtains a greater degree of effectiveness, by ratifying, as an imperative norm of international law, the principles appearing in the preamble to the Charter." *Barcelona Traction Light and Power Company, Limited* (Second Phase) (Judgment), ICJ Reports 1970, p. 304.

stemming from instruments such as the UN Charter[466] as a consequence of their non-derogable nature.[467]

Explaining the existence of *ius cogens* on the basis of an institutionalized international community is an attempt to address some of the deficiencies of public policy theories, notably the denial of any role to be played by will of States in the emergence of peremptory norms. But without touching upon the doubts already cast by doctrine[468] and States[469] on the very legal existence of an "international community" as such, the lack of an undisputable international institution with compulsory jurisdiction and decision-making competences affecting indistinctively all States challenges any association between the legal regime of *ius cogens* and the legal framework of international organization.[470] The material content of peremptory norms does tend to coincide with the fundamental principles of the UN Charter.[471] Indeed, the three most accepted norms of *ius cogens* in international law, namely the prohibition of the use of force, the prohibition of the most serious violations of international human rights and the principle of self-determination, reflect fundamental principles of the Charter. But regardless of a material coincidence, establishing a necessary link between the existence and functioning of *ius cogens* with the law of international organizations as the expression of an institutionalized international community ignores the possible emergence of

[466] UN Charter Art. 1, paras. 1-3: the promotion of international peace and security, friendly relations among nations, and human rights and fundamental freedoms.

[467] Virally's reasoning is further reinforced by the growing and recurrent practice among newly independent States of seeking international recognition by joining the United Nations. This dynamics, which dates back to the period of decolonization, was further reinforced by the dissolution of the soviet bloc in the aftermath of the fall of the Berlin wall in 1989, which was followed by the membership of small Pacific island states and other still remaining Western European [Azerbaijan (1992), Andorra (1993), Armenia (1992), Bosnia and Herzegovina (1992), Croatia (1992), Czech Republic (1993), East Timor (2002), Estonia (1991), the Former Yugoslav Republic of Macedonia (1993), Eritrea (1993), Marshall Islands (1991). Kazakhstan (1992), Kyrgyzstan (1992), Kiribati (1999), Latvia (1991), Liechtenstein (1990), Lithuania (1991), Micronesia (1991), Monaco (1993), Montenegro (2006), Namibia (1990), Nauru (1999), Palau (1994), Republic of Korea, (1991), Republic of Moldova (1992), Democratic Republic of Korea (1991), San Marino (1992), Serbia (2000), Slovakia (1993), Slovenia (1992), South Sudan (2011), Switzerland (2002), Tajikistan (1992), Tonga (1999), Turkmenistan (1992), Tuvalu (2000) and Uzbekistan (1992)]. Notwithstanding the outdated framework of some of its main bodies, among which the composition of the Security Council is the outstanding example *vis-à-vis* contemporary realities, days are gone when states could still regard the United Nations as an organization resulting from the immediate balance of power emerging from World War II. Today, only Palestine, Taiwan and Western Sahara are not members of the UN, being the second one replaced in 1971 by the People's Republic of China as representing China in the UN Security Council. The other two issues are directly related to territories under occupation.

[468] P. Weil, above n 288, pp. 306-312; Ch. de Visscher, above n 36, pp. 110-116.

[469] In 1999, the Permanent Representative of India in the Security Council challenged NATO's view according to which the West was bombing Serbia on behalf of the so-called "international community". See UNDOC S/PV 3988 (24 March 1999), p. 15-16.

[470] Sztucki noted that "the course and the outcome of the official discussions [at the Vienna Conference] have shown that the effective existence of a supranational factor – in spite of progressing organizational development and institutionalization of the international community – still belongs to the realm of wishful thinking rather than to the actual realities of our world," J. Sztucki, above n 287, pp. 9 and 63.

[471] "There is no doubt that the fundamental principles of general international law are those in which international *jus cogens* should be sought. While not all those principles can be qualified as *jus cogens* rules, the bulk of the fundamental principles have a peremptory character," L. Alexidze, above n 274, p. 260.

peremptory norms from other sources than those within international organizations, such as norms of *ius cogens* in the area of international humanitarian law, which have been developed outside the exclusive scope of the United Nations.

Section IV – *Ius cogens* as a material representation of *ius publicum*

Another material approach, generally presented as a piece of criticism to public policy theories, presents *ius cogens* in terms of its historical existence in Western General Theory of Law, particularly as expressed in the opposition between *ius publicum* and *ius dispositivum*.[472] Although views may differ as to the operationalization and, most importantly, to the identification of peremptory norms, there is a common understanding in *ius publicum* theories according to which *ius cogens* is a legal regime inherent to Law as a system.

The analogy with Roman law plays an important role in this material definition of *ius cogens*.[473] As a broad concept, *ius publicum* entailed norms of public law *stricto sensu*, such as those regarding the structure of the State (civil condition of individuals, participation of citizens in the political process, public administration, criminal law and tax law, among other issues), as well as specific norms of private law, such as some rules prescribing civil obligations (debt issues, for example). The common aspect was that these were rules from which individuals could not depart from in their particular agreements.[474] In the nineteenth century, the notion of *ius cogens* as a law binding legal subjects irrespective of the particular will of the parties was further developed by the work of German Pandectists on the general theory of Private Law.[475] Based on the distinction between *ius cogens* and *ius dispositivum*, the legal nature of peremptory rules was based on the assumption that there exist limits imposed upon the freedom of contracting parties in their *inter se* relations. The intrinsic force entailed by *ius cogens* resulted from the prevalence of the general or common interest over the particular interests.[476]

In international law, the notion of *ius cogens* as traditionally understood by these theories is related to that particular conception of *ius publicum* portraying

[472] E. Suy, above n 280, p. 63; L. Alexidze, *idem*, pp. 220-269.
[473] The words *ius cogens* as such appear only once in Roman law, in the context of private donations. See E. Suy, *idem*, pp. 18-19. In Roman Law, rules could or could not have an explicit peremptory character. Courts were able to determine the nature of the norm in question on the basis of the formula *ius publicum privatorum pactis mutari non potest* (Dig. II, 14, 38), but this formula is repeated several times in the Digest.
[474] V. Kaser, *Das römische Privatrecht*, 1955, pp. 174-175.
[475] Friederich Carl von Savigny, *System des heutigen römischen Rechts*, Berlin, Veit un comp, 1840. See also Christian Friedrich von Glück, *Ausführliche Erläuterung der Pandekten;* and Bernhard Windscheid, *Lehrbuch des Pandektenrechts*.
[476] L. Alexidze, above n 274, p. 233. Savigny said that some *ius cogens* rules protect the rights of private persons (legal capability as per age limitation, for instance), others express moral fundamentals and public welfare. See F. Savigny, above n 475, p. 35.

peremptory norms as the limits imposed to the contractual freedom States, as a consequence of the prevalence of the public interest of the international community over the individual interest of States.[477] The result of what could be called as a "synthesis" of wills would materially correspond to "those principles or rules of general international law which contain such moral demands of progressive mankind which cannot be derogated from every mutual agreement of contracting States."[478]

In an extensive analysis of the concept of *ius cogens* in the general theory of law and, more precisely, of its development within the epistemological universe of Private Law in Western tradition, Kolb attaches the concept of *ius cogens* to the notion of *utilitas publica gentium*. The notion of *ius publicum* is used by the Swiss author as a means to express the public interest in international law in the same manner that the notion of public interest operates within domestic or regional legal systems.[479] He argues that *ius cogens* is defined fundamentally by its role as a guarantee for the applicability and integrity of certain normative material contents *vis-à-vis* contradicting commandments stemming from the private sphere of autonomy (of states, in international law). In such a restrictive perception, in which *ius cogens* could only be a species of the gender of public policy,[480] the concept of peremptory norms operates as an exception to the principle of *lex specialis derogat legi generali* because it embodies the general interest in international law.

The main deficiency of *ius publicum* theories is due to the reproduction in international law of the opposition between *ius publicum* and *ius privatum* as existing in domestic legal systems.[481] But defining *ius cogens* as to a necessary

[477] Alexidze describes this public and common interest not in terms of the dissolution of the particular into the general interest nor as the mere sum of particular wills, but rather as a "common interest" deriving from mutually conditioned and adjusted interests "brought together under the pressure of existing factors." L. Alexidze, *idem*, p. 245.

[478] Based on an understanding of the international legal system that operates in a coordinative relationship, he alludes to the fundamental principles enumerated in the Preamble and Articles 1 and 2 of the UN Charter as an example of a "common coordinated interest" expressed in peremptory norms. But in the light of the decentralized character of the international legal system, he warns against the introduction in international law of all attributes of *ius cogens* as existing in domestic legal systems, particularly those stemming from the notions of public policy and good moral which are fundamentally dependent on their interpretation by competent judicial authorities. L. Alexidze, above n 274, p. 261.

[479] In a restrictive and essentially technical perception of the concept [(i) non-derogability of a general (not universal) regime by a particular regime and (ii) limitation to the law-making power of subjects of law], Kolb draws the conceptual roots of the concept of *ius cogens* from the differentiation between public and private law in the Western legal tradition: from the ancient origins in Roman Law (duality of *ius publicum* and *ius privatum* according to *utilitas*), through the Middle-age relations between *ius commune* and *ius proprium*, until the modern conception of *ius permissivum* and *ius cogens* as developed by Pandectist Private Law authors in the nineteenth century. R. Kolb, above n 4, pp. 188-207.

[480] *Idem*, p. 188-189.

[481] Some authors, such as Virally, also admit that *ius cogens* is an old concept present in the large development of law, particularly of Private Law as far as doctrinal writings are concerned. But he casts some doubts whether the analogy can be drawn with public international law due to little evidence of state practice in this direction. Virally also did not accept the contention that the concept of *ius cogens* is a necessary component of every legal system, for although a legal system has to satisfy certain requirements for predictability and axiological foundations, there are several manner by which those requirements of

content reflecting *ius publicum* would imply the establishment of an additional *a priori* criterion for the recognition of peremptory norms, namely the differentiation between the "public" and the "private" domains in international law. In several domestic legal systems, particularly those of positive Roman-Germanic traditions, this differentiation is determined by constitutional provisions with clauses of non-derogability providing for specific methods of legislative modification (e.g., for constitutional amendments by means of quantitative quorum at legislative bodies or material limitations for popular legislative initiatives). As of now, however, there is no positive source of public international law indicating an irrefutable distinction between what matters pertain to the "public" or to the "private" spheres of States' interest.[482] Legislation concerning the nationality of individuals, for instance, which could be considered a matter of "private" concern of States[483] may equally me subjected to the international "public" concern, such as in the areas of apatridia or discrimination, including racism and gender. All material domains are inherently public at the international level, since every form of international law-making process may impact, directly or indirectly, upon the development of international law as a whole.[484] States may agree on issues materially circumscribed to their own and exclusive "private" universe of interests (reserved domain, such as boarders, trade, diplomatic immunity, common legal regimes for natural resources, rights of movement to persons, labour laws, pension systems and many others issues) without creating rights and obligations to third parties. Nonetheless, the continuous state practice combined with *opinio iuris* may amount, in the course of time, to recognized customary norms of general international law. The question of asylum, which first developed in Latin America, is an example of a norm developed essentially on the basis of state practice that has

imperativeness can be met besides the legal regime operated by *ius cogens*. Virally in G. Abi-Saab, above n 409, p. 95.

[482] According to Sztucki, "the existence of *jus cogens* in municipal legal systems presupposes a clear distinction between public law and private contract. Any such, or *mutatis mutandis* corresponding, distinction is lacking in international law." J. Sztucki, above n 287, p. 7.

[483] Legislation on this matter falls within the individual sovereign discretion of States.

[484] Pauwelyn's criticism on the general idea of "public interest" is particularly valid as regards the concept of *ius cogens*. He says that "[t]he idea is to make those norms binding on all states, even without their consent, on the ground that they serve a "public interest" and should hence be seen as benefiting also non-parties. This approach is essentially proposed as a way out of the free-riders problem faced in many fields of international relations." Although Pauwelyn himself accepts the application of the idea of "public interest" for peremptory norms, his criticism on the imposition of treaty obligations on non-parties as a means to achieve "global-common" goals could also be applied to the theory on *ius cogens*. His main piece of criticism is that those "lower" so-called "public interest norms" could create obligations for non-parties. But actually "higher" public interest norms, namely *ius cogens*, would arise bearing the same level of uncertainty, for they would equally hinge upon a subjective judgment by a non-centralized authority, and potentially in opposition to the principle *pacta tertiis* as categorically codified by the 1969 VCLT. And the fact of being norms of general international law does not change the possibility of States being persistent objectors. Indeed, the same reasoning used by Pauwelyn to address the alleged *erga omnes* effects of "lower" public norms could also be perfectly used to *ius cogens*: that it "amounts to reverting to a legal-technical means to solve an essentially political question, namely, how to induce more states to sign a treaty so as to avoid the free-riders problem." J. Pauwelyn, above n 5, pp. 104-110. Prosper Weil criticizes this idea by warning against importing those inherently subjective judgements into international law, because such subjectivity would run against the framework of co-operation that serves as the basis for the well functioning of the international legal system. P. Weil, above n 288.

turned into a recognized principle of customary international law.[485] It is no surprise, following this reasoning, that attempts have failed to differentiate conventional law-making processes respectively concerning public and private spheres of interest in international law, such as in the alleged distinction between "treaty-law" and "treaty-contract,"[486] or on the basis of the idea of "law-making treaties."[487]

Section V – Concluding remarks on Material theories

In view of the above, it does not seem adequate to define *ius cogens* on the basis of its material object.[488] Putting emphasis on alleged necessary material content overlooks the fact that *ius cogens* operates primarily as a particular quality of existing norms of general international law. The search for necessary material content for peremptory norms tends to be conducive to mistaken and usually overstretched perceptions as to the essential features and the manner of functioning of peremptory norms. More than that, it leads to conclusions, such as those reached by theories of *ordre public,* touching upon legal concepts with legal implications far beyond the core elements of peremptory norms in public international law.

[485] See the 1928 Convention on Political Asylum (Convention of Havana); and the *Asylum* case (*Request for interpretation of the Judgement of November 20th, 1950, in the asylum case*), ICJ Reports 1950.
[486] H. Triepel, *Völkerrecht und Landesrecht*, Leipzig, Verlag von C. L. Hirschfeld, 1899.
[487] "[T]here is no clear and dogmatic distinction between 'law-making' treaties and others." I. Brownlie, *Principles of Public International Law*, Oxford, Oxford University Press, 6th ed., 2003, p. 14.
[488] "A large majority [of participants] considered that the object of *jus cogens* rules was unsuitable as an operational and objective criterion for the determination of these rules. Instead, the narrower and more ascertaineble criterion of the effect of the rules, proposed by the International Law Commission, was generally considered more suitable," G. Abi-Saab, above n 274, p. 10.

Chapter II - Hierarchical theories on *ius cogens*

The codification of the concept of *ius cogens* led several authors to advocate the emergence of a formal or a material hierarchy in public international law.[489] Such a view was reflected in the deliberations of the ILC to the VCLT[490] and has been recognized by international tribunals, such as the ICTY,[491] and advocated by judges such as Cançado Trindade[492] and Lauterpacht,[493] at the ICJ. According to this vertical approach to *ius cogens*, the non-derogable character and the validity effects of peremptory norms would have established a hierarchy endowing certain norms, namely those of a *ius cogens* nature, with a subordinating status *vis-à-vis*

[489] "The emergence and assertion of *jus cogens* in contemporary international law fulfill the necessity of a minimum of verticalization on in international legal order, erected upon pillars in which the juridical and the ethical are merged", A.A. Cançado Trindade, 'The Expansion of the Material Content of *Jus* Cogens: the Contribution of the Inter-American Court of Human Rights', in D. Spielmann et *alii* (eds.), *La Convention Européenne des Droits de l'Homme, un instrument vivant - Mélanges en l'honneur de Chr.L. Rozakis*, Bruxelles, Bruylant, 2011, p. 29. "The idea of international *jus cogens* as a 'body of higher' of overriding importance for the international community is steadily gaining ground," M. Cherif Bassiouni, above n 416, pp. 768, and 801-09. "*[J]us cogens* norm holds the highest hierarchical position among all other norms and principles," M. Cherif Bassioni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, *Law and Contemporary Problems - Accountability for International Crimes and Serious Violations of Fundamental Rights*, Vol. 59 ", No. 4, (Autumn 1996), pp. 63-74. Pauwelyn admits that the codification of *ius cogens* amounts to "an emerging hierarchy of values," since this process "corresponds to an awareness that not all norms of international law should have the same status". Conseqeuntly, some norms should have a higher hierarchical standing because they "protect so important and universal a value." J. Pauwelyn, above n 5, p. 24. See also G.M. Danilenko, above n 279, p. 42. In the Sixth Committee of the UNGA, the Representative of Thailand (Watanakun) said that the concept of *ius cogens* meant the recognition in public international law of "superior norms in the hierarchy of international discipline," 18th Session of Sixth Committee, 1963, Summary Records, p. 50. Hierarchy can be understood as related both to the classification of norms within a legal system (broad sense) or to their relationship of superiority or inferiority (narrow sense). See Martti Koskenniemi, 'Hierarchy in International Law: A Sketch', (1997) 8 *EJIL*, p. 567.

[490] Yasseen asserted that "*jus cogens* raised not only the question on the autonomy of the will of states, but also on the order of precedence of rules of international law." He suggested that the hierarchy derived from *ius cogens* would be defined on the basis of the material importance of norms accepted as "necessary to international life" and "which could not be broken without given rise to general indignation or severe censure." According to the Iraqi member of the Commission, while in domestic orders precedence would be solved by specific criterion (competence of the legislative body or hierarchical position in the legal order), in international law the order of precedence was of a very complex nature, since "contracting parties themselves were the legislators and created the rules of law." After denying the possibility of precedence based on the number of states accepting the rule, and by also refusing to accept a formal hierarchy between the recognized sources of international law (relationship between sources). M. A. Yasseen, YbILC, 1963-I, p. 63. Bartos also supported "the precedence of that order (international public policy) over the will of states." *Idem*, p. 66.

[491] "A peremptory norm or jus cogens principle is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules," *Prosecutor v. Furundzija*, Judgement 10 December 1998, IT-95-17/1-T, para. 153.

[492] "Identified with general principles of law enshrining common and superior values shared by the international community as a whole, *jus cogens* ascribes an ethical content to the new *jus gentium*, the International Law for humankind." A.A. Cançado Trindade, Dissenting Opinion, p. 52, para. 182.

[493] "The concept of *jus cogens* operates as a concept superior to both customary international law and treaty." *Genocide Convention* case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*), (Provisional Measures, Order of 13 September 1993), ICJ Reports 1993, Separate Opinion, Judge Lauterpacht, pp. 439-441, para. 100.

ordinary conventional and customary norms.[494] This notion of a material hierarchy[495] in international law assumes that the codification of the concept of *ius cogens* would have implicitly recognized the existence of superior and fundamental norms entailing a relationship of absolute precedence among norms of international law.[496] Following this reasoning, *ius cogens* would operate similarly to public policies in domestic legal systems, i.e., as a guarantee for the integrity of the material normative universe superiorly situated within the system and embodying the fundamental values of the international community.[497]

In spite of the opposition of voluntarist authors,[498] the suggestion that there exists a hierarchy in international law stemming from *ius cogens* has gathered a substantial level of support among publicists in the debate on peremptory norms.[499] Indeed, the assumption of a hierarchy introduced by *ius cogens*[500] is closely related to a fierce criticism of legal positivism and its depiction of an essentially horizontal relationship between norms of international law.[501] The idea is that peremptory

[494] Judge Lauterpacht stated that "(t)he concept of *jus cogens* operates as a concept superior to both customary international law and treaty." *Genocide Convention* case, Separate Opinion, *idem*, p. 440.

[495] In the context of the discussion on *ius cogens*, hierarchy is understood not only as the concept of formal hierarchy as developed by authors such as Kelsen (H. Kelsen, *General Theory of Law and State*, Cambridge, Massachusetts, 1945), Hart (H.L.A. Hart, above n 36) or Verdross (A. von Verdross, 'Régles générales du droit international de la paix', (1929-V) 30 *R.C.A.D.I.*, p. 290), that is, as composed of a normative summit represented respectively by a hypothetic basic norm (*die Grundnorm*), or made of primary and secondary norms, or even of constitutional norms from which the whole legal system derives its validity and existence, but also as a notion of precedence derived from the importance of certain norms to the functioning of the international system. In this equally fundamentally material approach to hierarchy, the notion of structural precedence is built upon the assumption that certain norms are superior to others as a consequence of their substantive importance. See also P-M. Dupuy, *Droit international public*, 3.éd., Paris, Dalloz, 1995, p. 221; and R. Quadri places *ius cogens* norms as the "primary principles" above customary and treaty law, as the expression of "a psychological feeling of the collective body," R. Quadri, 'Cours général de droit international public,' (1964-III) 113 *R.C.A.D.I.*, p. 335.

[496] According to Martti Koskenniemi, the non-derogable character of rules of *ius cogens* places them at the summit of the international law hierarchy, above and beyond the reach of incompatible voluntary law. "Jus cogens or imperative norms (...) presuppose relationships of normative hierarchy." M. Koskenniemi, above n 491, p. 566. See also D. Shelton, above n 282, pp. 297-319. See also J. H. H. Weiler & Andreas L. Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?' (1997) 8 *EJIL*, p. 559.

[497] See Chapter I, Section II above, on international public order.

[498] In a positivist approach, Sztucki said that "one might expect … that this congcept [*ius cogens*], by according a higher hierarchy to a certain limited number of norms, would, at least, allow for a clarification of priorities," J. Sztucki, above n 287, p. 85. See also P-M. Dupuy, above n 495, pp. 14-16; and P. Weil, above n 13, p. 413. See Chapter III below on horizontal theories on *ius cogens*.

[499] For an overview on the issue, see J.H.H. Weiler & A.L. Paulus, above n 496, p. 545; and R. Kolb, above n 4, pp. 126-127. On the idea of normativity in Law, see Torben Spaak, 'Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification', (2003) 16 (4) *Ratio Juris*, pp. 469-85. See also A. Ross, above n 27; Joseph Raz, *The Authority of Law*, Oxford, Clarendon Press, 1979, Chapter. 3.

[500] Dupuy said that it would be a new type of hierarchy. P.M. Dupuy, above n 401, p. 281. And Pauwelyn described it as "the only instance of *a priori* hierarchy." J. Pauwelyn, above n 5, p. 98.

[501] De Luna asserted, in a manifestly criticism to the "formalist positivist school predominant in that period," that *ius cogens* "implied the existence of rules of international law which prevailed over the will of States and from which no derogation would be permitted," YbILC, 1963-I, p. 71. Orakhelashvili argues that article 53 of the VCLT is the "only visible exception" for the general positivist rule of "no categorical hierarchy of international instruments, for no instrument is inherently superior to another."

norms are tantamount to constitutional rules[502] of international law that do not hinge upon the will of states.[503] Such an assumption, in which peremptory norms create an exception to the *lex specialis* rule, would amount, as an effect of *ius cogens*, to what Rozakis described as a vertical system of law,[504] in which superior rules determine the validity of inferior rules both of general and particular international law. This hierarchy, in which there are necessarily superior and consequently subordinate relationships with other norms within the system (*lex superior derogat legi inferiori)*, implies an absolute precedence on the basis of the materiality of certain material norms.[505] The legal regime of *ius cogens* would represent the normative summit of the international legal system, from which stem hierarchical relationships with other inferior norms of general international law.[506] However, this exception to the *lex specialis* rule is not based on any institutional or positive norm of *lex superior*; instead, it derives from an axiological rationale as suggested by public policy theories.[507]

Section I – The UN Charter and *ius cogens*

Within the debate on a hierarchy introduced by *ius cogens*, instruments of a constitutional nature of international organizations, such as the Covenant of the League of Nations and the UN Charter,[508] have been used to support the idea that

[502] Orakhelashvili considers that the emergence of a "constitutional order" in which peremptory norms would consist of "constitutional limitations" to the "contractual freedom" of private actors, i.e., sovereign States. He says that in the domestic order there is a distinction as to constitutional norms and peremptory norms, even if there is an overlap among some of them, because norms *iuris cogentis* "relate to private constracts." See A. Orakhelashvili, above n 355, pp. 7-8. However, this analogy with the role of constitutional rules in domestic systems is not observed in several legal systems. In Brazil, for example, the list of what could be considered peremptory norms go far beyond the substantive universe of rules that do not fall under the discretionary powers of private arrangements, such as *habeas corpus*, *habeas data*, and the crime of racism, for example, all of which do not aim at limiting the autonomous will of private actors.

[503] YbILC, 1963-II, p. 72.

[504] C. Rozakis, above n 302, pp. 19-20.

[505] R. Kolb, above n 4, pp. 130-133.

[506] According to Kolb, "le *ius cogens* opère ainsi une exception à la règle *lex specialis derogat legi generali*. Cela nous donne la règle qui suit: *lex specialis inferior non derogat legi generali superiori.*" *Idem*, p. 131.

[507] Instead of the material importance of peremptory norms *per se* or the sanction of nullity applied to conflicting norms, Schweitzer defined the hierarchical nature of peremptory norms basically in terms of the relationship of precedence stemming from its non-derogable nature. M. Schweitzer, 'Ius Cogens im Völkerrecht', (1971) *A.V.R.*, pp. 218 and ss. Sztucki, on his turn, argues that the concept of *ius cogens*, as a positive norm of general international law, represents a consensual hierarchy among consensual norms. But as not all norms of a higher hierarchy are necessarily of a *ius cogens* nature, a consensual hierarchy does not forcibly lead to the nullity upon conflicting norms. Consequently, "the recognition of a hierarchically higher character of a norm offers *per se* no answer, or clue, to ascertaining whether or not the norm in question permits any derogation." In his view, Article 103 of the UN Charter would create a consensual hierarchy in public international law without providing for the nullity of conflicting treaties. J. Sztucki, above n 287, p. 97. See also E. Suy, above n 280, p. 72; E. Schwelb, above n 283, p. 959. On a more rigid distinction between the ideas of precedence and nullity, see B. Conforti, above n 464, p. 182.

[508] Article 103 of the Charter provides that "[i]n 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,

certain norms embody greater hierarchical effects than other ordinary provisions of treaties and customary law.[509] Accordingly, several authors have associated Article 103 of the UN Charter to a normative hierarchy of peremptory norms based on a relationship of precedence.[510] States would have established such a consent-based normative hierarchy by specifying that the Charter's provisions should prevail over incompatible "ordinary" norms of international law.[511] The counter-argument of the strictly contractual nature of article 103 as binding only UN Member States would be pointless, since the virtual universality of UN membership would imply the establishment of a hierarchy between the Charter's provisions and other treaties' obligations on a voluntary basis.[512] Article 103 would thus be an example of a *ius cogens* norm, potentially the most important one.[513]

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their obligations under the present Charter shall prevail." Such a rationale was already established by Article 20.1 of the Covenant of the League of Nations, which provided that "The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof."

[509] "The Charter of the United Nations also contains principles which undoubtedly belong to the category of absolute principles of the *jus cogens*. The majority of commentators interpret in this sense Article 103 of the Charter," E. Suy, above n 280, pp. 72-3. See also, E. Schwelb, above n 283, pp. 957-959. Jean Salmon says that "l'introduction la plues nette du principe de hiérarchie, justifié par le caractère constitutionnel de l'acte, se trouve dans le Pacte de la Société des Nations et dans la Charte des Nations Unies." J.-A. Salmon, above n 11, p. 291. Nahlik argued the special position of the Charter as a *traité-loi* and as the constitution of the international society. See S. E. Nahlik and C.F. Amerisanghe, in G. Abi-Saab, above n 409, p. 107. However, most of authors supporting the peremptory nature of Article 103 do not advocate such a status. In the ILC, Ago's position prevailed in the sense that not all norms of the Charter are endowed with a *ius cogens* character, nor has the UN Charter the "monopoly" of creating *ius cogens*. Only the most important provisions of the Charter would be considered to be peremptory norms of general international law, binding Members and non-Members alike. Besides articles 102 or 103, which actually operate as formal rules of peremptory precedence and normative hierarchy, only a few other provisions of the Charter would be entitled with such a quality, such as the fundamental principles established in articles 1 (2) and 1(3), namely those of equality among nations, self-determination of peoples, of international cooperation and respect for human rights and for fundamental freedoms for all without distinction, the rules of article 2 or those specific competences and capacities established by Chapter VII. See also A. von Verdross, above n 342, p. 60; and B. Conforti, above n 464, pp. 181-184.

[510] In the ILC, A. El-Erian said that the provisions of Article 103 of the United Nations Charter had clearly established the supremacy of the provisions of the Charter over those of any other international agreement subscribed to by States Members of the United Nations, in YbILC, 1963-I, p. 17. See also B. Conforti, above n 464, p. 182; E. Suy, above n 280, p. 215; E. Schwelb, above n 283, p. 957; E.P. Nicoloudis, above n 462, pp. 127-8; E. Jiménez de Aréchaga, (1964-I) *Annuaire CDI*, 742e séance, p. 74, paras. 27-8; Kamrul Hossain, 'Jus Cogens and Obligations under the UN Charter', (2005) 3 *Santa Clara Journal of International Law*, p. 72.

[511] According to the conclusions of the Lagonissi Conference in 1967, "the principles of the Charter are obligatory to all members of the international community." *Conference on international law,* Genova, 1967, pp. 13 and 14.

[512] The UN Charter is a "norm of general international law" and almost universally "accepted and recognized by the international community of states as a whole." Norms of the UN Charter also possess a universal acceptance and recognition and, particularly in the case of the purposes and principles enshrined in the Charter, there is a strong support by States with regard to their fundamental character, as reflected by the level of ratification of the Charter and by general state practice.

[513] B. Conforti, above n 464, pp. 181-184. The precedence of Article 103 led MacNair to argue that Member States could not contract out or derogate from those provisions of the Charter that create legal obligations, and that any treaty whereby such an effect would be pursued should be declared as void. This interpretation on the effects of the legal regime entailed by the UN Charter's provisions is analogous to the concept of *ius*

Nevertheless, article 103 does not result in the same nullifying effects as peremptory norms, i.e., it does not entail the invalidity of treaties conflicting with the Charter's provisions.[514] Its effects are limited to guaranteeing that, in the event of a conflict, obligations under the Charter are to prevail over obligations under other treaties. For that reason, some authors have tried to relativize the weight of nullity in the definition of peremptory norms.[515] In other words, the hierarchical function of *ius cogens* as reflected in article 103 of the UN Charter would not be primarily based on its role as a criterion of validity, but rather as an element to determine the normative precedence among different instruments in conflict with each other, as developed by customary and treaty law.[516] Nullity effects would be an accessory aspect attached to the specific definition of *ius cogens* as codified in article 53 of the VCLT.[517] Thus article 103, as well as other provisions of the UN Charter, could be characterized as peremptory norms although they would not necessarily entail nullity effects to colliding norms.[518]

Notwithstanding the foregoing, and besides an undisputable normative hierarchy established within the law of international organizations,[519] it is questionable that article 103 is evidence of a *ius cogens* normative hierarchy encompassing all norms of international law.[520] First, the Charter does not expressly establish the *ius cogens* character of its provisions. As a matter of fact, some of its provisions seem to be of a dispositive nature, particularly those provided for Articles 38, 52, 77 and 80, or even the provision of Article 38 (2) of the Statute of the ICJ, which provides the Court with the power to decide a case *ex aequo et bono* if the parties agree thereto.

cogens as defined by the sanctions applied to colliding norms of general international law. A.D. Mc Nair, *The Law of Treaties*, Oxford, 1961, p. 217.

[514] "Incompatibility with the UN Charter is not tantamount to the voidness of a treaty. Yet, it appears doubtless that the established incompatibility of a treaty with the UN Charter would, in practice, seriously affect the standing of the treaty in question," J. Sztucki, above n 287, p. 29. See also Gerald Fitzmaurice, Third Report on the Law of Treaties, YbILC, 1958-II, p. 43; and Waldock, Second Report on the Law of Treaties, YbILC, 1963-II, pp. 55-56.

[515] Conforti, for example, defined *ius cogens* essentially on the basis of its normative relationship of precedence deriving from its non-derogable character. B. Conforti, above n 464, pp. 181-184.

[516] "Article 30 - Application of successive treaties relating to the same subject matter - 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs."

[517] In his comments on normative hierarchical theories, R. Kolb called Conforti's differentiation respectively as *ius cogens specialis* and *ius cogens generalis*. See R. Kolb, above n 4, pp. 134-135.

[518] Suy alluded, In this regard, to Article 102 (2) of the UN Charter, which establishes the non-admissibility of invoking non-registered treaties in cases before the ICJ ("Article 102 (2) - No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations"). The restriction imposed by article 102 (2) would be an example of a sanction worth of being entitled of a *ius cogens* nature regardless of not causing nullity effects to non-registered treaties. E. Suy, above n 280, p. 65.

[519] "Sur le plan des Nations Unies … les différences entre non-opposabilité et nullité se réduisent en pratique à fort peu de chose", R. Kolb, above n 4, p. 135, p. 129; see also A. Orakhelashvili, above n 355, p. 7.

[520] "Professor Schwarzenberger did object to calling the Charter a "higher law", so long as it was realized that the permanent members of the Security Council could contract out of its principles *de facto* (Articles 27, 51 and 107). Thus, the United Nations was only an international quasi-order, because it rested on merelry confederate foundations," in G. Abi-Saab, above n 409, p. 100. *Per contra*, see T. Meron, above n 400, p. 177; J. Pauwelyn, above n 5, p. 99.

Most importantly, Article 103 differs from the legal regime of *ius cogens* both by its nature and functions. The rationale of Article 103 operates not as a criterion of validity but as one of non-opposability and precedence for rules of successive treaties relating to the same subject-matter.

Such a differentiation is clarified by the analysis of the relationship between the UN Charter and *ius cogens*. Consider if, by virtue of article 103, the law of the UN Charter as expressed through the resolutions of the Security Council could conflict with *ius cogens*. Following the rationale of a normative hierarchy based on the peremptory character of article 103, the very question of a conflict between a UN Security Council resolution and *ius cogens* would be pointless. At most, it could be interpreted as a question of collision between norms of *ius cogens*, since the obligations arising from the Charter would have the same peremptory nature than other norms of that same character.[521] However, several authors have maintained that there are situations in which Security Council resolutions may be contrary to *ius cogens*. That hypothesis reinforces the understanding that, instead of a hierarchy of a *ius cogens* nature, Article 103 of the UN Charter operates chiefly as a criterion of precedence and non-opposability: UN Member States cannot argue other conventional obligations as a means of avoiding the observance of binding obligations of the Charter such as those provided for by resolutions of the UN Security Council, in accordance with articles 24 (1) and 25. Article 103 has thus only established the priority between treaty obligations; it does not entail the nullity of conflicting agreements. It is simply a rule of priority between the rights and obligations provided for by the Charter and those stemming from other international agreements.[522] In short, it is a compatibility clause.[523]

Some authors may argue that, in practice, the distinction between non-opposability (articles 102 and 103) and nullity is not of a great significance due to the virtual universality of UN membership.[524] Yet such a conceptual definition of *ius cogens* disregards the centrality of nullity effects as a result of the operationalization of peremptory norms' legal regime.[525] By portraying *ius cogens* essentially as a rule of precedence in its vertical dimension that establishes a necessary hierarchy in the

[521] See, in this regard, the analysis of R. Kolb, above n 16, pp. 497-498.
[522] The ILC „viewed article 103, like similar provisions found in certain ther treaties, as directed to establishing the priority of the obligations of Members under the Charter rather than the invalidity of treaty clauses incompatible with those obligations." YbILC, 1963-II, p. 24.
[523] "Article 103 is a compatibility (priority) clause, and does not designate the Charter as a superior law comparable with the peremptory rules of international law." W. Czaplinsky & G. Danilenko, above n 19, pp. 16-17. When analyzing this question, Virally affirmed that Article 103 may have defined the constitutional nature of the UN Charter not in terms of a formal or a material hierarchy, but rather as a hierarchy limited to conventional engagements. M. Virally, above n 297, p. 27. See also Part I, Chapter II, Section II above.
[524] "The near universality of the membership of the United Nations reduces still more the practical difference between a Charter provision imposing obligations which prevail over those under any other international agreement and a peremptory norm of *general* international law," E. Schwelb, above n 283, p. 959.
[525] Kolb highlighted that an alleged normative hierarchy introduced by Article 103 of the UN Charter results in a divorce between two essential elements of the concept of peremptory norms, namely those of non-derogability and nullity. R. Kolb, above n 4, p. 135.

whole universe of international law, it extrapolates the scope of the codified norm of article 53 of the VCLT. Consequently, Article 103 cannot be used as evidence of the *ius cogens* nature of the Charter's provision, since it does not envisage the nullity of a colliding treaty, but simply a solution for conflicting obligations deriving from the Charter and from other international agreements.[526] Rather than representing a "higher law," Art. 103 is solely a rule of priority.[527]

Finally, peremptory norms may pre-exist multilateral treaties, even those of a recognized universal scope such as the UN Charter. Although none of the recognized peremptory norms nowadays pre-existed the UN Charter, the rationale here is that the *ius cogens* status of a given norm does not stem exclusively from the UN Charter as a result of the legal operation of Article 103. *In extremis*, the UN Charter itself would be subject to the legal regime of *ius cogens*, just like any other international treaty,[528] and provisions of the Charter, such as some of its fundamental principles, may eventually acquire the status of *ius cogens* as any other existing norm of general international law.[529]

Section II – Concluding remarks on hierarchical theories

The deficiencies of hierarchical theories are due to the fact that peremptory norms can be found at any level of an alleged hierarchy of norms in international law.[530] Regardless of its undisputed material relevance, *ius cogens* has not introduced a formal nor a material normative hierarchy of superior and inferior norms in the international legal system.[531] Besides the doubts on the very existence of a

[526] O.J. Lissitzyn, in G. Abi-Saab, above n 409, p. 92.

[527] J. Pauwelyn, above n 5, pp. 337-338. Orakhelashvili differentiates the hierarchy of *ius cogens* from other regimes in international law, such as Article 103 of the UN Charter. He says that this sort of hierarchy would be ultimately a consequence of the will of States to determine the summit of the legal system. But if in the case of the UN system it is possible to think of some sort of "constitutional order", the same analogy could not be applied in international law, since there would be no hierarchy arising among international instruments. He adds that norms of *ius cogens* are not only outside the scope of the discretionary power of States, but are also hierarchically superior in the normative pyramid as a consequence of their effects, namely the nullity affecting any colliding norm of a different character. As such, they are not to be confused with superior rules within an institutional legal order, such as the UN system, but related to the existence of a international public policy. A. Orakhelashvili, above n 355, pp. 7-8.

[528] Indeed, the legal regime of article 103 remains ultimately subject to the contractual freedom of Member States, since all provisions of the UN Charter can be amended in accordance with the specific procedures set out in the Charter. And the validity of such ammendment would be naturally subject to the very normative universe of *ius cogens*.

[529] The general principles of law as recognized in article 38 of the Statute of the ICJ would not provide an adequate source of peremptory norms of general international law because "s'ils avaient un caractère absolument impératif il est probable qu'ils auraient acquis une valeur coutumière, ou auraient été consacrés dans le droit conventionnel, et seraient ainsi devenus, en même temps, des principes du droit international," M. Virally, above n 297, p. 27.

[530] L. Alexidze, above n 274, p. 260.

[531] "Les normes impératives, en réalité, prennent place non pas au-dessus des règles dispositives mais bien à côté d'elles, dans le cadre du droit international général," M. Virally, above n 297, pp. 18-19. Virally circumscribes the idea of precedence to the relation of validity between *ius cogens* and colliding treaties,

normative hierarchy in public international law,[532] the problem of an alleged hierarchy introduced by the regime of *ius cogens* (either from a narrow normative perspective or from a material point of view) is that it falls beyond the strict definition of peremptory norms provided for by Article 53 of the 1969 VCLT. Such a broader and inaccurate perception is reflected by both the conclusions drawn in the vertical dimension of colliding norms (precedence) and the alleged material hierarchy that operates as a criterion of validity not only for *ius cogens*, but ultimately for the whole material universe of the international legal system.

First, a formal hierarchy between norms of public international law was not codified by article 53 of the VCLT, or by any other positive norm of international law. As of now, there is no evidence of a positive nature suggesting, in an undisputable manner, that the international legal order does not remain essentially defined as a coordinative legal system. Second, the notion of formal hierarchy as developed in the General Theory of Law is based upon the existence of formal aspects instead of normative material contents alone. Constitutional regimes, either from common law or civil law traditions, are structured in terms of formal normative relationships, in spite of the fact that superior norms are expected to

without any relation to the emergence of a formal or material hierarchy in general international law. Slight differently, Rozakis affirms that the superior/inferior relationship is specifically attached to peremptory and "norms of particular law," without extending effects over all other domains of general public international law, in which relations remain fundamentally of a horizontal nature. C. L. Rozakis, above n 302, p. 22. Kolb has defined this approach as a "hiérachie relative," to the extent to which it only touches upon particular relations at the level of "sources d'obligations" instead of "sources de droit." See R. Kolb, above n 4, p. 139. One of the main voices against a material hierarchy introduced by *ius cogens* as depicted by public policy theories, P. Weil criticizes the suggestion that the recognition of an organized international community as the basis for an international legal hierarchy. Instead, he asserts that international law is an essentially non-hierarchical legal order founded on the will of states, in which there is no distinction between sources and legal acts. Weil denies, consequently, the possibility of defining *ius cogens* as per its hierarchical place, i.e., as per the introduction of a superior normative relationship *vis-à-vis* other rules. For the French scholar, the use of the concept of *ius cogens* as a justification to advocate a new structural framework in the international legal order, namely a hierarchical one, would be another symptom of the "maladie de la normativité" of international law. Weil did not reject, however, the existence of peremptory norms. His concern was focused on the alleged introduction of a hierarchical relationship in the international legal order. He would even admit the existence of *ius cogens* norms expressing supreme values of the international community. P. Weil, above n 288, pp. 261-312. Kolb criticizes Weil's views by contesting that they would imply an "a priori" rigid or necessary structure in international law that could ultimately operate as a criterion for the admissibility of new rules in the system. R. Kolb, above n 4, p. 53.

[532] Brownlie notes that there is no formal hierarchy in the sources of international law. On the one hand, the list of sources provided for by article 38 of the Statute of the ICJ does not set out any *a priori* hierarchy between treaty, customary law and general principles of law. On the other hand, the analogy with municipal systems is misleading. As he points out, "[i]n systems of municipal law the concept of formal source [of law] refers to the constitutional machinery of law-making and the status of the rule is established by constitutional law." See I. Brownlie, above n 487, pp. 1-3. In these same lines, Pauwelyn rejects a formal hierarchy of sources in international law as a consequence of the decentralized nature of the international legal system, above n 5, pp. 94-95. Salmon only accepts a potentional hierarchy *de facto*, in accordance with their level of precision and clarity. But in this case, the rule for solving legal antinomy would be rather one of *lex specialis* rather than *lex superior*. J.-A. Salmon, above n 11, p. 286. See also R. Nieto-Navia, above n 332, pp. 632-640. On this analogy, the Conclusions of the Lagonissi Conference read that the resemblence with municipal systems "is arrived at specially by establishing a hierarchy quality and sanctity. This effort cannot, however, lead to the desired end unless it is accompanied by a corresponding degree of international organization," G. Abi-Saab, above n 274, p. 15.

embody the axiological social and political relevance of certain subject-matters in a given society. But when outlawing ordinary law or private agreements collide with constitutional norms, domestic Courts will primarily base their decisions on how to solve an antinomy by legal reasoning of a formal nature, namely the superior structural status of constitutional norms and their relationship of validity *vis-à-vis* inferior rules within the system (*lex superior*). In international law, however, *ius cogens* norms as defined by article 53 of the VCLT could be placed theoretically at any "hierarchical" level, since their peremptory and non-derogable character is just a quality that in principle can be attached to any norm of general international law. Finally, for the purposes of our work, namely the problem of solving a collision between peremptory norms, hierarchical theories would not suffice either, since contradicting commands emanating from *ius cogens* norms would necessarily have the same hierarchical position. In summary, the only common element of peremptory norms and the notion of hierarchy is that both entail relationships of priority between conflicting norms.

The emergence of *ius cogens* has undoubtedly changed the manner in which some specific norms might operate in the international legal system. It has established a particular legal regime among norms of a general character, and it reflects a shift in the axiological structure of the international legal order, which has been marked by a growing interdependence between States. However, the regime of *ius cogens* is still a specific type of legal relationship that is applied in the horizontal context of conflicts between some norms of a peremptory character and other norms of general international law. Rather than operating as a rule of *lex superior*, the legal regime stemming from *ius cogens* operates as an exception to the rules of *lex specialis* and *lex posterior*.

Chapter III – Horizontal theories

The horizontal approach to *ius cogens* is largely based on the role played by the will of States in the norm-creation process in public international law,[533] in which the will of states represents the most important element for determining the existence and validity of all norms in the international legal system, including those of a *ius cogens* nature.[534] The absence of a compulsory supranational authority concentrating legislative and judicial activities is translated into an essentially unorganized process of normative genesis, in which sources are undifferentiated and placed at an equal hierarchical level.[535] Within this epistemological context of positive-voluntarism predominance,[536] the duality between *ius cogens* and *ius dispositivum* is answered from the standpoint of the sovereign will of states.[537] A discussion on the validity of certain treaties in the light of their material object is simply a non-issue, since there would be no *a priori* limitations on the autonomous will of States, and consequently no formal or substantive impediment for the creation of treaty law as regards its object or purpose.[538] The only acceptable limitation on the autonomous will of States is the need for conformity with rules of

[533] On state authority, see J. Bodin, *Les Six Livres de la Republique* (ed. by G. Mairet), Paris, Librairie générale de France, 1993, L. I, c.VIII.

[534] In his comments on the distinct roles played by the will of legal subjects domestically and internationally, Kolb affirms that, in international law, "la volonté a ici un valeur constitutive, pas seulement potestative (acte juridique)," R. Kolb, above n 4, p. 144.

[535] "Le caractère peu articulé ou différencié, et pour tout dire, le caractère en peu primitif de la formation, de la modification et de l'extinction des normes en droit international, accentue la tendance à l'uniformisation des facteurs créateurs de droit », R. Kolb, *idem*, p. 144.

[536] In a historical perspective, the rise of positivist-voluntarist doctrine in international law coincides with the progressive fading of natural law in the XIXth century. The so-called positive law doctrine emerged on the basis of the growing power of sovereign and organized States, in which laws were generated within constituted legislative authorities and applied by binding jurisdictional entities within the State. Hegel's theory on state and international has been further developed in the works of early voluntarist authors such as G. Jellinek (auto-limitation) and Triepel (convergence of wills). Triepel affirms that the convergence of the will of States would amount to a common and overriding will of a community of States (Vereinbarung). See G. Jellinek, *Teoría del Estado* (Spanish edition, trans. Fernando de los Ríos), Madrid, Librería General de Victoriano Suárez, 1914, pp. 474 and ss; and H. Triepel, 'Les Raports entre le Droit Interne et le Droit International,' (1923) 1 *R.C.A.D.I.*, p. 83. For a general description, see Ch. Rousseau, above n 73; L. Hannikainen, above n 277, p. 34. On 'consent based' approach in international law, see F. von Listz, *Derecho Internacional Público*, (12th ed., Spanish trans. by Gustavo Gili), Barcelona, 1929. Although it would not be correct to infer the complete disappearance of natural law doctrine in that period, particularly in the context of moral argumentation, Hegelian theory on State and voluntary international law would prevail until early in the XXth century.

[537] "Authors speak of peremptory norms of general international law as of "recognized" norms. Recognized by whom – is the question, and the only answer within positive law, or within positivist theory of law, is by making some reference to consensus between the very subjects of international law," J. Sztucki, above n 287, p. 64. See also G. Tunkin, 'International Law in the International System, General Course on Public International Law,' (1975-IV) 147 *R.C.A.D.I.*, p. 93; and D. Anzilotti, *Corso di diritto internazionale*, Roma, 1955, 4th ed., pp. 88-92; D. Anzilotti, *Cours de droit international* (traduction française G. Gidel), Paris, Sirey, 1929, pp. 96-101.

[538] It is not by accident, indeed, that the period immediately before World War I was characterized by the proliferation of secret treaties among the then world powers.

international law binding contracting Parties, in accordance with the principle *pacta sunt servanda*.[539]

Much of the opposition to *ius cogens* as suggested by public policy theories derived from positivist-voluntarist theories.[540] As one of the most important voices against public policy theories, Georg Schwarzenberger initially denied the very existence of peremptory norms.[541] He conditioned the existence of *ius cogens* to the intention of States to provide certain norms with this character on a consent basis, i.e., "if the parties to such treaties express their intention to this effect with sufficient clarity". In any event though, the existence of *ius cogens* in contemporary international law was impaired by the structural deficiencies of the international legal system,[542] sociologically explained as a consequence of "the plurality of great Powers and their mutual jealousies."[543]

[539] Ch. Rousseau, *Principes généraux du droit international public*, Paris, Pédone, 1944, vol. I, p. 340.

[540] Voluntarist views have first appeared as a response to Verdross's article on forbidden treaties (above n 1) in international law. See above Section I, Chapter II.

[541] "[I]nternational law on the level of unorganized international society fails to bear out any claim for the existence of international jus cogens." Consequently, "in the absence of clear evidence of international *jus cogens*, the freedom of contract of the subjects of international law is unlimited." G. Schwarzenberger, 'International Jus Cogens?', 43 Texas Law Review, 1965, p. 467 and p. 460. Schwarzenberger criticizes the role of interpreters as "law-makers" by saying that "it is not the function of the doctrine of international law or the international judiciary to transform discretionary powers into legal duties," idem, p. 471. See also G. Schwarzenberger, *Power Politics: a Study of World Society*, 3rd ed., London, 1964; and G. Schwarzenberger, 'The Problem of International Public Policy,' 18 *Current Legal Problems*, 1965, p, 191. Indeed, particularly regarding the debate on *ius cogens*, doctrine seems to despise the view of states in the creation of international law. It is not by accident therefore, that public policy theories are so engaged in this discussion.

[542] For Schwarzenberger, the possibility of rules binding without the agreement between the parties would imply, as precondition, a centralized supranational power with necessary jurisdictional capacities with overwhelming force to formulate rules analogous to those of public policy on the national level. With reference to the principles of the Charter of the United Nations and other corresponding forms representing "attempts to create consensual rules of international public policy," he says that they are "too precarious" or "too limited ratione personae or ratione materiae" and could not be opposable to third parties. G. Schwarzenberger, above n 275, p. 476. His perception on ius cogens is tributary to his "inductive" theory of international law, according to which general international law arises from positive law (treaties). The progressive and frequent reference to certain topics in treaty law would amount, due to its generality, to customary law. The former domain would be characteristic of organized international law (*ius aequm*) while the latter would be that of unorganized legal order (*ius strictum*), in which relations of power determine the application of existing law. G. Schwarzenberger, *The inductive approach to international law*. London, Stevens & Sons, Dobbs Ferry/N.Y., Oceana, 1965, p. 100. See also G. Schwarzenberger, Current Legal Problems, 1965, p. 208-212. During the debates in the Vienna Conference, Schwarzenberger's opinion on the precarious stage of organization of the international community was supported by the delegation of Luxembourg. The Luxembourgian representative stated that "in the present state of international relations it is not possible to define in juridical terms the substance of peremptory international law." Comments by Governments, Annex to 18th Report, p. 137.

[543] G. Schwarzenberger, above n 275, p. 467. Without being supported by unquestioned authority or overriding power, "international *jus cogens* … is as precarious as any *jus dispositivum*." Idem, p. 472. It is interesting to note, however, that Schwarzenberger justifies his denial of the existence of peremptory norms outside the scope of the will of States based on the criterion of "minimum standard of civilization". By alluding to hypothetical treaties legalizing piracy, slave trade, war crimes and restrictions to the freedom of the seas, he contested that, rather than contradicting *ius cogens*, these agreements would be null and void, in "a more realistic interpretation," due to "a level of barbarism incompatible with any claim to be regarded any longer as civilized communities." In other words, Schwarzenberger would not declare the voidness of such treaties on grounds of their incompatibility with existing positive norms of general international law embodying a *ius cogens* character, but instead because the concerned contracting parties would have simply lost any right to

In the period immediately before the preparatory work for the VCLT, voluntarist approaches to *ius cogens* still enjoyed a significant level of support from a variety of authors.[544] The idea of a hierarchically superior and independent normative universe over the will of states was met with deep scepticism. Hans Kelsen[545] and Gaetano Morelli,[546] for instance, put forward the fundamental positivist maxim that States are only bound to international obligations to which they have expressed their consent. They disagreed with an alleged customary acceptance of a moral consensus on the existence of certain non-derogable norms implying the nullity of contradicting treaties, i.e., a limitation to the sovereign will of states to contract on any subject whatsoever. However, not all positivist-voluntarist authors have advocated a limitless freedom of States in the law of treaties.[547] F. Liszt,[548] W.

be recognized as subjects of international law. His rationale is thus somehow contradictory to his positivist-voluntarist premises, namely that of unlimited freedom of sovereign States to contracting on whatever subject they may deem it appropriate. His assumptions are based on meta-juridical considerations, in which the recognition of the legal capacity of a given State within the international community would bear on axiological considerations of civilization standards in order to determining the validity of treaty law. See Schwarzenberger, above n 275, p. 463-465. Virally and Verdross have both contested Schwarzenberger's criticism. The French scholar depicted Schwarzenberger's criticism as an "authoritarian" view as to the mode of creation of law in the international legal system, implying a necessary and irresistible constraint as a condition for its functioning. Virally asserted that the lawmaking process in international law does not require a concentrated legislative authority neither a previously established sanction (organized use of force) for the non-observance of norms. For Murty, "an argument along these lines would require the denial of an international legal order itself, and not merely the "public policy" part of it," B.S. Murty, 'Jus Cogens in International Law,' in *The Concept of Jus Cogens in International Law*, 2 Lagonissi Conference on International Law, 3–8 April 1966 (IUHEI, Geneva, 1967), p. 80. See also M. Virally, above n 297, pp. 21-23.

[544] Charles Rousseau also refused the idea that *ius cogens* reflected an international *ordre public* by contesting that individualistic interests were an essential feature of the international legal system. The very issue of an illegal object in agreements among states would be as of no actual interest for legal studies. Ch. Rousseau, above n 541, pp. 340-341. Morelli added that the rules related to the sources of international law imposed no limitation whatsoever upon the will of States in regard to the object of a treaty. G. Morelli, *Nozioni di diritto internazionale* (7th ed.), Padova, 1967. In a reaction to neo-jusnaturalist doctrine arguing the existence of peremptory norms on the basis of moral imperatives (*contra bonos mores*), the Swiss author Paul Guggenheim, said that "les règles de droit international n'ont pas un caractère imperatif. 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 réintroduction du droit naturel dans le droit des traités." P. Guggenheim, *Traité de Droit International Public*, Genève, Librairie de l'Université, 1953, pp. 57-58. Others have argued that *ius cogens* is not a concept that can be operationalized in practice due to, *inter alia*, the lack of unequivocal expressions of the will of States to recognize their acts as invalid, or that they have only a symbolic significance without a procedure or institution with the competence to declare conflicting norms as invalid. See also Czaplinsky and Danilenko, above n 19, p. 42. Such a piece of criticism has been dealt with by Winiarski, who argued that "[t]he view that it is only possible to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law," Opinion of Judge Winiarski, *Effect of Awards* case, above n 449, p. 65.

[545] On the question if ius cogens norms exist, Kelsen stated that "No clear answer to this question can be found in the traditional theory of international law," H. Kelsen, *Principles of International Law* (1967) (2nd ed., R.W. Tucker ed.), New York, Holt, Rinehart & Winston, 1996, p. 483.

[546] G. Morelli, above n 544, p. 37 and *SS Lotus* case, above n 187, p. 18.

[547] The Genocide Convention and agreements abolishing slavery and piracy were generally mentioned by these authors as examples of these peremptory norms imposing limits on a limitless freedom to contract by States. But instead of affirming a public policy above and beyond the will states deriving from those norms, those authors generally depicted *ius cogens* as being essentially voluntarist in nature by asserting that peremptory norms are to be found in the positive sources of international law, particularly customary law, treaties and general principles. P. Guggenheim & K. Marek, 'Verträge, völkerrechtliche,' in K. Strupp & H.J. Schlochauer, *Wörterbuch des Völkerrechts*, 2nd ed., vol. III, 1962, p. 560.

Hall[549] and L. Oppenheim,[550] for example, alluded to universally principles recognized by civilized nations as peremptory to all subjects of international law. The so-called Soviet doctrine, which was under voluntarist influence, also rejected the legality of treaties when in conflict with basic principles of international law.[551]

The debates in the ILC reflected those divergences between public policy theories and the voluntarist paradigm. Due to the polarization between these currents of legal thought, the ILC converged to a more voluntarist approach according to which the existence of *ius cogens* should be established on the basis of legal sources reflecting the consent of States, as developed in customary or conventional international law.[552] References to "acceptance" and "recognition" by the international community as a whole in final article 53 have since forth been understood as bringing the concept of *ius cogens* "into the realm of positive law."[553]

In conclusion, the depiction of the concept of *ius cogens* by voluntarist theories is rooted in the primary notion of a consent-based approach. States being sovereign and all validity of law resulting from the expression of the autonomous consent of States,[554] the existence of a normative universe legally depicted as peremptory can only be conceivable when stemming from the will of States.[555]

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[548] F. von Liszt, *Das Völkerrecht - systematisch dargestellt*, Berlin, O. Häring, 1907.

[549] W.E. Hall, above n 366, p. 819.

[550] L. Oppenheim, above n 83, para. 506.

[551] G. Tunkin, 'Jus Cogens in Contemporary International Law,' (1971) *The University of Toledo Law Review*, Nos. 1-2, pp. 107-118; L. Alexidze, above n 274, p. 229.

[552] YbILC, 1966, p. 248. In his intervention at the Vienna Conference, the fourth rapporteur, Humphrey Waldock explicitly recognized that "the ILC had based its approach to the question of *jus cogens* on positive law much more that on natural law." United Nations Conference on the Law of Treaties, Official Records, First Session (Vienna, 26 March- 24 May 1968), New York, 1969, pp. 327-328. Such a voluntarist approach was also majoritarian during the Vienna Conference, in which an approach favouring a common-consent of States was predominant.

[553] G.M. Danilenko, above n 279, p. 46. Shelton asserts that the VCLT "bases the identification of [peremptory norms] squarely in state consent," D. Shelton, above n 282, p. 300. Along these lines, Ch. de Visscher said that "la Conférence de Vienne a entendu introduire dans le droit international positif la notion de normes impératives auxquelles les Etats contratant ne peuvent déroger, en d'autres termes d'un jus cogens," Ch. de Visscher, above n 341, p. 5. But even after the codification of peremptory norms by the VCLT some voluntarist authors continued to express their reluctance to admit the existence of *ius cogens*, at least as regards the logical effects of some of its essential features. The same Ch. de Visscher, for instance, approached the issue from the voluntarist maxim proclaiming the limitless power of States to conclude treaties regardless of their content. For him, the problem presented by the notion of *ius cogens* is whether there is an exception to that voluntarist axiom in general international law, i.e., if there are peremptory norms from which States cannot derogate along with the majoritarian universe of dispositive norms of public international law. According to Ch. de Visscher, the main obstacle for the existence of *ius cogens* norms is still due to their indeterminate character and its consequent lack of efficacy. Ch. de Visscher, *idem*, p. 6. See also Ch. Rousseau, above n 73, p. 151; and E. Suy, above n 280, p. 53.

[554] "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law," *SS Lotus* case, above n 187; "In international law there are no rules other than such rules as may be accepted by the states concerned," *Nicaragua* Case, above n 281, p. 135.

[555] G.M. Danilenko, above n 279, p. 47; and G. Schwarzenberger, above n 275, pp. 457-60. Rozakis argued that without evidence of state consent, "considerations such as the general nature of a rule, its moral, ethical, or constitutional status are insufficient to legitimize such a rule as a jus cogens norm," C. Rozakis, above n

Section I – *Ius cogens* as a rule of horizontal collision

Under a strict application of the voluntarist tenet to the concept of *ius cogens*, peremptory norms are defined as the result of the convergent agreement of States to limit, either expressly or tacitly, their capacity to derogate from norms on specific subjects by acknowledging their imperativeness and non-derogability.[556] The idea of *ius cogens* is thus restricted to a self-imposed material limitation on the sovereign will of states[557] as expressed in agreements admitting or prohibiting their derogation by other particular arrangements.[558] Accordingly, treaties are the most important and typical source of peremptory norms in contemporary international law,[559] because they represent the unequivocal expression of the will of States on which norms are legally "accepted" and "recognized" as *ius cogens*.

This horizontal approach is related to a particular interpretation of article 53 of the VCLT[560] as regards the conflict of peremptory norms in time (*lex posterior derogat priori*) and the application of nullity as sanction to successive treaties contracting out of *ius cogens* in their objective (material compatibility) and subjective (international responsibility as a consequence of non-compliance) aspects. In other words, the regime of *ius cogens* fundamentally operates as a rule of horizontal collision between successive norms,[561] and rules of conflicts between treaties (*lex specialis* and *lex posterior*) and principles such as *pacta tertiis* and *rebus sic stantibus* be considered mechanisms for the application of the *ius cogens* regime.[562]

The horizontal voluntarist tenet poses several problems for both theoretical and practical reasons. Rules dealing with conflicting treaties have more general functions and are based on other formal criteria[563] than that of peremptory norms.

302, p. 76. Shaw asserted that "that only rules based on custom or treaties may form the foundation of jus cogens norms", M.N. Shaw, *International Law*, Cambridge, Cambridge University Press, 5th ed., 2008, p.118.

[556] As affirmed by L'Huillier, "[u]n traité ne peut être considéré comme ayant un objet illicite que lorsqu'il est en contradiction avec des engagements internationaux qu'il ne peut pas avoir pour effet d'abroger ou de modifier." J. L'Huillier, *Elements de droit international public*, Paris, Rousseau, 1950, p. 72.

[557] G. Morelli, 'A proposito di norme internazionali cogenti,' (1968) 51 R.D.I., pp. 114-5.

[558] This strict horizontal approach was developed by Anzilotti on the basis of the understanding that "tutte le norme internazionali sono dispositive. Se non che, questa illimitata facoltà di abrogare e sostituire le norme vigenti presuppone il consenso di tutti gli Stati che hanno concorso a formarle." D. Anzilotti, *Corso di Diritto Internazionale*, Padova, Cedam, 1964, p. 91. As general international law is based on the existence of an agreement among States, either express or tacit, the central question for the Italian normativist is whether certain positive norms exclude or admit derogatory agreements *inter partes*.

[559] G. Abi-Saab, above n 274, p. 9.

[560] Article 53 stipulates that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm," Vienna Convention on the Law of Treaties.

[561] As mentioned by Kolb, "plus que la règle *lex superior derogat inferiori*, ce sont les règles de la *lex posterior* et de la *lex specialis* qui trouvent application." R. Kolb, above n 4, p. 145.

[562] *Idem*, p. 145.

[563] "Comme pour la collision verticale, la collision horizontale de normes (..) est située sur un plan d'une ampleur fort différente par rapport à l`aspect ponctuel de l'indérogabilité de certaines normes à raison de leur contenu; (…) le conflit de traités est régi par des règles propres, d'ordre formel (lex posterior, lex specialis). Il fait abstraction de la substance des règles", R. Kolb, above n 4, p. 153.

First, the application of meta-rules aimed at solving conflicts between treaties in time does not hinge upon a derogatory relationship from a peremptory norm, and solving conflicts between incompatible treaties does not necessarily entail the nullity of one of the agreements.[564] Second, when a treaty's provisions infringe upon the rights of third States, the operationalization of principles such as *pacta tertiis* and *res inter alias acta* does not hinge upon a collision with a peremptory norm, nor does it necessarily nullify the conflicting treaty in its entirety. If the voluntarist tenet implies that States may create norms of *ius cogens* exclusively on a consensual basis, it should be questioned whether such a consensus is necessarily as irreversible as it is necessary to enforce the nullity and voidness of any derogation from that treaty. But even assuming that consent is irreversible due to the rule *pacta sunt servanda*, still the question seems to touch upon legal relationships related to other legal mechanisms rather than *ius cogens*. In those cases, the problem caused by the non-observance of a treaty's provisions can be solved by reference to rules such as the principles of good faith, *pacta sunt servanda* or *rebus sic stantibus*, without having to recourse to the legal effects stemming from the concept of *ius cogens*, i.e., without operationalizing the legal regime of peremptory norms.[565]

Third, unless one admits a relative view of the universal scope of peremptory norms,[566] it is also disputable, under a strict consent-based approach, to assert that treaties can create norms of general international law binding the international community as a whole regardless of the individual consent of States. Multilateral law-making treaties are generally used as pieces of evidence on the existence of peremptory norms. But even multilateral treaties with virtual universal membership could still attract a great deal of criticism as to the positive justifications of the concept of *ius cogens*. Some strict positivist-voluntarist authors have themselves acknowledged that the possibility of peremptory norms binding States regardless of their consent contradicts the very premises upon which is based their account of the international legal system.[567] In accordance with the general regime applicable to treaty obligations, general multilateral treaties cannot automatically have force *erga omnes* as a consequence of their inherent relative

[564] Conflict between successive treaties can be perfectly dealt with by rules such as *lex porterior* and *lex specialis*, as provided by Articles 30, 40 and 41 of the VCLT, without the need for an analysis of the content of that rule, or of its potential collision with commandments stemming from other valid norms within the system, such as those of *ius cogens*. As recognized by the ILC when dealing with this question, it is thus hardly conceivable to identify the mechanisms of incompatibility between treaties in time with the effects of *ius cogens*. YbILC, 1966-II, p. 270.

[565] Indeed, it is most likely that the Party affected by the non-performance of the obligations set forth by a given treaty might prefer to maintain the arrangement into force, since its interest is assumedly the performance of the obligations contained therein rather than the declaration of its nullity.

[566] See, for instance, R. Kolb, above n 4, p. 146.

[567] Sztucki for instance argued that "it would be incorrect to depart from the assumption that once a treaty of a "general interest" is ratified by a certain number of States and enters into force, the non-parties must become bound by the material contents of that treaty on the customary basis." J. Sztucki, above n 287, p. 111. See also G. Schwarzenberger's positions in G. Abi-Saab, above n 409, p. 100.

binding force upon the parties only. And there is no reason for creating an exception to the general rule of *pacta tertiis* as established in Article 34 of the VCLT exclusively on grounds of the multilateral nature of certain treaties. Consequently, "treaties *per se* cannot be regarded as a direct source of any universally binding norm of international law."[568]

Finally, the horizontal approach to *ius cogens* must also be addressed from the perspective of denunciation and reservation clauses. Although an individual denunciation would not necessarily affect the validity of the treaty to all other Parties, peremptory obligations stemming from that treaty would not cease to apply to the denouncing State,[569] otherwise the universal imperativeness of *ius cogens* would be jeopardized.[570] It is worth mentioning that, beyond a theoretical interest, international practice provides little evidence on the possibility of a universal consensually created *ius cogens*. Most of the international instruments usually mentioned as sources of peremptory norms do have clauses of denunciation or reservation.[571] A strict application of the state consent-approach would imply that those treaties couldn't be used as sources of evidence of peremptory norms that bind non-party States, in spite of the universal nature of those international agreements.[572]

Such a restrictive positivist approach has been overruled by the ICJ on its Advisory Opinion on *Reservations to the Genocide Convention*.[573] After quoting General

[568] J. Sztucki, above n 287, p. 112. The only possibility for creating *ius cogens* norms through a strict consent-based approach ("conventional *ius cogens*") would be that alluded by Barberis, who said that the emergence of a *ius cogens* norm through treaty-law would be made by an international instrument to which all states in the world are a party. And still, that treaty would not bind newly independent States. J. Barberis, 'La liberté de traiter des Etats et le ius cogens' (1970) 30 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, p. 44.

[569] "It would be manifestly absurd to suggest that denunciation of the Genocide Convention by a party could affect the prohibition of genocide by international law," Humphrey Waldock, YbILC, 1963-I, p. 131.

[570] Mindful of this problem, Rosenne suggested as an objective criterion to determine the intrinsic force of a rule the fact that a convention does not permit reservations. Such an explicit provision would be tantamount to a consensually agreed limitation of the will of states to derogate from it and an unequivocal recognition of its peremptory character. YbILC, 1963-II, p. 74. Along these same lines, Schwelb, who has been always skeptical about this issue, admitted, as an example of such a consensual peremptory norm, "something akin to *jus cogens* in the denunciation clauses of the four Geneva Conventions of 1949." But in view of the inherent contradictions attached to a consent-based approach, he concluded that "the denunciation clauses … indicate that the idea of international *jus cogens* has not yet penetrated into the day-to-day thinking and action of governments." E. Schwelb, above n 283, pp. 956-957.

[571] See the Genocide Convention, the 1949 Geneva Conventions and the 1966 Human Rights Covenants (ICCPR and ICSECR). Most of them have limits to the right to make reservations, but not limits to the right of denunciation. Only the International Covenant on Human Rights does not contain denunciation clauses. (General Assembly Res. 2200 (XXI), Annex). See also E. Schwelb, above n 283, p. 953, noting that the Geneva Conventions and other multilateral human rights conventions also contain denunciation clauses. At the Lagonissi Conference, Lissitzyn casted doubts in creating *ius cogens* by treaties precisely due to the fact that most multilateral treaties included termination and withdrawal clauses. He argued that content is what counts for *ius cogens* purposes. O.J. Lissitzyn, in G. Abi-Saab, above n 409, p. 92.

[572] Custom "is problematic as a source for jus cogens rules because (…) States, if they choose, are (…) able to create legal exceptions to such rules," M. Byers, above n 454, pp. 222- 23.

[573] *Reservations to the Genocide Convention* case, above n 441. See also *Armed Activities on the Territory of the Congo, Jurisdiction of the Court and Admissibility of the Application*, above n 281.

Assembly Resolution 260,[574] the Court stated that the principles underlying the convention are recognized as binding on states, even without any conventional obligation. Reservations should not be incompatible with the object and purpose of the convention and should be interpreted as a means to facilitate its universal acceptance. An understanding arises from the Court's decision according to which the binding character of a norm of *ius cogens* cannot be derogated from by a denunciation or a reservation to a convention's provision portraying a peremptory character.[575] This rationale is implicitly based on arguments beyond a strict consent-based approach, since the Court established that if a denouncing state may be disobliged from some of the provisions deriving from treaties such as the Genocide Convention, it would remain bound by its central provisions of a *ius cogens* nature under general international law.

A strict use of the concept of self-imposed limitations would be tantamount therefore to denying the peremptory nature of *ius cogens* norms, since the imperative character of peremptory norms would always hinge upon the express consent of States. *Contrario sensu*, any removal of that consent would affect the validity of *ius cogens*.[576] If it is assumed that *ius cogens* can only be invoked *inter partes*, one would have to deny the very definition of peremptory norms as valid for all States and evocable at any circumstance arising from inter-subjective relationships in the international legal order. Otherwise, the "whole concept of *jus cogens* as one of 'peremptory norms of general international law (…) accepted and recognized by the international community of States as a whole' is turned down and rendered meaningless."[577] The above does not intend to suggest that treaties cannot carry provisions of a *ius cogens* nature.[578] But when treaty provisions are mentioned as peremptory norms, it is implicit that these norms are also binding as a result of their status as customary norms, i.e., as a consequence of the general acceptance and recognition by States, including States non-Parties to that treaty.[579]

[574] General Assembly Res. 260 C (III), Dec. 9, 1948, in which the Members of the United Nations declared that genocide "shocks the conscience of mankind", "results in great losses to humanity" and is "contrary to spirit and aims of the United Nations," and that "in order to liberate mankind from such an odious scourge, international cooperation is required."

[575] E. Schwelb, above n 283, p. 953.

[576] Sztucki said that such a possibility would mean "the acceptance of the thesis that *ex injuria jus oritur*." J. Sztucki, above n 287, p. 111.

[577] J. Sztucki, above n 287, p. 113.

[578] There is nothing in the preparatory work of the ILC that may exclude treaties as a valid source for identifying the peremptory nature of certain norms. On the contrary, in its commentary to draft Article 50, the ILC expressly noted that future modifications of *ius cogens* would most likely occur through multilateral treaties. And this understanding was further confirmed at the Vienna Conference, when most States' representatives acknowledged multilateral treaties as potential vehicles for peremptory norms. See C. Rozakis, above n 302, p. 58.

[579] "It appears that only treaties of a truly universal nature establishing general international law may produce peremptory rules. As a practical matter, however, treaties seem to be able to contribute to the development of general norms of *jus cogens* only with the help of customary process," G.M. Danilenko, above n 279, p. 63. On *ius cogens* created by treaties, McNair said that "A treaty of this kind … binds at first the parties thereto and no other States", but "the lapse of time and the acquiescence of other States in the agreement thus made

But if conventional norms are also binding as customary law, it is not their conventional content that binds *prima facie* the international community as a whole, but rather their customary content.[580] Accordingly, treaties, particularly multilateral ones, although not creating *ius cogens* norms *per se*, may be used as proof of state practice on the acceptance and recognition of certain norms which might be characterized as imperative, non-derogable and universal, and thus potentially amounting to norms of *ius cogens*.[581]

Section II – Consensual theories

Consensual or majority theories apply voluntarist premises in a non-radical manner to *ius cogens*. The central aspect of these theories is an interpretation of the terminology "acceptance" and "recognition" of "the international community as a whole" as reflecting a common will representing the consent of an overwhelming majority of States.[582] Neither one State nor a very small number of States can obstruct the formative process of peremptory norms.[583] That particular regime of *ius cogens* would be a consequence of the decentralized nature of the normative-making process among sovereign entities in international law.[584]

Evidence of consensus on the part of the international community as a whole would derive either from the express or implicit consent of States as embodied in multilateral and regional treaties, unilateral declarations, diplomatic correspondence and the absence of objections to emerging norms of a customary nature. The bottom-line is a hybrid source of international law, which is not exclusively neither customary nor treaty law, but a different manner of manifestation of state consent.[585] In particular, the peremptory character of norms

have the effect of (…) converting what may at first been a partly *de facto* situation into a *de jure* one," A.D. McNair, above n 366, pp. 259-260.

[580] O.J. Lissitzyn, in G. Abi-Saab, above n 409, p. 92.

[581] See Section IV below on the definition of *ius cogens*.

[582] "By the requirement that a norm must be accepted and recognized by the international community as a whole, the Convention adopted, in fact, the consensual concept of peremptory norms," J. Sztucki, above n 287, p. 97. As a matter of fact, Sztucki understood it as "a matter of consensual hierarchy of consensual norms." See also L. Alexidze, above n 274, p. 252; See C. Rozakis, above n 302, pp. 76-78.

[583] Drafting Committee, on the interpretation on acceptance and recognition by the international community as a whole, see UN Conference on the Law of Treaties, p. 472. L. Alexidze, *idem*, p. 256.

[584] In its commentary to Article 50 of the Draft, the ILC has anticipated such a view by suggesting that *ius cogens* does not require concrete universal acceptance in order to exist as resulting from a virtual consensus, i.e., to create obligations binding all States regardless of each of their individual consent. Instead, a "very large majority" of states accepting norms as of *ius cogens* nature would suffice to determine a consensus of "the international community of States as a whole." U.N. Conference on the Law of Treaties, at 471-72, U.N. Doc. A/CONF.39/11 (May 21, 1968) (comments of the Chairman). This consensual approach was expressed by Judge Guerrero, when he asked "whether the unilateral will of one State or the common will of the parties before the Court can have priority over the collective will expressed in an instrument as important as the Statute of the Court" and his answer was negative. *Norwegian Loans* case, above n 308, pp. 106-107.

[585] As explained by Alexidze, "[t]hose rules can be formulated either by general multilateral treaty or generally recognized customs, or by the so-called mixed norms: treaty, on the one hand, and – by the customary

would arise from the "common will" of the international community as expressed in virtual universal forums such as the UN General Assembly[586] or universal international conferences.[587] Those *loci,* virtually assembling the international community as a whole, would concretely embody the common will of States and thus express the acceptance and recognition of the peremptory nature of certain norms of general international law.

Majority or consensual theories are also a manner of circumventing the application of the persistent objector rule or the exception of objection for custom *in fieri*,[588] both recognized legal mechanisms that avoid the applicability of norms of customary law.[589] The rationale of consensual theory is that *ius cogens* norms, when created by the consent of a 'very large majority,' bind dissenting or newly emerged States because a non-expressive minority should not hinder the emergence of peremptory norms.[590] In other words, a minority should not derogate from international peremptory norms by mutual consent.[591] The prevalence of the common interest over the particular one would provide enough grounds from both political (legitimacy) and legal (representative majority in the law-making process) perspectives to create an exception to the persistent objector rule.[592] In other words, there would be no "inconceivable right of veto" to each State.[593]

process – upon those States which are not parties to the treaty." L. Alexidze, above n 274, p. 256. The ILC highlighted this convergence between multilateral treaties and customary law by asserting that "any modification of a rule of *jus cogens* would today most probably be effected by the conclusion of a general multilateral treaty." YbILC, 1963-II, p. 248. In this same reasoning, Reisman says that "In human rights discourse, jus cogens has evolved into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity," W. M. Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention,' (2000) 11 *EJIL*, p. 15.

[586] On this particular case, see J.J. Caicedo Perdomo, 'La teoría des *ius cogens* en derecho internacional a la luz de la convención de Viena sobre el derecho de los tratados', (enero-junio de 1975) *Revista de la Academia Colombiana de Jurisprudencia*, p. 265; A. Gómez-Robledo, above n 297, p. 174-176; M. Virally, above n 244, pp. 177-178. Commenting on that, see also P. Weil, above n 13, p. 425.

[587] J.J. Caicedo Perdomo, *idem*, p. 265; N.G. Onuf and R. K. Birney, 'Peremptory Norms of International Law: Their Source, Function and Future', (1974) 4 *Denver Journal of International Law and Policy*, p. 193.

[588] See *Fisheries* case, above n 81, Publications of the Pleadings, vol. I, pp. 382 and 383.

[589] Rozakis, for instance, denies the possibility of the *in feri* objection in circumstances involving *ius cogens*. C. Rozakis, above n 302, p. 74.

[590] L. Alexidze, above n 274, pp. 246, 247 and 258; R. St. J. MacDonald, 'The Character of the United Nations and the Development of Fundamental Principles of International Law,' in B. Cheng & E.D. Brown (eds), *Contemporary Problems of International Law, Essays in Honour of Georg Schwarzenberger*, 1988, p. 199; R. St. J. MacDonald, 'Fundamental Norms in Contemporary International Law,' (1987) 25 *Canadian Yearbook of International Law*, p. 131.

[591] "A number of States should not be allowed to oppose the common co-ordinated will of States reflecting most vital objective societal law of the development of mankind," L. Alexidze, above n 274, p. 258; "no individual state should have the right of veto," M. K. Yasseen, UNCLOT I, p. 971. See also the views of Ethiopia and Liberia as applicants in the *South West Africa* cases. They claimed that non-discrimination was an example of a rule which no State may "claim exemption from," since it "has been created by the overwhelming consensus of the international community, a consensus verging on unanimity." *South West Africa* Case*, (Ethiopia. v. S. Africa; Liberia v. South Africa)* (Second Phase), ICJ Reports 1966, Pleadings, Vol. 9, statement by E.A. Gross, agent for the Governments of Ethiopia and Liberia.

[592] "The Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognized as peremptory by all States. It would be enough, if a very large majority did so; that would

As those theories identify consensus with majority rather than unanimity,[594] the qualitative perception of a "considerable majority of States" is paramount for determining the existence of a consensus representing the common will of the international community as a whole.[595] While some scholars support a quantitative majority,[596] others advocate for a qualitative majority.[597] Historically, the qualitative interpretation of the legal meaning of "acceptance" and "recognition" "by the international community as a whole" represents a counter-argument in favour of the quantitative rationale,[598] based on the assumption that the will of the international community as a whole should not be determined by a simple majority but would rather require "as minimum, the absence of dissent by any important element of the international community."[599] *Contrario sensu*, the emergence of a *ius cogens* norm would hinge upon the non-opposition of "essential

mean that, if one State in isolation refused to accept the peremptory character of a rule, or if that State was supported by a very small number of States the acceptance and recognition of the peremptory character oa the rule by the international community as a whole would not be affected," Yasseen, in Vienna Conference, vol. I, p. 472. The ILC also discussed the qualitative meanings of "acceptance" and "recognition" of *ius cogens* during the debates on article 19 of the Draft Articles on State Responsibility. When dealing with the links between international crimes and *ius cogens*, the ILC reproduced the understanding reached by the Commission a decade earlier during the preparatory work for the VCLT, and opined that there is no requirement of unanimous recognition of peremptory norms by all members of the international community. YbILC, 1976-II, p. 73.

[593] *Idem*, p. 119-120.

[594] For a criticism on the absolute sovereignty of States as amounting to unanimity, see P. Guggenheim, *L'organisation de la société internationale*, Genève, 1944, p. 71. See also E. Suy, above n 280, p. 76.

[595] Akehurst advocated a double test for peremptory norms: acceptance as valid norms by all States (unanimity) and considered *ius cogens* by an overwhelming majority. M. Akehurst, above n 51, p. 285.

[596] See, as a case-study, the analysis by Danilenko on the position of developing countries gathered in G-77 during the negotiating process at the Third United Nations Conference on the Law of the Sea (UNCLOS), in G.M. Danilenko, above n 279, pp. 57-64.

[597] "A purely quantitative characteristic of an "overwhelming majority" is at present not sufficient… At present, an "overwhelming majority" of States should include States belonging to different socio-economic systems which may be considered sufficiently representative of the corresponding group of States," G. Tunkin, above n 537, p. 131.

[598] As a consequence of the process of independence by former-colonies during the 1950's, 1960's and 1970's, there was a growing concern among world powers on the increased capacities of newly independent states to create binding norms of general international law on the basis of automatic majorities in *fora* such as the General Assembly. A strict voluntarist interpretation of the UN Charter would be enough to counter potentially problematic normative processes at the UN General Assembly, but there was also a need for some sort of limitation as regards quantitative majorities in other virtually universal multilateral processes. "Instant declarations and paper resolutions did not establish customary international law, much less they give it a peremptory character," statement by the US representative at the Vienna Conference, UNCLOT II, p. 102. In the same reasoning, see the statement of the representative of Switzerland, UNCLOT II, p. 103. See also the position of France on the issue, in O. Deleau, 'Les positions françaises à la conférence de Vienne sur le droit des traités', (1969) *Annuaire français de droit international*, O. Deleau, 'Les positions françaises à la conférence de Vienne sur le droit des traités', (1969) *AFDI*, p. 17. See also the statements of the representatives of Finland (UNCLOT I, p. 294) and Australia (UNCLOT I, p. 388). This concern is also presented by Danilenko, who says that "As a result of an unprecedented expansion of membership of the international society of nation-states, the newly independent and essentially developing states are able to mobilize on automatic majority at any international law-making forum… Once the proponents of change acquired the preponderant majority, the temptation emerged to control the law-making process by way of majority decisions. In such a situation, it was only natural to develop a strong interest in jus cogens as a possible normative vehicle for introducing sweeping reforms dictated by the majority," G.M. Danilenko, above n 279, p. 57.

[599] Statement of the US representative, UNCLOT II, p. 102.

elements" of the international community.[600] No matter how realistic such an interpretation may be in political terms, it contradicts fundamental principles of international law, in particular the principle of sovereign equality among states. Moreover, it implies a reproduction in the general theory of *ius cogens* of the same balance of power that still exists in anachronistic regimes such as the UN Security Council. *In extremis*, it would amount to recognizing that powerful States would have a right to veto the emergence of a peremptory norm.[601] As such, a majority or consensual theory of the emergence of *ius cogens* can only be conceivable if implying an equal coordinative relationship among states in the normative-creation process of general international law.

Another manner of qualifying the international consensus has been developed in analogy with the idea that some States would be better positioned to assert the peremptory nature of certain rules because they directly affect them.[602] This idea operates in analogy with the rationale developed by the ICJ, according to which the creation of general rules of international law requires the participation of states whose interests are "specifically affected."[603] Yet, the idea that the existence of *ius cogens* hinges upon the particular interests of some states directly affected undermines the requirement of their universal "acceptance and recognition". But from a strict voluntarist perspective, and even if one assumes that an overwhelming majority of states provides evidence of state practice, how could one justify a majority imposing binding obligations on third states without their individual consent? Some would say that states do consent to the general customary process by which norms arise regardless of their expressly consent as to the particular norms created in that process.[604] And yet, it may be contested that the persistent-objector rule prevents the emergence of peremptory norms when opposed by "an important element of the international community,"[605] what runs contrary to the premise that *ius cogens* is universally imperative. As a result, an exclusively voluntarist consent-based approach would inevitably lead to the

[600] For Ago, the qualitative element implies that the conviction on the peremptory character of a given norm is shared by all the "composantes essentielles de la communauté internationale," as opposed to a certain group of States, even when representing a quantitative majority. R. Ago, 'Droit des traités à la lumière de la Convention de Vienne' (1971-II) 134 *R.C.A.D.I.*, 323.
[601] J. Sztucki, above n 287, p. 99.
[602] Danilenko alludes to the establishment of peremptory rules on the legal regime of the outer space without the consent of the major space powers. G.M. Danilenko, above n 279. As a matter of fact though, in the case of the legal regime of the outer space, international law has progressed towards the prevalence of the general interest of the international community as a whole. The 1967 U.N. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies does not use the term "*common heritage* of *mankind*," but states that "the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries and shall be the province of all mankind."
[603] *North Sea Continental Shelf* Cases, above n 1, p. 44.
[604] *Per contra*, Sztucki contested that "it would be incorrect to depart from the assumption that once a treaty of a "general interest" is ratified by a certain number of States and enters into force, the non-parties must become bound by the material contents of that treaty on the customary basis." J. Sztucki, above n 287, p. 22.
[605] Danilenko alludes to the opposability to the peremptory nature of UNCLOS provisions as an example of a persistent-objector application to the emergence of ius cogens norms. G.M. Danilenko, above n 279, p. 63.

assertion according to which a treaty, even one of a multilateral character, could only have a peremptory nature *inter se*, and thus would not bind third parties.[606]

Section III – Customary theories

As one of the leading doctrinal approaches to *ius cogens*, the customary theory is fundamentally based on an interpretation of the term "general international law" inscribed in Article 53 of the VCLT.[607] As the most likely source of general international law,[608] customary norms would constitute *ipso facto* and *ipso iure* a privileged source of *ius cogens* norms.[609] These theories usually merge elements from material theories, such as the ethical content of peremptory norms, with a voluntarist approach based on the positive sources of general international law. Peremptory norms are thus defined as the positive material limitations on the will of States resulting from a customary normative-creating process that reflects the common interest of the international community as a whole.[610] This normative field, from which the common interest would emerge, is evidenced by positive norms such as the provisions of the UN Charter[611] and the very 1969 VCLT, which entail the general consent by the international community to widely accepted and recognized customary norms. That would be a characteristic of a developing international community in a decentralized international legal system based on

[606] See the statement of the representative of France during the 1977 Vienna Conference on Succession of States in Respect of Treaties (Official Records, First Session at 39, 1978), the Vienna Conference on the Law of Treaties that confirmed the definition of jus cogens (UN Doc. A/Conf. 129/C.1/SR28, p. 7, 1986), and the UN Conference on the Law of the Sea (IX UNCLOS, p. 106).

[607] M. Byers, above n 454, pp. 211- 212.

[608] "[L]a costumbre internacional conserva todavía su antiguo rango, y en lo que hace al punto que examinamos, es hasta hoy la única fuente indiscutible de derecho internacional general," A. Gomez Robledo, above n 335, p. 79. "Since 1963, one may observe a growing support for the category of an international *jus cogens*, with simultaneous departure from the recognition of custom as the only possible source of that category of norms," J. Sztucki, above n 287, p. 75. See also Asamoah, Lagonissi Conference, p. 96; and the Representative of Italy to the Vienna Conference (vol. I, p. 311). Some authors even hold that only custom could be a source of general international law. Krystina Marek,' Thought on Codification', (1971) 3 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, p. 497.

[609] Wengler took the view that peremptory law amounts to rules of customary international law the validity of which is ensured by the collective legal constraint of all States. He suggests that general international law cannot be modified *inter partes* if every State is entitled to demand its respect (e.g., norms of international human rights law and the prohibition of the use of force). Here, interests of third States would obsttruct any derogation from customary norms of general international law. The question would fundamentally hinge upon the manner by which third States can react to a conflict or a violation of a general norm. His views are a reaction to an exclusively content-based criterion to determine the peremptory character of rules of general international law. See W. Wengler, Völkerrecht, Berlin, Springer, 1964, vol. I, pp. 410-412.

[610] "Par définition, puisqu'il appartient au droit international général, le jus cogens échappe, au point de vue de sa création, à la volonté des Etats individuels et relève, exclusivement, d'un processus collectif, dans lequel doit être engagé la société internationale toute entière," M. Virally, above n 297, p. 22.

[611] "[I]l est au moins douteux qu'à cette époque les principes de la Charte auraient pu être considérés comme l'expression du droit international général," M. Virally, *idem*, p. 27.

coordinated relationships,[612] in which emphasis is progressively placed on multilateral relations instead of the individual interest of States.[613]

For many of those who support a customary approach to *ius cogens*, the peremptory character of norms of general international law can be determined on the basis of the level of support by States for resolutions adopted in international *fora* such as the UN General Assembly.[614] GA resolutions would provide testimonies on the existence of *ius cogens* norms in a privileged and unique manner: by gathering the international community as a whole[615] (chiefly in sessions of the UN General Assembly and universal international conferences).[616] Accordingly, resolutions unanimously or consensually approved would provide evidence *per se* on the existence of peremptory norms.[617]

[612] K. Marek, above n 608, p. 497.

[613] Always departing from the understanding that the nullifying effects are the essential feature of *ius cogens*, Virally takes the view that, by being based on a consensus at the center of the international community ("prise de conscience"), customary law would provide the certainty that peremptory norm cannot be derogated from by particular arrangements. He advocates further the need for establishing the existence of a peremptory norm of general international law "de façon claire et indiscutable, c'est-à-dire objective" in the light of the recognized sources of public international law, in particular treaty and customary law. It is in this context that he affirms that customary law is the most frequent and normal source for the lawmaking process of *ius cogens*. M. Virally, in G. Abi-Saab, above n 409, p. 105. "International conscience" wal also the terminology used by Yasseen during the preparatory work of the ILC, YbILC, 1963-I, p. 63. Along these same lines, Ch. de Visscher argued that, although customary norms are usually of a dispositive nature, customary norms constitute by excellence general international law as referred to by Article 53 of the VCLT, because they entail a general consent ("*assentiment*") on the existence of a few necessary imperative norms from which States cannot derogate in their mutual relations. According to Ch. de Visscher, "la norme coutumière se construit sur une pratique; la norme impérative procède directement d'un jugement de valeur morale ou sociale. Seules ces normes indérogeables, valables en dehors de tout lien conventionnel, représentent le *jus cogens*." Ch. de Visscher, above n 341, p. 9. *Opinio iuris* would operate as a means of differentiating them from ordinary norms of general international law. Ch. de Visscher, *idem*, pp. 8-9.

[614] On the nature of UN General Assembly resolutions, "[i]n general those resolutions are not binding on member states, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinion. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules." I. Brownlie, above n 487, p. 15. See also *Nicaragua* case, above n 281, pp. 98-104, paras. 187-95; and pp. 107-8, paras. 203-5; and J. Castañeda, 'Valeur juridique des résolutions des nations unies', (1970-I) 129 *R.C.A.D.I.*, p. 207-331.

[615] J.J. Caicedo Perdomo, above n 586, p. 263.

[616] Among the most important examples in this regard, one could mention Resolution 1514 (XV) on "the Granting of Independence to Colonial Countries and Peoples"; Resolution 1893 (XVII) entitled "Permanent sovereignty over natural resources"; Resolution 2131 (XX) entitled "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty"; Resolution 2625 (XXV) entitled "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations" the UN Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations; Resolution 3314 (XXIX) on the " Definition of Aggression"; Resolution 2749 (XXV) entitled "Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil," and Resolution 1962 (XVIII) entitled "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space."

[617] Caicedo Perdomo said that, "GA resolutions constitute *ius cogens* norms when unanimously, by consensus or almost-unanimously approved" ("constituyen normas de *ius cogens* las disposiciones de la Asamblea General de las Naciones Unidas aprobadas por unanimidad, cuasi-unanimidad y consenso"). J.J. Caicedo Perdomo, above n 586, pp. 261-274. Gomez-Robledo also supported the idea that GA resolutions should acquire the status of peremptory norms when approved by consensus, but only in the case of resolutions

On the one hand, the customary approach to *ius cogens* is a manner of circumventing potential deficiencies arising from strict consent-based theories. The possibility of unilateral reservations and/or denunciations of international treaties is avoided, for example, because the principles of *pacta tertiis neque nocent neque prosunt* and *rebus sic stantibus* cannot be invoked against international customary law.[618] It also solves the problem of persistent objectors by implicitly rejecting its application in the case of customary norms of a peremptory character.[619] As such, customary theories necessarily imply a non-strict application of positivist-voluntarist premises, since that States cannot claim the rule of persistent objector as a means of avoiding the application of peremptory norms of a customary nature.

On the other hand, however, an exclusive customary theory of *ius cogens* presents some inevitable deficiencies. First and foremost, the persisting violations of presumably peremptory norms, such as the prohibition of genocide, torture and the use of force against the UN Charter, can be seen as state practice contradicting the very premises of customary theories.[620] And even if international bodies of universal membership, such as the General Assembly, do refer to peremptory norms on some occasions, it does not seem appropriate either to argue that GA resolutions approved without a vote and, to be even more rigorous, without dissenting opinions after the vote, would amount to the genesis of *ius cogens* norms *per se*. Customary sources do not provide undisputable evidence *per se* of the *ius cogens* character of certain norms of general international law. But as the most likely means of expressing norms of general international law, customary rules are nonetheless among the most likely sources of norms that may acquire the quality of *ius cogens*. And having recourse to customary norms may prove to be quite useful in the task of determining the quality of *ius cogens* for norms of general international law.

Resolutions of the GA serve as relevant elements to demonstrate state practice and *opinio iuris*, and as such they may indicate the existence of a legal trend as to the

intending to legislate on specific matters and that deal with the "highest interests of the international community." A. Gomez Robledo, above n 335, p. 79. The ICJ reinforced this view by recognizing that the unanimous consent of States to UN declarations "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves." *Nicaragua* case, above n 281, p. 100, para. 188.

[618] In the *North Sea Continental Shelf Case*, Judge Padilla Nervo said, in his separate opinion, that "no right is conferred to make unilateral reservations to articles which are declaratory of established principles of international law. Customary rules belonging to the category of *jus cogens* cannot be subjected to unilateral reservations." Above n 1, p. 97. Along these same lines, Judge Tanaka declared, in a dissenting opinion in that same case before the ICJ, that "if a reservation were concerned with the equidistance principle, it would not necessarily have a negative effect upon the formation of customary law, because in this case the reservation would in itself be null and void as contrary to an essential principle of the continental shelf which must be recognized as *jus cogens*." *Idem*, p. 186.

[619] "Not only are new States, as well as passive and subsequent objectors, bound, but all States are bound by rules of *jus cogens* whether they presently consent to be so bound or not." J. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *BYIL*, p 19.

[620] "[N]on-compliance with the peremptory norms against military aggression, torture, genocide, and slavery is too widespread to support the custom theory," A. Orakhelashvili, above n 355, p. 113; "The asserted primacy of all human rights law has not been reflected in state practice," D. Shelton, above n 282, p. 294.

interpretation on the legal nature of a specific matter.[621] Moreover, GA resolutions embody state practice and *opinio iuris* to the extent to which they may express both the position of states on a given subject-matter while also resulting from the work of experts, such as the ILC. In that sense, they reinforce the traditional sources of public international law, as put forward by article 51 of the Statute of the ICJ. In summary, customary sources are essentially a means for determining the level of acceptance and recognition of the legal status of certain norms rather than the express intention of States to create peremptory norms of general international law.

Section IV – *Ius cogens* as the general principles of law and the principles of international law

Another horizontal approach to *ius cogens* associates the materiality of the concept of peremptory norms with the fundamental principles of law or the fundamental principles of international law. Starting from the understanding that norms of general international law are essentially dispositive by nature, some authors, particularly from the old Soviet school, admitted that the contractual freedom of States has material limits imposed by the fundamental principles of public international law, first and foremost these positive principles consensually formulated in the UN Charter.[622]

Tunkin was the main voice among those authors. Being himself a member of the ILC during the preparatory work to the 1969 VCLT, he rejected both natural law and strict positivist theories as appropriated approaches to *ius cogens*. While conceding that peremptory norms were defined as norms States are not allowed to derogate from in *inter partes* agreements,[623] he suggested alternatively that the content of the recognized principles of international law would provide a material normative universe against which the validity of particular agreements could be determined.[624]

The fact that principles are norms of general international law with an increased potential to have a *ius cogens* character was underlined by the Special Committee

[621] See the opinion of G. Abi-Saab and L. Condorelli, in A. Cassese and J.H.H. Weiler (eds.), *Change and Stability in International Law-Making*, Berlin, New York, Walter de Gruyter, 1988, pp. 50-61. As noted by Czaplinsky and G. Danilenko, "the movement towards new law may be facilitated … if the States have reached a consensus on new trends within a multilateral forum." W. Czaplinsky & G. Danilenko, above n 19, p. 29.

[622] As noted by Sztucki, such a tendency "creates a *continuum* (if not identity) of three notions, namely those of '*jus cogens,*' 'generally recognized (or fundamental) principles of international law' and '[five] principles of peaceful co-existance' – as criteria of legality of treaties." J. Sztucki, above n 287, pp. 63 and 65.

[623] "[L]e traité doit correspondre aux principes fondamentaux du droit international". G.I. Tunkin, *Droit international public, Problèmes théoriques*, Paris. Pédone, 1965, pp. 96-97.

[624] He nonetheless maintained that the enforcement of the limits imposed to the freedom of States would ultimately hinge upon their will not to conclude agreements derogating from those accepted principles. *Idem*, p. 100.

on Principles of International Law Concerning Friendly Relations and Co-operation among States. The Committee proclaimed that the principles[625] "positivised" in the UN Charter are the *pierre de touche* of international law and the very basis of peaceful relations among states.[626] The conclusions of the Special Committee subsequently served as the basis for the "Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,"[627] which represents an important effort to promote the progressive development and codification of the fundamental principles of international law.[628]

It has already been said above that the material content of peremptory norms will most likely coincide with the fundamental principles of public international law. This is true particularly as a consequence of the general character and the material importance of principles in any given legal system. All mentioned principles are a constitutive part of so-called general international law.[629] However, it does not seem appropriate to establish a necessary relationship of cause and effect between the recognition of the universal compulsory nature of these principles and their *ius cogens* character. First, the material universe of the fundamental principles of international law is wider than that generally acknowledged as pertaining to *ius cogens* norms. Most importantly, although they may resemble each other as regards their universal imperative character, these categories of norms may differ as to their possible non-derogation. Several principles of international law are subject to derogation in agreements *inter partes* and by customary law. This has been the case, for instance, of the principles of sovereign equality among nations, non-intervention and territorial integrity.[630] Second, even such a list of recognized

[625] The Special Committee was established by the General Assembly in 1963, and asked to look at four essential principles suggested by the GA, namely the prohibition to use force, the principle that States should settle their disputes peacefully, the non-intervention principle, and the principle of sovereign equality of States. In its first report (A/5746), the Committee concluded that there was no consensus on the meaning and content of the first three principles (non use of force, settlement of disputes and non-intervention), and that there was consensus only on a list of elements of sovereign equality. After the first report, the GA added three more principles to the list: the duty to cooperate, the principle of good faith, and the principle of self-determination of peoples, all of which would be reflected in the 1970 Declaration.

[626] ONU, Chronique mensuelle, vol. I, n. 6, novembre 1964, pp. 57-58. According to Suy, these references in those terms "leave no doubt as to the absolute character of these principles." E. Suy, above n 280, p. 56.

[627] Adopted by General Assembly Resolution 2625 (XXV) of 24 October 1970.

[628] Those principles, namely the prohibition of threat and use of force, peaceful settlement of disputes, non-intrvention, international cooperation, equal rights and self-determination of peoples, sovereign equality of Statesand good faith, were not newly created by the Declaration; they were all already codified in the UN Charter. The Declaration is therefore an express manifestation of state practice and *opinio iuris* on the character of certain principles of public international law. It serves both as a means for reinforcing their compulsory nature and as a piece of interpretation concerning the universal scope of application and recognition of the fundamental principles of the UN Charter.

[629] The relevance of those principles in international law was stressed by the PCIJ. PCIJ, series A, n. 17, p. 29.

[630] See, for instance, Article 4(h) of the Constitutive Act of the African Union which recognizes an express right of intervention of the Union, 102 the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity [as well as a serious threat to legitimate order]." Constitutive Act of the African Union, 11 July 2002, OAU Doc. CAB/LEG/23.15.

principles of public international law is not necessarily an exhaustive one. It may be modified from time to time by means either of including or suppressing certain principles. Today, for example, it would not be conceivable to enumerate the fundamental principles of international law without mentioning the principle of promotion and protection of human rights in accordance with the 1993 Vienna Declaration, or the principle of common but differentiated responsibilities in the area of international environmental law.

The materiality of peremptory norms has also been associated with the "general principles of law recognized by civilized nations."[631] Some authors have even affirmed that only the general principles of law could serve as sources of *ius cogens*.[632] In general, this doctrinal reasoning depicts as norms of *ius cogens* some general procedural principles such as *pacta sunt servanda*[633] and *rebus sic stantibus,*[634] or even fundamental human rights enshrined in domestic legislations and further reinforced by national judicial decisions. But as contested by Ago, if *pacta sunt servanda* is a rule of *ius cogens,* then all norms of treaty law should be considered peremptory norms as well.[635] In other words, assuming that *pacta sunt servanda* is a norm of *ius cogens* implies that any treaty may derogate from a peremptory norm, since the obligation to comply with an agreement's provision would be peremptory itself, a situation that would be tantamount to a persistent antinomy between peremptory norms. As regards the principle *rebus sic stantibus*, its identification with *ius cogens* assumes that states could not derogate from it, since they cannot renounce in advance the right to claim a fundamental change of circumstances for terminating or withdrawing from a treaty. But rather than evidence of an association between *rebus sic stantibus* and *ius cogens*, such an assertion seems to be a consequence of simple logical impossibility: States cannot renounce it because a change of circumstances does not hinge upon the will of States.

Finally, as mentioned above, authors such as Verdross and Lauterpacht argued that general principles of law were compelling evidence of a transcendental morality tantamount to international public policy,[636] imposing limits on the

[631] See, for instance, R. Quadri, *Diritto internazionale pubblicco* (5th ed.), Napoli, Liguori, 1973, p. 109.
[632] "Es gibt Zwingendes Völkerrecht nur im Rahmen der allgemeinen Rechtsgrundsatze," H. P. Reinmann, Ius cogens *im* , p. 57.
[633] Tunkin, for instance, affirmed that the principle of *pacta sunt servanda* was a rule of *ius cogens*. YbILC, 1963-I, p. 197. See also K. Strupp, *Theorie und Praxis des Völkerrechts*, Berlin, 1924, pp. 67-68. Among States, the Representative of Austria argued in the VI Committee in 1966 that an international legal order without *pacta sunt servanda* was unthinkable. 911th meeting of the Sixth Committee.
[634] See Bastos, YbILC, 1963-I , p. 148; and Yasseen, *idem*, pp. 142 and 250.
[635] YbILC, 1963-I, p. 200. According to the ILC, "the existence of *jus cogens* may be denied by some on the basis of the importance attached to the norm *pacta sunt servanda*. But it has to be noted that *pacta sunt servanda* is by no means an absolute and no prescription could ever be so. *Pacta sunt servanda* is at least matched by the prescription of *rebus sic stantibus*. Even if one takes a voluntarist view of the law and maintains that consent, express or tacit, is its basis, an agreement which is repugnant to an earlier tacit agreement, finding expression in a customary prescription, need not be accorded validity under all circumstances." See also B.S. Murty, above n 543, p. 82.
[636] A. von Verdross, above n 1, p. 573.

contractual freedom of states.[637] In contrast, a positivist-voluntarist rationale suggests that states may implicitly consent to peremptory norms by recognizing them as fundamental principles in their respective domestic legal systems.[638] However, only a few principles may be accepted as recognized in all legal systems, and even in those cases they may be interpreted in different manners depending on the specific characteristics of each legal tradition. In some States the principle of *pacta sunt servanda* may be absolute, while in others it may be subject to considerations of a social and economic nature, or even of a moral and religious character. As a result, the general principles of law cannot be transposed as peremptory norms of general international law exclusively on the grounds of their importance in domestic legal systems.

Section V – Concluding remarks on horizontal theories

The main criticism of the so-called "horizontal" theories arises from the very premises they are generally based on: that the existence and validity of all norms in the international legal order, including those of a *ius cogens* character, hinge upon the consent of States. But the legal regime of *ius cogens* assumes that peremptory norms are binding regardless of the individual consent of each and every member of the international community. As such, the insistency on the need for a consensual element to determine the existence of *ius cogens* inevitably leads, in the ultimate instance, to the very denial of that concept.[639] Also, the main elements of customary law, namely *opinio iuris sive necessitatis* and state practice, could not be easily reduced to a time perspective in which prevalence is determined precisely on the basis of the *lex posterior* criterion. Nor would voluntarist theories solve the problem of the distinction between general and particular norms, since the legal regime of *ius cogens* operates as an exception to the rule of *lex specialis*. Particularly for the purposes of the present work, voluntarist theories based on *lex posterior* criteria fail to address the problems posed by colliding peremptory norms in an accurate manner. Voluntarist theories of *ius cogens* also fall short of dealing with colliding commandments stemming from peremptory norms when such rules have different subject-matters. Even if one admits that the rule of *lex posterior derogat priori* could hypothetically be applied to the conflict between peremptory norms in successive treaties when dealing with equal or even similar material subjects, it is hard to envisage its application to colliding norms with different material contents but that can be equally applied to the same factual circumstance.

[637] The general principles of law recognized in article 38 (1) (c) of the Statute of the ICJ would represent a codification of the customary norm already accepted by "the former unorganized international society" A. von Verdross, above n 342, p. 61.
[638] See I. Brownlie, above n 487, p. 16.
[639] J. Sztucki, above n 287, pp. 63-64.

Chapter IV – Definition of *ius cogens*

Most of the theories analysed above seem to display a fundamental flaw when approaching the concept of peremptory norms: they pose the wrong question.[640] In spite of the variety of views on the issue, all those theories fail to describe the concept of *ius cogens* because they do not focus on the essential features of peremptory norms. Rather, they focus on searching for an ontological basis that would supposedly provide the very foundations of the existence and functioning of peremptory norms. As a result, these theories, either of a material, hierarchical or horizontal nature, seem to be more interested in explaining other issues, such as the material sources of *ius cogens*, or in searching for the foundations of the international legal order as a whole, than in dealing with the objective features of the concept as it exists today in public international law.

At the Lagonissi Conference, Suy suggested that there are two possible methods for defining *ius cogens*: "by reference either to the effects of the rules or to their object" (content or subject-matter).[641] The analysis of existing theories on *ius cogens* shows that the first alternative is more appropriate, i.e., that the definition of *ius cogens* must be based on the effects of peremptory norms.[642] The reason is that the concept of *ius cogens* is defined as a specific quality attached to existing and valid norms of general international law. *Ius cogens* is not primarily defined in relation to the materiality of the norm it qualifies,[643] nor to some essential structural shift that they may bring about in the international legal system, such as an alleged hierarchy in *ius gentium*. Nor is the difference between rules of *ius cogens* and rules of general international law a consequence of the sources from which they

[640] A radical application of the positivist tenets may amount to the denial of the existence of peremptory norms as such, while natural law theories generally tie them up to a necessary supranational or supra-legal existence. Other theories create an intrinsic bound between *ius cogens* and an assumed "international public policy", while others can only admit the existence of peremptory norms insofar as these norms derive exclusively from the will of States.

[641] In his summary conclusions, Abi-Saab noted that "a large majority of the participants considered that the object of *ius cogens* rules was unsuitable as an operational and objective criterion for the determination of these rules. The narrower and more ascertainable criterion of effect of the rules, proposed by the International Law Commission, was generally considered more suitable." G. Abi-Saab, above n 409, p. 113.

[642] E. Suy favoured the first alternative, because "the effects of the rule depend on its *jus cogens* character and not the *jus cogens* character on the effect. A rule possessed this character when its violation affected interests of the international community as such." In G. Abi-Saab, above n 409, p. 106. See also Orakhelashvili, for whom "criteria for identifying peremptory norms aim at demonstrating that certain norms are more fundamental." A. Orakhelashvili, above n 355, p. 44-45. Other Authors have also criticized a definition exclusively based on its effects. See Natalino Ronzitti, 'La disciplina dello ius cogens nella convenzione di Vienna sul diritto dei trattati,' XV *Communicazioni e Studi*, p. 277, and P. Ziccardi, 'Il contributo della Convenzione di Vienna sul diritto dei trattati alla determinazione del diritto applicabile dall a Corte internazionale di giustizia', in *Mélanges G. Morelli*, Milan, Giuffré, 1975, p. 1073. See also Stefan Kadelbach, 'Jus cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms', in Christian Tomuschat and Jean Marc Thouvenin, eds., *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden, Martinus Nijhoff, 2006, pp. 29-30.

[643] On the several approaches to *ius cogens*, Ruda asserted that "what mattered was the effect of the rule and not the reason for attributing this effect to it," J.M. Ruda, in G. Abi-Saab, above n 409, p. 101.

respectively stem. The specific quality or feature of peremptory norms as codified by article 53 of the VCLT is a consequence of the fact that these norms have been attributed with different effects *vis-à-vis* other norms of general international law. The particular materiality of norms, such as their axiological importance or their overriding relevance for the international legal order,[644] will contribute as persuasive elements to the decision-making process of determining the *ius cogens* nature of certain norms, but it is not its ultimate justification.

The objective particularity of norms with the attribute of *ius cogens*, i.e., the core of the definition of peremptory norms, is primarily a consequence of the universal effects of its imperative and non-derogable character.[645] Determining the *ius cogens* feature means identifying how these specific features have been attributed to an already existing norm of general international law. It should not to be confused therefore with the emergence (source) of a new norm, since it supposes the existence of a valid norm deriving from the recognized sources of public international law to which certain qualities may be attributed.[646] In order to determine whether a rule of general international law has a *ius cogens* character, it is necessary to examine its specific treaty or customary source in order to see how it has been interpreted in international practice by States, international scholars and the jurisprudence of international tribunals as regards its peremptory character.[647] Each of these premises will be further analysed below.

Section I – The question of the sources of *ius cogens*

Sztucki rightly addressed the question of the sources of *ius cogens* by saying that "the importance of sources seems to be rather secondary for both theoretical and practical reasons."[648] The reason is that the question of the sources does not oppose any *a priori* legal impediment for determining the *ius cogens* character of norms, since rules can be characterized as peremptory whatever are their sources.[649]

[644] "La formación del *ius cogens* está estrechamente vinculada con consideraciones axiológicas," J. Barberis, above n 568, p. 44.
[645] See Sections II, III and IV below.
[646] The *ius cogens* feature can be attributed to any recognized source of public international law, but most likely to multilateral agreements of universal scope and international customary law. See Section V below.
[647] As a matter of fact, the actual recognition of the *ius cogens* quality to certain norms is most likely to happen, in contemporary reality, in the context of jurisdictional activities of international tribunals in the light of the work of international publicists, and expressly or implicitly by the practice of States. *Idem*.
[648] J. Sztucki, above n 287, p. 73.
[649] "Les normes de *jus cogens* sont des normes de droit positif; elle ne constituent pas une catégorie à part… elles sont intégrées dans l'ordre juridique par le jeu du système de sources que cet ordre juridique comporte, tout comme les autres normes qui le composent." M. Virally, above n 297, p. 16. "Norms of *jus cogens* are not included specifically as being a 'formal' source of international law." R. Nieto-Navia, above n 332, p. 634. That was also the understating adopted by the ILC when it expressly rejected a potential distinction among the recognized sources of public international law as a means of determining the peremptory character of a norm

Nonetheless, some authors have suggested that the codification of *ius cogens* would have led to the emergence of a new source in public international law or, alternatively, to a relationship of precedence among existing sources.[650] Particularly if the concept of *ius cogens* is portrayed as an essentially non-consensual normative-creating process, the emergence of peremptory norms could be interpreted as a new law-making process in international law that does not rest upon a consent-based approach. Consequently, the concept of *ius cogens* would amount to the emergence of a new source in international law capable of creating universally binding rules regardless of the consent of states.

The rationale behind the suggestion of the emergence of a new source of general international law is formulated in terms of the recognition of a "common will" of the international community as a whole as expressed in virtual universal community forums such as the UN General Assembly and universal international conferences.[651] These *loci* theoretically assembling the international community as a whole would create general norms binding all subjects of public international law, while sources listed in article 38 (1) of the Statute of the ICJ would correspond to the traditional consent-based sources of international law. More than a "strengthened form of custom," such a law-making process would amount to an autonomous source not necessarily based on state practice.[652]

However, concluding that the emergence of *ius cogens* would be tantamount to a new source of general international law is erroneous. As mentioned earlier, discussions on *ius cogens* by the ILC have shown that the issue was never approached from the standpoint of a newly established source of international law. On the contrary, the *travaux préparatoires* show that ILC Members developed the concept of *ius cogens* on the basis of traditionally recognized sources.[653] The misunderstanding on the question of sources seems to be due mainly to the confusion between law-making processes in international law. In particular, the

of general international law. See Commentary by the ILC on Art. 50 in the final Draft of 1966, YbILC, 1966-II, pp. 58-59.

[650] M. Akehurst, above n 51, pp. 60-61; Onuf and Birney, above n 587, p. 195; J.J. Caicedo Perdomo, above n 586, p. 263; G.A. Christenson, above n 275, p. 592. For a critical analysis on this issue, see also G. M. Danilenko, above n 279, p. 42.

[651] J.J. Caicedo Perdomo, *idem*, p. 265; Onuf and Birney, *idem*, p. 193.

[652] S. Sur, 'Intervention', in A. Cassese & J.H.H. Weiler (eds.), *Change and Stability in International Law-Making*, 1988, Walter de Gruyter, Berlin-New York, p. 128.

[653] In fact, the ILC highlighted treaties and custom as the most likely sources of *ius cogens*, in YbILC, 1966-II, p. 248. During the Vienna Conference the majority of States also regarded *ius cogens* as deriving from the existing recognized sources of international law, primarily from international custom and treaty law. The emergence of a new source of international law as a consequence of the codification of *ius cogens* was also addressed, but as a matter of concern, by the representative of France during the Vienna Conference on the Law of Treaties. According to the French delegate, the draft article 50 on *ius cogens* could be "interpreted to mean that a majority could bring into existence peremptory norms that would be valid *erga omnes*, then the result would be to create an international source of law." Such a possibility was then strongly rejected by France, which could not admit the creation of a new source of law with "no control and lacking all responsibility." Indeed, only the French representative alluded to the question on whether *ius cogens* would be tantamount to a new source of international law, and such a remark was done as a piece of criticism and concern. UNCLOT I, p. 94.

allegation that the codification of the legal regime of peremptory norms would be tantamount to the emergence of a new source confuses the notion of sources of norms in the international legal system with the process of determining the quality of *ius cogens*. As mentioned above, the concept of *ius cogens* is defined by the qualities of certain norms producing some specific effects *vis-à-vis* other norms within the system, regardless of their respective sources. In order to feature the quality of a peremptory norm, a norm must first be considered existing and valid in public international law.[654] And sources are simply the means by which norms of general international law arise as existing and valid rules within the legal system.[655]

Section II – Non-derogability

The non-derogable aspect of peremptory norms is a non-dissociable feature, potentially the most important one, in the definition of *ius cogens*.[656] The non-derogable nature of *ius cogens* highlights that the definition of the concept is fundamentally based on its effects rather than on its content.[657] It is an aspect of an undisputedly technical nature: peremptory norms cannot be derogated from in *inter partes* conventional processes,[658] i.e., they are not subjected to fragmentation in particular regimes.[659] Hence, the impossibility of derogation from *ius cogens* norms by other rules operates as an exception to the rules of *lex posterior derogat legi priori* and of *lex specialis derogat legi generali*, which are applicable to the law-making process of other norms of general international law.

[654] As Danilenko puts it, "the acceptance of *jus cogens* by the international legal order does not automatically imply the introduction of a new international law-making technique … in order to acquire the quality of *jus cogens* a norm must first pass the normative tests for rules of 'general international law'." G. M. Danilenko, above n 279, p. 55.

[655] "It seems needless to repeat that the legal effect of a norm is not the source but the result of its quality." J. Sztucki, above n 287, p. 89.

[656] "Le *ius cogens* est cela, il n'est pas autre chose", *Contribution à l'étude du ius cogens en droit international. Hommage à Paul Guggenheim*, Genova, 1968, p. 438. *Per contra*, Miaja de la Muela argues that the distinctive feature of *ius cogens* does not lie at the non-derrogability, but in the impossibility that subjects of law do not observe them in their reciprocal relationships. For him, both dispositive and imperative norms are "derogable" by nature, as much as the subjects that created them intend to do so. A. Miaja de la Muela, '*Ius cogens* y *ius dispositivum* en derecho internacional público', in *Estudios Jurídicos Sociales: Homenaje al profesor Luis Legaz y Lacambra*, Santiago de Compostela, p. 1772. This interpretation is likely to be due to a question of translation. The Spanish version of article 53 reads that "una norma imperativa de derecho international general es una norma que (…) no admite acuerdo en contrario".

[657] See, *inter alia*, A. Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making', (1988-1989) 12 *Australian Yearbook of International Law*, p. 38; and G. Abi-Saab, above n 274, p. 15.

[658] In several legal systems, the terms abrogate and derogate may have distinct meanings. In Roman law, *aborogare* meant total suppression while *derogare* meant a partial modification of a legal text. Also, in French law "déroger" may relate to an act of public power or to an act between particulars (Art. 6 of the Napoleon Code). For our purposes, the term derogate has been used in the 1969 VCLT in order to address the impossibility of a contrary agreement to derogate from a peremptory norm.

[659] R. Kolb, above n 4, p. 84; and R. Kolb, '*Jus Cogens*, Intangibilité, Intransgressibilité, Dérogation « positive » et « negative »', (2005) *R.G.D.I.P.*, p. 323.

The non-derogable character of *ius cogens* is placed at the abstract level of normative conflict. It is not a *prima facie* consequence of a State's conduct, but rather of normative-creation processes. Derogation occurs when a particular regime derogates from a general one, such as when some parties to a multilateral treaty create a particular regime in which normative provisions establish different legal relationships from those agreed upon in the general regime. Such would the case, for example, of a derogatory regime from the 1961 Vienna Convention on Diplomatic Relations. Some States may create a regime *inter partes* based on waiving diplomatic immunities regarding tax duties or criminal acts committed by State representatives, which would be derogatory from the general regime set forth by the Convention. Nonetheless, the general provisions would still be considered existing, valid and applicable to all other Parties, since they would not be affected by the particular derogatory regime in accordance with the rule of *pacta tertiis nec nocent nec prosunt*. Accordingly, derogation differs from modification of norms in international law. Modification presupposes a shift in the general legal regime to be applied to all subjects of law submitted to it. The original norm is modified, and not a second norm that is added. Considering the hypothesis mentioned earlier, the integral regime of diplomatic immunities established by the 1961 Vienna Convention could only be modified through a process including all Parties to the Convention, or alternatively through the demonstration of the emergence of a new customary norm modifying the previous general regime.[660]

Notwithstanding, the idea of non-derogabilty should not be construed as precluding "positive" derogation. Only "negative" derogation is prohibited, i.e., derogation by a particular regime that renders the general regime inapplicable either partially or entirely.[661] Under a teleological analysis, a general peremptory regime may be derogated from whenever it remains applicable *erga omnes.* For instance, States may agree to enlarge the protective universe conveyed by a peremptory norm of international humanitarian law without "negatively" derogating from *ius cogens*. The bottom-line is that the integrity of the normative universe of *ius cogens* remains fully valid.[662] In addition, the non-derogable character of *ius cogens* shows that the legal regime of peremptory norms is not circumscribed to the Law of Treaties. Although one of the fundamental dimensions of peremptory norms is given by their definition as rules from which States cannot derogate by *inter partes* agreements, the non-derogability effects of *ius cogens* also affect unilateral acts.[663] Accordingly, *ius cogens* effects nullify any act of States

[660] On the differences between derogation and modification, see R. Kolb, above n 4, p. 87-88.
[661] R. Kolb, above n 659, p. 305 and ss, p. 324.
[662] "Il est impossible d'insister plus nettement sur la distinction entre dérogation au sens propre (négative) et impropre (positive), afin de repousser la première et admettre la seconde. Il s'agit ici dès lors d'uns *jus cogens* d'indérogeabilité et non pas d'un *jus cogens* d'intangilibité. Les dispositions en cause restent modifiables par accords particuliers, mais seulement dans une direction et non pas dans une autre." R. Kolb, above n 659, p. 305 and ss, p. 324.
[663] G. Abi-Saab, above n 274, p. 10.

contrary to the provisions of a peremptory nature,[664] including unilateral exceptions.[665] Also, unilateral acts colliding with peremptory norms are devoid of any legal effect for expressing recognition, acquiescence, reservations or prescription of a given legal regime.[666] Indeed, it would be irrational to circumscribe the effects of the *ius cogens* to the restrictive universe of treaty law.[667] Unilateral acts contribute to the development of international law and as such might lead to the establishment of a legal regime that overcomes a previously existing one. As such, the legal regime of *ius cogens* must be applied to unilateral acts with normative force as sources of rights and obligations.[668] The difference lies in the fact that while treaties conflicting with peremptory norms are sanctioned with absolute nullity, unilateral acts are simply devoid of any legal effect (inoperative or *inopposable*).[669]

Absolute nullity is the legal sanction applied to acts and agreements derogating from *ius cogens* norms. [670] This understanding was reached by the ILC as exposed in its commentary to Draft Article 50, which reads that agreements conflicting with peremptory norms should be sanctioned with absolute nullity and voidness.[671] The VCLT's approach is leaned towards the stability of international agreements, and

[664] "Any legal act of whatever nature and, hence, any international agreement is unlawful in so far as it infringes a rule of *jus cogens*," E. Suy, above n 280, p. 75.
[665] S. Kadelbach, above n 642, p. 29.
[666] This understanding was referred to at the ICJ in the *Legality of Use of Force* case (Yugoslavia v. United States of America) by a dissenting opinion of Judge Kreca, who stated that "norms of *ius cogens* are of an overriding character; thus, they make null and void any act, be it unilateral, bilateral or multilateral, which is not in accordance with them." Legality of Use of Force (Yugoslavia v. United States of America), Request for the Indication of Provisional Measures, Order of 2 June 1999 [p. D.O. Kreca] 9. Fitzmaurice, for instance, alludes to cases of unilateral actions such as when "a State breaks certain of the laws of war." G. Fitzmaurice, Third Report on the Law of Treaties, YbILC, 1958-II, p. 125. Suy and Dahm also support the view that the concept of *ius cogens* might be applicable to unilateral acts of States. G. Dahm, *Völkerrecht*, Stuttgart, Kohlhammer, 1961, vol. III, p. 60; E. Suy, above n 280, p. 49.
[667] *Per contra*, Weil affirms that the application of the legal regime of *ius cogens* to unilateral acts logically impossible, since unilateral acts cannot create an regime *inter partes*. For Weil, unilateral acts either respect or violate international law. See P. Weil, above n 288, p. 261.
[668] R. Kolb, above n 4, p. 89.
[669] G. Abi-Saab, above n 274, p. 11.
[670] In Roman Law, there was a difference between absolute and relative nullity on the basis of civil nullity and Pretorian nullity. The former resulted from positive law itself, while the latter supposed the existence of an appeal and would occur without a judicial sentence. Absolute nullity was (i) immediate, and reduced to nothing the legal act, including its effects in time; (ii) *erga omnes*, for its effects applied to all indistinctively; and (iii) did not disappear (*quod nullum est non potest tractu temporis convalescere*). Relative nullity, on the other hand, was the legal consequence applied when legal acts lacked a fundamental element for its validity, such as the consent of the concerned parties, the observance of a specific format or the legality of the object. In French law, these two types of nullity would be called respectively "nullité légale" and "nullité judiciaire".
[671] Subsequently, during the intergovernmental negotiation process, the notions of "general international law" and "acceptance" and "recognition" by the international community as a whole were added to the definition of *ius cogens.* Such an inclusion would have led to what several authors have described as a double test for the identification of peremptory norms, namely its general and non-derogable character. See G.J.H. Van Hoof, *Rethinking the Sources of International Law*, Antwerpern, Boston, Frankfurt, London, 1983, p. 157.

there is no automatic or implicit nullity for existing treaties as a consequence of the emergence of a rule of *ius cogens*.[672]

But non-derogability should not be confused with "illegality."[673] While the question of the legality of norms relates to the non-observance of normative commandments, the legal regime of *ius cogens* is related to the prohibition of derogation from a general regime by a particular one. Accordingly, while illegality may give rise to international responsibility, *ius cogens* entails the nullity of conflicting norms.[674] The principles of *pacta tertiis* and *pacta sunt servanda* may address concerns over the legality of a certain treaty without the need to invoking the legal regime of *ius cogens*. Also, for practical reasons, interested States may prefer to have recourse to claims based on the legality of treaties, since the resource to notions such as "nullity" and "voidness" may result in retroactive effects contrary to the interests of the parties to an international dispute. For that reason claims on the legality of treaties, such as declarations of non-recognition of the validity of international agreements, are much more frequent in international practice than allegations of voidness and nullity.[675]

In any event, the non-derogability aspect alone is not enough to determine the *ius cogens* nature of norms of general international law. The recognition that some specific norms cannot be lawfully derogated from does not necessarily imply the peremptory nature of these rules, i.e., its *ius cogens* nature.[676] The non-derogability aspect of norms or the sanction of nullity can be explained in several circumstances without the need to resort to the concept of *ius cogens*. This is the case, for example,

[672] Implicitly, the VCLT conveyed a consent-based understanding on the effects of nullity, since there is a need for a declaratory decision sanctioning a given international instrument as null and void as a consequence of contracting out of a peremptory norm. Behind this precautionary approach one can find a deep concern, as expressed by several authors from all doctrinal tendencies, that States could henceforth unilaterally argue their exoneration of treaty obligations by claiming the emergence of *ius cogens* norms. The option taken by the VCLT favoured instead the certainty and stability of the treaty system over their caducity and destruction. For these purposes, the VCLT established a complex and slow procedure, which is based on the consent of the concerned parties to that specific treaty. The compulsory solution is a last and avoidable step. See also N. Ronzitti, above n 642, p. 277.

[673] The discussion on *ius cogens* arose within the context of the general theory of the legality of treaties. Early in the XXth century, it was deeply related to the specific debate on the legality of the object of international agreements in the light of their material content, particularly as regards the effects of nullity upon treaties colliding with certain norms of general international law.

[674] "La violation en tant qu'acte matériel est simplement la non-conformité d'un comportement avec le contenu, avec l'injonction d'une norme. La dérogation a, quant à elle, trait à substitution d'un régime normatif à un autre, au remplacement d'un lex generalis par une lex specialis applicable entre les parties restreintes. Donc la violation est un simple fait ; la dérogation est un acte juridique." R. Kolb, above n 659, p. 305 and ss, p. 322.

[675] Judicial decisions usually touch upon the question of the legality of certain treaties or upon the compatibility of certain conventional provisions with other existing international obligations without referring to the question of the nullity of the treaties in question as a result of *ius cogens*. And the reason behind this prudence in international judicial practice seems to be due to the existence of certain formal rules much more adequate to deal with the interests of the contesting parties to an international dispute when addressing issues related to the legality of certain acts and agreements.

[676] R. Kolb, above n 4, pp. 96-97.

of the non-derogable character of fundamental human rights, which in general cannot be derogated from under any circumstances.[677]

Section III – Imperativeness

The imperative character of peremptory norms is an etymological tautology stemming from the very term *ius cogens*[678] that reinforces its objective nature within the international legal system.[679] Regardless of certain objections to the use of this term in the VCLT,[680] the terminological identity between *ius cogens* and peremptory norms emphasizes the compulsory aspect requiring subjects of law to comply with the objective commandments stemming from norms portraying such a character.[681]

The imperativeness of peremptory norms relates both to their binding character upon all subjects of law of the international community, as well as to its non-derogability effects.[682] On the one hand, it qualifies obligations imposed upon all States as absolute, i.e., as compulsory in all situations.[683] It relates here to the idea of *intransgressibilité* of certain norms the observance of which is absolute under any

[677] ILC's commentary to article 50 in the final Draft Convention clearly states that "nor would it be correct to say that a treaty provision possesses the character of *jus cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void. Such a stipulation may be inserted in any treaty with respect to any subject-matter for any reasons that may seem good to the parties." YbILC, 1966-vol. II, p. 248.

[678] Some authors have even emphasized the imperative character of *ius cogens* norms in detriment of their non-derogabilty. This idea is expressed by the assumption that what really matters for the effectiveness of the concept of *ius cogens* is the need to dissuade subjects of law of violating these rules instead of derogating from them. See N. Ushakiv, in G. Abi-Saab, above n 409, p. 109. According to Miaja de Muela, the essence of *ius cogens* is not to be found in its non-derogable nature, but rather in the impossibility that subjects of law do not observe its compulsory legal commandments. For him, if norms of international law are created by the express, tacit or presumed will of States, a contrary expression of the will may derogate from these norms whenever such a will derives from the same subjects of law that established them. See Miaja de la Muela, above n 656, p. 1127.

[679] The imperative nature of *ius cogens* can be analysed from the perspective of the notion of integral obligations. Peremptory norms do not entail legal relationships of a reciprocal or synallagmatic character. On the contrary, they are norms of an integral character because they usually stem from multilateral treaties of an intended universal scope of application that do not admit *inter se* modifications in particular agreements among states, in accordance with article 41 of the VCLT. Article 41 renders illegal modifications to multilateral treaties which "affect the enjoyment by the other parties of their rights under the treaty of the performance of their obligations" or relate to a "provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole." See J J. Pauwelyn, above n 5.

[680] For a critical analysis, see J. Sztucki, above n 287, pp. 103-106.

[681] "The term 'jus cogens' means 'the compelling law'." M. Cherif Bassioni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, *Law and Contemporary Problems - Accountability for International Crimes and Serious Violations of Fundamental Rights*, Vol. 59 ", No. 4, (Autumn 1996), pp. 63-74.

[682] Kolb, for instance, understands the imperative nature of *ius cogens* exclusively on its second dimension, i.e., "qu'impératif signifie norme à laquelle il est impossible de substituer valablement un régime juridique particulier par voie d'accord", See R. Kolb, above n 4, pp. 85-86.

[683] G. Fitzmaurice, above n 377, p. 125; M. Virally, above n 297, p. 11.

circumstance.[684] On the other hand, it reinforces the non-derogable legal regime operated by *ius cogens vis-à-vis* colliding norms.[685] As a result, the imperative nature of *ius cogens* is translated into the idea that no exception can be made to their normative commandments, not even by consensus among States, or within their domestic legal orders (*lex specialis non derogat legi generali*).[686] It follows that reservations, denunciations, and unilateral or reciprocal exceptions cannot be accepted in any circumstance, even under treaty law.[687] As a corollary, for instance, States cannot create a particular legal regime in which torture of foreign individuals is acceptable in some exceptional circumstances as a matter of national security.[688]

It has already been said that the development and subsequent codification of the concept of *ius cogens* is inscribed within a broader development of public international law, particularly in the second half of the twentieth century. Along with the idea of binding peremptory norms regardless of the individual consent of States (universal imperativeness), other notions dealing with similar problems of high axiological concern have been advanced both in legal literature and in international jurisprudence.[689] This is the case of the cognate concepts of

[684] R. Kolb, above n 659, p. 305 and ss, pp. 324-326.
[685] G. Fitzmaurice, YbILC, 1958-I, p. 40 ; M. Virally, above n 297, p. 8; A. von Verdross, above n 1, pp. 571-573; E. Suy, above n 280, p. 18; A. Orakhelashvili, above n 355, pp. 67-72.
[686] For Authors supportive of a material approach to *ius cogens*, this is a consequence of the need to safeguard the "public interest" or the "public policy" embodied in peremptory norms. See A. Orakhelashvili, *idem*, pp. 67-72. On the applicability of the legal regime operated by *ius cogens* within domestic legals systems, see E. de Wet, 'The Prohibition of Torture as an International Norms of *Jus Cogens* and its Implications for National and Customary Law', (2004) 15 (1) *EJIL*, pp. 97-121.
[687] "Peremptory norms apply despite any conflicting circumstance external to a norm in question," A. Orakhelashvili, *ibidem*, p. 68.
[688] International jurisprudence reinforced the absolute imperativeness of certain norms, regardless of the specific factual circumstances surrounding a situation in which they may be applicable to. In the *Corfu Channel* case, the ICJ held that the prohibition of the use of force was compulsory in spite of the purpose for which a State could use it. *Corfu Channel (Merits)*, *ICJ Reports 1949,* p. 35. The European Court of Human Rights also characterized the prohibition of torture as absolute despite factual circumstances, such as combat against terrorism. *Chahal* (ECtHR), paras 79-80. Even UN Security Council resolutions require the observance of international human rights and international humanitarian law in all circumstances, particularly in situations of armed conflict. See, for instance, UNSCR 1456 (2003). In the last decades, the UN Security Council authorized the use of "all necessary means" with the objective of countering grave offences against human dignity, in both international and non-international conflicts. Similarly, most UN peacekeeping operations have included in their mandates subjects related to the protection of individuals. Current "multidimensional" operations, some of which were adopted under Chapter VII, include such tasks as protecting civilians and humanitarian personnel under immediate threat of physical violence. But as mentioned by Brownlie, "[i]n practice, such action (UNSC) has been taken on a very selective basis and has been shadowed by *ad hoc* geopolitical reasons unconnected with human rights," in I. Brownlie, above n 487, p. 557. Indeed, the practice of the UNSC is far from being perfect. The various measures and resolutions adopted by the Council have led to concepts that are imprecise in legal terms. Their relationship with the fundamental principles enshrined in the UN Charter is also unclear. But in being imperfect and not above criticism, the practice of the UN does nothing but reflects the shortcomings of both international law and the international system.
[689] The work of the ILC on the Articles on State Responsibility (General Assembly Resolution 56/83 of 12 December 2001) the jurisprudence of international criminal tribunals for Rwanda and the former Republic of Yugoslavia and the Rome Statute of the International Criminal Court, all provide examples of this progressive development of cognate concepts closely associated with *ius cogens*. For authors arguing the existence of a

obligations *erga omnes*, international crimes and universal jurisdiction.[690] But regardless of their common origins resulting from a growing consciousness on the axiological importance of certain norms in the international legal system, and in spite of some similarities, particularly between obligations *erga omnes* and *ius cogens*, these "categories" of norms are far from being identical, and are far from operating in the same manner.[691]

Consider the cognate concept of *erga omnes* obligations.[692] The similarities between obligations *erga omnes* and *ius cogens* are due to the fact that both are legal norms imposed upon all States regardless of their individual consent. As such, the literal *erga omnes* nature, i.e., its existence as norms valid for all States of the international community, can also be used to describe the imperative feature of peremptory norms.[693] Indeed, States do not owe peremptory obligations to other States individually, but to the international community as a whole.[694] In this connection, many authors have maintained that breaches of peremptory norms also have inherent and specific consequences in the area of international responsibility,[695] and claims of international responsibility would stem directly from the application of the legal regime entitled by *ius cogens*.[696] The absolute binding nature of peremptory norms would make irrelevant any claims based on circumstances

hierarchical structure in international law, the common fundamental character of those norms would have placed them at a higher rank in comparison to other ordinary norms.

[690] See Christian Tomuschat and Jean Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Leiden, Martinus Nijhoff, 2006.

[691] S. Kadelbach, above n 642, p. 25.

[692] In accordance with the classical reference in the ICJ decision in the *Barcelona Traction* case, these obligations are defined essentially as duties that are owed towards the international community as a whole because they embody fundamental values for the international community and protect essential rights the compliance of which is in the legal interest of all States. The ICJ enumerated some examples of obligations *erga omnes* such as the prohibition of aggressive force between States and the respect of elementary considerations of humanity. See above n 465, p. 32. Contemporary authors have also suggested the existence of obligations *erga omnes* in the case of basic rules of the law of the sea, air and space areas beyond the exclusive jurisdiction of states, and in the area of international criminal law. L. Hannikainen, above n 277, p. 5.

[693] By referring to the essential interests of the international community, the ICJ went beyond the semantical definition arising from the strict meaning deriving from the Latin expression *erga omnes*, which relates to the scope of application of these obligations. It implied also that their non-observance might justify the search for reparation beyond a limited bilateral relationship, i.e., that States that are not directly affected by a wrongful act committed in contradiction to an *erga omnes* obligation would have legal interest to act and to invoke the responsibility of the wrongful act performed by another State arising from such a violation.

[694] L. Hannikainen, above n 277, p. 5.

[695] See, for example, A. Orakhelashvili, above n 355. A similar approach was taken by the ILC when dealing with the Draft Articles on State Responsibility. In its Chapter III on "serious breaches of obligations under peremptory norms of general international law," the Commission stipulated that beyond the effects in the area international responsibility, a violation of obligation deriving from *ius cogens* also requires States to cooperate to bring to an end such a breach (Article 41, para. 1), to fail to recognize as lawful situations brought about by such a breach (Article 41, para. 2), and, finally, not to render aid or assistance in maintaining such a situation (Article 41, para. 2). It is necessary to note, however, that the obligation not to contribute to violations of international law is not limited to *ius cogens*, since it applies to all obligations stemming from general international law, in accordance with Article 16 of the Draft Articles. In an extensive interpretation, one could add that the "recognition of a consequence" of a violation also amounts to a contribution to the violation, and as such is also forbidden by Article 16.

[696] Crawford said that *erga onmes* obligations are "virtually coexistensive with peremptory obligations" J. Crawford, Third Report of the ILC on State Responsibility para. 106 (a).

precluding wrongfulness, such as necessity, for instance.[697] The concepts of *ius cogens* and obligations *erga omnes* merge, therefore, under the notion of an international "community interest."[698] However, these ideas seem to confuse the legal regime operated by *ius cogens* with the notion of and the consequences arising from the regime of international responsibility.[699] The legal regime of *ius cogens* does not entail consequences *prima facie* in the area of international responsibility. But there are situations in which both concepts may apply to the same specific factual circumstance, i.e., the norm being violated has a peremptory character. Consider acts of aggression resulting in the illegal occupation of foreign territory. At once, the same norm, namely the prohibition of the use of force, which is a norm of *ius cogens* nature and an obligation *erga omnes*, is being violated.[700] On the one hand, the aggressive State would be responsible for a breach of an international obligation *erga omnes*; on the other hand, any act performed through the aggressive use of force should be considered null and void as a result of the regime of *ius cogens*.[701] But the operation of both legal regimes, namely those of *ius cogens* and international responsibility, occurs at different normative levels. In other words, the analysis of international responsibility involves different questions from those primarily stemming from *ius cogens*. International agreements and acts of acquiescence and recognition, for example, must be considered null and void as a consequence of contradicting *ius cogens* norms while also involving the legal responsibility of the parties thereto. But other agreements, although subjected to the sanction of nullity stemming from the legal regime of *ius cogens*, may not necessarily create a nexus of cause and effect between the treaty and the damages caused by its implementation (no damage may have been caused at all, or the treaty in question has not been enforced yet). For that reason, although closely related as to their historical emergence and their growing importance in the contemporary development of public international law, the legal regimes of obligations *erga omnes* and *ius cogens* are different.[702] As a matter of fact, there exists no necessary material coincidence between a norm entailing an obligation *erga omnes* and a peremptory norm. A given norm of general international law may be an obligation *erga omnes* without necessarily portraying a peremptory nature, such as the right of passage in international straits.[703] The same could be said of international crimes. In other words, there is a coincidence between several

[697] A. Orakhelashvili, above n 355, p. 69.
[698] A. Cassese, *International Law* (2nd ed.), Oxford, Oxford University Press, 2005, pp. 13–17; P.-M. Dupuy, above n 401, pp. 301–302; B. Simma, 'From Bilateralism to Community Interest in International Law', (1994-VI) 250 *R.C.A.D.I.*, pp. 285–301; C. Tomuschat, above n 462, pp. 56–88.
[699] S. Kadelbach, above n 642, p. 39.
[700] "The distinction between *jus cogens* and *erga omnes* obligations … is not as clear-cut as it appears. The equation of both seems to be justified by the observation that the primary rules which belong to *jus cogens* and *erga omnes* norms are basically the same." S. Kadelbach, *idem*, p. 27.
[701] Only in this sense one can accept the suggestion of Orakhelashvili that "*jus cogens* and obligations *erga omnes* are but two sides of the same coin." A. Orakhelashvili, above n 355, pp. 268-269.
[702] *Per contra*, see the notion of "objective illegality" in C. Rozakis, above n 302, pp. 14-14 and 185-186.
[703] A. Orakhelashvili, above n 355, p. 269.

international crimes and human rights norms of *ius cogens* character. But this fact does not imply a synonymy or a cause-and-effect relationship.[704] Of course they may be intrinsically connected in some circumstances, and may derive from the same normative commandment, but they are still different concepts and different legal regimes operating at distinct levels of Law.[705]

The compulsory nature of *ius cogens* norms also raised some comparisons as regards the general binding character of norms in international law. The existence of peremptory norms distinguished from other ordinary norms as a result of their quality (imperativeness) could be interpreted as implying that dispositive rules (*ius dispositivum*) would have less binding force and therefore could be violated.[706] But it is a mistake to question the existence of peremptory norms on the basis of their alleged stronger normative force. All norms of general international law are equally in force, i.e., they all exist and are valid as rules binding subjects of *ius gentium*. The question of *ius cogens* norms is not related to their more or less binding nature, but rather to their effects in comparison to other norms within the system. First, while peremptory norms are compulsory in all circumstances, other norms of general international law may admit exceptions or derogations, *inter alia* by reciprocity. Second, the distinctive characteristics of peremptory norms arise only in the contexts of normative conflict (non-derogability) and their scope of application (universality, or compulsoriness literally *erga omnes*). The operation of non-derogability, for example, has nothing to do with its more or less binding force when compared to other norms within the legal system.[707] In summary, the imperativeness of *ius cogens* norms does not imply that other norms of general international law are not or are less compulsory. Admitting such a distinction

[704] Ver YbILC, 1976-II, par. 62 and other texts on international responsibility.

[705] "The concept of obligation *erga omnes* should be used only with reference to the type of obligation and not to the type of the rules that impose these obligations." G. Gaja, '*Ius cogens*, Obligations *Erga Omnes* and International Crimes: A Tentative Analysis of Three Related Concepts,' in J. Weiler, A. Cassese and M. Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State* Responsibility, Berlin, 1989, p. 153. In its conclusions to the Draft Articles on State Responsibility, the ILC highlighted the different focus of both concept regardless of their more or less identical contents: "[W]hile peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance." Commentary to Chapter III, Report of the International Law. Commission, GAOR, 56th Session, Suppl. No. 10 and *corrigendum* (A/56/10), para. 7; and Responsibility of States for Internationally Wrongful Acts, UN GA Res. 56/83, 28 Jan. 2002, Annex; see also in J. Crawford (ed.), above n 293, p. 244. See also, Stefan Kadelbach, above n 642, p. 35.

[706] Weil, for instance, criticizes the emergence of *ius cogens* by adducing that the recognition of the special normative status of peremptory norms implies the existence of two degrees of norms in international law, depending on their force ("more or less force"). P. Weil, above n 13, p. 421.

[707] Orakhelashvili contradicts Weil's argument by saying that "the differentiation of norms is accepted in all legal systems." Regardless of his advocacy of a hierarchy among norms of general international law, the problem of his analysis is that he founds his argumentation on an analogy with domestic systems in the context of his theory of "public international order." However, peremptory norms do not have "more or less force" as if other norms did not exist in the same normative level. A. Orakhelashvili, above n 355, p. 33.

would be tantamount to inferring that norms of international law are not binding as legal norms, but only political declarations without any legal nature.[708]

Section IV – Universality

The third and last fundamental feature of *ius cogens* as generally conceived by a majority of authors is its universal scope of application.[709] The universal scope is a consequence of the requisite put forward by article 53, which requires its acceptance and recognition by the international community "as a whole". As expressed by the President of the Writing Committee of the Vienna Conference on the Law of Treaties, such an emphasis, which can also be interpreted as a redundancy in the light of the quality *cogentis*, is due to the objective of stressing the universal consensual basis on which international law lies upon. This rationale assumes that a norm of "general international law" cannot be considered peremptory by "the international community as a whole" if the conviction on its imperative and non-derogable nature is circumscribed to a specific regional or particular legal regime.[710]

Notwithstanding the foregoing, some authors have suggested that peremptory norms of general international law could be established through bilateral or regional regimes (*inter se* basis),[711] what implies that the legal concept codified by Article 53 of the VCLT would not be the only type of *ius cogens* in international law. Suy admitted regional peremptory norms under a strict application of the voluntarist approach, which could lead to the possibility "of a regional *jus cogens*

[708] The character of *ius cogens* norms do "not consist in that they may not be lawfully violated as against others, because this is true of all legal norms – imperative as well as dispositive; but in that they may not be lawfully derogated from even by an agreement … Any other construction of *jus cogens* would amount to the degradation and reduction of the whole body of law to peremptory norms as the only ones which may not be violated." J. Sztucki, above n 287, p. 68.

[709] "Le fait que le *jus cogens* soit constitué exclusivement de normes de droit international général souligne, en effet, qu'il présente un caractère d'universalité," M. Virally, above n 297, p. 13. See also E. Schwelb, above n 283, p. 968; "genuine universal recognition is – according to the Convention – the essential premise of the existence of *jus cogens* norms," J. Sztucki, above n 287, pp. 66 and 106.

[710] Ago affirmed that "peremptory rules might be customary or even of conventional origin, provided that they become general rules in the true sense of the term. They must accordingly be valid for all the members of the international community, and in particular they must be valid as customary rules for States which were not parties to the treaty laying them down." R. Ago, YbILC, 1963-I, p. 75. Bartos also specifically touched upon this issue during the preparatory work for the VCLT when he clarified that the Drafting Committee understood the expression "general international law" in draft article 50 as concerning universal international law to the exclusion of "regional international law." YbILC, 1963-I, p. 214. In this same reasoning, Cançado Trindade stated that in the move from *jus dispositivum* to *jus cogens*, the absolute prohibition of torture "knows no limits in time or space: it contains no temporal limitations (being a prohibition also of customary international law), and it ensues from a peremptory norm of a *universalist* international law." A.A.Cançado Trindade, Dissenting Opinion, p. 52, para. 183. Several authors also developed their theories on *ius cogens* upon these same premises of universality. See also L. Hannikainen, above n 277, pp. 208-209; C. L. Rozakis, above n 302, pp. 55-56.

[711] C. Rozakis, *idem*, pp. 108-110.

as the basis of a community of interests limited in space."[712] By depicting *ius cogens* restrictively as a guarantee against the derogation of a general legal regime by a particular one, Kolb also admits the existence of regional and relative *ius cogens*.[713] In his view, the bottom-line for the existence of peremptory norms is a material general interest (*ius publicum*) instead of an absolute universality. Another allegation on the relative scope of *ius cogens* was expressed by Boutros-Ghali at the Lagonissi Conference. The Egyptian lawyer, who would later become UN Secretary General, considered that it was necessary to differentiate universal and regional *ius cogens*.[714]

However, there is no consensus in this regard.[715] First, alleged peremptory norms in a given regional legal regime, such as the existing ones in the European Union or the African Union, could never prevail as "peremptory norms" binding third, non-party States to these particular regimes, not only as a consequence of the principle of *pacta tertiis nec nocent nec prosunt* but also because they do not constitute *per se* a norm of general international law.[716] It is correct to assert that the theoretical notion of "peremptory norms" (non-derogable and imperative) can exist within a communitarian legal regime. Indeed, it is conceivable that it is much easier to obtain objective or positive "acceptance" and "recognition" within a limited group of States than in a decentralized international community. But it is not the fact of existing "peremptorily" (imperative and non-derogable) in a regional or a bilateral legal system that makes a norm peremptory for the purposes of *ius cogens*, at least if one understands it in the terms of the 1969 VCLT. In the example of the EU, the peremptory character of norms and their non-derogable effects could only be accepted, *in extremis*, if opposed in a legal dispute between Members of that same specific legal community of States. It would hardly be conceivable to admit claims in opposition to non-EU members based on the existence of a "communitarian" peremptory norm that would equally bind the

[712] Such would be the case, for instance, of the European Communities. E. Suy, above n 280, p. 71.

[713] Only domestic *ius cogens* is universally applicable indistinctively to all legal subjects, while international *ius cogens* is relative in accordance with the participation of subjects of law in a specific normative regime. Kolb recognizes, nonetheless, that a universal *ius cogens* "doit avoir comme source du droit international général et s'appliquer à tous les Etats de la communauté internationale," R. Kolb, above n 4, p. 189.

[714] He argued that the rule prohibiting the use of force should take precedence over the principle of self-determination at the universal level "because of the nuclear threat." In a regional legal order such as the African Union, however, the principle of self-determination should have the priority over the prohibition of the use of force because the nuclear threat did not exist. Beyond the consequences for the core of our discussion in this work, namely that of colliding norms of *ius cogens* nature, Boutros-Ghali's assertion also relates to the potential relationship between regional and universal *ius cogens*. Regardless of the erroneous assumption that the legal rationale for the prohibition of the use of force is primarily or exclusively a result of the nuclear threat, his comments imply either two distinctive and independent legal regimes of *ius cogens* (one could talk of a "dualist" regime of *ius cogens* or a monist regime of *ius cogens* in which the particular/regional regime would take precedence over the universal one). *The Concept of Jus Cogens in International Law*, 2 Lagonissi Conference on International Law, 3–8 April 1966 (IUHEI, Geneva, 1967).

[715] "Es difícil imaginar cómo podrían dares otros valores locales o geográficos cuya realización o reconocimiento tenga el mismo grado de necesidad que los valores universales," A. Gomez Robledo, above n 335, p. 78. See also A. von Verdross, above n 342, p. 61; and M. Virally, above n 297, p. 14.

[716] M. Virally, *idem*, p. 14.

opposing party exclusively on the grounds of its existence as a peremptory norm within the European legal system. It is not the case here to deny the possibility of norms originating first within regional systems and then becoming universal.[717] Nor it is the goal here to deny the existence of imperative and non-derogable legal regimes within legal systems other than the international one. But unless such a norm further develops as a norm of general international law, their scope of application will continue to be restricted to that specific regional arrangement. Consequently, they cannot be recognized as universal peremptory norms of general international law for the effects of article 53 and 64 of the VCLT.[718]

Also, the assumption that a regional "*ius cogens*" regime might operate in public international law as a peremptory regime as provided for by article 53 of the VCLT would simply disappear in the scenario that its rules collide with universal peremptory norms of general international law. Consider the hypothetical situation in which a regional or specific legal regime has a legal provision establishing a peremptory obligation of participating in armed operations against non-member states in case a member-state uses force without exercising its right to self-defence, an authorization of the UN Security Council or the consent of the concerned country. In principle, such a norm could be characterized as pertaining to the "general" or "public" interest of that given community. But such an alleged "peremptory norm" should be declared as null and void under Art. 53 for contradicting a peremptory norm, namely the prohibition of the use of force. So if one can envisage that a specific legal regime (either domestic or regional) may depict norms as imperative and non-derogable, they are not necessarily and equally imperative and non-derogable in public international law.[719] More importantly, its validity hinges upon the fact that it does not run contrary to a peremptory norm. For that reason, al least in what concerns the effects of the provisions of the VCLT, *ius cogens* norms are intrinsically of a universal nature, understood as applicable indistinctively to all states of the international community.[720]

[717] See Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', (2005) 16 *EJIL*, pp. 113-124. One could also allude to the customary origins in Latin America of the doctrine of non-recognition of territorial titles acquired by the use of armed force, which has a *ius cogens* nature as a corollary of the peremptory norm of prohibition of the use of force. For an overview on the origins of this doctrine, see R. Kolb, *Ius contra bellum, Le droit international relatif au maintien de la paix*, Bruxelles, Bruylant, 2e édition, 2009, pp. 63-67.

[718] Virally and Rozakis argue that the possibility of regional *ius cogens* would only exist in case it I subordinated to a universal *ius cogens*. C. Rozakis, above n 302, p. 56; and M. Virally, above n 297, p. 15.

[719] "En culaquier hipótesis, aun si pudiera formularse así un *ius cogens* regional, tendría, por supuesto, que estar subordinado al *ius cogens* mundial," A. Gomez Robledo, above n 335, p. 78.

[720] Virally affirms that peremptory norms belong to general international law and cannot be limited in terms of geographical application. M. Virally, above n 297, pp. 14 and 25. See also A. Orakhelashvili, above n 355, p. 40; L. Hannikainen, above n 277, p. 5; T. Meron, above n 400, p 193; Nieto-Nava, 'International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law', in *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio* Cassese, L.C. Vorhah *et al.* (eds.), 2003, p. 611. See also the opinions of Suy, Nahlik and Tunkin at the Lagonissi Conference, in G. Abi-Saab, above n 409, p. 108.

Given today's development of public international law in a fragmented and decentralized normative creating process, the need for the universality aspect of *ius cogens* cannot be overemphasized.[721] The perspective of each state or group of states having the capacity to arguing the existence of "peremptory norms" in accordance with their respective and specific perception on values and public policy and general interest, contradicts, particularly in dealing with the issue of *ius cogens*, the progressive universalistic development of public international law since the establishment of the United Nations.[722]

Section V – Determination of peremptory norms[723]

If *ius cogens* is not a new source of international law, and having established that the concept of *ius cogens* is primarily a quality attached to existing and valid norms, the question remains unanswered as to how it is possible to determine the feature of *ius cogens* in certain norms of general international law.[724] Also, who can determine the *ius cogens* character of norms in international law, given that there is no supranational entity with recognized authority to enact norms with universal scope binding upon all members of the international community indistinctively?[725]

By merely affirming the existence of *ius cogens* as imperative and non-derogable norms, the ILC left open the question on the manner in which *ius cogens* norms are "accepted" and "recognized" by the international community as a whole. [726] The

[721] "[H]aving regional *jus cogens* would introduce chaos into the international legal system," A. Orakhelashvili, above n 355, p. 39.

[722] See General Assembly Resolution 174 (II), 21 November 1947, establishing the International Law Commission (ILC). Hannikainen affirms that the fulfillment of its purposes, namely the protection of the overriding interests and valued of the international community of States, would be enhanced by its universality. L. Hannikainen, above n 277, p. 5.

[723] For an analysis on the legal conceptual differences between "determination" (*Bestimmung*) and identification (*Identifizierung*), see P. Tavernier, 'L'identification des règles fondamentales, un problème résolu ?', in Christian Tomuschat & Jean Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, 2006, Leiden, Martinus Nijhoff, 2006, pp. 5-6. He concludes that determination is more suitable for *ius cogens* because it implies a more proactive engagement of the interpreter.

[724] "Although there is a well recognized minimum content of peremptory law, (...), the criteria which help to identify *jus cogens* norms are not entirely clear," S. Kadelbach, above n 642, p. 28. See also P. Tavernier, *idem*, p. 2.

[725] This question was made by the Swiss representative during the Conference, but remained unanswered. In *Vienna Conference*, vol. II, p. 123.

[726] In its preparatory work, the ILC concluded that "there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of jus cogens." *Second Report on the Law of Treaties*, [1963] 2 YBILAC 52, U.N. Doc. A/CN.4/156. "The article spells out the consequences when a treaty conflicts with a rule of *jus cogens*: it says that the treaty is void. The article does not say which norms of general international law have the character of *jus cogens* and which have the character of *jus dispositivum*. The Commission considered it to be the right course to leave the full content of the rule to be worked out in state practice and in the jurisprudence of international tribunals. It did not accept the suggestions of some of its members who felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best-settled rules of *jus cogens* in order to indicate by these

"non-definition" adopted by the ILC provoked a great deal of criticism.[727] No international body or binding legal procedure was provided with the capacity to determine which norms may be accepted and recognized as *ius cogens*. The purely formal criterion suggested by the ILC left the responsibility of the progressive identification of peremptory norms to state practice and judicial decisions.[728] Fears emerged due to the possibility that the determination of *ius cogens* would be subject to the specific interests and circumstantial judgments of States and other actors with the capacity to influence the development of peremptory norms.[729] And concerns were raised over the potential misuse of the concept of peremptory norms, such as for claiming unilateral waiver from international obligations on the basis of the alleged emergence of peremptory norms.[730]

These uncertainties led several authors to suggest specific methods for the identification of *ius cogens*. Decades before the VCLT, Von der Heydte affirmed that each norm of general international law itself determines whether its content is of a *ius cogens* character. The criterion to determine its peremptory nature should be developed on the basis of the sense and the aim (respectively *Sinn* and *Zweck*) of each existing and valid norm within the system.[731] Verdross also suggested that the determination of the peremptory character of a given norm of general international law should occur by the analysis of its meaning (*ihrem Sinne nach*) in the light of its material relevance.[732] Erik Suy put forward a method for identifying *ius cogens* norms based on three criteria: (i) they cannot be derogated by an agreement among

examples the general nature and scope of the rule contained in the article," 18th Session of Sixth Committee, 1963, Summary Records, p. 24.

[727] "The Convention does not say anything about the criteria to be used for the identification of a *jus cogens* rule among others having a different nature." L. Alexidze, above n 274, p. 227. The lack of clarity in the VCLT led to what several authors characterized as an empty or circular definition. Ch. de Visscher said that the lack of precision in the definition of *ius cogens* could have been compensated by a clear designation of the competent authorities to be charged with the task of elaborating and introducing peremptory norms in positive international law. But references to the "international community as whole" in the 1969 VCLT were meaningless as regards positive international law, since "dans les réalités de la vie internationale, elle est encore à se chercher, elle ne correspond pas à un ordre effectivement établi." Ch. de Visscher, above n 341, pp. 7-8. Sztucki also criticized the solution suggested by the ILC as a means of determining the *ius cogens* quality of norms of general international law. Such a solution would contradict the requirements of "acceptance" and "recognition" of the international community as a whole to the extent that "neither State practice, nor the jurisprudence of international tribunals must necessarily reflect the view of the 'international community of States as a whole'." J. Sztucki, above n 287, p. 101.

[728] The only indication in this regard in the work of the ILC was given by the fourth rapporteur, Humphrey Waldock, who stated that "the full extent of *jus cogens* would be determined ultimately by practice, the decision of international tribunals and pronouncements of political organs." Waldock's commentary, which was implicitly supported by the final text of the VCLT, implies the recognition of these procedures (state practice and judicial decisions) as adequate means to determine the quality of *ius cogens* of existing norms of general international law. YbILC, 1963-II, p. 198. This "solution" led to what Hannikainen called as a partly codification and a partly progressive development in public international law. L. Hannikainen, above n 277, p.162.

[729] See Chapter I, Section II above for a piece of criticism on the morality factor in public policy theories.

[730] J. Sztucki, *idem*, p. 126.

[731] Van der Heydte, 'Die Erscheinungsformen des Zwischenstaatlichen Rechts: *jus cogens* und *jus dispositivum* im Völkerrecht', (1932) 16 *Zeitschrift für Völkerrecht*, pp. 461-487.

[732] He favoured a material criterion according to which a *ius cogens* norm "consists in the fact that they do not exist to satisfy the needs of the individual States but in the higher interest of the whole international community." A. von Verdross, above n 342.

states; (ii) international covenants do not authorize their derogation (*de iure cogenti* or *de iure dispositivo*); and (iii) the international community considers their violation as an "international crime".[733]

Today, there is a growing consensus in legal literature that the solution is to be sought in the notion of "general international law."[734] On the one hand, the meaning of "norms of general international law" has led to several interpretations, usually related to axiological considerations.[735] Many commentators seem to skip a more thorough debate on that issue by simply referring to the "universality" of those values assumedly portraying the interests of the international community as a whole in opposition to the individual interests of the States. Others have said that it implies the existence of an international society with values that no State would be free to repudiate or ignore.[736] On the other hand, however, if one does not admit any civilizational standard *a priori* and seeks more objective pieces of evidence, such as those established by legal instruments of manifestly universal scope as the UN Charter and the 1948 Universal Declaration on Human Rights, it is hard to conceive other method for determining the *ius cogens* quality of norms of general international law than those suggested by the ILC, namely (i) state practice and *opinio iuris cogentis* (which today could include the opinion of international organisations as subjects of international law); (ii) the decisions of international tribunals, particularly those of intended universal scope of jurisdiction, such as the ICJ and the ICC; and, subsidiarily, (iii) the work of international publicists, understood as of means of reinforcing existing pieces of evidence on the recognition and acceptance of the *ius cogens* quality of certain norms of general international law.

But if it is correct to assume that these are valid procedural means for determining the peremptory status of norms of general international law, it would be erroneous to infer that all State practice and all jurisprudence of international tribunals are necessarily indicative of the "acceptance" and "recognition" of the *ius cogens* character of certain norms by the international community as a whole. Limitations would appear in circumstances of limited agreements among States (even those of a multilateral scope) establishing the peremptory nature of certain norms, or judicial decisions passed by a narrow majority and with dissenting opinions. The fact that international practice, both of States and international tribunals, provides

[733] Suy himself recognized that such a method would be far from satisfactory. Erik Suy, *Le droit des traités et les droits de l'homme*, Strasbourg, Institut international des droits de l'homme, Juillet, 1980.
[734] In a more naturalist approach, A. A. Cançado Trindade affirmed that "[the law] does not emanate from the inscrutable "will" of States, but rather from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the *opinio juris communis* of all the subjects of international law (the States, the international organizations and the human beings). Above the will is the conscience." IACtHR, *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18, Concurring Opinion of Judge A.A. Cançado Trindade, p. 32, para. 87.
[735] J. Barberis, above n 568, p. 44.
[736] A. Gómez-Robledo, above n 335, p. 79.

no actual example yet of a treaty being declared as null and void on grounds of derogating from a peremptory norm, also sheds doubts on the revolutionary potential of *ius cogens* for achieving a shift in the persistent deficiencies of the international legal system.[737] This is particularly pertinent as regards the competences and legitimacy of certain bodies and law-making processes to determine the universal binding force of certain norms of general international law.[738] Rather than the enforcement of the non-derogability effects stemming from peremptory norms, one should expect instead that those means would be paramount for determining the legal status of certain norms of general international law. The progressive development of the content of *ius cogens* is therefore most likely to take place slowly and in very circumstantial cases instead of in a rapid and overriding manner that could shift the prevailing balance of powers in the international legal order.

State practice

State practice is the most fundamental means for determining the quality of *ius cogens* of norms of general international law in an international legal system characterized by coordinative relationships among subjects of law as a consequence of decentralised legal structures. If rules of *ius cogens* are general in character, it is most likely that provisions of a peremptory nature, such as those norms portraying general normative commandments of an alleged universal scope,[739] derive from sources such as custom, general principles of law and multilateral treaties.[740]

The role played by customary law in the determination of the *ius cogens* nature of existing norms is a direct consequence of the fact that it is the most likely source of general international law.[741] By considering the resolutions of the General Assembly, for example, it is possible to assert that some of them can be regarded as authoritative interpretations on the current status of norms in international law. That is particularly the case of resolutions unanimously approved by the General Assembly, to the extent to which they indicate an outstanding level of support as

[737] Difficulties related to the process of determination of *ius cogens* norms highlight the continuous pertinence of Hart's criticism on the imperfect feature of international law, as a consequence of the non-existence of necessary secondary rules in international law that could guarantee the recognition, the modification and the adjudication of rights and obligations in international law. H.L.A. Hart, above n 36, Chapter X.

[738] See P. Tavernier, above n 723.

[739] In this regard, Kolb noted that *ius cogens* as "[d]roit de la communauté internationale, elle [la source du *ius cogens*] se situera avant tout dans la coutume générale ainsi que qu'éventuellement dans les traités multilatéraux généraux ayant atteint un niveau de participation quasi-universel." R. Kolb, above n 4, p. 175. See also C.F. Amerisanghe, in G. Abi-Saab, above n 409, p. 107.

[740] E. Suy, above n 280, p. 49.

[741] "[L]a costumbre internacional conserva todavía su antiguo rango, y en lo que hace al punto que examinamos, es hasta hoy la única fuente indiscutible de derecho internacional general," A. Gomez Robledo, above n 335, p. 79. See also K. Marek, above n 608, p. 497.

regards the *opinio iuris* of States on a certain aspect of public international law. An analogy could be drawn with the process observed in the World Trade Organisation (WTO), in which bodies with similar competences to that of the GA, namely the Ministerial Conference and the General Council, were granted with the authority to adopt interpretations on the multilateral trade normative system.[742]

In contrast to international customary law, which by its very nature provides pieces of evidence for the determination of peremptory norms of general international law,[743] the role of multilateral treaties is played at another level of legal practice. Multilateral treaties are expected to perform an equally leading role in this task as an objective indication of the degree of support by States on the binding character of specific norms of general international law.[744] The number of parties and its universal scope of application are elements that provide a remarkable indication on the level of "acceptance" and "recognition" of certain norms by the international community as a whole. Also, multilateral treaties are usually the result of a long negotiating process in which not only representatives of States take part, but also international organizations, civil society and legal experts. Of course the final version of a multilateral treaty reflects primarily the balance of States' interests on that particular issue, since States are the subjects of law with legal capacity to create rights and obligations in current public international law. But in some circumstances multilateral treaties may also be the result of processes initiated in technical bodies composed by legal experts representing different regions of the world and presumably elected in their personal capacities. This is the case of the very ILC,[745] the several existing treaty bodies, particularly in the area of human rights, or the former Sub-Commission on Human Rights and now Advisory Committee of the Human Rights Council.[746] As such, the *travaux*

[742] Pursuant to article IX:2 of the Marrakesh Agreement, "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."

[743] See *North Sea Continental Shelf* case, above n 1, pp. 38-39, para. 63.

[744] The ILC referred to multilateral treaties as the most likely means for making changes in the normative universe of *ius cogens*.

[745] The ILC was established by 21 November 1947, by the General Assembly Resolution 174 (II). It replaced the Committee on the Progressive Development of International Law and its Codification (GA Resolution 94 9 (I), 11 December 1946). Article 1, paragraph 1 of the Statute of the ILC provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification". Article 15 of the Statute makes a distinction "for convenience" between progressive development as meaning "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States" and codification as meaning "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine".

[746] "Pursuant to Human Rights Council Resolution 5/1, the Human Rights Council Advisory Committee (hereinafter "the Advisory Committee"), composed of 18 experts, serving in their personal capacity, has been established to function as a think-tank for the Council and work at its direction. The Advisory Committee replaces the former Sub-Commission on the Promotion and Protection of Human Rights. The function of the Advisory Committee is to provide expertise in the manner and form requested by the Council, focusing mainly on studies and research-based advice." See www.ohchr.org, access on November 7, 2012.

préparatoires are a valuable source of evidence on the current status of state practice.

It should be said nonetheless that, in practical terms, it is hardly conceivable that a multilateral treaty's provisions immediately create peremptory norms. There is as yet no international treaty expressly declaring the peremptory quality of a certain rule in accordance with article 53 of the VCLT. It is more appropriate to imagine that multilateral provisions would serve as a normative basis for the progressive development of the peremptory character of norms. In the due course of time, normative layers of acceptance and recognition would be added to a specific aspect of a multilateral treaty on the basis not only of state practice, but also of international jurisprudence and the writing of scholars. This process of a clearly customary nature may eventually amount to the recognition of the peremptory quality of a certain norm, resulting in a modification or, most likely, the emergence of a norm of *ius cogens* ultimately deriving from a multilateral treaty.[747]

In the case of a modification of existing *ius cogens*, new peremptory provisions stemming from multilateral treaties would not necessarily derogate from a previously existing peremptory norm in its entirety. New peremptory norms would most likely attenuate some of the essential elements of previous norms of *ius cogens*. Otherwise, the very emergence of a new peremptory norm could be tantamount to derogation from a previously existing *ius cogens* norm. That would be the case, for instance, of the principle of non-intervention in the domestic affairs of other States. During intergovernmental negotiations for the VCLT, that principle was among the rules mentioned by many as an example of *ius cogens*. Indeed, in the Cold-War period, it was a fundamental principle of public international law of widespread acceptance and recognition by the international community as a whole, and considered by many authors and states as having a *ius cogens* quality. After the fall of the Berlin wall and the increased importance of issues such as human rights in the international agenda, the non-derogable nature of the principle of non-intervention has been attenuated, *inter alia*, by the increased membership of international instruments of human rights, by the interpretations by the Security Council of human rights violations as threats to international peace and security and by the provisions of the GA Resolution 60/1, which created the Human Rights Council and recognized the notion of responsibility to protect in international politics. As a result, today the acceptance and recognition of the principle of non-intervention as a norm of *ius cogens* does not enjoy a sufficiently substantial level of support in state practice to portray it as a principle having a peremptory nature to the effects of the legal regime of article 53 of the VCLT.

In conclusion, multilateral treaties of universal or quasi-universal acceptance cannot be used as the sole an undisputable criterion for determining the *ius cogens*

[747] "If treaty obligations are recognized also in international customary law, a strong case can be made for them to belong to international *jus cogens*," S. Kadelbach, above n 642, p. 31.

character of certain of their provisions. Under a strict positivist-voluntarist approach, only a multilateral treaty of concrete universal membership could expressly establish the peremptory character of all or some of its provisions. But this theoretical hypothesis has no reflection in international practice, and it is doubtful that such a provision will be expressly made in the foreseeable future.[748] But rather than "positivisation" of a peremptory norm, multilateral treaties provide unequivocal evidence of state practice and of the level of recognition of the central role of certain norms in the international legal system.

Judicial determination

In the early debates on peremptory norms, several scholars advocated for compulsory international adjudication. It was argued that it would be a precise means for determining the *ius cogens* nature of certain norms of general international law, and consequently for avoiding the unilateral interpretation by States on the existence and operationalization of the legal regime of *ius cogens*.[749] The central idea was that "only a judge could derive *jus cogens* in relation to a concrete situation."[750] However, the proposal of the ILC concerning compulsory jurisdiction[751] did not gather sufficient support in the Vienna Conference, and the VCLT conveyed a secondary role, subject to the consent of States, to be played by international adjudication in the process of determining the *ius cogens* character of norms of general international law. Article 66 as finally approved[752] established a mechanism of dispute settlement aimed at addressing the application of Articles 53 and 64, but its efficacy is weakened by the possibility of reservations to that

[748] J. Sztucki, above n 287, p. 113.

[749] Suy alerted to the dangers of unilateral application of the concept of *ius cogens* as a means to be used by States to escape their international obligations, or to deny the validity of agreements between third parties. He said that "any unilateral application of that principle would destroy the very foundations of the international legal system which, precisely, it is the aim of the introduction of the notion of the *jus cogens* to stabilize and re-inforce." Suy advocated that "the application of the *jus cogens* in public international law must inevitably envisage such an impartial control in the absence of which international law would become enriched by a notion which, undoubtedly, is very attractive, but which in the long run would prove injurious" E. Suy, above n 280, p. 73. That was also the conclusion reached by the ILC in the preparatory work for the 1969 VCLT. A compulsory adjudication or any other impartial means of peaceful settlement of disputes (Chapter VI of UN Charter) would avoid the dangers posed by a unilateral manipulation of the legal regime operated by the concept of *ius cogens*. Otherwise, such a task would have been primarily left to the individual and particular appreciation of States and only complementarily for judicial adjudication.

[750] G. Abi-Saab, above n 409, p. 86.

[751] See the suggestions made by the first rapporteur, Hersch Lauterpacht, in YbILC, 1953-II, pp. 93 and 155.

[752] "*Article 66 - Procedures for judicial settlement, arbitration and conciliation* - If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed: (*a*) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration; (*b*) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations."

specific provision when opposed by States Parties to the Convention.[753] That possibility leaves compulsory judicial adjudication dependent on the willingness of States to submit their disputes to the ICJ or to any other mechanism.[754]

Several authors are sceptical about the role of international adjudication in the determination of the peremptory character of norms of general international law. First, there is no evidence on the reliance on *ius cogens* rules to analyse and subsequently declare the nullity of international treaties. Second, no dispute has so far been brought before the ICJ concerning the application or the interpretation of articles 53 or 64 of the VCLT. Furthermore, international tribunals have sometimes been hesitant in expressly referring to the concept of *ius cogens*.[755] But if it is correct to affirm that international courts, particularly the ICJ, and parties to a dispute have not resorted to *ius cogens* as much as first imagined, it is a mistake to assume that *ius cogens* does not exist as a consequence of the absence of its actual operationalization by judicial means *vis-à-vis* other norms of general international law, i.e., to the extent to which treaties have not been declared as null and void by a competent tribunal as a consequence of their collision with peremptory norms.[756] If and when judicial institutions refer to the concept of *ius cogens* (as has already been the case, particularly through *ad hoc* international criminal tribunals and regional human rights courts) they do so precisely because the concept exists and is valid in the international legal order. Also, the fact that international judicial decisions[757] refer to cognate notions of *ius cogens* does not diminish in any way the imperativeness of the concept. The progressive use of the concept of *ius cogens* by *ad hoc* international criminal tribunals such as the ICTY,[758] and regional human rights courts (European Court of Human Rights and Inter-American Court of

[753] "But even assuming that, in case of a dispute concerning *jus cogens*, the Convention provides for obligatory jurisdiction of the ICJ or obligatory adjudication, in the last instance, one must still regard the procedural safeguards as rather unsatisfactory." J. Sztucki, above n 287, p. 141.

[754] In spite of that, the consent of a Party to Article 66 of the Convention might be perfectly regarded as allowing for a unilateral submission of a dispute before the ICJ by a third State Party to the VCLT on the interpretation of Articles 53 and 64, in accordance with Article 36 (1) of the Statute of the Court.

[755] Weckel noted that "la Cour est parvenue à éviter de justesse la confrontation avec le *jus cogens.*" P. Weckel, 'Chronique de jurisprudence internationale. Cour interaméricaine des droits de l'homme, Avis n. 18 du 17 septembre 2003, *Condition juridique et droits des travailleurs migrants en situation irrègulière*', (2004) *R.G.D.I.P.*, p. 233. See also S. Kadelbach, above n 642, pp. 31-33. For instance, the ICJ has scarcely relied on the concept of *ius cogens*, and when it did so the ICJ did not rely on it unequivocally. Indeed, most of the references made to *ius cogens* occur in the context of dissenting or separate opinions, or within legal argumentation concerning the validity of certain international obligations as a consequence of their peremptory character regardless of the will of States. See, for instance, the alegations of Congo in the several cases *concerning Armed Activities on the Territory of the Congo*.

[756] As Orakhelashvili points out, "the crucial point is that the peremptory character of norms does not exclusively depend on judicial pronouncements." A. Orakhelashvili, above n 355, p. 42.

[757] *Teheran Hostages (US Diplomatic and Consular Staff in Teheran)*, ICJ Reports 1980, p. 41; *Reservations to the Genocide Convention* case, above n 441, p. 22.

[758] See F. Harhoff, 'La consecration de la notion de *jus cogens* dans la jurisprudence des tribunaux pénaux internationaux', in Paul Tavernier (sous la direction de), *Actualité de la jurisprudence pénale internationale à l'heure de la mise en place de la Cour pénale internationale*, Bruxelles, Bruylant, 2004, pp. 65-80.

Human Rights[759]) is a conspicuous example of the potential to be explored by the legal regime operated by peremptory norms.[760]

In conclusion, the judicial method is undoubtedly a very important tool as a clear and unequivocal means to determine the *ius cogens* quality of certain norms, since such a quality is unlikely to arise from consensual law-making processes in international law. Of course, the particular effects of a judicial decision are restricted to the Parties to a dispute before an international court, such as the ICJ.[761] But for our purposes, a judicial decision might also operate as a means of interpreting and determining the legal status of certain norms of general international law, in accordance with Article 38 (d) of the Statute of the ICJ.[762] Since jurisdictional activities are expected to apply the existing law as it stands in the light of the recognized sources of international law,[763] they "must be presumed to be an accurate statement of what the law is."[764] It is not the case to advocate an automatism of law-making on *ius cogens* on the basis of pronouncements from international tribunals, particularly these made in dissenting or separate opinions, or in the context of arbitral processes. Nor is the question related to the expansion *erga omnes* of the capacity of the ICJ as a means to enforce to all States the effects of Article 53, i.e., to enlarge the effects of a judicial decision to the international community as a whole and consequently beyond the parties to a dispute. The question at hand is circumscribed to the role of international adjudication as an objective source of evidence on the acceptance and recognition of the *ius cogens* quality in existing and valid norms within the international legal order. In this case, judicial decisions are tantamount to the legal practice stemming from tribunals and as such must be regarded as a subsidiary means for the determination of the level of "acceptance" and "recognition" of certain rules of law. For that reason, the objective determination of the *ius cogens* nature of a certain norm is most likely to occur in the context of legal adjudication,[765]

[759] P. Weckel, above n 755, pp. 234-237.

[760] As observed by Tavernier, "dans la société international actuelle, le rôle principal en matière d'identification des règles fondamentales semble bien revenir au juge international." P. Tavernier, above n 723, p. 11.

[761] Article 59 of the Statute of the ICJ reads that "The decision of the Court has no binding force except between the parties and in respect to that particular case".

[762] Article 38 (d) of the Statute recognizes that "subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

[763] The *caput* of Article 38 of the Statute of the ICJ reads that "The Court, whose functions is to decide in accordance with international law such disputes submitted to it, shall apply …".

[764] J J. Pauwelyn, above n 5, p. 110. Kingsbury addressed the important role of international tribunals in the task of pacifying the legal interpretation on the current status of international norms by saying that, in the absence of a supranational judicial system, "the ICJ must continue to maintain its intellectual leadership role", which would also impact upon the work of other international tribunals that would "be under pressure to abide by the ICJ's determinations on international law." B. Kingsbury, "Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem? (1993) 31 *New York Journal of International Law and Politics*, p. 707.

[765] According to Lambert, the practice of international tribunal is, as any jurisdictional activity, "l'agent nécessaire de la transmutation du sentiment juridique en norme de droit." Ed. Lambert, *Etudes de droit commum législatif*, quoted in P. Foriers, above n 9, p. 21.

regardless of the non-existence of a necessary and binding supranational judicial solution under the VCLT.

Among the reasons increasing the likelihood of international tribunals being a potential source of evidence for determining the *ius cogens* nature of certain norms is the fact that jurisdictional activities deal with concrete cases, i.e., they are applied to specific circumstances, while the law-making process is by its very nature general and produced *in abstracto*. Indeed, rather than appearing in a consensual and express manner, the determination of *ius cogens* is most likely to happen when a specific normative provision is under analysis by a specific body, such as an international tribunal. This is likely to be the most suitable context for declaring the peremptory nature of a given normative provision.

In summary, the importance of judicial decisions is fundamentally given by their declaratory role on the *ius cogens* quality of certain norms of general international law. Notwithstanding, one should still remain relatively sceptical regarding the role of international judicial decisions in the task of identifying *ius cogens,* particularly if one intends to draw a parallel with judicial activities in municipal law. In domestic legal systems judges have to base their decisions on objective criteria of operationalization of law provided for by the very legal system, such as those norms related to the specific competences of the Judicial Power and norms of different hierarchical nature. This is not the case in the international legal system, in which the applicable law and compulsory jurisdictional competences are a result of voluntary law even in the scenario of equity, since Article 38(2) of the Statute of the ICJ provides that the Court may decide cases *ex aequo et bono* only where the parties have agreed thereto.

Writings of scholars

The work of jurists is also an important subsidiary means for determining the quality of *ius cogens* in certain norms of general international law. The role to be played by the writings of publicists, the so-called *doctrine*, derives from Article 38, para. 1 (d) of the Statute of the ICJ, which includes "the teachings of the most qualified publicists of the various nations" among "the subsidiary means for the determination of rules of law."

Although hardly an undisputable source in itself, doctrinal writings might contribute directly or indirectly to constituting pieces of evidence of the law. *A priori*, the work of publicists may exert a pivotal influence over the formative development of international law. If one regards the progressive development of the very concept of *ius cogens*, it is possible to identify that doctrine has provided the epistemological basis for its eventual codification in international law. Analogous practice developed by international bodies of legal experts, such as the

ILC and the Advisory Committee of the Human Rights Council, may contribute as well not only to the determination of the status of the recognition and acceptance of certain norms in international law, but also for the preparatory process of international legal instruments.

Another important influence of legal doctrine is played at the level of state practice and international adjudication. Doctrinal writings play an important role in the interpretation of *ius cogens* as *lex lata* or *lex ferenda*.[766] In the ICJ, judgments never openly rely on doctrine, probably because of the need to avoid selective quotations that could jeopardize the premises of impartiality and universality of the Court. But one may find doctrinal references in dissenting and separate opinions, in which the lines of legal reasoning are usually developed in a more thorough manner. But even when the epistemological sources are not expressly mentioned in the *dictum*, legal doctrine still exerts influence over a judicial decision. By contrast, States pleadings before the ICJ are full of doctrinal references as elements or persuasion on the legal status of certain norms.[767]

Overall, the *communis opinio doctorum* must be dealt with in a cautious manner. Legal writings are inevitably under the influence of subjective assessments reflecting ideological, political or moral backgrounds. They may also reveal national interests rather than an objective and impartial assessment of law as it stands in international reality. In times of progressive development of international law and increased inter-relationships between subjects of law, it is paramount to obtain as diverse doctrinal views as possible in the task of determining the actual status of law as regards *ius cogens*. The diversity of views is given both by the geographical origin as well as by the legal tradition of the jurist. This is the sole guarantee against the imposition of views that could ultimately amount to an anachronistic perception of the international law-making process in contemporary world.

Section VI – Concluding remarks on the definition of *ius cogens*

In summary, the concept of *ius cogens* is essentially defined as a quality that can be attached to existing and valid norms of general international law. It is not a new source, nor a newly emerging hierarchy between norms of public international law. It is simply a particular quality that distinguishes certain norms from other existing rules of general international law as a consequence of a series of aspects attached to that category of norms. It is therefore a "technical" feature that results

[766] As mentioned by Bystricky at the Lagonissi conference, "jurists could play as important a role as that of judges, because if their writings were persuasive, they could affect decision-makers, including judges." Bystricky, in G. Abi-Saab, above n 409, p. 90.
[767] I. Brownlie, above n 487, pp. 23-24.

from the observance of certain fundamental aspects in norms of general international law, namely their imperativeness, non-derogability and universality. The imperative character means that peremptory norms are compulsory for all States in all circumstances. The non-derogable character suggests that peremptory norms cannot be derogated by *inter partes* agreements, but only as a result of the emergence of a new norm of that same character. And the universal character implies the universal acceptance and recognition of their peremptory character, what results in their universal scope of application. The simultaneous existence of these three features is a requisite for determining the *ius cogens* quality in norms of general international law.

Beyond its positive existence, though, peremptory norms undoubtedly possess a distinct axiological importance when compared to other norms of general international law. As occurs in any legal system, norms of public international law are also the result of the axiological evaluation over facts emerging from real life, to which certain legally binding commandments are attached as a means of guaranteeing social stability and the achievement of the legally protected goals within the international community. Axiological and extra-positive considerations over factual circumstances of human reality are the very core of concerns in all activities developed by lawmakers, and potentially even more in the case of *ius cogens*. But axiological considerations are an extra-positive factor that operates in the pre-normative process in which the specific quality of *ius cogens* is attached to norms of general international law. They are not, however, the element that determines the peremptory nature of a given norm. As far as the positive legal regime of *ius cogens* operates, the question is not related to axiological considerations anymore.

Without a centralized authority with recognized competences to enact legally binding peremptory norms upon the international community as a whole, the task of the legal interpreter lies in searching for, in the light of state practice, judicial activities and, subsidiarily, the work of publicists, pieces of evidence on the universal, imperative and non-derogable character of existing norms in the international system. The result of this process will be conducive to the determination of the *ius cogens* character for existing norms of general international law. On the contrary, suggesting that the central aspect in the discussion on *ius cogens* is rather the materiality of norms, or their hierarchical position, or even their positive existence as expressed by the will of States, deviates from the essential features of the concept of peremptory norms. For that reason, these approaches tend to lead to other and erroneous conclusions as regards the essential character of the concept of *ius cogens*, namely its objective technical core features: universality, imperativeness and non-derogability. Such conclusions are precisely what the present work has intended to avoid.

Part III – The Material Content of *Ius Cogens*

Attempts to establish which norms have a *ius cogens* quality have proved very problematic. During the *travaux préparatoires* for the Vienna Convention, several members of the ILC tried to list which norms have a peremptory character. Fitzmaurice specified three categories of norms considered peremptory: cases where the position of the individual is involved and where the rules have been instituted for the protection of the individual; planning wars of aggression; and conventions legitimizing piratical acts on the high sea.[768] As the next rapporteur on the subject, Waldock suggested as examples of peremptory norms the prohibition of the use of force, acts or omissions characterized as international crimes, and acts or omissions in the suppression or punishment of which every State is obligated to cooperate, such as slave trade, piracy and genocide. Other members of the ILC also mentioned the promotion and protection of human rights, and the principles of equality among States and self-determination.[769] However, these attempts did not succeed, chiefly because they excluded other norms having a *ius cogens* nature. The ILC concluded that it was not within its mandate to proceed with a study on which norms had a *ius cogens* character,[770] and decided that it was better to have an imperfect rule than no rule at all.[771]

During intergovernmental negotiations, the practical viability of the concept of *ius cogens* without a materially defined content was discussed. Several countries acknowledged the existence of peremptory norms, but expressed fears on the lack of an expressly agreed list of peremptory norms.[772] In 1963, States provided several non-exhaustive lists of peremptory norms, which included the prohibition of the use of force, respect for fundamental human rights, crimes under international law,

[768] YbILC, 1959-II, p. 40.
[769] *Idem*.
[770] YbILC, 1966-I, p. 76-77.
[771] *Idem*, p. 40.
[772] The British representative alleged that the draft article submitted by the ILC was equivalent to establishing a penal code without specifying which behaviours were considered criminal offenses. Summary Records of Meetings of the sixth Committee of the GA, 23th session, 1968, pp. 304-305.

the principle of non-intervention, and the self-determination of peoples.[773] In 1967 these lists also came to include the peaceful settlement of disputes, the principle of sovereign equality of States and article 103 of the UN Charter.[774] At the Vienna Conference, 32 States submitted lists of peremptory norms that reflected the same examples mentioned before.[775] But due to a lack of a common understanding on which norms could be considered peremptory, the task of determining the content of *ius cogens* was abandoned in the negotiating process.[776] At the end, the 1969 VCLT was silent on which norms are materially qualified as *iuris cogentis*, and the determination of its content was left to the progressive practice of states and to international adjudication.[777]

Doctrine has also provided several lists of peremptory norms,[778] which may be over-reaching or more conservative as regards the level of recognition and acceptance of *ius cogens*. In general, there are basically two approaches: a simple enumeration of norms or a classification based on certain criteria. In the first group, Hannikainen affirms that there is evidence of the existence of the following peremptory norms: (i) the prohibition of aggressive armed force between States; (ii) the right to self-determination; (iii) respect for human rights; (iv) respect for the basic rules which guarantee the international status, order and viability of sea, air and space areas outside national jurisdiction; and (v) respect for the basic norms of the international law of armed conflicts (*ius in bello*).[779] Orakhelashvili mentions, as norms of public policy with a peremptory character, the prohibition of the use of force, the principle of self-determination, fundamental human rights, international humanitarian law and certain norms of environmental law.[780] Brownlie recognizes as the least controversial examples the prohibition of the use of force, the law on genocide, the principle of racial discrimination, crimes against humanity, the rules prohibiting trade in slaves and piracy, and "as other rules which have this special status," the principle of sovereignty over natural resources and the principle of self-determination.[781] Cassese recognizes the principle of non-use of force; the right to self-determination; and the prohibitions of slavery, genocide, *apartheid*, crimes against humanity, and torture.[782] Scholars gathered at the Lagonissi Conference

[773] Report of the Sixth Committee to the GA, UN Doc. A/5601, p. 3.
[774] Report of the Sixth Committee to the GA, UN Doc. A/6913, p. 16.
[775] Weisburd noted that state delegations at the Vienna Conference "offered widely differing lists of rules meeting the requirements of jus cogens; of the twenty-six delegations . . . no more than thirteen agreed with respect to any one rule," in A.M. Weisburd, above n 277, p. 1493.
[776] States understood that this measure was not their main objective when preparing a convention on the law of treaties. L. Hannikainen, above n 277, p. 178. J. Sztucki, above n 287, pp. 114-123.
[777] YbILC, 1966, p. 76.
[778] As already mentioned above, the respective material content in those lists varies as much as the several theoretical approaches on *ius cogens*. Hannikainen identified norms of *ius cogens* including "the prohibition of aggressive armed force between States," "basic human rights," "order and viability of sea, air, and space areas outside national jurisdiction," and "the law of war," in L. Hannikainen, above n 277.
[779] L. Hannikainen, *idem*, p. 178.
[780] A. Orakhelashvili, above n 355, pp. 50-60.
[781] I. Brownlie, above n 487, pp. 488-489.
[782] A. Cassese, above n 698, pp. 198–212.

referred to "elementary considerations of humanity" as developed by the ICJ in the *Corfu Channel* case, Article 103 of the UN Charter, the prohibition of the use of force, and those principles of independence and equality of States and of non-intervention in the domestic affairs of other States.[783] In the other group, Caicedo Perdomo classified peremptory norms as follows: (i) rules related to the sovereign rights of States and peoples (sovereign equality, territorial integrity, self-determination); (ii) rules related to the maintenance of international peace and security (prohibition of the use of force, peaceful settlement of disputes); (iii) rules related to contractual freedom and inviolability of treaties (*pacta sunt servanda*, good faith, etc); (iv) rules related to fundamental human rights (prohibition of slave trade, *habeas corpus*, prohibition of torture, fundamental freedoms, etc); and (v) rules related to the use of air, space and sea as areas belonging to the international community as a whole (outer space, high seas, seabed).[784] Scheuner classified as norms of *ius cogens*: (i) rules on the foundations of international order, (the prohibitions of genocide and use of force, except in self-defence), (ii) rules concerning peaceful cooperation in the protection of common interests (i.e., freedom of the seas) and rules protecting the most fundamental and basic human rights, and (iii) rules for the protection of civilians in time of war.[785] Salmon classified norms of *ius cogens* as "les règles d'humanité ou de justice qui limitent la licéité des représailles (…), qui interdisent le recours à la guerre (…) ou qui imposent certaines normes de conduite à l'égard de l'individu (Convention sur le génocide, conventions relatives aux Droits de l'homme) et, enfin, qui instituent des infractions internationales: piraterie, traite des Noirs, traite des Blanches, etc."[786]

The above shows that there are also serious discrepancies between the various lists of peremptory norms. In particular, there are clearly divergent views on the acceptance and recognition of the peremptory nature of certain rules such as non-intervention, the peaceful settlement of disputes, sovereign equality of states, and environmental rules.[787] Consequently, relatively few peremptory norms can be regarded as gathering enough recognition and acceptance as indisputably *ius cogens*. Due to the divergent views on which norms have a *ius cogens* character, and bearing in mind that such a task would not fall within the primary scope of this work, the subsequent description will focus only on those norms gathering enough support in doctrine, in the opinion of states and in international jurisprudence as having a peremptory character.[788]. These rules, namely the prohibition of the use of

[783] E. Suy, above n 280, pp. 75-76.
[784] J.J. Caicedo Perdomo, above n 586, pp. 261-274.
[785] J. Crawford, above n 293, p. 81.
[786] J.-A. Salmon, above n 11, p. 290.
[787] "This points to a rather weak link between the ideas prevailing at the Vienna Conference and the doctrinal background against which the matter was taken up in elaborating the Convention." J. Sztucki, above n 287, p. 121.
[788] In this regard, the ILC's commentaries to the 2001 Draft Articles on State Responsibility remains valid as an emerging consensus on some a minimum material content of *ius cogens* in public international law. According to the ILC, "those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-

force, the right to self-determination, and the prohibition of the most serious violations of international human rights law and international humanitarian law, will be described below in order to be subsequently used in Parts V and VII in examples of antinomies between peremptory norms, the main goal of the present work.

determination." Article 26 (*Compliance with Peremptory Norms*), in 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', YbILC, 2001-II, Part Two, p. 85. In addition, Article 51 (1) of the 2001 Draft Articles enumerates, as obligations that impose material limits to the taking of countermeasures, (a) to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) the protection of fundamental human rights; (c) obligations of humanitarian character prohibiting any form of reprisals against persons protected thereby; other obligations under peremptory norms of general international law; and (e) the inviolability of diplomatic or consular agents, premises, archives and documents.

Chapter I - *Ius cogens* and the use of force

The prohibition of the use of force[789] is a norm of general international law that undeniably possesses a *ius cogens* feature.[790] Firmly based on international customary and treaty law, and further reinforced by international tribunals, the peremptory nature of the prohibition of the use of force stands out today as one of the few consensual matters in the theory of *ius cogens*. It is a general obligation imposed upon all members of the international society and owed towards the international community as a whole, to refrain from the use of force in inter-state relationships.

Section I - Historical development

The positivisation of the prohibition of the use of force is a political phenomenon of the twentieth century.[791] It is associated with the emerging understanding that the traditionally absolute and indiscriminate power of States to wage wars threatens the stability and predictability of the international legal system. From a doctrinal perspective it represents the end of both the traditional idea of "just war'' as developed centuries before through the practice of states and the work of international publicists,[792] and the previously prevailing notion granting absolute discretion for States to pursue their interests by military means as attribute of statehood,[793] as illustrated by Clausewitz.[794] In the last century, and particularly after the creation of the United Nations, the prohibition of the use of force became

[789] For an analysis of the term "force" of a broader scope instead of "war" as previously used in international practice, see R. Kolb, above n 717, pp. 241-247.
[790] A. Orakhelashvili, above n 355, p. 50; P P. Dailler & A. Pellet, *Droit international public*, Paris, LGDJ, 7th ed., 2002, p. 967, para. 576. For Gomez Robledo, it is "la más cierta de todas, y con obligatoriedad jurídica no sólo para los Estados partes en la Convención de Viena, o para los Estados miembros de las Naciones Unidas, sino en general para todos los miembros de la comunidad internacional", A. Gomez Robledo, above n 335, p. 133. Brownlie places the prohibition of the use of force as one of the least controversial examples of *ius cogens*, I. Brownlie, above n 487, p. 489.
[791] For a deep analysis on the evolution of the use of force and the historical development of the prohibition of the use of force in international law, see I. Brownlie, *International Law and the Use of Force by States*, Oxford, Oxford University Press, 1963.
[792] For a thorough analysis of the historical evolution of the concept of just war, see P. Haggenmacher, *Grotius et la doctrine de la guerre juste*, Paris, Presses Universitaires de France, 1983; J.B. Elshtain, *The Just War Theory*, Oxford, Cambridge, Blackwell, 1992; and M. Waltzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed., New York, Basic Books, 1992.
[793] I. Brownlie, '"International Law and the Use of Force" Revisited', Europaeum Lecture delivered at the Geneva Graduate Institute of International Studies, Geneva, February 1, 2001, p. 2; L. Oppenheim, above n 83, pp. 177-178.
[794] "Der Krieg ist eine bloße Fortsetzung der Politik mit anderen Mitteln", C. von Clausewitz, *Vom Kriege*, I, 1, 24.

an essential principle for the maintenance of international peace and security.[795] To-day, it represents the most important legal guarantee for the political sovereignty and territorial integrity of States, and suggests the emergence of a law of co-operation in parallel to a law of co-existence at the international level. In an international legal system still characterized by the fragmentation of legal regimes and the decentralization of the normative creation process, the general prohibition of the use of force may be regarded as the minimum-binding element of a social contract worth of that name at the international level.[796]

After modest attempts to limit *ius ad bellum*,[797] the regime of the League of Nations was the first concrete advancement towards the general prohibition of the use of force in international law. Established in 1919 in the aftermath of World War I, the League was based upon the common objective of avoiding and controlling the use of force, particularly wars of aggression among States.[798] But the Covenant did not outlaw the use of force in absolute terms, particularly as regards force as a means, potentially the *ultima ratio*,[799] to settle differences among states.[800] Concretely, the Covenant only prohibited in peremptory terms wars of aggression when occurring before a recourse to peaceful settlement of disputes (article 15), against a State which respected in good faith a decision rendered by an arbitral or judicial body (article 13 (4)) or against a State which agreed with the conclusions of a report unanimously adopted by the Council (articles 13 and 15 (6)).[801]

The prohibition of the indiscriminate and discretionary recourse to force in international law was further developed by successive conventions and declarations.[802] The most important one was the 1928 General Treaty for the

[795] "This fundamental principle draws a distinction between a post-Charter era of law-abiding, civilized community of nations and the pre-Charter era when the strong and powerful States were not restrained from attacking the weak at will and with impunity." *Oil Platforms* case *(Islamic Republic of Iran v. United States of America)* (Judgment), ICJ Reports, 2003, Dissenting Opinion of Judge Elaraby, para. 1.1., p. 291.

[796] Greig affirms that Article 2 (4) of the UN Charter provides the "basis" of the international order. D.W. Greig, *International Law*, London, Butterworths, 1976, p. 473. See also See R. Kolb, above n 717, p. 235-6.

[797] In particular the Hague Conferences of 1899 and 1907, and the process of "cooling off" introduced by the Bryan treaties between 1912 and 1919 See R. Kolb, above n 717, p. 34-35.

[798] Articles 10, 11 (1) and 11 (2) of the Covenant established specific obligations regarding the respect for the territorial integrity and political independence against external aggression; declared that any war of threat of war was a matter of concern of the whole League; and provided for the right of each member to bring to the attention of the Assembly or the Council of the League any circumstance threatening international peace.

[799] Article 12 of the Covenant established the obligation among members to first bring existing disputes before an arbitral or judicial body or the Council of the League as an attempt to settle the matter through peaceful means. Should a member disregard the obligation of first attempting to solve a dispute through those peaceful means and it would *ipso facto* be considered committing an act of war against not only another state but against all the other members of the League. But recourse to war was implicitly permitted if those means for peaceful settlement were exhausted.

[800] I. Brownlie, above n 793, p. 2.

[801] R. Kolb, above n 717, p. 42.

[802] For instance, the 1924 Geneva Protocol for the Peaceful Settlement of Disputes. The 1928 Treaty of Paris was followed by several other instruments of a treaty or a customary nature. In Latin America, the 1933 Anti-War Treaty of Non-Aggression and Conciliation basically reproduced the binomial relationship of the rule of non-use of force (condemnation of wars of aggression) and the duty of peaceful settlement of disputes. Also, in 1925, the League of Nations approved a resolution declaring wars of aggression as an international crime

Renunciation of War[803] ("Treaty of Paris"), which condemned the "recourse to war for the solution of international controversies," and established that the Parties renounced to it "as an instrument of national policy in their relations with one another."[804] But its efficacy was eroded by reservations regarding the inherent right of Parties to resort to armed force in self-defence,[805] and the international system set forth by the framework of League of Nations was not sufficient to cope with the continuous disregard of the prohibition of aggressive wars.[806]

In the immediate aftermath of World War II, concerns about the discretionary and indiscriminate use of force were once again reaffirmed in the charters of the criminal tribunals of Nuremberg and Tokyo.[807] In spite of any criticism on both military tribunals,[808] their respective Charters and Judgments became part of general international law, and the principles applied therein were accepted unanimously in 1946 by GA Resolution 95 (I), and subsequently approved by the defeated States.[809] As a result, although there were doubts regarding the scope of the prohibition of the use of force, particularly regarding the extension of the right of self-defence,[810] the rejection of wars of aggression evolved after World War II into an absolute prohibition in inter-state relationships.[811]

(see Resolutions of the Sixth Assembly, 1925, p. 21), an understanding that would be reaffirmed in another resolution of 1927 that also emphasized that wars of aggression were prohibited in international law (see Records of the Eighth Assembly, Plenary Meetings, 1927, p. 84).

[803] L. Hannikainen, above n 277, p. 118.

[804] Article 1 of the Treaty of Paris. Most interestingly, the general prohibition of the resource to war was also followed by the commitment of peaceful settlement of disputes. Indeed, an integral interpretation of the short (only two articles) Kellogg-Briand Pact indicates a strong and non-dissociated relationship between the rule of non-use of force and the obligation for seeking peaceful settlement of disputes. Article 2 of the Treaty of Paris reads as follows "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." I. Brownlie, above n 791, pp. 66-111.

[805] I. Brownlie, *idem*, pp. 235 and ss.

[806] Although the Council condemned the use of force on some occasions, particularly before the second half of the 1930's and the rise of the Nazi regime, it was not sufficiently strong to entail the nullity of treaties imposed by force or the acquisition of territory by non-defensive armed force. In 1938, France and Great Britain signed the Munich agreement with Germany and Italy by which certain territories of the former Czechoslovakia were ceded to Germany. It is worth mentioning that Czechoslovakia did not participate in the negotiations. Only after the outbreak of World War II international treaties such as the Munich Agreement were declared as void and the territorial titles obtained by countries such as Germany, Italy and Japan through aggressive wars were considered illegal. See J. Sztucki, above n 287, pp. 26-31; L. Hannikainen, above n 277, pp. 118-119.

[807] Article 6 (a) of the Charter of the Nuremberg International Military Tribunal defined crimes against peace by expressly referring to the notions of war of aggression and war in violation of international treaties. Eventually, the Judgment of the Nuremberg Tribunal stated that "the planning and waging of war of aggression was the supreme international crime, with special attention to the provisions of the Treaty of Paris." Similarly, Article 5 (b) of the Charter of the International Military Tribunal for the Far East (Tokyo Tribunal) also defined crimes against peace in relation to the general prohibition of wars of aggression. The Tokyo Tribunal concluded that aggressive war was already a crime under international law before 1945 by quoting, inter alia, the Nuremberg Tribunal.

[808] At the political level, they could be considered representing the views of the victorious states to the extent that only individuals of the defeated states were judged for crimes committed during World War II.

[809] L. Hannikainen, above n 277, p. 120; I. Brownlie, above n 791, pp. 182-94.

[810] Great Britain and the USA formulated reservations to the Treaty of Paris in broad terms of self-defense. See I. Brownlie, *idem*, pp.231-250.

[811] L. Hannikainen, above n 277, p. 137.

The UN Charter

Article 2 (4) of the UN Charter is the contemporary legal milestone of the general prohibition of the use of force.[812] Not only are wars of aggression prohibited in absolute terms, but so too are other uses of force, and the threat to use force.[813] This idea is reflected throughout the Charter in several other references to the paramount importance of the prohibition of the use of force within the legal regime inaugurated by the United Nations. The Preamble of the Charter states that "armed force shall not be used, save in the common interest."[814] Within the legal regime of the UN Charter, the use of force can only be accepted as an exception to the general prohibition under the scenarios of self-defence (Article 51)[815] and authorization of the Security Council (Article 42[816]) or upon an invitation of the concerned country.

State practice and *opinio iuris* further reinforced the general prohibition contained in the UN Charter. The constitutive instruments of the major regional and multi-

[812] Article 2 (4) as follows "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." According to Virally, Article 2 (4) is "une véritable mutation du droit international, un changement qu'il n'est pas excessif de qualifier de révolutionnaire", M. Virally, 'Article 2, Paragraphe 4', in Jean-Pierre Cot, Alain Pellet & Mathias Forteau (eds.), *La Charte des Nations Unies, Commentaire article par article*, Paris, Economica, 2nd. ed., p. 115.

[813] L. Hannikainen, above n 277, p. 327; I. Brownlie, above n 791, p. 364; E. Jiménez de Aréchaga, 'International law in the Past Thrid of a Century', (1978-I), 159, p. 88.

[814] It counterbalances the general prohibition of the use of force by referring to the objective "to maintain international peace and security" and to "live together in peace with one another." This phrasing implies that maintaining peace is the central value and that the unlawful use of force or its threat is a permanent menace to achieving that goal. In this regard, Article 1 of the Charter enumerates, among the purposes of the United Nations, the goal of taking "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace" and "to bring about by peaceful means (…) international disputes or situations which might lead to a breach of the peace."

[815] Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." The inherent right of self-defense would apply even in extreme circumstances such as those related to the use of nuclear weapons. In the *Nuclear Weapons* case the ICJ considered that the right of a State to resort to use of force as a means of self-defense is inherent in the inalienable right of survival of the state, as a result also of international customary law pre-existing the UN Charter. In a decision passed only after the casting of the vote of the then President of the ICJ, Judge Bedjaoui, the Court declared that it could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." Such a decision implies that the analysis to be made as to whether the resort to force is lawful under international law, i.e., under Article 2 (4) of the UN Charter and customary law, is closely related to its *ius cogens* nature. Above n 187, p. 263. As regards the inherent right of self-defense, Brownlie considers the Charter provisions and customary law as being one and the same. I. Brownlie, above n 791, pp. 272-275.

[816] Article 42: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

party arrangements have express provisions almost reproducing the language of the UN Charter. The Charters of the Organisation of the American States" (OAS),[817] the African Union,[818] the Organization for Security and Co-operation in Europe (OSCE),[819] the North Atlantic Treaty Organization (NATO),[820] the Arab

[817] The Charter of the OAS establishes in Article 5 (e) that "the American States condemn war of aggression: victory does not give rights" and in Article 18 that "the American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof." It also establishes the general duty of seeking peaceful settlement of disputes (Articles 4 (b) and 5 (g)); the notion collective security in accordance with the principle of self-defense in cases of aggression (Article 4 (c) and 5 (f) and Chapter V); a broad scope for the principle of non-intervention, which outlaws not only the use of force but also any other form of interference or attempted threat against the State or against its political, economic and cultural elements (Articles 15 and 16); and the principle of territorial inviolability (Article 17). Subsequently, the 1948 American Treaty on Pacific Settlement (Pact of Bogota) reinforced the recognition and acceptance of the common obligation of refraining from the use of force. Article I of the Pact of Bogota explicitly reads that "[t]he High Contracting Parties, solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures." In the Americas, such an understanding was confirmed by the 1947 Inter-American Treaty of Reciprocal Assistance (Articles 1 and 2).

[818] In the African continent, Article 4 (f) of the Constitutive Act of the African Union establishes as a central principle the "prohibition of the use of force or threat to use force among Member States of the Union." Once again, a systematic interpretation of the Constitutive Act points out the interconnection between the prohibition of the use of force and the principles of "peaceful resolution of conflicts among Member States of the Union" (Article 4 (e)) and of "non-interference by any Member State in the internal affairs of another" (Article 4 (g)). Nonetheless, the Constitutive Acts has innovated in the sense of providing a specific right of intervention for the Union "in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity" (Article 4 (h)). Such a right to intervene, which derogates from the general principle of non-intervention, provides for specific exceptions in material domains in which States have agreed upon the general rule of non-intervention would not apply. It is therefore a conspicuous example of the non-peremptory nature of the principle of non-intervention, since it can de derogated from in inter-state basis.

[819] The so-called Helsinki Final Act, 1975, laid down the normative basis for the Organization for Security and Co-operation in Europe (OSCE), which currently assembles 57 from Europe, Central Asia and North America, and is the world's largest regional security organization. The Declaration on Principles Guiding Relations between Participating States contained in the Final Act of the Conference on Security and Cooperation in Europe also denotes the clear intention of contracting Parties to establish a comprehensive prohibition of the use or threat of force. Article II states first that the "participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration." It is thus narrowly aligned with the general prohibition of Article 2 (4) of the UN Charter. But it goes further by clarifying that no "consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle" and accordingly, "the participating States will refrain from any acts constituting a threat of force or direct or indirect use of force against another participating State." The European most important reference for the issue at hand also draws a connection with the principle of peaceful settlement of disputes by stating that "no such threat or use of force will be employed as a means of settling disputes, or questions likely to give rise to disputes." Indeed, the principle of peaceful settlement of disputes is established as a binding obligation upon the contracting Parties (Article V reads peremptorily that "the participating States will settle disputes among them by peaceful means in such a manner as not to endanger international peace and security, and justice." This is fully in accordance with the spirit of the preamble, in which the signatories declared they are "convinced that the peaceful settlement of disputes is a complement to refraining from the threat or use of force.").

[820] Article 1 of the North Atlantic Treaty Organization (NATO) is almost a genuine reproduction of Article 2 (4) of the UN Charter. It reads that "The Parties undertake, as set forth in the Charter of the United Nations, to settle any international dispute in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations."

League[821] and the Shanghai Cooperation Organization,[822] all expressly place the obligation to refrain from the threat or the use of force as a central value in the efforts to attaining their respective purposes, and all indicate the need to pursue national interests arising from international disputes through peaceful means.[823] The explicit reference contained in those regional and multi-state arrangements is evidence of both the practice and opinion of States on the legal status of the prohibition of the use of force in contemporary international practice.

International customary law[824] also played an important role in interpreting the normative scope of application of the prohibition of the use of force. Several resolutions of the GA provide important evidence on the opinion of states on the legal status of the prohibition of the use of force.[825] The unanimously approved UN Declaration on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations[826] stated that "the principle of refraining from the threat or use of force in international relations is universal in character and is binding" and that "States parties to international disputes shall settle their disputes exclusively by peaceful means."[827] Probably the most important piece of *opinio iuris* on the principles of public international law, the 1970 UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States reaffirmed the inadmissibility of the use of force outside the normative regime of the UN Charter.[828] Those documents were subsequently followed by other GA

[821] Article 5 of the 1945 Pact of the League of Arab States establishes that the "recourse to force for the settlement of disputes between two or more member States shall not be allowed."

[822] Article 5 of the "Declaration on the Establishment of the Shanghai Cooperation Organization" reads that "The SCO member states shall abide by strictly the purposes and principles of the Charter of the United Nations, mutually respect independence, sovereignty and territorial integrity, not interfere in each other's internal affairs, not use or threaten to use force against each other" and in the line of the idea of peaceful settlement of disputes, agreed to "adhere to equality and mutual benefit, resolve all problems through mutual consultations and not seek unilateral military superiority in contiguous regions." The SCO has as its members two of the recognized world's nuclear powers and members of the UN Security Council (China and Russia) and as observer states other two recognized nuclear powers (India and Pakistan).

[823] Article 301 of the 1982 United Nations Convention on the Law of the Sea and paragraph 7 of the preamble of the Rome Statute also reproduce the terms of Article 2 (4) of the UN Charter.

[824] In the *Nicaragua* case, twelve judges in the majority and Judge Schwebel in his dissenting opinion highlighted the importance of customary law relating to the use of force. See above n 281.

[825] In principle, according to articles 10 to 14 of the UN Charter, the resolutions of the General Assembly are not compulsory but only recommendations, unless they are dealing with issues related to internal questions or to budgetary matters. Nonetheless, it is admitted in international law that GA resolutions may play a decisive role as an authoritative piece for interpreting and clarifying the meaning and the scope of provisions of the UN Charter, particularly when there is a wide and unambiguous support by Member States. It is a recognized source, therefore of *opinio iuris*.

[826] The centrality of the prohibition of the use of force led to the establishment of the GA Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations charged with the preparation of an international convention on "the non-use of force" in international relations. As a result, the Committee submitted a draft Declaration that was subsequently unanimously approved as an annex to GA Resolution A/RES/42/22.

[827] Respectively, Articles 2 and 17 of GA Resolution A/RES/42/22 of 18 November 1987.

[828] The Declaration resulted from the preparatory work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. Its preamble indicates the intention of UN Members as regards the declaration, such as its qualification as "paramount importance of the Charter of the United Nations" and that it would "constitute a landmark in the development of international law and of

resolutions reinforcing the idea that the threat and the non-consented use of force is prohibited among States, such as the 1974 unanimous Definition of Aggression,[829] the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,[830] the 1970 Declaration on the Strengthening of International Security, and the 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.[831] All those GA resolutions can be regarded as representing the legal perception of UN Member States as to the legal status of the general rule prohibiting the use of force in inter-states relationships.[832]

In its discussions on the Law of Treaties, the ILC highlighted the importance of the general prohibition of the use of force by sanctioning with absolute nullity international instruments resulting from coaction (*contrainte*) exerted against the state representative or against the state.[833] This norm overruled the previously valid doctrine that allowed a given treaty to be valid regardless of being the result of the threat or the use of force against one of the parties, which reflected the overall acceptance, at least until the League of Nations (Pact Briand-Kellog),[834] of

relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter." Article 1 slightly rephrases Article 2 (4) of the UN Charter by stating that "The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations." It is subsequently followed by several specific provisions interpreting Article 2 (4) in the sense that the threat of the use of force "constitutes a violation of international law and the Charter of the United Nations" and "shall never be employed as a means of settling international issues." And it also defines war of aggression as "a crime against the peace, for which there is responsibility under international law," and confirms the universal prohibition of acts of reprisal involving the use of force. GA Resolution 2625 (XXV) of 24 October 1970.

[829] On 14 December 1974, the GA adopted by consensus Resolution 3314 (XXIX) annexing the Definition of Aggression. The Declaration adopted a broad definition of aggression, drawn largely from Article 2 (4) of the Charter and specifies a non-exhaustive list of acts of aggression (Article 3). Interestingly, it states that the first use of armed force constitutes prima facie evidence of an act of aggression, subject to a different conclusion reached by the UN Security Council in the light of circumstances. Although the Definition has not been explicitly used for its original purpose, namely to guide the UN Security Council in determining the existence of an act of aggression, it has been nonetheless referred to by the ICJ in its consideration of unlawful use of force by States. The ICJ has decided that the provision in article 3, paragraph (g), of the Definition reflects customary international law. See *Nicaragua* case, above n 281, p. 14, para. 3; and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), (Judgment), ICJ Reports* 2005, p. 222-223, para. 146. However, the status in customary law of the resolution as a whole is controversial. See, in this same case, the Separate Opinion of Judge Kooijmans, *idem*, pp 321-322, paras. 63-64. To-day, the Definition has also been used as a major source for the negotiations on the definition of the crime of aggression within the jurisdiction of the International Criminal Court (ICC).

[830] GA Resolution 2131 (XX) (A/RES/20/2131), of 21 December 1965.

[831] A/RES/36/103, of 9 December 1981.

[832] L. Hannikainen, above n 277, p. 335.

[833] Article 52 of the VCLT.

[834] For many authors, only after the UN Charter the use of force would be definitely prohibited as a legal and legitimate means of interaction among states. They argue, for example, that the constitutive act of the League of Nations was not as restrict as to the possibility of using force (Article 12), nor the renounce to war as an instrument of national policy, as established in the Pact Briand-Kellog. The ultimate step would be taken by the recognition of the criminal character of aggression in public international law.

the arbitrary use of force.[835] In 2001, the ILC once again reaffirmed the centrality of the prohibition of the use of force in the international legal system.[836] Article 50 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts places "the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations" among certain fundamental obligations which are not subjected to counter-measures. Finally, the ICJ also confirmed the absolute character of the prohibition of the use of force. In the *Corfu Channel* case, the Court stated that the right to intervene by military means in another State has no place in international law.[837] In the *Nicaragua* case the ICJ highlighted the centrality of that norm by evoking the preparatory work of the ILC for the 1969 VCLT.[838] And in the *Nuclear Weapons* case, the Court unanimously declared as unlawful any threat or use of force by means of nuclear weapons that is either contrary to Article 2 (4) of the UN Charter or that fails to comply with the requirements of Article 51.[839]

It is well known, however, that in the past almost seventy years the individual practice of States has not been always consistent with the regime of the UN Charter. There were several examples in which the threat or the actual use of force occurred in violation of both the UN Charter and general international law. In some cases the competent bodies of the international system, in particular the UN Security Council as the primary organ in matters related to the maintenance of peace and security, condemned the disregard of applicable international law. In other situations these bodies attempted to persuade transgressors to refrain from disregarding Article 2 (4). However, on several occasions the international community witnessed the paralysis and the failure of the relevant mechanisms of the international system in addressing the threats and the use of armed force in violation of international law, regardless of the protests from concerned states.[840]

[835] For the ILC, such a principle was already *lex lata* in public international law. See A/CONF.39/11/Add.2, Art. 49, par. I, p. 70.
[836] YbILC, 2001, vol. II, Part Two.
[837] *Corfu Channel* case, above n 690, p. 35.
[838] *Nicaragua* case, above n 281, pp.90-91, para. 190.
[839] *Nuclear Weapons* case, above n 187, p. 244, para. 38.
[840] See, for example, the case of Grenade. In 1983, the military regime of Grenade was overthrown by an armed intervention led by the *Organisation of Eastern Caribbean States (OECS), with the support of Barbados, Jamaica and the United States as "invited" powers. Intervening states claimed that the rule of prohibition of the use of force as provided for Article 2 (4) of the UN Charter was not absolute and other provisions of the Charter would justify the employment of armed force as a means to safeguard values such as freedom, democracy and peace. A UNSC draft resolution condemning the use of force as provided for by article 2 (4) and calling upon States to retreat their troops from Grenade was not approved as a consequence of the veto of the US. Repertoire of the Practice of the UN Security Council 1981-1984. Supplement, p. 343. In this same vein, a UNSC draft resolution condemning both the air attacks perpetrated by the United States against Tripoli and terrorist attacks of any nature was opposed by the American veto in 1986. Repertoire of the Practice of the UN Security Council 1985-1988. Supplement, p. 443-444.* Those deficiencies are at the origins of a long and complex discussion in both legal doctrine and among States on the limits and shortcomings of the exclusiveness of the capacities of the UN Security Council as the sole authority legally able to authorize the use of force in accordance with international law. It is interesting to note that the pieces of criticism in the way that the UNSC performs its tasks as the primary body of the UN system in the area of peace and security are silent on the need to reform the Council in order to adapt it to contemporary realities and to make it more representative.

But the inconsistencies of the competent organs of the international system and the disrespect of the Charter by States cannot be interpreted as a lawful or emerging modification of the general prohibition of the use of force in international relations.[841] These deficiencies do not give States the right to resort to military means beyond the strict provisions of the Charter on the basis of an alleged shift of circumstances or a right of reciprocity. In other words, it does not provide States with the legitimacy or the legal capacity to unilaterally recourse to force against third States according to their own respective assessment of the political and legal specificities of each situation. It does not imply either that there is not enough evidence of consistent state practice in the sense of the general recognition and acceptance of the prohibition established by Article 2 (4) of the UN Charter. The legal practice of States has been marked by the continuous repetition of the commandments contained therein, as reflected in the several regional and multiparty arrangements still in force in the area of peace and security. Moreover, the practice at the Security Council[842] or the General Assembly[843] indicates a pattern based on a strict interpretation on the use of force.[844] The inconsistencies of international bodies, particularly the Security Council, and the several cases of state practice contrary to the rule provided for Article 2 (4) are just reminders of the persistent deficiencies of the international legal order as a system of law.[845]

Section II - The prohibition of the use force as a norm of *ius cogens*

In view of the above it is no surprise that the general prohibition of the use of force has a *ius cogens* character.[846] As a fundamental principle of the UN Charter and of the international legal system as a whole, it stands today as the least controversial peremptory norm. Authors from all doctrinal approaches have confirmed the peremptory character of the prohibition of the use of force. States have referred to it as a conspicuous example of a peremptory norm in international law. And

[841] O. Schachter, 'International Law in Theory and Practice: General Course of Public International Law', (1982-V) 178 *R.C.A.D.I.*, p. 139.; T.M. Franck, *Recourse to Force, State Action Against Threats and Armed Attacks*, Cambridge University Press, 2002.
[842] See, e.g., Security Council Resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962, 188 (1964) of 9 April 1964, 316 (1972) of 26 June 1972, 332 (1973) of 21 April 1973, 573 (1985) of 4 October 1985 and 1322 (2000) of 7 October 2000.
[843] See, e.g., General Assembly Resolution 41/38 of 20 November 1986.
[844] Beyerlin affirms that there is no indication of exceptions to the general interpretation on the prohibition of the use of force in the practice of the United Nations. U. Beyerlin, 'Humanitarian Intervention,' *EPIL* II (1995), pp. 926-35. See also Waldock, 1962, p. 243.
[845] As perfectly summed up by Schrijver in his commentaries to Article 2 (4), "Il faut améliorer le système juridique international, non brader la règle fondamentale de l'interdiction du recours à la force." N. Schrijver, 'Article 2, Paragraphe 4', in Jean-Pierre Cot, Alain Pellet & Mathias Forteau (eds.), *La Charte des Nations Unies, Commentaire article par article*, Paris, Economica, 3rd. ed., 2005, p. 464.
[846] O. Corten, *Le droit contre la guerre*, Paris, Pédone, 2008, pp. 293 and ss.

international judicial bodies, particularly the ICJ, have used the provisions of Article 2 (4) of the UN Charter as a means to refer to the legal regime operated by *ius cogens* in public international law.

During the debates in the ILC in preparation for the 1969 VCLT, the general rule of prohibition of the use force appeared as one of the most cited material examples of *ius cogens* norms.[847] Several members referred to the prohibition of aggression and, more generally, of the use of force as an outstanding example of an existing peremptory norm of general international law.[848] For the ILC, "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens.*"[849] States firmly supported the ILC's opinion on the peremptory character of the general prohibition of the use of force. In 1963, the Report of the Sixth Committee of the General Assembly mentioned the prohibition of the use of force as a material example of an *ius cogens* norm.[850] This view was subsequently reconfirmed by the Report of the Sixth Committee in 1967, which declared that the prohibition of the use of force had been frequently mentioned as a material example of *ius cogens*.[851] During the Vienna Conference the prohibition of the use force was once again frequently mentioned by states as a conspicuous example of a peremptory norm.[852] And the 1986 Vienna Convention on the Law of Treaties between States and International Organizations reproduced this same understanding on the *ius cogens*.[853]

[847] As pointed out by Hannikainen, "this was the only rule regarding which the ILC was unanimous." L. Hannikainen, above n 277, p. 163.

[848] In his draft, Humphrey Waldock expressly pointed out that the use or the threat of force in contradiction to the UN Charter may cause, as a rule of *ius cogens,* the nullity of colliding treaties. "The recognition of a jus cogens rule from which the parties concerned could not depart by agreement inter se made the problems even clearer, and he personally advocated that solution. States Members of the United Nations could not depart from the provisions of Article 2, paragraph 4, of the Charter inter se, for it imposed obligations to the whole international community. Hence it was not only a matter of the reciprocal relations of States, but also of international obligations under jus cogens." YBILC, 1963, vol. I, p. 50. On the work of Waldock, Gómez Robledo says that "debe reconocérsele el mérito de haber presentado la prohibición del uso o amenaza del empleo de la fuerza (artículo 2.4 de la Carta) como uno de los precetos de ius cogens absolutamente indiscutibles, y así se le considera hasta el momento atual". A. Gomez Robledo, above n 335, p. 28.

[849] Paragraph (1) of the commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, YbILC, 1966-II, p. 247) The same understanding was reconfirmed by the ILC in 2011. See Commentary to article 48., paragraph 10, ILC Report 2001.

[850] Report of the Sixth Committee of the GA, UN Doc. A/5601, p. 3.

[851] Report of the Sixth Committee of the GA, UN Doc. A/6913, p. 16.

[852] L. Hannikainen, above n 277, pp. 176-178.

[853] In its commentary to Article 53 of the 1986 Convention, the ILC stated that the notion of peremptory norms apply equally to the legal relationships of international organizations. It also pointed out that the prohibition of the use of armed force in violation of the principles of international law embodied in the UN Charter, considered "the leading example of a peremptory rule", should also apply to international organizations. ILC Report, 1982, UN Doc. A/37/10, pp. 117-118. The same dynamics was observed during the negotiations for the 1987 Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, GA Resolution A/RES/42/22. On that occasion, particularly the old socialist block and non-aligned states, mentioned the prohibition of the use of force as a peremptory norm. See UN Docs. A/34/41, A/35/41, A/36/41, A/37/41 and A/38/41.

The ICJ also touched upon the *ius cogens* quality of the general prohibition of the use of force. In the judgment on the Merits of the *Nicaragua* case, the ICJ quoted the commentaries of the ILC on the *ius cogens* nature of the prohibition of the threat and use of force, as well on the recognition by both contending Parties that the rule of article 2, paragraph 4 of the UN Charter amounts to a peremptory norm.[854] The peremptory character of the principle of non-use of force was also expressly affirmed in two separate opinions. Judge Singh emphasized that "the principle of non-use of force belongs to the realm of *jus cogens*, and is the very cornerstone of the human effort to promote peace in a world torn by strife."[855] Judge Sette-Camara believed that the non-use of force is not only a cardinal principle of customary international law but also a peremptory rule of customary international law which imposes obligations on all States.[856] Further on, in the *Oil Platforms* case, several judges also addressed the *ius cogens* nature of the principle of non-use of force. Judge Simma explicitly declared that existing norms regarding the unilateral use of force are undeniably of a peremptory character.[857] In his dissenting opinion Judge Elaraby affirmed that this principle "reflects a rule of jus *cogens* from which no derogation is permitted."[858] In the Advisory Opinion on the *Wall*, Judge Elaraby once again reaffirmed that "the prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter, is no doubt the most important principle that emerged in the twentieth century. It is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted."[859]

The *ius cogens* nature of the prohibition of the use of force is further reinforced by the interplay of its essential features, namely its universality, imperativeness and non-derogability. Although there may be some discrepancies as to the normative scope of the peremptory character of the prohibition of the use of force,[860] both doctrine and states unanimously recognize the universal character of the prohibition of the use of force. The universal aspect of the peremptory nature of the prohibition of the use of force derives from both its widespread acceptance by States as a fundamental norm of the international legal system and from its universal scope of application (*erga omnes*). On the first point it has already been said above that the general prohibition of the use of force is a positive norm inscribed not only in Article 2(4) of the UN Charter, but also in the virtual totality of regional and multi-party arrangements in the area of peace and security. The inclusion of the general prohibition of the use of force in the majority of the constitutive treaties of most regional arrangements or agencies created with

[854] *Nicaragua* case, above n 281, p. 14. On the acceptance by the USA of the peremptory nature of the norm embodied in Art. 2 (4) of the UN Charter, see also AJIL, 1989, p. 419.
[855] *Nicaragua* case, above n 281, p. 153.
[856] *Idem*, p. 199.
[857] *Oil Platforms* case, above n 795, Separate Opinion, para. 9, p. 330.
[858] *Idem*, Dissenting Opinion of Judge Elaraby, para. 1.1., p. 290.
[859] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, Separate Opinion of Judge Elaraby, para. 3.1, p. 254.
[860] See below in this Section, p. 171 and ss.

mandates in the area of peace and security is an outstanding evidence of its universal character. It is likely the more reaffirmed provision in contemporary international law. Besides the almost universal membership of the UN Charter in present days, the geographical superposition of all those arrangements, particularly in the area of collective self-defence, covers the virtual entirety of States in the world, with a few exceptions in the Asian continent. On the second point, the prohibition of the use of force is imposed upon all members of the international community, including those emerging regimes as transitional governments, newly independent States and the few still existing non-Member States of the United Nations. The *erga omnes* character of the prohibition of the use of force entailed by Article 2 (4) therefore applies to *de facto* regimes[861] both in the active (using armed force) and passive (suffering an attack from others) forms.[862]

The imperative character of the rule prohibiting the use of force derives from the central importance given to its normative commandments as expressed in customary, treaty and jurisprudential law, as well as widely reaffirmed in doctrine. As mentioned above in this Section, its material importance stems from almost all constitutive treaties of regional arrangements, which place the prohibition of the use of force among their main purposes and founding principles. In the General Assembly, States have continuously reaffirmed and sustained the importance of the principle of prohibition of the use of force in the UN system. The ICJ has also referred to the imperative nature of prohibition of the use of force not only for the purposes of describing the legal regime of *ius cogens*, but also to highlight that it consists of an example of the *erga omnes* effects stemming from certain obligations in public international law.[863]

Finally, any international agreement deviating from the general prohibition of the use of force is null and void as a consequence of article 53 of the VCLT. Besides the exceptions provided for by the regime on the use of force (self-defence and authorization by the Security Council), and the possibility of the consent of States for the use of force within their respective territories,[864] no other circumstance can be claimed as a lawful means to preclude the wrongfulness of the non-observance of article 2 (4) of the UN charter, including those related to necessity or distress.[865] Such a non-derogable aspect of the prohibition of the use of force is further reinforced by the sanction of nullity imposed upon any agreement contracting out not only from the normative core of Article 2 (4) of the UN Charter, but also from its corollaries, such as the prohibition of the recognition of titles and factual

[861] For the purposes of the use of force, the mere exercise of basic attributions of sovereignty, such as the control over a territory, creates a link of obligation to refrain from the use of force against other States.
[862] R. Kolb, above n 717, p. 239.
[863] See *Barcelona Traction* case, above n 465.
[864] See discussion below in this Section, p 167 and ss.
[865] See the Commentary of the ILC on A*rticle 26 ("Compliance with peremptory norms* - Nothing in this chapter 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") of the Draft articles on Responsibility of States for Internationally Wrongful Acts, YbILC, 2001, vol. II, Part Two, p. 84.

situations arising from the unlawful use of force. Accordingly, States cannot derogate in *inter partes* agreements from the rule of prohibition of the use of force by renouncing the protection accorded to them by the existing regime of collective security in the UN system, or by accepting the settlement of disputes by force, or even less for purposes of aggressive alliances against third States. But the above is not tantamount to denying the lawful exemptions from the general rule in certain specific circumstances, such as those in which sovereign States legitimately authorize the use of force in their territory, or when States exercise their right to self-defence.

Effects of the ius cogens nature of the prohibition of the use of force

There are two main effects stemming from the *ius cogens* character of the general prohibition of the use of force: (i) the principle of non-recognition of titles and territorial acquisition obtained by the use of force or its threat; and (ii) the principle that any treaty concluded as a result of the threat or the use of force is null and void. These are crystallized corollaries[866] of that legal regime and, as essential effects stemming from the prohibition of the use of force, they also have a peremptory nature.

The first corollary establishes that treaties are null and void if they provide for the threat or the use of force against another state in contradiction of the UN Charter.[867] These effects are imposed whenever its provisions or its actual operationalization entail threats or the use of force against another state in circumstances different from those allowed by the UN Charter.[868] The same rationale must be applied to unilateral acts of states. Effects resulting from threats of the use of force are necessarily null and void, such as rights and titles regarding the territorial acquisition or the jurisdiction over a certain population.[869]

One application of the effects of the peremptory nature of the general prohibition of the use of force for the validity of treaties and acts of States can be observed in the potential limits imposed to the capacity of sovereign states to consent to the use of foreign force into their own territory.[870] According to Hannikainen, there is a legal presumption of lawfulness for authorizations given by State authorities for an

[866] I. Brownlie, above n 791, pp. 402-423.
[867] A. Verdross & B. Simma, *Universelles* Völkerrecht, Berlin, Duncker and Humboldt, 1984, p. 266.
[868] According to Greig these are threats to peace, breaches of peace or acts of aggression. D.W. Greig, above n 796, p. 473.
[869] Of course, there is also an interesting and rich discussion resulting from the threat of the use of force in the area of international responsibility, but this is not the object of this work.
[870] This case does not relate to the notion of neutrality, since in these circumstances the use of armed force is supposed not to occur in the territory of the neutral state. This hypothesis does not touch either upon potential questions concerning international responsibility arising from the practice of neutral states. It does not touch upon the problems arising in circumstances in which *de facto* governments sponsor foreign interventions.

armed operation into its territory, particularly when such an intervention takes place shortly after such authorization and if the consent is valid.[871] Today, that hypothesis of lawfulness would include, *inter alia*, the mandates of peacekeeping operations established by the UN Security Council[872] and multi-party arrangements of collective self-defence. In these cases, the consent cannot be construed as derogating from a *ius cogens* norm, since it consists of a legitimate exercise of the sovereign rights of States. The opposite would be applicable if that consent was given under any form of coercion, a situation in which articles 52 and 53 of the VCLT would apply. In principle therefore, those multiparty arrangements of collective self-defence and decisions of international bodies such as the UNSC do not derogate from *ius cogens* because they are based on a valid exceptions from that general rule.

Nonetheless, a more complicated scenario arises in situations in which states have authorized the use of force *ex ante* in an open and non-specified manner in multiparty or multilateral treaties, particularly when such a type of open-ended authorization was not accompanied by another provision requiring a future confirmation by the State of its consent whenever an specific armed action is to be taken in its territory. In principle, those treaties are not contrary to Article 53 of the VCLT.[873] However, there are several examples in which the lack of a specific consent for armed action led to divergent opinions on the legal status of the general authorization contained in international treaties.[874] In a few bilateral or multi-party treaties, the need for an express and specific consent of the concerned state seems is the most appropriate means to comply with the peremptory norm on the use of force. But other contemporary situations are not as certain. Such would be the case of treaty allegiances of collective self-defence with general clauses establishing that an attack against one of the parties should be regarded as an

[871] L. Hannikainen, above n 277, p. 342. This view has been confirmed by the ICJ in the *Nicaragua* case, in which the State consent (invitation) to the use of military armed force in its territory in support against an armed attack was interpreted as the exercise of a sovereign prerogative whenever it derives from a legitimate authority. See above n 281, para. 246.

[872] Peacekeeping operations are a longstanding legal and political construction at the UN system. Its historical development is an effort of balancing the fundamental principles of the UN Charter, namely the rules of non-intervention, non-use of force, sovereignty of states and peaceful settlement of disputes, with emerging issues of the international agenda such as the common objective of promoting and protecting human rights worldwide. This delicate legal and political exercise is expressed in the principles that orientate peacekeeping activities: the non-use of force except in self-defense and in the defense of the mandate, impartiality among the parties in conflict and the consent of the concerned parties. United Nations Peacekeeping Operations: Principles and Guidelines (2008). New York, United Nations (DPKO and DFS) at pp. 31-36.

[873] "A treaty whereby a State is invited to intervene in a specific situation or whereby foreign troops are permitted to be stationed or to pass through a State's territory would not fall within the ambit of Article 53 of the Vienna Convention, it would not involve an actual breach of the prohibition of the use of force or an authorization to commit such a breach; a breach arises when the victim State is not asked." A. Orakhelashvili, above n 355, p. 156.

[874] Hannikainen mentions the wide and discretionary use of force by the USA in Cuba until 1934 on the basis of the 1903 Treaty between the two countries; the 1921 Treaty of Friendship between the Russian Socialist Federative Soviet Republic and Persia, which provided for unilateral armed intervention by the USSR into Iran in the interest of the defense of Soviet interests; and the 1960 Treaty Concerning the Establishment of the Republic of Cyprus, which provided for the right of the guaranteeing States to intervene in Cyprus.

attack against all the parties.[875] In those cases there may be some doubts whether the resort to the use of force by the other Parties to those treaties (i.e., an armed intervention in the territory of the state under attack) can be interpreted as being in accordance with the inalienable right of self-defence in its collective format in the absence of an authorization of the Security Council (articles 52 to 54 of the UN Charter). The question is whether it is possible to consider that an armed action enforced by the other Parties without specific consent and without the authorization of the UN Security Council is in fact preserving and realizing the right which the state in question is itself unable to exercise at that time as a consequence of suffering an aggressive attack.[876]

There are several legal consequences arising from this circumstance. First, the general rule should be based on the need for an *ad hoc* consent in each particular situation; the *ex ante* consent remains in force inasmuch as there is no contrary expression of the will of the State concerned. Consequently, the *ex ante* consent could never overrule a posterior will of the State concerned contrary to the use of force in its territory.[877] Second, in the absence of an expression of the will by the State concerned, any measure to be taken on grounds of collective self-defence should be the result of a decision agreed upon by the respective competent body provided for by the constitutive agreement of a given regime of self-defence. In principle, individual States are not allowed to intervene by armed force without the invitation from the state concerned. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council, and should be terminated whenever the Security Council decided accordingly.[878] Finally, the Parties enforcing a collective action of self-defence must seek to take concerted action with the concerned state, and the use of force by the other Parties should cease as soon as the concerned authorities would require them to do so.[879] If other Parties do not refrain from pursuing armed enforcement, the armed action is unlawful under international law by contradicting the express will of the state concerned. Otherwise, the idea of legitimate collective self-defence would be replaced by discretionary unilateral intervention.

[875] See for example, article 5 of the North Atlantic Treaty and article 3 of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).

[876] As noted by Brownlie, the problem with this kind of use of force as a means of self-defense by regional arrangements is that "it gives rise to a second-hand and low-level legitimacy without the more objective constraints of the provisions of Article 51" of the UN Charter. I. Brownlie, above n 793, p. 11. In this regard, the ICJ noted that there "is no rule in customary international law permitting another State to exercise the right of collective self-defense on the basis of its own assessment of the situation." *Nicaragua* case, above n 281, p. 104, para. 195.

[877] As mentioned by Kolb, "le caractère de *ius cogens* de l'interdiction du recours à la force s'opposerait à un tel accord qui limiterait excessivement la souveraineté de l'Etat cible et permettrait discrétionnairement l'utilisation de la force par l'Etat privilégié." R. Kolb, above n 717, p. 324.

[878] The USSR invasion of Czechoslovakia in 1968 is a reminder of the risks entailed by a loose interpretation on open-ended authorizations providing for collective self-defense treaties, particularly in the absence of an express and specific consent of the concerned state. See L. Hannikainen, above n 277, pp. 346-347.

[879] *Armed Activities on the Territory of the Congo*, above n 831, pp. 223-225, para. 42. See also R. Kolb, above n 717, pp. 324-325.

In that same vein, armed action taken on the basis of general and open-ended authorizations for humanitarian intervention, such as that provided for in the Constitutive Act of the African Union (AU), is also to be assumed as lawful in principle and non-derogatory from the peremptory norms of article 2 (4) of the UN Charter. On the one hand, the Constitutive Act establishes the subjective right of Member States "to request intervention from the Union in order to restore peace and security."[880] In this case, it is not an *ex ante* consent to an open-ended right of intervention provided for all other parties, but a right the exercise of which is necessarily subjected to an express and inescapable request to be made by the concerned State. On the other hand, the African Union Charter also provides for an explicit "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[881] The interpretation of this clause in the light of the whole text of the Constitutive Act indicates that such a right of intervention is a strong example of a *numerus clausus* provision, since the normative rationale of the treaty as a whole impedes that other situations can be added as justifications for the resort to the use of force by the AU.[882] In any event, such a provision must be interpreted in the light of the UN Charter, in particular Article 53 establishing that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council."[883] Consequently, any measure to be taken by the AU under article 4 (h) of the African Charter must rely on the authorization of the UN Security Council. The bottom-line is still the application of a restrictive interpretation for the use of force in international relations, since even *a priori* authorizations for the use of force must be interpreted in a narrow manner (*exceptiones sunt strictae interpretationis*).

[880] Article 4 (j) of the Constitutive Act of the AU.

[881] Article 4 (h).

[882] Indeed, the rules of non-intervention in the internal affairs of another State and of prohibition of the threat or use of force appear immediately before in the text of the Constitutive Act among other principles of the same hierarchical status within the African normative system. The *ratio legis* of the open-ended right of intervention in the African Union is aimed at addressing, in a restrictive manner, those specific situations expressly enumerated by article 4 (h), namely those of war crimes, genocide and crimes against humanity. It would be a mistake therefore, both from a legal and a political perspective, to assume that a provision such as Article 4 (j) would entail a universal right of intervention in the African continent. In spite of the potential criticism and doubts on the real capacities of the AU to enforce action in cases of war crimes, genocide and crimes against humanity, this clause represents an attempt of African states to address and find solutions for their problems by themselves, although such a possibility of the use of force is still subjected to the control of the UN Security Council. From a historical and political perspective, this exception to the general rule of international law of non-intervention has been achieved after the occurrence of the Rwandan genocide, which shocked the conscience of mankind and led to efforts in the African continent to change the general assumption of absolute sovereignty of states in cases of gross and systematic violations of human rights and humanitarian law. But in the case of the African Union, the responsibilities and capacities to act upon those cases were expressly reserved to African institutions themselves.

[883] Kolb takes the view that article 4 (h) of the African Charter is a "clause habilitatrice" providing for the capacity of the African Union to act in the domain of humanitarian intervention. He notes, however, that that provision is subjected to its compatibility under Art. 103 of the UN Charter, what means that article 4 (h) carries a "clause implicite réservant les attributions du Conseil de sécurité." R. Kolb, 'Article 53', in Jean-Pierre Cot, Alain Pellet & Mathias Forteau (eds.), *La Charte des Nations Unies, Commentaire article par article*, Paris, Economica, 3rd. ed., 2005, pp. 1421-1423.

Another effect stemming from the peremptory nature of the prohibition of the use of force consists of the nullity imposed upon titles and legal regimes resulting from the unlawful threat or use of armed force. This discussion is at the origins of the very debate on the existence of *ius cogens* early in the twentieth century.[884] The recourse to war was then widely accepted as a legitimate means at the disposal of sovereign states in pursuing their interests. Conquest therefore could produce legal titles.[885] In contemporary international law though, the acquisition of territorial titles by coercive means became sanctioned with absolute nullity as a consequence of the legal regime operated by the concept of *ius cogens*. Today, the majoritarian view among scholars is that states are bound by the peremptory obligation not to recognize the lawfulness and validity of titles and acts related to territorial acquisition resulting from aggressive armed force.[886] Also, State practice shows that the international community has consistently rejected the validity of acts and titles obtained by the illegal use of force.[887] Several resolutions of the UN Security Council and the General Assembly have implicitly recognized the unlawfulness and nullity of titles and treaties arising from the threat or the use of force. Besides provisions in resolutions of a general character,[888] these bodies also addressed the unlawfulness of aggressive territorial acquisition in specific circumstances.[889] Although not making explicit reference to the regime operated by *ius cogens*, several of those resolutions specifically called upon States not to recognize those acts and titles as legal and valid.

The peremptory scope of the prohibition of the use of force

There are also some questions regarding the peremptory scope of the prohibition of the use of force. More specifically, it should be asked whether all or just some normative aspects of the general prohibition of the use of force would have a peremptory nature. This question is closely related to the interpretation the terms employed in Article 2 (4).[890] Some commentators suggest that the prohibition of the

[884] As noted above, the legality of treaties imposed by coercive means was at the bottom-line of the reasoning developed by Verdross in his seminal article 'Forbidden Treaties in International Law', in 1937. During the period of the League of Nations, this notion was launched by the so-called Stimsom doctrine, which proclaimed the non-recognition of territorial titles acquired by armed force. See R. Kolb, above n 717, pp. 63-64.
[885] I. Brownlie, above n 793, p. 2.
[886] I. Brownlie, above n 791, pp. 418-419; R.Y. Jennings, above n 428, p. 54.
[887] J. Crawford, above n 293, pp. 106-107.
[888] See the UN Declaration on Principles of International Law, the UN Definition of Aggression and the UN Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.
[889] The UNSC adopted a number of resolutions on the situation in Palestine in which it emphasized "the inadmissibility of the acquisition of territory by war." See SC Resolutions 242 (1967), 252 (1968), 267 (1969), 452 (1979), 465, 476 and 478 (1980) and 497 (1981). This view was reaffirmed by GA Resolution A/RES/67/19, of 4 December 2012, which accorded to Palestine a non-member observer State status in the United Nations.
[890] *Oil Platforms* case, above n 795, p. 198, para. 76.

use of force should be interpreted in a looser manner that would allow an allegedly lawful use of force beyond the explicit provisions of the Charter. Following this reasoning, States could discretionally have recourse (individually or within a regional or multiparty arrangement, but without the authorization of the UN Security Council) to the use of force under the umbrella of self-defence or collective use of force, such as in circumstances of anticipatory self-defence,[891] unilateral humanitarian intervention,[892] or the protection of nationals abroad.[893]

[891] This doctrine has been usually referred to as preemptive or preventive use of force. Article 51 of the UN Charter is interpreted as allowing armed action in anticipatory self-defense in circumstances of imminent armed attack in the light of the criterion of "necessity". See e.g. G. Powers, 'Ethical Analysis of War Against Iraq', in *Would an Invasion of Iraq be a Just War?*, US Institute for Peace Special Report, 2003, p. 98; O. Schachter, above n 843, p. 141; and O. Schachter, 'International Law: The Right of States to Use Armed Force', (1984) 82 *Michigan Law Review*, p. 1620. However, the dominant line of interpretation in international law is contrary to the idea of a right of anticipatory self-defense. At least as developed since the 1928 Kellogg-Briand Pact, *opinio iuris* and state practice clearly do not support such a possibility. See I. Brownlie, above n 791, pp. 66-111; M. Akehurst, 'Enforcement Action by Regional Agencies with Special Reference to the OAS', (1967) 42 *BYIL*, pp. 214-219; and L. Hannikainen, above n 277, p. 338. As suggested by the former U.N. Secretary General Kofi Annan, the preemptive use of force like that resorted by the U.S. against Iraq, opened the door to a dangerous precedent that could lead to a proliferation of the unilateral and lawless use of force, "with or without justification." (U.N. Secretary-General Kofi Annan, Address to the U.N. General Assembly, Sept., 23, 2003. See also the Report of the *High-level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility" (General Assembly document A/59/565, 2 December 2004)* para. 191.) Also, in accordance with the general rules of legal interpretation, the right of self-defense cannot be interpreted extensively because it is an exception to the general rule prohibiting the use of force. Article 51 expressly requires an "armed attack" as a prerequisite to the exercise of that right. Otherwise states could claim any other reason at their own discretion to pursue their national interests on grounds of humanitarian interest. The central idea of the exception of self-defense is the objective of repelling an actual and ongoing armed attack, in accordance with the principles of necessity and proportionality. Finally, an integral interpretation of Article 51 must take into account the subsequent wording that limits the exercise of the right of self-defense "until the Security Council has taken measures necessary to maintain international peace and security." Within the UN Charter, the exception of self-defense is a temporary and subordinated right within the broader system of collective security, and therefore subject to a subsequent evaluation by the Security Council. See also the interpretation of the ICJ in the *Nicaragua* case, ("in the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack," above n 281, p. 103, para. 195) and *Armed Activities on the Territory of the Congo*, in which the Court stated that Article 51 of the Charter may justify a use of force in self-defense "only within the strict confines there laid down. It does not allow the use of force by a State to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council," above n 829 p. 223-225, para. 148. "Under the Charter alarming military preparations by a neighboring country state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened," P.C. Jessup, *A Modern Law of Nations*, New York, The Macmillan Company, 1948, p. 166. It should be said, however, that a restrictive and unfavourable view on the notion of anticipatory self-defense is not tantamount to a narrow evaluation of the concept of armed attack for purposes of self-defense, mostly in light of contemporary means of warfare. But particular circumstances should be dealt with accordingly within the system of collective security in the light of concrete elements of a given situation. See also R. Kolb, above n 717, p. 281. As mentioned by Rosenstock as regards the resort to the UNSC and even the GA under the "Uniting for Peace" resolution, "it must be assumed that the term "breach of peace" includes act of such bellicosity as would cause a reasonable government to fear that, if it did not strike first, its very existence would be threatened. Action falling short of a use of force across the border (or boundary) but causing a state (particularly a small state threatened with nuclear destruction) to fear for its existence might include the massing of troops near the border, statements that the threatening state intended war, and acts of minor harassment falling just short of "armed attack". R. Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey", 65 *AJIL*, 1971, p. 722.

[892] The question of humanitarian intervention will be dealt with in the Part V, when the collision between the peremptory norms of prohibition of the use of force and human rights is under analysis.

The rationale is based on the assumption that the normative scope of obligations deriving from Article 2 (4) should be interpreted restrictively to cases of threat or use of force "against the territorial integrity or political independence of any state" or to actions "in any other manner inconsistent with the Purposes of the United Nations." In other words, it would be applied exclusively to aggressive armed force, allowing therefore the potential resort to the use of force on several other grounds.[894] As a consequence, the rule of Article 2 (4) of the UN Charter would have a limited peremptory scope of application,[895] and only titles, treaties and regimes resulting from "aggressive force" would be null.

The normative scope of the general prohibition of the use of force in international law should be interpreted from a broader hermeneutical perspective instead, aiming at determining the meaning and sense of that norm within the international legal system.[896] First, besides the Charter's several provisions reinforcing the

[893] In legal terms, States incurring in those unilateral and unnoticed practices are violating the territorial integrity of other sovereign states. This is contrary to the normative commandments stemming from article 2 (4) of the UN Charter. In those circumstances of undeniable urgency and pressure upon governments of the nationality of the individuals under threat, the appropriate measure is first to seek the cooperation of the concerned country. In cases of lack of capacity to address the problem, it is reasonable to suppose that governmental authorities are likely to cooperate in order to solve the problem, including by the authorization of activities of a police nature in its territory. In cases of unwillingness of the concerned government, the situation is much more complicated. If it is understandable in political terms that State authorities might be pushed towards an intervention of that nature under the pressure of the public opinion, it is nonetheless a breach of international law. The best solution in legal terms would still be the search for an authorization of the UN Security Council. The risks and the benefits of a decision on this regard are to be balanced by each government in the light of the specific circumstances. Understandably though, for powerful countries, this is an area in which political considerations are most likely to surpass the costs resulting from violating the existing law. Advocating a discretionary and unilateral decision on the side of the states of the nationality of the individuals in peril means, in practical terms, granting a *carte blanche* to the most powerful states in the world, which are the only ones in actual condition to pursue such a measure without risking entering into a conflict of wider proportions with the concerned country. Or would some of those authors supporting this "right to intervene" imagine that a country such as Pakistan, for example, would be able to perform a *Blitz* type of operation in Guantanamo for releasing imprisoned Pakistanis suffering human rights violations?

[894] As noted by Kolb, "[t]outes les utilisations de la force qui n'auraient pas une telle finalité seraient *a contrario* licites: par exemple la force mise au service d'une intervention humanitaire, des opérations de secours en faveur de ressortissants en danger de mort à l'étranger, des opérations militaires visant le désarmement d'Etats dangereux, etc. L'appreciation de ce qui est compatible avec les finalités indiquées se ferait alors par chaque Etat *uti singulis*. Le résultat est que l'article 2, §4, n'énoncérait pas une interdiction absolue, mais seulement une interdiction limitée téléologiquement." He takes the view, however, that "[à] notre sens, l'article 2, §4, est « absolu » ; les exceptions réelles et éventuelles au recours à la force doivnet être cherchées ailleurs, dans l'article 51 et, le cas échéant, dans le droit coutumier, mais non au sein de l'article 2, §4. Ce dernier pose un principe clair et sans ambigüités: vous n'avez pas le droit d'utiliser la force ; et en cela il se résorbe." R. Kolb, above n 717, pp. 250-251.

[895] Hannikainen, for example, affirms that only the use of force for aggressive purposes would have a peremptory character. He defines the use or the threat of aggressive armed force as "armed force with an aggressive (including dictatorial) intention" in opposition to other phenomena with allegedly have non-aggressive purposes, such as humanitarian intervention and anticipatory self-defense, which "have not been within the essential sphere of the presumably peremptory norm." L. Hannikainen, above n 277, p. 356 and 340. On his turn, Schrijver writes that the peremptory nature of the principle of prohibition of the use of force does not extend to the prohibition of the threat of the use of force. It would be limited to the illegal employment of force ("l'emploi illicite de la force") or armed aggression. N. Schrijver, above n 845, p. 460.

[896] In accordance with the general rule of interpretation of treaties provided for by article 31 of the VCLT, the prohibition contained in article 2 (4) must be interpreted beyond the strict literary meaning given to the its terms, and consequently must also be taken "in their context and in the light of its object and purpose" in an

comprehensive scope of normativity of the general rule of prohibition of the use of force, the *travaux préparatoires* to Article 2 (4) show that Member States did not accept other exceptions to the prohibition of the use of force than those expressly codified in the UN Charter.[897] Second, on the claim that the scope of the general prohibition entailed by Article 2 (4) would apply only to situations of use of force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations",[898] it should be noted that the specific phrasing of "territorial integrity" and "political independence" was introduced as a complementary guarantee for smaller states. It was not intended as a restriction to the scope of application of the general prohibition.[899] According to the prevailing *opinio iuris* at the UN,[900] the notions of "territorial integrity" and "political independence" contained in Article 2 (4) imply that, with the exceptions of the authorization of the UN Security Council and of self-defence, no pretext whatsoever can justify the use of force by a State in the territory of another other States without the consent of that concerned State.[901] Third, as regards the use of force "in any other manner inconsistent with the Purposes of the United Nations", the *travaux préparatoires* provide enough evidence that the intent of the original Member States was to declare an absolute and unrestrictive prohibition in the most general terms.[902] The words "in any manner inconsistent" were introduced precisely as a means to ensure that there would be no gaps of interpretation,[903] and the use of force should be interdicted in absolute terms.[904] Fourth, on whether Article 2 (4) should be applied only to wars of

analytical process that must include, *inter alia*, "its preamble and annexes," "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty," "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions," "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," and "any relevant rules of international law applicable in the relations between the parties." In addition, Article 32 of the VCLT sets forth, as supplementary means of interpretation, "the preparatory work of the treaty and the circumstances of its conclusion."

[897] According to Brownlie, the preparatory work of the Charter is sufficiently clear on the intent of Member States to have a restrictive interpretation on the possible exceptions to the general prohibition of the use of force. I. Brownlie, above n 791, p. 267; M. Akehurst, above n 51, p. 313; L. Hannikainen, above n 277, pp. 331-332. As a matter of fact, during the preparatory work at Dumbarton Oaks several states advocated an even broader scope for the general prohibition of the use of force covering also economic constraints (Brazil) or moral or political force (Ecuador). The use of the more comprehensive term "force" instead of "war" as previously referred to in documents such as the 1928 Paris Pact denotes precisely the aim of avoiding potential divergent interpretations by states that could be used as justification for an unlawful unilateral use of force.

[898] This phrasing is "le problème des vingt-quatre derniers mots. " R. Kolb, above n 717, p. 250-1.

[899] I. Brownlie, above n 791, pp. 265-268.

[900] The discussion on humanitarian interventions will be specifically dealt with in Part V, particularly regarding a potential waiver given by the notion of "in any manner inconsistent with the Purposes of the United Nations."

[901] I. Brownlie, above n 487, p. 222; L. Oppenheim, above n 83, p. 154.

[902] The restrictive interpretation of Article 2(4) relates to the differences between armed coercion and other forms, such as economic, social and political coercion, which are to be dealt with under the principle of non-intervention in accordance with the dominant view in doctrine. See R. Kolb, above n 717, pp. 245-246.

[903] See, in particular, the position of the United States. UNCIO, vol. 6, p. 335.

[904] UNCIO, vol. 6, p. 335. The central goal of the original Member States was to avoid the previous deficiencies of the regime of the League of Nations and therefore outlaw potential forms of unlawful use of force that interested States could allegedly claim as not being covered by that general prohibition. N. Schrijver, above n 845, p. 443.

aggression, it is worth recalling that during the preparatory works at Dumbarton Oaks, proposals to include the concept of aggression in that provision were rejected precisely because it would narrow down the scope of application of the general prohibition of the use of force. The idea of aggression would be better understood in all its forms by the general notion of "threats to peace."[905] Further on, the General Assembly interpreted the notion of aggression in more precise terms in its Resolution 3314 (1974), which defined aggression *prima facie* in terms of the first use of armed force in contravention to the UN Charter. [906] Aggression therefore means the first attack without a legal justification.[907] Despite the fact that there is an objective distinction between "aggression" and "armed attack" (the idea of armed attack is broader than aggression),[908] these circumstances are equally covered by the general prohibition of the use of force.[909] International practice also provides little evidence of *opinio iuris* allowing the interpretation that only "aggressive" armed force is peremptory. On the contrary, the continuous opinion of states on matters such as "humanitarian intervention"[910] provides clear evidence on the lack of *opinio iuris* supporting a looser interpretation on the scope of the prohibition of the use of force.[911] Stating the opposite amounts to implying that the non-aggressive use of force is just unlawful (entailing only international responsibility) and consequently subject to derogation from in *inter se* agreements.

Finally, on the non-peremptory nature of the "threat to use of force,"[912] could one infer that the threat to perform a specific behaviour prohibited in peremptory

[905] N. Schrijver, *idem*, p. 444.
[906] GA Resolution 3314, 14 December 1974.
[907] Such an assumption can only be changed as a result of a decision of the UN Security Council, which may find that the situation is different, i.e., that a given state has not incurred in an act of aggression in spite of being the first one to recourse to military force against another state. In this case, a decision of the UN Security Council could set aside the illegality of the first strike, at least for a certain time, and most likely on grounds that it would be interpreted as an exercise of legitimate self-defense, although in a political instead of legal exercise of interpretation. This would be the case, for example, of a decision of the Security Council declaring a breach of peace, which does not necessarily imply the determination of which is the aggressive state. See Korea in S/RES/ 82, (1950); Malvinas S/RES/502 (1982); Iran/Iraq S/RES/598 (1987); Iraq/Kuwait S/RES/660 (1990).
[908] R. Kolb, above n 717, pp. 284-285.
[909] This understanding was enunciated by the ICJ in the *Oil Platforms* case, in which the Court pointed that the entire *ius ad bellum* would have a *ius cogens* nature when examining the limits imposed by peremptory norms upon treaties. See above n 795.
[910] In the South Summit in 2000, the Member states of the G77 declared that "we reject the so-called 'right' of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law." Done in Havana, Cuba, April 10-14, 2000, para. 54. In this same vein, Member States of the Movement of the Non-aligned Countries, sustained that "We reject the so-called 'right' of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law." XIII Ministerial Conference, Cartagena, Colombia, April 8-9, 2000, Final Document, para. 263.
[911] It should be added, moreover, that during intergovernmental negotiations for the 1969 VCLT and the UN Declaration on Principles of International Law several States alluded to principles such as non-intervention as having a *ius cogens* nature. Although the latter rule cannot be regarded as having a peremptory nature, that understanding stands nonetheless as a piece of evidence of a broader understanding among several states on the scope of the *ius cogens* character of the rule embodied in Article 2 (4) of the UN Charter.
[912] Schachter defines threat as "any blatant and direct threat in order to obtain concessions", O. Schachter, above n 841, p. 139.

terms is not itself a peremptory prohibition? What if a state obtains what it intended, such as a territorial acquisition, by the threat of the use of force? Would the corollary of non-recognition be applied as a peremptory norm as well, or third states would be allowed to recognize such an acquisition in *inter partes* agreements? The risks arising from such an interpretation[913] indicates that it would be wrong to infer that the threat of the use of force is not equally prohibited in peremptory terms. For the purposes of international responsibility, it makes sense to distinguish the scope of application of the threat and the use of force in order to determine the nexus of cause and effect, and thus determine which and to what extent a given State should be held accountable for an act contrary to the prohibition of the use of force. The threat has a lower objective level of dangerousness, but in the domain of the legal regime operated by *ius cogens*, the threat of the use of force remains as a menace to international peace and security and as such is also prohibited in peremptory terms.

In conclusion, the prohibition of the use of force encompasses a comprehensive normative scope.[914] On the basis of the UN Charter and several other international instruments and customary international law, military intervention is generally prohibited.[915] There are only three specific exceptions to that general rule allowing for what can be considered a lawful recourse to the use of armed force under the UN Charter, namely those of self-defence, authorization of the UN Security Council and consent of the country concerned.[916] But the above is not tantamount to ignoring the rapid and profound transformations that contemporary warfare has gone through in the past decades, nor the urgent need to properly address situations of gross and systematic human rights violations. The interpretation on the general prohibition of the use force has to accompany these changes arising from new threats to international peace and security. Somehow this progressive interpretation has already been put in place by means of an extensive interpretation on the concept of threats to international peace in cases of gross and systematic human rights violations, by the delegation of powers by the Security Council to regional arrangements or multinational coalitions, or even when it comes to combatting terrorism within the scope of Article 51. But re-interpreting the normative scope of Article 2 (4) of the UN Charter should never deviate from the core of the legal rationale stemming from the general prohibition of the use of force and its positive exceptions. Broadening and loosening the interpretative scope of Article 2 (4) would contradict the epistemological development of that norm in the twentieth century because it is a step backwards to the acceptance of

[913] The crisis in Czechoslovakia in 1938 should be a powerful reminder in this regard.
[914] As regards the scope *ratione materiae*, the prohibition of the use of force regards military armed force or in any other manner hostile armed force. It does not cover therefore police operation of low intensity. In this regard, see R. Kolb, above n 717, p. 247.
[915] E. Jiménez de Aréchaga, above n 813, p. 90. One can discuss, however, the intensity of the use of force, particularly for the effects of the right of self-defense. See R. Kolb, above n 717, pp. 288-90.
[916] Articles 53 and 107 related to "enemy states" are not in force anymore after the Report of the UN Secretary General Doc. A/59/565, 2 December 2004, para. 298.

the unilateral use of force in detriment of the UN system of collective security. It would also widen the possibilities of derogation by States in *inter se* arrangements or in their respective unilateral (individual or collective) acts. Such an understanding threatens the very peremptory nature of that norm.[917] To put it another way, one would be admitting that the legality of the use of force would be subject to the particular and discretionary assessment of each State (unilateral use of force) in a world in which there is no international judicial system with compulsory competences in analysing the lawfulness of the use of force.[918] This is particularly true in the light of the continuous occurrence of armed attacks perpetrated by States in foreign territories without any consequences both from political or legal perspectives, in spite of formal protests presented before the UN Secretary General or the UN Security Council. In legal theory, admitting or advocating such a possibility is not only wrong but also clearly disregards treaty, customary and jurisprudential law as developed in the past century. One could say that it would amount to admitting that the rule of force overrides the rule of law.[919]

Peaceful settlement of disputes: does it possess ius cogens nature?

Before ending this Section, it is necessary to address a last aspect which is not itself an intrinsic part of the normative scope of the prohibition of the use of force, but that nonetheless stands out as a constant topic of debate in the discussion of which norms of general international law portray a peremptory character, namely the status of the principle of peaceful settlement of disputes. Indeed, in analysing the legal framework in the area of international peace and security, one can identify a

[917] N. Schrijver, above n 845, pp. 460-461.

[918] As pointed out by the ICJ in the *Corfu Channel case*, such a supposition implies that the use of force "would be reserved for the most powerful States", since weakening the requirements of concerted action by the international community as a whole could led to a situation in which every state, in particular the most powerful ones, would be in a position to lawfully derogate from the general prohibition of the use of force. The ICJ also addressed both the questions of pertinence and scope of Article 2 (4) in the *Corfu Channel* case. The Court considered that the minesweeping operation conducted by the United Kingdom in the Albanian territorial sea violated the territorial integrity of that country under article 2 (4) of the UN Charter. The British argument in favour of a limited intervention based on the use of force was outlawed by the Court, which considered it "as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses" and underlined that "respect of territorial sovereignty is an essential foundation of international relations", above n 688, pp. 12-36. Also, in its Advisory Opinion in the *Nuclear Weapons* case, the Court implicitly adopted a restricted interpretation by stating that the prohibition of the use of force "is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter," *Nuclear Weapons* case, above n 187, p. 244, para. 38. By silencing on other exceptions, and expressly referring to those provisions as the ones to be applicable "to any use of force, regardless of the weapons employed," it is possible to infer that the ICJ suggested that the law of the Charter does not allow any other lawful use of force in public international law.

[919] "Il est possible de s'interroger si l'extrême début du XXe siècle ne nous propose pas des velléités révisionnistes, qui, sous couvert de 'frappes préventives' et la 'guerre contre le terrorisme', n'imposent une certaine involution d'un effort plusieurs fois séculaire", R. Kolb, above n 717, p. 23.

clear duality emerging from both the UN Charter and general international law between the rule on the non-use of force and the principle of peaceful settlement of disputes.[920] The two norms are intrinsically connected throughout the text of the Charter and in a number of international instruments[921] as non-dissociated elements concurring to the supreme objective of maintaining peace and security.[922]

These ties trace their roots to the historical development of both norms in the international legal systems. Until the early twentieth century, the use of force was recognized by international law as a valid means, potentially the last recourse, of dispute settlement.[923] But after States were prohibited from using force in order to protect and realize their national interests, it became necessary to offer alternative means for States to pursue their interests in a legal manner. The principle of peaceful settlement of disputes was therefore a rational corollary of and a complement to the general prohibition of the use of force.[924]

But does it also has a *ius cogens* character? To answer this question it is necessary first to separate the contents of the principle of peaceful settlement of disputes from that of the prohibition of the use of force. Although closely linked, these norms are materially different and independent in public international law. Bearing in mind such a distinction, there are other elements to be taken into account. First, the principle of peaceful settlement of disputes also has a universal

[920] "Tout ele système de la Charte est construit autour de l'interdiction du recours à la force (article 2 paragraphe 4), l'obligation faite aux Etats par l'article 2, paragraphe 3, de régler pacifiquement leurs différends internationaux n'apparaît que comme corolaire logique de cette interdiction", J. Charpentier & Batyah Sierpinski, 'Article 2, Paragraphe 3', in in Jean-Pierre Cot, Alain Pellet & Mathias Forteau (eds.), *La Charte des Nations Unies, Commentaire article par article*, Paris, Economica, 3rd. ed., 2005, p. 425. See L. M. Goodrich, E. Hambro & A.P. Simons, *Charter of the United Nations (Commentary and Documents)*, Columbia University Press, New York, 1969, p. 41.

[921] The links between the principle of peaceful settlement of disputes and the principle of non-use of force are also highlighted in a number of international instruments, including the 1945 *Pact of the League of Arab States* (Article 5), the 1948 *American Treaty on Pacific Settlement* (Pact of Bogota) (Article I), the 1947 *Inter-American Treaty of Reciprocal Assistance* (Articles 1 and 2), the *Constitutive Act of the African Union* (article 4) and the *Declaration on Principles Guiding Relations between Participating States contained in the Final Act of the Conference on Security and Cooperation in Europe* (last paragraph of section II). Article I of the Pact of Bogota explicitly reads that "[t]he High Contracting Parties, solemnly reaffirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures." On the role of regional agencies and/or arrangements, including in the area of human rights, see the *UN Handbook on the Peaceful Settlement of Disputes between States* (1992), United Nations, New York, (OLA/COD/2394).

[922] Such a relationship is highlighted in the wording of article 2 (3), which reads that all "Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." See also J. Charpentier & Batyah Sierpinski, above n 920, p. 426.

[923] I. Brownlie, above n 791, pp. 66-111.

[924] The Special Committee charged by the GA to elaborate the declaration on principles of international law also understood that the principle of peaceful settlement of disputes is a logical corollary of the prohibition of the use of force. The rationale follows from the fact that if states have first revoked their right to resort to force as a legitimate and legally accepted means to pursue their national interests, the universal obligation to settle their international disputes by peaceful means offers the proper path to pursue such interests in an international legal order aimed at maintaining peace and preventing conflicts. See also N. Schrijver, above n 845, p. 442.

nature, but it certainly does not have an imperative character if one understands that it requires all States to submit all their disputes to peaceful settlement of disputes.[925] States have sovereign discretion in electing the moment and the means for pursuing their own interests. They can decide otherwise and renounce to pursue their interests through peaceful means, since States have a sovereign will in choosing not only the moment, but also the means and their capacity to analyse the results of such a process.[926]

For the purposes of *ius cogens* though, what is universal, imperative and non-derogable is the obligation imposed upon all States, as corollary of the prohibition of the use of force, to pursue their national interests only by peaceful means. To put differently, States cannot pursue their interests in a given dispute by other means than those of a peaceful nature. States may eventually renounce to their interests, but when and if States intend to seek the realization of their interests related to a given matter under dispute with another State, international law peremptorily requires that actions to be taken in this regard are to be of a peaceful nature. This is the sole corollary that could be considered having a peremptory (universal, imperative and non-derogable) nature. In other words, the peremptory nature of the principle of settlement of disputes does not lie in an allegedly compulsory obligation imposed upon all states to submit their disputes to a proceeding whenever there is a dispute with another State. Its peremptory nature lies in the imperativeness that if and when states intend to pursue their national interests related to an international dispute with another State, they are obliged to do so through peaceful means, understood as in opposition to the threat or the use of force.

[925] During the negotiations for the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the proposal to qualify the principle of peaceful settlement of disputes as representing the expression of a legally universal conviction of the international community was rejected precisely because states did not want to interpret it as a peremptory norm.Report of the Special Committee, supplement n. 4, vol. I, p. 363.

[926] As suggested by Charpentier and Sierpinski, "c'est à la différence de l'article 2, paragraphe 4, une obligation de comportement. L'article 2, paragraphe 4, impose un résultat: le non-recours à la force." J. Charpentier & Batyah Sierpinski, above n 920, pp. 428-9.

Chapter II – The principle of Self-Determination

The principle of self-determination is also commonly viewed as another norm of general international law of *ius cogens* character. After its codification by some of the most fundamental pieces of conventional law of the contemporary international legal system, namely the UN Charter and the 1966 Human Rights Covenants, the principle of self-determination has been widely accepted and recognized as peremptory by the practice of States (particularly in the context of the decolonization process), the jurisprudence of international tribunals, and the work of publicists and the expert bodies of the international system. All these aspects of a legal and political nature have reinforced each other in such a manner that the principle of self-determination appears today as one of the least controversial peremptory norms of general international law.

Section I - Historical development and the positive nature of the right to self-determination

The principle of self-determination is inscribed within a broader process of affirmation of the rights of peoples and individuals *vis-à-vis* the absolute power of States.[927] Its core element – the right of peoples to take responsibility for their own future – has inspired peoples all over the world for seeking independence and political autonomy in the most various formats. In practical terms, it represents a historical achievement resulting from the struggle against foreign subjugation and the search for autonomy and political participation in decision-making processes in non-self-governing territories. Historically, its legal and political dimensions are so intermingled that it is impossible to dissociate its juridical implications from the uninterrupted state practice in this area in the last sixty years.

The principle of self-determination became a positive reality after the establishment of the UN Charter. In spite of the fierce opposition from colonial

[927] The historical roots of the principle of self-determination can be traced to the 1789 French Revolution and the subsequent process of creation of national states in the XIX century. It entailed an irresistible connection between the idea of nationality and the right of peoples to constitute a sovereign State. Legitimacy would stem from and be exerted by the people instead of the king, particularly if the latter was a foreign monarch. Later on, the central ideas contained in the principle of self-determination were used as the conceptual basis for the political discourse of early XXth century against imperialism regardless of ideological partisanships. In Lenin's socialist discourse, the emancipation of peoples was to be exercised in opposition to capitalist imperialism. In Liberal reasoning, the idea of self-determination appeared in Wilson's fourteen points in 1918. The former American President suggested, in a less radical transformation of the *status quo*, the free "autonomous development" for entire regions of the former Turkish Ottoman Empire and Eastern Europe peoples under the control of Austria-Hungary. In the process that led to the Covenant of the League of Nations, the Liberal approach prevailed over Socialist's as expressed in the regime of mandates provided for Article 22. But the seeds of the dismantling of the colonial empires were already thrown.

powers, which resisted the idea of a "right to independence" for peoples under foreign subjugation and rejected the imposition of obligations in favour of those populations, the proposal presented by the Russian delegation was eventually adopted in the final text of the Charter, and Article 1(2) of the UN Charter emerged as the conventional landmark of the right of peoples to self-determination. Placed among the main purposes of the UN, it established that the development of "friendly relations among nations [should be] based on the respect for the principle of equal rights and self-determination of peoples." The same rationale is reproduced in Article 55 of the UN Charter, which subjects the promotion of international economic and social cooperation, including human rights, to "the principle of equal rights and self-determination of peoples."[928] The principle of self-determination also applied to the regimes created for the administration of non-self-governing territories (Chapter XI) and international trust territories (Chapter XII), as corollary of the political objectives underlying its adoption in the post-War period. Those regimes are based on the recognition that in cases in which the peoples concerned have not yet attained self-government, the administration of the respective territories must observe the interests of those populations, including of those developing self-government.[929] The interests of the inhabitants of those territories, which are ultimately the objective core of the principle of self-determination, prevailed over those belonging to administrating entities, and provided the yardstick for the legality and political legitimacy of any such a type of international regime.[930]

Several other conventional instruments also explicitly refer to the principle of self-determination. Article 1[931] of both the 1966 International Covenant on Economic, Social and Cultural Rights (ICESC)[932] and the 1966 International Covenant on Civil and Political Rights (ICCPR)[933] reproduce exactly the same language, recognizing it as a fundamental right in international human rights law. Both Covenants went beyond the mere reaffirmation of the right of peoples to self-determination, and specified some of the elements of the normative content of that principle in public international law. First, the Covenants positivized the rights of peoples to "freely dispose of their natural wealth and resources."[934] Second, they reinforced the

[928] Article 55 of the UN Charter reads as follows: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (1) higher standards of living, full employment, and conditions of economic and social progress and development; (2) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (3) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

[929] See also article 1 (3) of both 1966 covenants on human rights (ICSECR and ICCPR).

[930] See Articles 73 and 76 of the UN Charter.

[931] "[A]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[932] The ICSECR had 42 signatories and 10 parties by March 5, 2013, see htttps://treaties.un.org.

[933] The ICCPR had 74 signatories and 167 parties by March 5, 2013, see https://treaties.un.org.

[934] Article 1 (2) of the ICCPR and ICSEC reads as follows: "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic

compulsory obligations imposed upon the international community as a whole, "including those having responsibility for the administration of Non-Self-Governing and Trust Territories," to respect the exercise of peoples of their right to self-determination.[935] And in the area of international humanitarian law, the 1977 Additional Protocol I of the Geneva Conventions of 1949 on the protection of war victims included the "fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination" among the situations encompassed by the scope of application of the definition of armed conflicts.[936]

The practice at the United Nations, particularly at the General Assembly, took a sweeping approach in the process of interpreting and applying the principle of self-determination.[937] Over the last decades this practice has been built upon the unequivocal commitment to end colonialism and all other forms of external subjugation. The principle of self-determination was upheld as a fundamental legal and political tool in advancing the cause of eradicating segregationist and colonial regimes, such as the apartheid in South Africa. The first authoritative piece of *opinio iuris* on the issue is the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples,[938] which states that the subjection of peoples to alien subjugation constitutes a denial of fundamental human rights, is contrary to the Charter and is an impediment to the promotion of world peace and co-operation. It also calls upon administering States to transfer, "without any conditions or reservations," all powers to the peoples of non-self-governing territories in order to enable them to enjoy complete independence and self-determination, and requires that "all armed action or repressive measures of all kinds directed against dependent peoples shall cease." The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations reinforced that

co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence."

[935] Article 1 (3) of the ICCPR and ICSEC reads that "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

[936] Article 1 (4): "The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

[937] Western States traditionally opposed the application of the principle of self-determination to actual circumstances of colonial and alien domination, and argued that the rule enshrined in Article 1(2) of the Charter was a mere "general principle" without legal value. However, the progressive state practice and *opinio iuris* of States took precedence over that reasoning. See Jean-François Dobelle, "Article 1, Paragraphe 2", in Jean-Pierre Cot, Alain Pellet & Mathias Forteau (eds.), *La Charte des Nations Unies, Commentaire article par article*, Paris, Economica, 3rd. ed., 2005, pp. 340-341.

[938] GA Resolution 1514 (XV) of 14 December 1960, adopted by a vote of 89-0-9.

interpretation[939] by drawing a relationship between self-determination and the objective of maintaining peace and security.[940] In the context of the process of decolonization, the GA adopted a series of resolutions condemning colonialism, despite the opposition of former colonial powers and other Western States.[941] More recently,[942] Resolution 55/2 of 8 September 2000 (United Nations Millennium Declaration) and Resolution 60/1 of 16 September 2005 (2005 World Summit Outcome) upheld *inter alia* the right to self-determination of peoples under colonial domination and foreign occupation.[943] The result of this process has been outstanding: since 1945, 80 former colonies gained their independence, and all eleven Trust Territories have achieved self-determination either through independence or free association with an independent State.[944]

[939] The preamble declares that the principle of equal rights and self-determination "constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States," and calls upon States to promote the realization of the principle of self-determination of peoples in order "to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned" since "the subjection of peoples to alien subjugation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter." Article 1 (4) of the 1977 Additional Protocol I of the Geneva Conventions of 1949 accepts the definition of self-determination "as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

[940] It declares that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security." A legal interpretation is construed here according to which any obstruction to the exercise of self-determination is contrary to one of the most important purposes of the UN – namely the maintenance of international peace and security – and therefore should be condemned as a matter that concerns the international community as a whole.

[941] L. Hannikainen quotes GA res. 2621 (XXV), GA res. 2270 (XXII); res. 2184 (XXI) and res. 3103 (XXVIII). In general, those resolutions declare the lawfulness of the struggle against colonial and alien domination and racist régimes (Article 1 of GA res. 3103 (XXVIII) reads that "The struggle of peoples under colonial and alien domination and racist régimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law") and denounce the ill-treatment of combatants and the violations of human rights and international humanitarian law incurred by the administering States when repressing the exercise of the right of self-determination by peoples under foreign subjugation. As corollary of the unlawfulness of the use of force against national liberation movements, those resolutions condemned the repression as being against the UN Charter and public international law, and declared that those unlawful actions should entail international responsibility.

[942] The Third Committee of the GA approves resolutions on the issue in an annual basis.

[943] Both texts represent the most recent attempt by States to interprete the legal status of their obligations under the UN Charter. Also, the Durban Declaration of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance also reaffirmed the principle of self-determination of peoples. UN A/CONF.189/12 of 8 September 2001.

[944] According to the United Nations, in 1945, 750 million people - almost a third of the world's population - lived in territories that were non-self-governing, dependent on colonial Powers. Today, fewer than 2 million people live in such territories. See www.un.org/en/decolonization/index.shtml. The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples (the G-24) also played an important role by maintaining certain issues in its agenda and offering likely the sole universal forum for discussing situations in which peoples are still living in non-self-governing territories. More importantly, it provides a forum in which those matters can be analyzed with full respect to the principle of peaceful settlement of disputes, contributing therefore to the maintenance of international peace and security in accordance with the purposes of the UN Charter. The list of cases under the analysis of G-24 includes 16 situations of non-self-governing territories: one in Africa (Western Sahara), nine in the Atlantic and Caribbean (Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland/Malvinas Islands, Montserrat, St. Helena, Turks and Caicos Islands and United States Virgin Islands),

The ICJ also touched upon the legal nature of the principle of self-determination. In the Advisory Opinion on *Namibia*, the Court declared the applicability of the principle of self-determination to all situations of non-self-governing territories,[945] and referred to the 1960 Decolonization Declaration as "a further important stage" in the development of the legal norm of self-determination as developed by treaty and customary law. Further on, in its 1975 Advisory Opinion on *Western Sahara*, the Court recalled that Resolution 3292 (XXIX) was the latest of a long series of General Assembly resolutions dealing with Western Sahara in the context of decolonization of non-self-governing territories, and relied explicitly on treaty provisions (Article 1 (2) of the Charter), elements of *opinio iuris* (the 1960 Decolonization Declaration and the 1970 Declaration on the Principles of International Law) and on its own former decisions (*South West Africa* advisory opinion) as sources confirming the application of the right to self-determination to the situation of Western Sahara.[946] In the *East Timor* case, the Court reaffirmed the principle of self-determination as an "essential principle of contemporary international law" and declared the "right of peoples to self-determination as right *erga omnes*."[947]. And in its Advisory Opinion on the *Wall*,[948] the Court noted that the principle of self-determination of peoples was enshrined in the UN Charter and reaffirmed by several other instruments such as the ICCPR, the ICSECR, by a number of resolutions of the General Assembly and further referred to in the jurisprudence of the ICJ (*South West Africa*, *Western Sahara* and *East Timor*).[949]

The normative content of the principle of self-determination

In the light of the foregoing, the principle of self-determination stands out as one of the central norms within the contemporary international legal system. It implies the existence of rights and obligations of an *erga omnes* nature as developed by conventional and customary law, and as recognized by the jurisprudence of the ICJ. But the precise content of the principle of self-determination is hard to be determined due to the wide array of references to it emerging from conventional and customary sources.[950] The analysis of all those references[951] indicates the

one in Europe (Gibraltar) and five in Asia and Pacific (American Samoa, Guam, New Caledonia, Pitcairn and Tokelau).

[945] *Namibia* case, above n 100, p. 31.

[946] *Western Sahara,* Advisory Opinion, ICJ Reports 1975, pp. 31-33.

[947] *East Timor* case *(Portugal* v. *Australia)* (Judgment), ICJ Reports 1995, p. 90.

[948] Advisory Opinion on the *Wall*, above n 859, p. 136.

[949] *Idem*, pp. 171-173.

[950] During the discussions at the ILC on the Draft Article on State Responsibility, the Special Rapporteur Waldock said that he did not "underestimate the political and legal importance of the principle of self-determination, even if its precise content was extremely difficult to define." ILC Reports, p. 256, 1963, vol. i.

[951] Besides the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among

existence of rights and obligations in this area, as well as corollaries stemming from the effects of both the objective (obligations) and subjective (rights) dimensions of that rule.

On the side of the rights, the material content of the principle of self-determination can be defined by the rights of peoples (i) to freely determine the political status without external interference, and to pursue the economic, social and cultural development;[952] (ii) to the separate status of their non-self-governing territories; (ii) to struggle for the realization of their right to self-determination, including by the use of force (peoples living under foreign subjugation, i.e., colonial or other form alien rule);[953] (iii) to receive support for the realization of the right to self-determination; and (iv) over the natural resources within their respective non-self-governing territories. These rights constitute the core of the subjective dimension of the principle of self-determination. Regardless of lacking full legal personality, non-self-governing peoples may exercise those rights in opposition not only to the administering State or Occupying Power, but also against any other State or other legal subject (international organizations, for instance) that in any manner may be obstructing the realization of their right to self-determination.

On the side of duties imposed *erga omnes*, one can identify (i) the general prohibition of the threat and the use of force to deprive a dependent people of its right to self-determination; (ii) the duty to refrain from obstructing the right to self-determination, (iii) the obligation to accelerate the realization of the right of self-determination in accordance with the will of the concerned peoples, and (iv) the prohibition of exploitation of natural resources by external States without benefiting or the participation of concerned peoples. These obligations oblige all States in their relationships not only with the peoples of non-self-governing territories, but also with other States, including those entitled with mandates or exerting actual administration of those territories.

There are two main corollaries stemming from the normative universe of the right to self-determination, namely the territorial integrity of non-self-governing territories and the unlawfulness of the use of force against the exercise of the right to self-determination. As regards the first corollary, the principle of territorial

States in accordance with the Charter of the United Nations, see also GA res. 2621 (XXV), GA res. 2270 (XXII); res. 2184 (XXI) and res. 3103 (XXVIII).

[952] "The nucleus of the right of dependent peoples to self-determination is their free determination of their political status", L. Hannikainen, above n 277, p. 376.

[953] Article 5 (1) of the 1970 Declaration on Principle of International Law reads as follow: "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter." Espiell say that "the right of peoples to self-determination necessarily implies the right of peoples to struggle by every means available to them," H. Gros Espiell, *The Right to Self-Determination*, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980), p. 14. However, during the decolonization process, several Western States were reluctant to accept the right of peoples to resort to armed force in the exercise of their right to self-determination.

integrity is applied as a fundamental element in the determination of the boundaries of the units entitled with the right to self-determination.[954] Objectively, administering States and Occupying Powers are prohibited to disaggregate the integrity of non-self-governing territories.[955] Territorial fragmentation promoted by administering States or Occupying Powers may lead to situations in which the interests of the concerned peoples are jeopardized, particularly as regards an eventual independence of that territory and the benefits resulting from the exploitation of its natural resources. The principle of territorial integrity is not tantamount, however, to the impossibility of territorial fragmentation. The purpose of the rule of territorial integrity is to guarantee that a given territory belonging to a non-self-governing people is protected under international law from any form of unlawful acquisition or annexation by third States, particularly as a result of the threat or the use of force. This rule reproduces the same rationale of the general rule of international law that protects sovereign States from any form of threat to their territorial integrity, as established in article 2 (4) of the UN Charter. The principle of self-determination simply does not legitimize any action disrupting the territorial integrity or political or national unity of existing States, but there are circumstances beyond the possibilities envisaged by the Principle VI of GA Resolution 1541 (free association with an independent state or integration with an independent State) in which a territory can be fragmented in accordance with the interests and the will of the non-self-governing peoples.[956] The foregoing does not imply either an inherent right of secession stemming from the right to self-determination. Those concepts operate in different circumstances.[957] In existing States, particularly those of non-fragmented territories, there is a supposition of

[954] The principle of integrity was particularly relevant during the decolonization period, in which the former colonial boundaries provided the objective criterion for determining the limits of newly independent States. L. Hannikainen, above n 277, p. 370.

[955] The practice of States at the UN shows a consistent pattern of condemnation and rejection against attempts of territorial fragmentation. For instance, South Africa plans to create Bantustan territories for the black community in poorer and less productive areas, and the rejection by the General Assembly of France's continuous efforts to separate the island of Mayotte from the archipelago of Comoros,[955] are evidence of the rejection by the international community against attempts of territorial fragmentation by administering States. See also GA res. 181 (II).

[956] This was the case, for instance, of the partition of the Trust Territory of British Cameroons and the Trust Territory of Ruanda-Urundi, after the failure of the UN to maintain the unity of the former colonial territory. Consequently, if the principle of territorial integrity is the main rule concerning non-self-governing territories, its application remains nonetheless subject to the exercise of the right of self-determination as regards the interests, the choices and the will of concerned peoples under foreign subjugation. The main principle is the right of political self-determination. See also Part VI below on the collision between the prohibition of the use of force and the right to self-determination.

[957] First, the principle of integrity is applied in contexts of foreign subjugation of non-self-governing territories, while the legal notion of secession occurs in circumstances within already existing States, even when different peoples are living within the same territory. Second, the idea that principle of self-determination does not legitimize any action disrupting the territorial integrity or political or national unity of existing States is firmly rooted in the *opinio iuris* of States (see, for instance, the reaction at the UN towards the attempts of secession in the Congo (Katanga), Nigeria (Biafra) and Cyprus (Northern Cyprus)) and international doctrine. See E. Jiménez de Aréchaga, above n 813, pp. 109-11; J. Crawford, *Creation of States in International Law*, Oxford, Clarendon Press, 1979, pp. 257-268.

lawful control over the territory in opposition to "foreign" subjugation.[958] In those cases, grievances between different ethnically and culturally peoples are usually a consequence of violations of human rights rather than the disregard of the right to self-determination.[959]

A second and fundamental corollary stemming from the principle of self-determination is the unlawfulness of using force to prevent its realization. Administering States and Occupying Powers are obliged not only to promote the social and economic development and human rights of the concerned populations, but also not to obstruct the development of the capacities of self-government towards their full independence and sovereignty.[960] The use of force either as a mean of repressing the exercise of their rights to self-determination or of forcefully integrating a territory into the territory of the administering State is prohibited and unlawful. This rationale derives from a systemic interpretation of the UN Charter. Self-determination is one of its main purposes, and the legality of the use of force is limited to those circumstances in which it is not "in any manner inconsistent with the Purposes of the United Nations." Accordingly, the threat and the use of force against the realization of the right to self-determination are therefore manifestly contrary to one of the main purposes of the Charter.[961]

[958] Consider the case of Bangladesh in 1972. A new State emerged through secession from Pakistan in face of an intolerable discrimination against the Bangladeshi population contrary to the principles of non-discrimination. In that case, the rule of territorial integrity did not apply as a tenet of the principle of self-determination because the government did not respect its human rights obligations to representing the whole people belonging to the territory without distinction as to race, creed or colour. In those cases, there is room for lawful secession without contradicting the principle of territorial integrity. Nonetheless, actual circumstances are not always as clear as to the distinct conditions for the application of the principle of self-determination or secession. The process of the territorial fragmentation of the former Yugoslavia and the emergence of newly independent States in the Balkans, for example, is a fresh reminder of the complexities related to the issues of secession and self-determination in public international law.

[959] These problems lead to the distinction between "internal" and "external" self-determination. The central idea for the concept of "external" self-determination is based upon the notion of "dependent peoples" as those living in territories under colonial or other alien rule. The term "dependent peoples" would define peoples living in non-self-governing and the trust territories. It implies the lack of a fundamental element of statehood, namely that of sovereignty of a people over a given territory in which it lives. Such a conception of external self-determination would exclude therefore the realization of internal self-determination within existing States, particularly when existing regimes are not representative of the people. This distinction, which implies a differentiation between the principle of self-determination and other fundamental human rights, may have several implications to issues such as the right of a group to receive military external support in circumstances of an armed conflict, its relationship to the principle of non-intervention, and the legal notion of secession of States. In any event, the existence of external subjugation of another people within a non-self-governing territory is essential for differentiating a situation in which the principle of self-determination ("external") or the international law of human rights ("internal") should apply. In any event, the principle of self-determination is currently understood as a prerequisite for the promotion and protection of human rights. See L. Hannikainen, above n 277, pp. 357-358, and Jean-François Dobelle, above n 937, p. 341.

[960] L. Hannikainen, above n 277, p. 359.

[961] This interpretation has been confirmed by the *opinio iuris* of States in several decisions at the General Assembly, such as the 1970 Declaration on the Strengthening of International Security and the 1974 Declaration of Aggression. Also, GA resolutions approved on annual basis on the issue have methodically reaffirmed the disapproval of States on the threat or the use of force against the exercise of the right of self-determination. The latest document adopted on the issue, GA res. 66/145 declares that "*firm opposition* to

Section II - The peremptory nature of the principle of self-determination

Despite a few divergent views,[962] the acceptance and recognition of the peremptory character of the right to self-determination emerges from customary law, doctrinal views[963] and international jurisprudence. In several occasions, the *ius cogens* character of the principle of self-determination was recognized in the context of deliberations among members of expert bodies of the UN system. During the preparatory works for the VCLT, several members of the ILC expressly referred to the principle of self-determination as a material example of peremptory norms.[964] Subsequently, in its commentaries to the final Draft articles on Responsibility of States for Internationally Wrongful Acts, the ILC also included the principle of self-determination among norms that are clearly accepted and recognized by the international community as part of *ius cogens*.[965] This same opinion was expressed by the then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Human Rights Commission, Hector Gros Espiell. In his study on the implementation of United Nations resolutions relating to the right of peoples under colonial and alien domination to self-determination, Espiell stated that the principle of self-determination of peoples "as enunciated in General Assembly Resolution 2625 (XXV)" is "of the nature of *jus cogens*."[966]

The practice at the UN also touched upon the peremptory nature of the principle of self-determination. At the former UN Human Rights Commission, Resolutions

acts of foreign military intervention, aggression and occupation, since these have resulted in the suppression of the right of peoples to self-determination and other human rights in certain parts of the world."

[962] J. Crawford, above n 957, p. 81.

[963] "The right of selfdetermination is overwhelmingly characterized as forming part of the peremptory norms of international law." K. Doehring, "Self-Determination" in B. Simma (ed.), *The Charter of the United Nations: A* Commentary, New York: Oxford University Press, 1994, p. 70. "This right [of self-determination] has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*," R. McCorquodale, 'Self-Determination: A Human Rights Approach', (1994) 43 *I.C.L.Q.*, p. 858. Anaya said that "self-determination is widely held to be a norm of general or customary international law, and arguably *jus cogens*." S. James Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8 *Arizona Journal of International and Comparative Law*, pp. 29-30. See also, L. Alexidze, above n 274, p. 262; A. Gómez Robledo, above n 335, pp. 174-75; J.J. Caicedo Perdomo, above n 586, pp. 272-73; I. Brownlie, above n 487, p. 489.

[964] See, for instance, the opinion of Tunkin on treaties imposed on former colonies which had become independent States, in YbILC, 1963-I, p. 155. Also, in 1963, Waldock used principle of self-determination as a criterion of validity for international agreements related to non-self-governing territories. In those cases it was not enough to fulfill formal criteria of validity, such as the legal capacities of those signing a treaty, because the principle of self-determination required "some expression of the will of the people concerned, because their political future was at stake in the treaty." The then Special Rapporteur pointed out that the principle of self-determination of peoples "constituted a principle of general international law, confirmed and developed in many important international instruments." YbILC, 1963-I, p.4.

[965] YbILC, 2001-II, Part Two. pp. 86 and p. 113.

[966] Based on a hierarchy among norms of public international law, Espiell pointed out that "the idea that self-determination is a case of *jus cogens* is widely supported." H. Gros Espiell, above n 953, para. 72.

1997/4, 1998/4, 2003/3[967] reaffirmed the principle of self-determination as enshrined in the UN Charter and other conventional and customary sources, and expressly declared that "the right to self-determination as an international principle" is a "right of all peoples in the world, as it is a *jus cogens* in international law."[968] Those pieces of evidence of *opinio iuris* originated in the Sub-Commission, as expressed in 1977 by some of its members such as Espiell, Ortiz Martin, Caicedo Perdomo, Navarro Richardson, Dadiani, Cassese and Yussef.[969] In this same reasoning, Judge Ammoun argued in the *South West Africa* case that the act of using force with the object of frustrating the right of self-determination was "all the more grave" because "the right of self-determination is a norm of the nature of *jus cogens,* derogation from which is not permissible under any circumstances."[970]

The peremptory character of the principle of self-determination emerges from the observance of the three essential features of the concept of *ius cogens*. The universal scope of application of the principle of self-determination is widely recognized and accepted, which makes it one of the least controversial aspects of its peremptory character. Its first and foremost source of universal application is the UN Charter, but its universality also emerges from the interpretative process developed in the practice of States and the work of publicists. As all other rules embodied at the Declaration on Principles of International Law, the principle of self-determination is universally applied, since GA Resolution 2625 (XXV), as unanimously approved, provides strong evidence of the *opinio iuris* of States on the issue. In addition, the GA approves annual resolutions with the title of "Universal realization of the right of peoples to self-determination," and the ICJ and the Inter-American Commission on Human Rights also recognized the principle of self-determination as of *erga omnes* nature.[971]

The imperative feature stems from both the objective and the subjective dimensions of the principle of self-determination. The respect for the rights of non-self-governing peoples and the duties imposed upon administering States and Occupying Powers are considered imperative in all circumstances. As such, rights and obligations are imperative not only in the relations between administering States and non-self-governing peoples, but also in their relations with all other

[967] Resolution 2003/3 was adopted by a recorded vote of 51 votes to 1, with 1 abstention.
[968] In the three resolutions mentioned above there is a paragraph at the preamble with that phrasing.
[969] H. Gros Espiell, *The Right to Self-Determination*, U.N. Doc. E/CN.4/Sub.2/405(vol.I), 20 June 1978, para. 78.
[970] In the *Namibia* case, above n 100, see the Separate Opinion of Judge Ammoun, para. 12, pp. 89-90, in which he confirms declares its *erga omnes* feature.
[971] The Inter-American Commission on Human Rights of the Organization of American States declared that the principle of self-determination has the legal status of *erga omnes* (Inter-American Commission on Human Rights, Organization of American States, Press Communique no. 13/93 (May 25, 1993). In this same reasoning, in the *East Timor* case, the Court regarded the principle of self-determination as of *erga omnes* nature and an essential principle of international law, *East Timor* case, above n 947, p. 102, para. 29. The Advisory Opinion on the *Wall* reaffirmed all conventional provisions (UN Charter and both 1966 Covenants) and relevant previous decisions on the issue (*South West Africa* case, *Western Sahara*, East Timor), and declared the *erga omnes* nature of the right to self-determination. See above n 859, pp. 171-172, para. 88.

States and subjects of international law that in any manner, even indirectly, may entail relationships affecting non-self-governing territories. They are equally obliged to strive, to the extent of their respective capacities and means, for the realization of the principle of self-determination when acting in international *fora* such as the United Nations, or entailing relationships with administering States and Occupying Powers. These peremptory obligations include the duty not to recognize titles and rights emanating from the unlawful acts of States administering or occupying non-self-governing territories, as recognized by the ICJ[972] and applied by the Security Council in a number of occasions.[973] Also, not only the obligation to refrain from the threat or the use of force against self-determination is peremptory, but also circumstances such as necessity and emergency cannot be used as waivers not to comply with the obligations stemming from the principle of self-determination. Economic and budgetary difficulties do not allow administering States of non-self-governing territories to disregard the free and informed will of the concerned peoples in circumstances such as those of referendum on independence, or on decisions related to the exploitation of natural resources in those territories.

Finally, no subject of public international law can contract out from the obligation not to affect negatively the array of rights of non-self-governing peoples protected under the principle of self-determination. As corollary, all States must reject as an imperative obligation the legality of titles and agreements contradicting those rights and obligations. The non-derogable aspect of the principle of self-determination is translated into the sanction of nullity imposed upon treaties and other acts contrary to the realization of that right. Hence, the validity of all unilateral acts and treaties celebrated by and with administering States or Occupying Powers in relation to non-self-governing territories hinges upon their harmonization *vis-à-vis* the peremptory norm on self-determination. These include

[972] This view was confirmed by the ICJ in the *Namibia* case, in which the Court stated that States are under the obligation not to enter in treaties with South Africa whenever it purports to act on behalf of Namibia, or if the object and consequences of those arrangements are related to Namibia, except for certain humanitarian treaties the non-performance of which would adversely affect the concerned peoples, in accordance with the analysis of the competent international bodies. See above n 100, p. 55. In the Advisory Opinion on the *Wall*, the Court declared that "(g)iven the character and the importance of the rights and obligations involved, the Court is of the view that al1 States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in imaintaining the situation created by such construction. It is also for al1 States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end." See above n 859, p. 200, para. 159.

[973] In Resolution S/RES/465 (1980), the Security Council called upon "all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories." The same formula was also applied to the situation in the former colonies of Portugal in Africa, when the Security Council, besides of reaffirming the legitimacy of the struggle for self-determination, also called upon all states to refrain from giving any assistance that would enable the continuation of the repression of the peoples in those territories. See S/RES/312 and S/RES/322 (1972).

not only agreements aimed at obstructing the right to self-determination,[974] but also treaties contracting out of other rights and obligations stemming from that principle. For instance, a treaty providing for the exploitation of the natural resources of non-self-governing territories may be declared as null and void if it does not respect the obligations and rights related to the concerned people.[975] Equally, arrangements running contrary to the territorial integrity of non-self-governing territory are null and void.[976] In the same vein, all acts performed by administering States are also subject to the peremptory regime operated by the principle of self-determination.

On a number of occasions, the General Assembly had the occasion to address or to apply, even in an implicit manner, the legal regime of *ius cogens* in circumstances involving the principle of self-determination. In Resolution 35/118, the GA stated that Member States "categorically reject any agreement, arrangement or unilateral action by colonial or racist Powers which ignores, violates, denies or conflicts with the inalienable rights of peoples under colonial domination to self-determination and independence."[977] On the situation in Namibia, the SC described the South African occupation as illegal and, in its Resolution 269 (1969), following the General Assembly, it recognized "the legitimacy of the struggle of the people of Namibia against the illegal presence of the South African authorities in the territory."[978] These bodies also implicitly applied the effects of nullity over titles and acts of threat and use of force against the right to self-determination in some specific circumstances. The General Assembly regarded as void some acts performed by Administering States in order to deceitfully promote the shifting of indigenous populations from non-self-governing territories,[979] as well as arrangements for non-representative elections or deceitful referenda.[980] In

[974] One could imagine an arm-trade treaty which provides for the supply of weaponry to be used in the repression of a non-self-governing people striving to realize its right to self-determination. In this case, the same rationale used by the UN Security Council to impose an arms embargo on South Africa during the apartheid regime could be applied.

[975] This view was confirmed by the GA in several resolutions declaring as void all permissions granted for the exploitation of natural resources in Namibia during South Africa occupation. See GA. Res. 3399 (XXX) and res. 37/31 and 38/50. However, the GA used "somewhat milder" terms towards treaties in which South Africa presented itself as having jurisdiction over Namibia (treaties with Portugal), and did not declared them as void.

[976] That was the case of the treaty signed between Morocco and Mauritania on the delimitation of their alleged "common" boarders across Western Sahara, which was considered illegal and void for contradicting the principle of self-determination of the Saharawi people. L. Hannikainen, above n 277, p. 407.

[977]According to Hannikainen, "here the GA had apparently *jus cogens* in mind." For the Finish scholar, the voting (122-6-20) was a result of several controversial provisions contained in GA res. 35/118 which prevent it from being unanimously adopted. L. Hannikainen, above n 277, p. 382.

[978] UNSC res. 269 (1969).

[979] See GA res. 2548 (XXIX) and 3481 (XXX). The shifting of population also contradicts Art. 49 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

[980] Res. 2708 (XXV). In this regard, the GA and the Security Council declared the invalidity of a variety of acts performed by South Africa with regard to Namibia, including the realization of election, and requested all UN Members not to recognize them since they occurred as a deceptive purpose of obstructing self-determination (see SC Resolutions 435 and 439 (1978)). Also, the disrespect by Morocco of the obligation to observe the free and informed will of the Saharawi people was also among the main reasons entailing the nullity of the alleged "consultation" that took place with the Yema's representatives in 1976, implicitly as a consequence of the legal

Palestine, both the GA and the SC have persistently declared that illegality and voidness of the establishment of settlements by Israel in the occupied territories,[981] not only as a consequence of the prohibition of territorial acquisition through the use of force, but also in the light of the principle of territorial integrity embodied by the right to self-determination.

The peremptory scope of the principle of self-determination

Most of the debate on the peremptory nature of the principle of self-determination has occurred at a general level, without analysing the specificities of the normative scope of that principle. As a result, the recognition of its *ius cogens* nature has occurred in general statements aiming primarily at attaching a peremptory quality to it. Such a level of generality raised doubts as to the peremptory scope encompassed by the principle of self-determination. Uncertainties relate to whether the rights stemming from that principle are also peremptory or only the obligations; or if the peremptory character of self-determination is restricted *ratione personae*, i.e., exclusively to those peoples living under "colonial subjugation," or if it extends to all peoples living under foreign subjugation.[982]

The first hypothesis was put forward by authors maintaining that only the obligation of States to refrain from obstructing the right of dependent peoples to external self-determination can be deemed as having a peremptory character.[983] The rights stemming from the principle of self-determination would not be peremptory, since "one cannot speak of the universal right of dependent peoples to self-determination" because "a given people may be unable or unwilling to exercise its right."[984] In a similar reasoning contesting the peremptory nature of the rights contained in the principle of self-determination, Sztucki contended that States could derogate from the right to permanent sovereignty over natural resources of non-self-governing territories in *inter se* arrangements.[985]

regime operated by the *ius cogens* nature of the principle of self-determination. See L. Hannikainen, above n 277, pp. 404-405.

[981] In Resolution 465 (1980), the Security Council declared that "all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity."

[982] In his study on the issue, Craven alludes to the statement of Judge Dillard in the *Namibia* case as evidence of the confinement of the principle of self-determination to contexts of decolonization. C.R. Craven, 'The European Community Arbitration Commission on Yugoslavia', (1995) 66 *BYIL*, pp. 380-381.

[983] Hannikainen, for instance, affirmed that there are peremptory norms only in the field of obligations imposed upon States in their treatment of dependent peoples that according to the criteria developed in international law have incontestably the right to external self-determination. L. Hannikainen, above n 277, pp. 375-376. Crawford argues that the right to self-determination can only be applied to units which have fulfilled those criteria. J. Crawford, above n 957, p. 101.

[984] L. Hannikainen, above n 277, p. 383.

[985] Criticizing an implied "right of nationalization", he contended that attaching the quality of *ius cogens* to that rule would be a "misconception" since "every international agreement involves some limitation of the freedom

As for whether only obligations stemming from the principle of self-determination would have a peremptory nature, it is necessary to underline first that the non-exercise of a given right does not imply its less imperative nature. As a general rule of law, every right implies the existence of an obligation opposed to those who are obliged to respect that right in *inter se* relationships.[986] But the non-exercise of a given rights is not tantamount to its derogation or less imperativeness, simply because the exercise of rights is a legal attribute belonging to rights' owners. Accordingly, there is no derogation when States or peoples of non-self-governing territories lawfully enter into contracts related to the exploitation of natural resources in their territories, but simply the exercise of the rights embodied in the peremptory norm of self-determination.[987] The only point that may be questioned is whether the consent of the non-self-governing territory has been legal and valid. But still the discussion does not hinge upon the object of the agreement, the validity of which cannot be discussed on grounds of derogating from a peremptory norm in the hypothesis suggested by those authors.[988]

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of action of the contracting parties." His main point of disagreement was the logical corollary stemming from the principle of self-determination allowing States to "disregard" rights and guarantees accorded to foreign investors "in the exercise of sovereign and inalienable rights." J. Sztucki, above n 287, pp. 42-44. Some cases brought before international bodies of adjudication, particularly arbitral procedures, also bear similar interpretations. In the *Aminoil* case the Arbitral Tribunal stated that sovereign rights do not prohibit the subscription by States of contracts related to the exploitation of natural resources. Aminoil, 66 ILR, pp. 587-588, as quoted in A. Orakhelashvili, above n 355, p. 52.

[986] An analogy can be drawn from the legal regime operated by the normative universe of fundamental freedoms. Individuals are the rights' owners, but the existence of those rights implies the establishment of limits (negative obligations) on the behaviour of public authorities. As a general rule, those freedoms and their respective obligations are non-dissociated and cannot be derogated either by law or by particular agreements. But the exercise of those rights is a prerogative of the rights' owners, and the absence of that exercise does not affect in any manner the normative quality attached to those rules in the legal system. The same rationale is applied to the principle of self-determination in its subjective (rights) and objective (obligations) dimensions.

[987] This parallel is put forward by A. Orakhelashvili, above n 355, p. 53. Today, several authors maintain that the incidences of the right of self-determination, such as the principle of permanent sovereignty over natural resources, are also part of *ius cogens*. Orakhelashvili affirms that the right to permanent sovereignty "is an integral element" of the principle of self-determination, since States must be free to dispose of their own natural resources in the exercise of their sovereignty. *Idem*, p. 52. Brownlie also recognizes that right as having a peremptory character. It is not clear, however, if Brownlie understands the principle of permanent sovereignty over natural resources as a separate rule from the right of peoples to self-determination. See I. Brownlie, above n 487, p. 489.

[988] As interpreted by the Arbitral Tribunal in the *Texaco* case, the legal regime of nullity operated by *ius cogens* would apply only in situations when the State concerned has generally alienated its sovereignty over its natural resources. *Texaco*, para. 78, 53 ILR 482. "In 1952, the General Assembly requested the Commission on Human Rights to prepare recommendations concerning international respect for the right of peoples to self-determination. The Commission on Human Rights recommended the establishment of a commission to conduct a full survey of the right of peoples and nations to permanent sovereignty over their natural wealth and resources, having noted that this right formed a "basic constituent of the right to self-determination". In accordance with this recommendation, the General Assembly established the United Nations Commission on Permanent Sovereignty over Natural Resources on 12 December 1958 under Resolution 1314 (XIII). In 1961, this Commission adopted a draft resolution outlining principles concerning permanent sovereignty over natural resources. Following consideration of this draft resolution by the Economic and Social Council and the Second Committee of the General Assembly, the General Assembly adopted Resolution 1803 (XVII)." A. Kilangi, 'Introductory note' to General Assembly Resolution 1803 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources, available at http://legal.un.org/avl/ha/ga_1803/ga_1803.html. The GA Resolution 1803 (XVII) on the "Permanent Sovereignty over Natural Resources", which constitutes a landmark of *opinio*

Moreover, those views appear to confuse the legal regime operated by *ius cogens* with that of international responsibility,[989] particularly when it comes to the sovereign decision of nationalizing natural resources. On the one hand, States may nationalize or, in cases also of nationally owned private properties, expropriate private capital as a legitimate exercise of their sovereign rights over natural resources. Not only the practice observed in the aftermath of the decolonization process, but also recent practice shows that the right to self-determination enjoys widespread recognition and acceptance by the international community as a whole.[990] The lawfulness of these acts has been continuously reiterated by the General Assembly and implies a logical effect of sovereign rights over a territory, as well as reflects the imperative character of rights stemming from the principle of self-determination. On the other hand, however, the exercise of the rights stemming from *ius cogens* norms in the area of self-determination does not imply a waiver of international responsibility. States may be held accountable either in domestic or international courts[991] as a result of their actions, including those of expropriation when exercising their rights guaranteed by the peremptory right to self-determination. In other words, the lawful exercise of the rights contained in the peremptory normative universe of the principle of self-determination does not affect in any manner potential liabilities arising from the performance of such rights, and vice-versa. In any event, all these questions are related primarily to the subject of international responsibility rather than that of *ius cogens*.

Finally, the peremptory scope of the right to self-determination cannot be restricted to the struggle of peoples against colonial domination.[992] That would run contrary not only to its universal scope of application, but also to the purposes of

iuris on the issue, depicted the principle of sovereignty over natural recoueses as a "basic constituent of the right to self-determination." Adopted on 14 December 1962 by 87 votes in favour to 2 against, with 12 abstentions.

[989] Once again, it seems relevant to recall here that the legal regimes of international responsibility and of peremptory norms operate at different levels of the international legal system. See Part II, Chapter IV, Section III above.

[990] Interestingly enough, such a level of recognition derives not only from the practice of expropriating States, but also from the States of the nationality of the expropriated companies. Indeed, States of the nationality of the expropriated company do not tend to dispute the right of the expropriating State to proceed accordingly. Claims are related to the domain of legal responsibility on the basis of the manner in which the expropriation of foreign assets occurred, in particular as regards issues such as a denial of justice, the lack of due process in accordance with the principle of national treatment, or the lack of due compensation to the companies who suffered any loss or damage arising therefrom. And they imply the recognition that the expropriating State was exercising a sovereign right. It is noteworthy to observe the reaction of countries such as Spain as to the nationalization of companies in Argentina and Bolivia in the past few years.

[991] Besides the possibility of States extending diplomatic protection for national companies, private investors can also recourse to arrangements such as the International Centre for Settlement of Investment Disputes (ICSID). Established by a multilateral treaty formulated by the World Bank, the ICSID is primarily focused on providing means for conciliation and arbitration of international investment disputes between States and nationals of other States. Most of the expropriations carried out by Argentina resulted in lawsuits before it.

[992] As contested by Orakhelashvili, "today it is absolutely clear that the principle of self-determination benefits peoples also outside the colonial context." A. Orakhelashvili, above n 355, p. 52.

the UN Charter,[993] the 1966 Human Rights Covenants and the 1977 I Additional Protocol to the Geneva Conventions. It would imply the acceptance of an unwritten exception to the positive normative universe encompassed by the principle of self-determination, namely that Occupying Powers are not be bound in peremptory terms by the duties stemming from the principle of self-determination. As such a hypothesis can hardly be admitted under current customary international humanitarian law, the peremptory scope of the right to self-determination must encompass any form of external subjugation, particularly in circumstances involving foreign occupation as a result of armed force, as recognized by the ICJ in the *East Timor* case[994] and in the Advisory Opinion on the *Wall*.[995]

[993] See Resolution 55/2 of 8 September 2000 (United Nations Millennium Declaration) and Resolution 60/1 of 16 September 2005 (2005 World Summit Outcome), according to which the right to self-determination of peoples applies to colonial domination and foreign occupation.
[994] *East Timor* case, above n 947, paras. 105 and 106.
[995] The Court recognized the right to self-determination for peoples living in non-self-governing territories in other circumstances than those of a colonial nature. Above n 859, para. 88, p. 122.

Chapter III - *Ius cogens* and human rights

In the last decades, particularly after the end of the Cold War, the protection and promotion of human rights was raised to a new level in the multilateral system.[996] In 2005, the former Commission on Human Rights was replaced by the Human Rights Council as one of the main results of the UN World Summit.[997] The number of states that acceded to human rights international treaties augmented considerably while other new treaties have entered into force, among which those establishing new treaty bodies.[998] After the establishment of *ad hoc* criminal tribunals for the former Republic of Yugoslavia and Rwanda by the UN Security Council in the 1990s, the creation of the International Criminal Court[999] represented another step ahead in the efforts seeking the accountability of those responsible for the most serious violations of human rights and international humanitarian law. UN Peacekeeping Operations also incorporated human rights components,[1000] the Office of the High Commissioner for Human Rights (OHCHR) substantially increased its activities[1001] and the 2005 UN World Summit Outcome

[996] *In Larger Freedom: Towards Development, Security and Human Rights for All,* Report of the Secretary-General, 21 March 2005 (A/59/2005). In this report, the then Secretary-General Kofi Annan makes an argument for recognizing human rights as the third pillar of the UN, along with development and security. His argument was subsequently recognized by heads of states in the 2005 UN World Summit: "We acknowledge that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. We recognize that development, peace and security and human rights are interlinked and mutually reinforcing." 2005 World Summit Outcome, above n 993, para.9.

[997] 2005 World Summit Outcome, above n 993, paras. 157-160. After consultations conducted by the President of the General Assembly, the Human Rights Council was finally established by GA Resolution 60/251 and further operationalized by HRC Resolution 5/1.

[998] "Since 2004, the human rights treaty body system has grown enormously and doubled in size with the addition of four new treaty bodies (CMW, CRPD, SPT, and the CED), two new optional protocols for individual complaints (CRPD and ICESCR, the latter not yet having entered into force) and one in the making (CRC). This trend is expected to continue with the ongoing development of international human rights law and the adoption of new instruments, such as on issues relating to the human rights of older persons (currently in negotiation), mercenaries, as well as business and human rights. There have been increases in membership for the CRC, CMW, CRPD and the SPT bringing the total number of treaty body experts in 2011 to 172 (versus 97 in 2000 and 125 at the end of 2009)." See *Requirements and implications of the ongoing growth of the treaty body system on the periodic reporting procedures, documentation and meeting time*, Background paper prepared by the Office of the UN High Commissioner for Human Rights (OHCHR) and circulated on the occasion of the Informal technical consultation for States parties to international human rights treaties, Sion, Switzerland 12-13 May 2011.

[999] In its preamble, the statute of the International Criminal Court (ICC) reads that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" and "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" [Rome Statute, A/CONF.183/9 of 17 July 1998].

[1000] At the end of 2010, there were 14 UN peacekeeping, special political and peace-building support missions that incorporated human rights promotion and protection into their mandated work, with dedicated human rights staff: Afghanistan, Burundi, Central African Republic, Côte d'Ivoire, Darfur (Sudan), the Democratic Republic of the Congo, Guinea-Bissau, Haiti, Iraq, Liberia, Sierra Leone, Somalia, Sudan and Timor-Leste.

[1001] The United Nations human rights programme has grown considerably since its modest beginnings some 60 years ago. Organizationally, it started as a small division at United Nations Headquarters in the 1940s. The division later moved to Geneva and was upgraded to the Centre for Human Rights in the 1980s. At the World

Document[1002] recognized the concept of responsibility to protect.[1003] All these political processes were oriented towards the strengthening of the multilateral framework for the protection and promotion of human rights worldwide.

The normative status enjoyed by human rights is evidence of its centrality[1004] and greater relevance[1005] in contemporary legal order.[1006] The preamble of the UN Charter affirms the faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women,[1007] and Article 1 (3) places the promotion of the respect for human rights and fundamental freedoms as a main purpose of the United Nations to be pursued through international cooperation.[1008] The practice of UN Bodies and the continuous process of

Conference on Human Rights in 1993, the international community decided to establish a more robust human rights mandate with stronger institutional support. Accordingly, Member States of the United Nations created the OHCHR by GA Resolution in 1993. The mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the United Nations, and strengthening and streamlining the United Nations system in the field of human rights. In addition to its mandated responsibilities, the Office leads efforts to integrate a human rights approach within all work carried out by United Nations agencies. See www.ohchr.org.

[1002] 2005 World Summit Outcome, above n 993, paras. 138 to 140.

[1003] The 2005 UN World Summit also resulted in the establishment of the Peacebuilding Commission and the Human Rights Council, *Id.* 2.

[1004] A.A. Cançado Trindade, *A humanização do direito internacional*. Belo Horizonte, Editora Del Rey, 2006, p. 142.

[1005] M. Shaw, above n 555, p. 265.

[1006] In the same "humanist" reasoning once introduced by Immanuel Kant, contemporary legal scholars such as John Rawls, Norberto Bobbio and Jürgen Habermas have all advocated the centrality of human rights in the establishment of an international legal order reflecting ongoing political realities. In any event, human rights stand to-day not only as a central element of the international legal order, but also as an axiological foundation of the international legal system as a whole. See I. Kant, *Perpetual Peace. A Philosophical Sketch*, reprinted in Hans Reiss (ed.), (translated by H. B. Nisbet) in, *Kant, Political Writings*, 2nd edn, Cambridge, Cambridge University Press, 1991; John Rawls, *The Law of Peoples*, Harvard University Press, 5th printing, 2003, part I, 2.2, p. 27; J. Rawls, 'The idea of an Overlapping Consensus', (1987) 7 (1) *Oxford Journal for Legal Studies*, 1; N. Bobbio, *L'età dei diritti* (1990), Torino, Einaudi, 1997; J. Habermas, *The Postnational Constellation: Political Essays*, Cambridge, MIT Press, 2001; J. Habermas, above n 230; J. Habermas, *Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years'Hindsight*, in J. Bohman and M. Lutz-Bachman (eds.), Perpetual Peace. *Essays on Kant's Cosmopolitan Ideal*, Cambridge and London: MIT Press, 1997.

[1007] That reference expresses the axiological importance attached by Member-States to human rights within the legal regime inaugurated by the Charter. UNCIO, VI, p. 464. See also J.P. Cot & A. Pellet, 'Préambule', in Jean-Pierre Cot, Alain Pellet & Mathias Forteau (eds.), *La Charte des Nations Unies, Commentaire article par article*, 3rd. ed., Paris, Economica, 2005, p. 291. According to the rapporteur of the Committee I/1 charged with the preparation of the UN Charter, the preamble has the same value as articles 1 and 2. Those provisions should be considered equally valuable and operational for the purposes of the implementation of the Charter obligations. However, international practice shows that references to the preamble are made mostly as a means to reinforce the legal status of other provisions of the Charter. It is thus understood usually as a recourse of interpretation of the legal context in which a given provision exists, in accordance with the notion suggested in article 31 (2) of the VCLT.

[1008] Article 55 of Chapter IX on economic and social cooperation states that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," which is complemented by article 56 requesting joint and separate action in cooperation with the UN for the achievement of the purposes set forth in the previous article. For a more thorough analysis on the scope of article 55, see Part V below on the conflict between the peremptory norms of prohibition of the use of force and the duty to promote and protect human rights.

codification in the area of human rights[1009] further enhanced the importance of human rights in international law in the second half of the twentieth century. In 1948, the General Assembly approved the Universal Declaration on Human Rights, which contains some of the most relevant customary norms in this area. In that same year, the United Nations approved the Convention on the Prevention and Punishment of the Crime of Genocide, which represented a seminal effort towards the achievement of the goals established in the preamble of the Charter.[1010] In 1949, another important achievement was reached by the signature of the four Geneva Conventions on International Humanitarian Law.[1011] In 1966, on the basis of the work of a body of experts, two Human Rights Covenants were approved in the areas of Civil and Political Rights, and Economic, Social and Cultural Rights. All these processes come together towards the convergence between the international law of human rights, international humanitarian law and international refugee law,[1012] under the idea of complementarity or concomitant application of the three species of the gender of human rights.[1013]

[1009] Article 13 of the UN Charter requests the GA to engage into studies for the purpose of assisting in the realization of human rights without distinction as to race, sex, language or religion.

[1010] The preamble starts by reading that "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."

[1011] The 1949 Geneva Convention protect respectively (i) the wounded and sick members of armed forces in land warfare (Geneva Convention I), (ii) the wound, sick and shipwrecked members of armed forces in sea warfare (Geneva Convention II), (iii) the prisoners of war (Geneva Convention III) and (iv) civilians, particularly civilians in the power of the adversary belligerent (Geneva Convention IV). The importance of the 1949 Geneva Conventions is due not only to their character as treaty law imposing treaty obligations under the principle of *pacta sunt servanda* to the virtual universality of States in the globe (The four 1949 Geneva Conventions had 194 parties by 18 April, 2013), but also as a consequence of their role in strengthening the customary character of international humanitarian law. In all of them there is a common provision (article 3) stipulating that basic humanitarian obligations of States shall be applied indistinctively in international armed conflicts and non-international armed conflicts. As recognized by the ICJ in the *Nicaragua case*, the provisions of the common article 3 of the Geneva Conventions constitute a "minimum yardstick" in all circumstances of armed conflict. Above n 281, paras. 218-20.

[1012] "The law of armed conflicts and human rights law were not formed ex nihilo. They both sprang from the same meta-juridical requirements: the need to promote respect for human beings and their dignity in order to shield them from abuse by states." D. Campanelli, 'The law of military occupation put to the test of human rights law', (September 2008) 90 (871) *International Review of the Red Cross*, pp. 654-655.

[1013] As Cançado Trindade refers to it, it is "the unity of law and convergence of its distinct branches of the international protection of the human person," as expressed in the complementarity between the concepts of international responsibility of States and international criminal responsibility of individuals; or the convergence between international law of human rights and international criminal law, or even between passive and active subjectivity of individuals both nationally and internationally. He also takes the view that the consolidation of the subjectivity, both active and passive, of the individual in contemporary international law, as a fundamental means for ensuring access to justice and accountability of individuals in situation involving human rights violations. The central element in the consolidation of the juridical personality of the human person, "as a true subject of the law of nations, and no longer as a simple object of the protection," lies at the interest of the victims. A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Aula Magna, Utrecht University, 10 November 2011, p. 60 and ss. See also A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Geneva, CICR, 2000, pp. 1-66; and Separate Opinion in the case *Las Palmeras versus Colombia* (preliminary objections, Judgment of 04.02.2000); and A.A. Cançado Trindade, 'The Human Person and International Justice', (W. Friedmann Memorial Award Lecture 2008), (2008) 47 *Columbia Journal of Transnational Law*, pp. 21-23. See also R. Kolb, G. Gaggioli (eds.), *Handbook on Human Rights and Humanitarian Law*, Edward Elgar, 2013.

Section I - The peremptory nature of human rights norms

The historical development of the concept of *ius cogens* norms is intrinsically related to the progressive advancement of international human rights law and international humanitarian law.[1014] If the legal regime operated by peremptory norms is understood essentially as an objective limitation to the absolute will of States, few other norms of international law would better embody the need for universal compulsory observation (imperativeness) and non-derogability than those stemming from the legal domain of human rights.[1015] For the purposes of this chapter, this process is translated into the acceptance and the recognition of certain norms of international human rights and international humanitarian law as having a *ius cogens* character.

Several decisions of international courts law implicitly or expressly recognized the peremptory character of certain norms of international human rights and humanitarian law.[1016] In the *South West Africa* cases, Judge Tanaka addressed the peremptory aspects of human rights by affirming that "if we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to the *jus dispositivum*, capable of being changed [sic] by way of agreements between the States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*."[1017] In the area of international criminal law and international human rights law, the ICTY recognized the peremptory status of the prohibition of torture, "similar to those prohibiting genocide, slavery, racial discrimination, aggression, acquisition of territory by force and the forcible suppression of the right of peoples to self-determination."[1018] The Inter-American Court of Human Rights (IACtHR) also referred to the concept

[1014] See L. Hannikainen, above n 277, p. 425.
[1015] "A very important group of norms having the character of *jus cogens* are all rules of general international law created for a humanitarian purpose." A. von Verdross, above n 342, p. 59.
[1016] Although without referring to *ius cogens*, the international Military Tribunal at Nuremberg held that it was not to decide whether the IV Hague Convention of 1907 would be applicable after the entry of Italy (non-party) into the war because "these rules laid down in the Convention were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war." *Trial of the Major War Criminals before the International Military Tribunal*, vol. I, Nuremberg, 1947, pp. 253-254. The ICJ also addressed the issue under cognate concepts such as obligations *erga omnes* in various contexts closely linked to humanitarian law and fundamental human rights. On considerations of humanity, see *Corfu Channel* case, above n 688, p. 22; *Nicaragua* case, above n 281, pp. 112-14; *South West Africa* cases, above n 591, p. 34 and Dissenting Opinion of Judge Tanaka, pp. 252-3, 270, 294-9; and *Nuclear Weapons* case, above n 187, Dissenting Opinion of Judge Oda. On the *erga omnes* obligations to protect individuals, see *Barcelona Traction* case, above n 465; and *Reservations to the Genocide Convention* case, above n 441. On the principles of international humanitarian law, see Advisory Opinion on the *Wall*, above n 859.
[1017] *South West Africa* cases, above n 591, p. 298.
[1018] *Furundzija* case, above n 491, paras. 147-155. See also *Prosecutor v. Delalic*, Judgement of 16 November 1998, IT-96-2-T, para. 466; and *Prosecutor v. Kunarac*, Judgement of 22 February 2001, IT-96-23-T, para. 454.

of *ius cogens* in a number of occasions.[1019] Among other issues, it recognized the peremptory nature of the principle of equality before the law, equal protection before the law and non-discrimination.[1020] At the same IACtHR, Cançado Trindade declared the rights to access to justice, both nationally and internationally, as an imperative of *ius cogens*.[1021] And the Inter-American Commission on Human Rights[1022] also declared that the right to life belongs to the realm of *ius cogens*.[1023]

Doctrine has also given countless pieces of evidence on the acceptance and recognition of the *ius cogens* nature of human rights and humanitarian law provisions. The work carried out by the ILC on the Law of Treaties interpreted several norms of human rights as peremptory.[1024] The peremptory character of norms of international human rights and international humanitarian law has received a wide level of support from all doctrinal backgrounds.[1025] For material theories, human rights norms are the quintessential example of peremptory norms in public international law.[1026] Even positivist authors recognized the peremptory nature of certain norms of human rights and humanitarian law.[1027]

[1019] In the IACtHR, see *Case of La Cantuta v. Peru. Merits, Reparations and Costs.* Judgment of November 29, 2006. Series C No. 162, para. 225; and *Case of Blake v. Guatemala. Merits.* Judgment of January 27, 1998. Series C No. 36, para. 28.

[1020] IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of August 31, 2001. Series C No. 79, para. 4; and *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03, September 17, 2003, Series A No. 18, para. 101.

[1021] See A A.A. Cançado Trindade, *Evolution du droit international au droit des gens – L'accès des particuliers à la justice internationale : le regard d'un juge*, Paris, Pédone, 2008, pp. 1-188.

[1022] The OAS Charter establishes that the IACtHR is a principal organ of the OAS, whose function is to promote the observance and protection of human rights and to serve as a consultative organ of the OAS in human rights matters.

[1023] *Victims of the Tugboat '13 de Marzo'*, para. 79; A. Orakhelashvili, above n 355, p. 54.

[1024] See the 1963 and 1966 YbILC.

[1025] G. Abi-Saab, 'The uses of article 19', (1999) 10 (2) *EJIL*, 339, pp. 63–74; A. A. Cançado Trindade, 'Direitos Humanos: Personalidade e Capacidade Jurídica Internacional do Indivíduo', in *O Brasil e os Novos Desafios do Direito Internacional*, Rio de Janeiro, Forense, 2004, p. 225; A. Cassese, 'A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis', (1999) 10 (4) *EJIL*, 791; A. Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 (1) *EJIL*, 23; A. Pellet, 'Can a State commit a crime? Definitely yes!', (1999) 10 *EJIL*, pp. 425-434; J-A. Salmon, *Dictionnaire de droit international public*, Bruxelles, Bruylant, 2001, pp. 631-632.

[1026] Jusnaturalists maintain that aspects of international human rights law are intrinsically rooted in the very understanding of the concept of *ius cogens*. Public policy theories suggest that the peremptory character of human rights norms reflects the representation of the general or the community's interest as opposed to the individual interest of States. For instance, Orakhelashvili affirms that human rights "are rights not disposable by States, individually or in concert" because they protect the interests of mankind instead of the interests of the State. See A. Orakhelashvili, above n 355, p. 53. This assertion is correct, but one should not imply from it that it is not in the interest of States to promote and protect human rights. States are not the rights' holders, but the subjects whose behaviours are aimed and regulated by the legal commandments stemming from human rights norms. The whole idea of norms limiting the powers of States *vis-à-vis* individuals is at the very origins of the legal-philosophical debate on human rights, the creation of which is precisely aimed at protecting the individual from the discretionary and arbitrary power of States. No question about that: individuals are the aim and the beneficiaries of norms of human rights. These norms were created to protect human beings instead of the reciprocal interests of States. But it is equally true that States may also be interested in the protection and promotion of human rights. The enlargement of the human rights machinery in recent years reflects the interests of States to abide to norms creating rights for individuals and duties for the States, while also represents a growing attention by the international public opinion, which has exerted a great deal of

Which human rights have a ius cogens nature?

All these aspects converge to an undisputable recognition of the peremptory nature of certain human rights norms. However, most of the difficulty lies in the task of determining which specific norms of international humanitarian and human rights law are peremptory norms and which are *ius dispositivum*.

There are several lists of human rights norms allegedly having a *ius cogens* quality. In the work carried out by the ILC, the prohibitions of genocide, racial discrimination, slavery and certain violations of international humanitarian law were mentioned by almost all members of the Commission as examples of *ius cogens* in the area of international human rights and humanitarian law. Norms of human rights and international humanitarian law were also among the most quoted examples by the participants in the Lagonissi Conference. The same thing occurred during intergovernmental negotiations for the 1969 VCLT, in which States gave several examples of peremptory norms in the area of international human rights law and international humanitarian law. But in spite of some recurrent coincidences, such as the prohibitions of genocide, crimes against humanity, torture, slavery, and racial discrimination, those lists also show a relevant level of discrepancies on the peremptory nature of other norms such as the right to life, or fundamental freedoms, which from a strictly axiological perspective should most certainly be considered peremptory norms as well.

The legal status of the 1948 Universal Declaration on Human Rights is one of the most contentious issues in this debate. Some authors maintain that the UDHR provides customary evidence of the peremptory character of certain norms in the realm of human rights, since it sets forth the most fundamental rights that cannot be derogated by the will of states.[1028] This is certainly true, but do all norms contained therein should be considered having a peremptory nature?[1029] The UDHR sets forth fundamental human rights norms in a general manner. More than

influence over governmental positions at the international level when dealing with the human rights agenda. But it is in the interests of States to protect and promote human rights since it is in their interest to comply with their international obligations. At the domestic level, particularly in democratic regimes, governmental authorities are expected to follow the interests of those – the people - that provided them with the legitimate mandate to perform their official activities. And those interests are translated into the need to protect and promote human rights, as expressed in the virtual totality of positive and customary constitutions of democratic regimes all around the world. Consequently, it is possible to infer that the protection and promotion of human rights is a matter falling also within the universe of interests of the States, i.e., that human rights norms also reflect the interests of States. In conclucion, implying such an opposition as a sole justification for granting human rights a peremptory status is a simplification of much more complexes international and national realities, in which several other elements of various natures may influence over the action of a given State as regards the implementation or the expansion of the normative universe in the human rights area.

[1027] See D. Anzilotti, *Corso di diritto internazionale*, Roma, 1955, 4th ed., pp. 90-92.

[1028] M.S. McDougal et al., *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*, New Haven, Conn., Yale university Press, 1980, p. 274.

[1029] See analysis below on which norms of human rights can be considered *ius cogens*.

specific provisions regulating their respective normative contents and their application in practice, the Declaration proclaimed, in general terms, the existence of those rights as a minimum and compulsory standard of universal scope of application (*erga omnes*).[1030] But their respective regimes of derogability or suspension as developed by other subsequent treaties, such as the 1966 ICCPR, present relevant distinctions in circumstances of emergencies, for example. This fact may impact upon the acceptance and recognition of the peremptory nature of the UDRH in its entirety.

The same problem occurs as regards the status of human rights norms in the UN Charter. In its Advisory Opinion on *Namibia*, the ICJ stated that the *apartheid* regime in South Africa, based on grounds of race, colour, descent or national or ethnic origin, constituted "a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the Charter."[1031] The Court recognized the existence of minimum and objective obligations in the field of human rights arising from the UN Charter. But unless one accepts an institutionalized approach for the study on *ius* cogens, the general character of the human rights norms in the Charter makes it hard to recognize their peremptory nature *per se* without a more careful examination of each of the specific normative contents of these norms, and on the context in which those norms are contained.

In doctrine, the majoritarian view does not agree that all rules of international human rights and international humanitarian law have a peremptory character.[1032] States also disagree as to the "importance" or "fundamental character" of certain human rights norms, in accordance with their respective ideological, cultural or socioeconomic backgrounds. Such a level of disagreement is reflected in the number of signatures and ratifications of the core international instruments in this area.[1033] And the continuous violations of widely recognized fundamental human rights, starting by the very right to life, is also indicative of state practice contrary

[1030] The General Assembly proclaimed the 1948 UDHR as "common standard of achievement for all peoples and all nations."
[1031] ICJ Reports, 1971, p. 57.
[1032] I. Sinclair, above n 278, p. 217. Simma and Alston affirmed that not every right enshrined in the 1948 Universal Declaration on Human Rights has a *ius cogens* nature. B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', (1992) 12 *Australian Yearbook of International Law*, p. 103. Hannikainen recalls that most human rights are not of an absolute character because international conventions permit derogations from them on a number of grounds in public interest. L. Hannikainen, above n 277, p. 428.
[1033] In spite of the high number of parties in some cases, can hardly achieve actual universal membership. In 4 April 2013, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide had 142 parties, the International Convention on the Elimination of All Forms of Racial Discrimination had 175 parties; the International Covenant on Economic, Social and Cultural Rights had 160 parties, the International Covenant on Civil and Political Rights had 167 parties; the Convention on the Elimination of All Forms of Discrimination against Women had 187; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had 153 parties, and the Convention on the Rights of the Child had 193 parties, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families had 46 parties; the International Convention for the Protection of All Persons from Enforced Disappearance had 37 parties; and the Convention on the Rights of Persons with Disabilities had 130 parties. See https://treaties.un.org.

to the universal acceptance and recognition of the peremptory character of all existing human rights norms stemming from seminal documents such as the UDHR and the 1966 Human Rights Covenants.

Alternatively, several authors put forward some criteria for determining which norms of human rights could be considered peremptory, based on notions such as "the most basic human rights", "core rights", "irreducible core", "sacrossant rights" or "les droits fondamentaux réservés" as the only ones genuinely deserving to be accepted and recognized as peremptory norms.[1034] In this same reasoning, some authors suggested that the identification of peremptory norms in the area of human rights would imply a process of hierarchy according to their respective axiological rank.[1035] However, as regards strictly international human rights law, it is hard to admit the determination of the *ius cogens* character of human rights norms on the basis of a hierarchical approach. Although the acceptance of the idea of "hierarchy" in human rights is shared among several publicists, such a position can hardly find any relevant piece of evidence emanating from *opinio iuris* and state practice in contemporary international law. On the contrary, the progressive development in the past couple of decades of both international human rights law and the multilateral human rights machinery has been oriented towards the affirmation of their inextricable and indivisible nature placing all human rights at a same hierarchical level in public international law. This opinion is firmly based on the *opinio iuris* of States at the multilateral level. First, both 1966 UN Human Rights Covenants mutually reproduced the exactly same language recognizing an equal importance attached to civil and political rights, and to economic, social and cultural rights.[1036] The same understanding has been reproduced in the two major

[1034] This view is most common among authors supporting an essentially material approach to the concept of peremptory norms, in which normative contents provide the main guidance for determining the peremptory status of a rule of general international law. Frowein, for instance, referred to the terminology of "basic" rights instead of "fundamental" rights as used by the ICJ in the *Barcelona Traction* case as evidence that only some specific and "core" human rights should be considered part of *ius cogens*. For Koji, "the justification (…) is simple: the more important human rights deserve more protection." T. Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights', (2011) 12 (5) *EJIL*, p. 921. See also A. Orakhelashvili, above n 355, p. 53.

[1035] Meron first advocated a hierarchy in human rights in his influential 1986 article on the issue. T. Meron, 'On a Hierarchy of International Human Rights Law', (1986) 80 *AJIL*, p. 1. Koji, who also supports a hierarchy among human rights, suggested that a core of norms placed at a higher rank could be identified on the basis of a value, function and consent-oriented approach. Those hierarchical relationships would affect not only the normative position of other human rights norms, but also other rules within the international legal system. T. Koji, above n 1034, pp. 917-941. Pauwelyn recognizes an increasing hierarchy of norms taking shape "within the sphere of human rights" resulting from a difference drawn between "normal" human rights and "non-derogable" rights such as which particular regime is protected by article 4 (2) of the ICCPR. J. Pauwelyn, above n 5, p. 21. Higgins also recognizes the peremptory character of human rights in the light of their importance and their recognition by "civilized" States. Their material relevance, therefore, would be the main justification for attaching a non-derogable quality for those "fundamental" or "basic" human rights.

[1036] See the preamble of both 1966 Covenants recognize that "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights." In accordance with Article 31 of the VCLT, the interpretation of a treaty shall comprise its preamble.

UN conferences on Human Rights, first in Teheran in 1968, which proclaimed for the first time the idea of indivisibility of all human rights, and subsequently in the 1993 Vienna World Conference on Human Rights, the Declaration and Plan of Action of which furthered the scope of that "non-hierarchical" notion by proclaiming the need to interpret human rights in a non-divisible, interdependent, inter-related and mutually reinforcing manner.[1037] All these documents are pieces of evidence of existing customary law incompatible with any notion of hierarchy in the area of human rights, in spite of the divergent individual opinion of some scholars. This understanding, likely among the most important achievements in the area of human rights in the past few decades, has been central for avoiding a step backwards to the situation reigning during the Cold-War period, in which the opposition between civil and political rights and social, economic and cultural rights was not only instrumentalised for other purposes than the effective universal promotion and protection of human rights worldwide, but also represented a major obstacle for advancing the normative scope of international human rights law.[1038]

The non-derogable aspect alone of *ius cogens* has also been used for certain authors as a criterion for attaching the peremptory quality for certain human rights rules.[1039] This analysis is based on the existence of specific provisions of a non-derogable nature in international human rights treaties, which would reflect a consensus in the international community that certain norms cannot be set-aside even in circumstances when the very existence of the State is assumedly under risk. Such a status would be tantamount to the positive recognition of the peremptory nature of those treaty provisions. That would be the case, for example,

[1037] Strictly in the legal domain, the discussion on an arguably "hierarchy" among human rights has thus become obsolete and meaningless in the light of these developments, particularly after the 1993 Vienna Conference. Several other resolutions and declarations adopted at the United Nations confirm this interpretation, such as the 1986 Declaration on the Right to Development (article 6) and innumerous resolutions adopted either in the III Committee of the GA or in the former Commission on Human Rights, now transformed into the Human Rights Council.

[1038] As a matter of fact, addressing the issue of the determination of peremptory norms from the standpoint of an allegedly hierarchy in international law brings even more controversy over a subject already full of doubts such as the concept of *ius cogens*. The suggestion (which is quite common among authors supporting a material approach) to use a "hierarchy" or a classification based on an alleged "material importance" of specific human rights (those of a "fundamental" or "basic" nature in opposition to "less important" human rights) in detriment of others as justification for attaching the *ius cogens* quality for certain norms, introduces an element of uncertainty that in principle should not even exist in the task of determining which human rights norms might have a peremptory nature. One should avoid therefore a hierarchical approach to the determination of the *ius cogens* quality to norms of international human rights law and international humanitarian law. Applying the idea of "hierarchy" as existing in the general theory of law as a means to determine which human rights have a peremptory norm introduces the same type of criticism already casted above on the existence of "hierarchy" in international law. The peremptory nature is nothing but a quality attached to certain norms of general international law. It does not suppose as preconditions the existence of a previous existing hierarchy or a classification of norms in accordance with their material relevance within the system.

[1039] E. Suy, above n 733.

of the provisions of article 4 of the ICCPR.[1040] The number of ratifications of treaties such as the 1966 ICCPR would provide further evidence of the universal acceptance of those non-derogable rights.[1041]

However, as noted by the UN Human Rights Committee, "the enumeration of non-derogable provisions in article 4 (ICCPR) is related to, but not identical with the question whether certain human rights obligations bear the nature of peremptory norms of international law."[1042] The fact that certain provisions of the Covenant are non-derogable partly reveals the peremptory nature of some fundamental rights provided therein (e.g., articles 6 and 7). But other provisions of the Covenant are non-derogable simply because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18), rather than a consequence of their peremptory character.[1043] Furthermore, the category of peremptory norms in the area of human rights is not identical with

[1040] Article 4 (1) reads that "[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Accordingly, no derogation is permitted, not even "in time of public emergency which threatens the life of the nation," from the right to life (article 6), the prohibition of torture (article 7), the prohibition of slavery (article 8), the prohibition of civil imprisonment (article 11), the principles of anteriority of criminal law (prohibition of prosecution under *ex post facto* law) and the prohibition of retrospective criminal penalties (article 15), the right to legal recognition before the law (article 16) and the right to freedom of thought, conscience and religion (article 18). Article 26 of the ICCPR should also be included in that list, in accordance with General Comment 29 of the Human Rights Committee. The Human Rights Committee declared that "even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances." Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 8.

[1041] 167 parties as of 18 April, 2013.

[1042] Human Rights Committee, General Comment 29, States of Emergency (article 4), *idem*, para. 11. It is worth mentioning that other scholars simply reject any criteria based on the consent of States for the determination of the peremptory status of human rights norms, and consequently deny a major role to be played by the non-derogable character of treaty provisions. In a clearly anti-State position, Orakhelashvili argued that the text of a treaty and the intention of the parties of establishing the non-derogable character of certain treaty provisions could only have an "accessory significance" in assessing the peremptory status of those norms, since "non-derogability under human rights treaties does not necessarily reflect or prejudice a norm's peremptory character." The content of specific rights, in particular to what extent their materiality embodies the interests of the international community as a whole distinct from the individual interests of States, would be the most relevant criterion for determining the peremptory character of human rights norms. Accordingly, even "derogable" rights under certain international instruments could be admitted as having a *ius cogens* character since they would protect the interests of the international community. He argues that derogability under the VCLT would be different from derogability under international human rights treaties because in the latter case "derogation is made within the system." He says that those norms would be "derogated" from only for a limited period of time that would not affect the continuing operation of a given human right. By doing that the author diminishes the weight of non-derogability as an essential feature of the definition of *ius cogens*. See A. Orakhelashvili, above n 355, pp. 57-58.

[1043] In a comparison with the undoubted peremptory nature of other provisions from the ICCPR (the Committee expressly refers to articles 6 and 7), the Committee notes that "it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency (e.g., articles 11 and 18)." Above n 1040.

non-derogable provisions. States parties cannot, under any circumstances, invoke a state of emergency as a waiver to suspend or violate several norms of international humanitarian law, such as by taking hostages, imposing collective punishments or arbitrary deprivations of liberty, or by deviating from fundamental principles of fair trial.[1044] But the non-derogable aspect of these provisions is not tantamount to recognizing their peremptory character.

The conclusion from the above is that not all norms of international human rights and humanitarian law have a peremptory nature. The question of which human rights norms are peremptory should be dealt with exclusively from the standpoint of the observance of the specific criteria of universality, imperativeness and non-derogability attached to norms of general international law, as reflected in the process of recognition and acceptance by the international community. Any other method seems to increase the level of uncertainty and subjectivity on the part of the interpreter. Existing practice indicates that acceptance and recognition has been conveyed chiefly by the non-acceptability of certain specific violations of human rights.[1045] The most consensually recognized human rights norms of *ius cogens* are the prohibitions of the most serious offences against human beings, particularly those based on the excessive and massive use of violence.[1046] Besides the *prima facie* materiality of the offence (genocide, war crimes, crimes against humanity, racial discrimination), the scale (whether it is widespread and massive) and the circumstances involving the non-compliance with those prohibitions are also fundamental elements in the manner in which the international community has expressed its recognition and acceptance of their peremptory nature. In other words, the level of acceptance and recognition on the *ius cogens* character of certain

[1044] *Idem.* Not even authors supporting a material approach to the theoretical foundations of *ius cogens* consider that the non-derogability aspect alone is enough for determining the peremptory status of human rights norms. See A. Orakhelashvili, above n 355, pp. 57-59. Meron, for instance, although admitting the importance of non-derogability, says that just a core of human rights norms would have attained the peremptory character under different human rights instruments, and not only because of their non-derogable character. This approach concedes a role to be played by the will of States as expressed in international instruments, but do not implies that non-derogable provisions established in treaties are *per se* tantamount to the existence of peremptory norms. T. Meron, *Human Rights in Internal Strife*, Cambridge, 1987, p. 137-139; T. Koji, above n 1034, pp. 917-941. In this connection, Brems recalls that "Human rights are as a rule included in constitutions and international treaties as a result on the top of the hierarchy of legal sources. This does not mean that human rights are absolute. Their exercise can be subjected to restrictions that are imposed for the protection of the general or individual interest. The priority of human rights that holds in principle does not in every concrete case." E. Brems, 'Conflicting human rights: an exploration in the context of the right to a fair trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005) 27 *Human Rights Quartely*, 1.

[1045] On objective international responsibility of States, Cançado Trindade says that "breaches of the absolute prohibition of violation of fundamental rights (e.g. torture and forced disappearance of persons, enslavement of persons, summary executions) can simply not be admitted at all in any circumstances, nor can undue restrictions to remedies which safeguard fundamental rights." A.A. Cançado Trindade, above n 1013, p. 58.

[1046] As highlighted by Hannikainen, most of those prohibitions refer to human rights violations "on a widespread scale." L. Hannikainen, above n 277, p. 437.

norms fall primarily over those behaviours the non-observance of which creates great repulse in the international community as a whole.[1047]

Such a conclusion is not tantamount, however, to the acceptance of a hierarchy or any type of relationship of precedence among norms of human rights. It means that there is a certain pattern of acceptance and recognition of the peremptory nature of norms usually related to the prohibition of the gravest human rights violations. The above is not tantamount either to implying that only violations on a large scale of a specific norm of human rights could have a peremptory nature. The prohibition of torture, for instance, is a *ius cogens* norm regardless of whether it has been applied on a large or a limited scale. Its peremptory character exists regardless even of the actual non-observance of the prohibition of torture in inter-subjective relationships. The question of scale is just an important element to persuade States and other entities capable of determining the *ius cogens* character of norms of general international law, in particular international tribunals, as to the acceptance and recognition of the peremptory character of human rights norms. From a sociological perspective this is certainly a very subjective process placed under the influence of considerations of various areas not necessarily related to *ius cogens*. But there is an important level of evidence pointing out that certain rules of international law in the area of human rights, in particular prohibitions related to genocide, slavery, racial discrimination, torture, crimes against humanity and the prohibition of the most serious violations of international humanitarian law are considered human rights norms having a *ius cogens* nature.[1048] These specific norms will be considered below in a more detailed manner.

[1047] Indeed, the notion of gravity has been paramount as a threshold when considering mass atrocities. In the last decades, there have been some efforts aimed at construing an objective threshold based on the level of violence for the task of determining the establishment of legal liability on subjects closely related to the notion of *ius cogens*, such as state responsibility and international crimes, for example. This matter was analyzed by the ILC when considering the Draft Articles on State Responsibility. On that occasion, under the work carried out by the rapporteur Roberto Ago, the ILC suggested that there were some international wrongful acts that were "more serious than others" since the breached fundamental principles "deeply rooted in the conscience of mankind" or the foundations "of the legal order of international society." It referred expressly to the prohibition of crimes such as genocide, *apartheid* and "other inhuman practices of that kind. YbILC, 1976-II, Part II, pp. 109 and 113-114. The issue was once again discussed after the approval of the 1977 Additional Protocol I to the four 1949 Geneva Conventions, particularly in connection to article 85 on "Repression of breaches." And even though there has been no concluding decision at the normative level, international tribunals have also dealt with the issue both in the domain of international criminal law and international human rights law. For an overview on the issue, see W.A. Schabas, 'Gravity and the International Criminal Court', in C. Eboe-Osuji (ed.) *Protecting Humanity – Essays in International Law and Policy in Honour of N. Pillay*, Leiden, Nijoff, 2010, pp. 689-706.

[1048] "The least controversial of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting trade in slaves and piracy". I. Brownlie, above n 487, p. 489. "Those peremptory norms that are clearly accepted and recognised include the prohibitions against aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination." J. Crawford, above n 293, p. 188.

Section II – The Prohibition of Torture

The peremptory nature of the prohibition of torture[1049] stands today as one of the least controversial issues in the study on *ius cogens*.[1050] As reflected in treaty and customary law, both domestic and international jurisprudence, and the work of internationalists, the international community has recognized and accepted the peremptory character of the prohibition of torture on a number of occasions, either expressly or implicitly. Besides the positive nature of CAT provisions on the issue, non-derogable aspects of the prohibition of torture are inscribed in a wide array of instruments of international human rights and humanitarian law.[1051] Today, the

[1049] Although the terminology may slightly differ in the several international instruments, the main definition of torture is provided by article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which reads that: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesance of a public official or other person acting in an official capacity".

[1050] See K. Parker and L.B. Neylon, 'Jus Cogens: the Compelling Law of Human Rights' (1988-89) 12 *Hastings International and Comparative Law Review*, p. 411.

[1051] In the post-war period, the prohibition of torture was first inscribed in article 5 of the 1948 Universal Declaration of Human Rights, which establishes that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." As one of the provisions of the Declaration which have been accepted and recognized as peremptory as part of customary international law, it binds all states regardless of their individual consent. Two decades later, Article 7 of the 1966 ICCPR would prohibit in absolute terms the subjection to torture or to cruel, inhuman or degrading treatment or punishment. Most importantly, the ICCPR encompassed as well medical or scientific experimentation without the free consent of the individual as practices amounting to torture. The same language was reproduced in articles 3 of the ECHR and 5 of the ACHR, which included the prohibition of torture among the rights within the human rights framework of both regional systems that cannot be derogated from even in circumstances of public emergency. In 1975, the General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Resolution 3452/30, of 9 December 1975), which anticipated the imperative and non-derogable nature of the prohibition of torture that would be positivized more than a decade later by the CAT. But provisions related to the absolute and non-derogable character of the prohibition of torture could also be found in several other resolutions of the General Assembly dealing with various issues. It is worthwhile to mention, for example, the 1982 Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which establishes the non-derogation of those principles even in time of emergency (Resolution A/RES/37/194, of 18 December 1982); the 1992 Declaration on the Protection of All Persons from Enforced Disappearances, which reiterates, in article 1, the right to be protected from torture (Resolution 47/133 of 18 December 1992); the 1993 Declaration on the Elimination of Violence Against Women, which explicitly makes reference to the right of women not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (Resolution A/RES/48/104, of 20 December 1993). It is also present in a number of UN treaties concerned with the rights of specific groups, which expressly prohibit torture and other forms of inhuman and degrading treatment as a non-derogable norm, such as the 1989 Convention on the Rights of the Child, the 1981 African Charter on Human and Peoples' Rights; the 1949 European Convention on Human Rights (ECHR), the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which created a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT); the 1978 American Convention on Human Rights; the 1985 Inter-American Convention to Prevent and Punish Torture; and the 1994 Arab Charter of Human Rights, which also proclaims the prohibition of torture as a non-derogable obligation imposed upon Arab States. Later on, the 1998 Rome Statute of the International Criminal Court also specifically prohibited torture under various provisions by adopting a broad

peremptory character of the prohibition of torture is reconfirmed on an annual basis at the General Assembly, where resolutions recall that "the prohibition of torture is a peremptory norm of international law and that international, regional and national courts have recognized the prohibition of cruel, inhuman or degrading treatment or punishment as customary international law."[1052]

The ICJ expressly recognized that "the prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens)*."[1053] And in recent years, international criminal and human rights tribunals have further confirmed the acceptance and recognition of the peremptory nature of the prohibition of torture. The International Criminal Tribunal for the former Yugoslavia (ICTY) recurrently referred to the prohibition of torture as a peremptory norm. In the *Prosecutor v Delalic and* others, the Tribunal stated that "the prohibition of torture is a norm of customary law" that "further constitutes a norm of *jus cogens,* as has been confirmed by the United Nations Special Rapporteur for Torture."[1054] In the case *Prosecutor vs. Anto Furundzija,* the ICTY established a jurisprudential landmark precedent concerning the peremptory status of the prohibition of torture by declaring the extension of its effects to all subjects of international law, including individuals.[1055] The ICTY also highlighted the non-derogable feature of the prohibition of torture, by stating that it "can never be derogated from, not even in time of emergency."[1056] And finally, in *Prosecutor v Kunarac* the ICTY held that "[t]orture is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of *jus*

understating of torture in Articles articles 7 and 8. Common article 3 of the four Geneva Conventions absolutely also prohibits, as a non-derogable obligation, torture of protected persons in times of war on the basis of a ban imposed on "violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment." In a more detailed manner, Article 31 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War specifically prohibits the use of force to obtain information of protect persons by stating that "no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties." As regards the Third Geneva Convention relative to the Treatment of Prisoners of War, articles 12, 14, 17 and 130 establishes several obligations regarding torture and other inhuman and degrading treatment. Finally, Article 75 on "Fundamental Guarantees" of the 1977 Additional Protocol I relating to the Protection of Victims of International Armed Conflicts also prohibits torture in aboluste and comprehensive terms.

[1052] See, e.g., Resolution 67/161, of 7 March 2013.

[1053] "That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly Resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora." However, the Court rejected the retroactive effects of the prohibition of torture as regards the duty to prosecute as established in the CAT. The general rule established in article 28 of the VCLT is applicable. See *Question relating to the Obligation to Prosecute or Extradite*, above n 285, p. 33, para. 99.

[1054] ICTY Trial Chamber, IT-96-21-T (16 November 1998), para. 454.

[1055] According to the ICTY, "the fact that torture is prohibited by a peremptory norm of international law has effects at the inter-state and individual levels". *Furundzija* case, above n 491, para. 144.

[1056] *Idem*, para. 144.

cogens."[1057] This same trend can be observed in the work carried out by regional human rights courts, which have also declared the peremptory nature of the prohibition of torture. In *Al-Adsani v UK* case, the ECtHR recalled a number of judicial statements referring to the fact that the prohibition of torture attained the status of a peremptory norm, and accepted accordingly "that the prohibition of torture has achieved the status of a peremptory norm in international law."[1058] The IACtHR also reiterated the peremptory character of the prohibition of torture in a number of cases by asserting that "[t]here exists an international legal regime of absolute prohibition of all forms of torture, both physical and psychological, a regime which belongs today to the domain of *jus cogens*". [1059] The Inter-American Commission on Human Rights specified that "an essential aspect of the right to personal security is the absolute prohibition of torture, a peremptory norm of international law creating obligations *erga omnes*."[1060]

The acceptance and recognition of the peremptory character of the prohibition of torture is also present in the activities of national courts and other domestic bodies. In general, domestic tribunals have resorted to the concept of *ius cogens* as a means to protect the rights of the victims by upholding the non-derogable and imperative nature of the prohibition of torture *vis-à-vis* national and foreign entities that could benefit from provisions accorded by law. Several national courts have also declared the peremptory nature of the prohibition of torture in unequivocal terms, such as in the United Kingdom,[1061] the United States[1062] and Greece.[1063] In Switzerland, in 1994, the Federal Council provided a remarkable example of state practice by rejecting an originally popular proposal submitted by the Parliament that would have been contrary to the peremptory prohibition of *refoulement*. As a result of this process, it was inscribed in the Swiss Federal Constitution an explicit provision establishing that peremptory norms impose a material limitation to any

[1057] ICTY Trial Chamber, IT-96-23-T and IT-96-23/1-T (22 February 2001), para. 466.
[1058] *Al Adsani* case, above n 92, paras 59-61.
[1059] See, for example, its judgments in *Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs.* Judgment of November 27, 2003. Series C No. 103, para. 92; *Case of Tibi v. Ecuador. Merits, Reparations and Costs.* Judgment of September 7, 2004. Series C No. 114, para. 143; *Case of the Gomez Paquiyauri Brothers* v. *Peru. Merits, Reparations and Costs.* Judgment of July 8, 2004. Series C No. 110, para. 112; *Case of Baldeon Garcia v. Peru. Merits, Reparations and Costs.* Judgment of April 6, 2006. Series C No. 147, para. 117; *Case of Caesar v. Trinidad and Tobago. Merits, Reparations and Costs.* Judgment of March 11, 2005. Series C No. 123; and *Case of Goiburu et al. v. Paraguay. Merits, Reparations and Costs.* Judgment of September 22, 2006. Series C No. 153.
[1060] Terrorism and Human Rights, 22 October 2002, OEA/Ser.L/V/II.116, Doc. 5 rev 1 corr., para. 155.
[1061] "The prohibition of torture is incontrovertibly a *jus cogens* norm giving rise to obligations *erga omnes*" and "The *jus cogens* nature of the prohibition of torture is well established in international and domestic case law." Law reports, Court of Appeal: [2004] EWCA Civ 1123; [2005] 1 WLR 414, paras. 54 and 55, p. 21.
[1062] "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*." *Siderman de Blake v Republic of Argentina*, 965 F. 2d 699 (22 May 1992).
[1063] See Distomo case, Prefecture *of Voiotia v. Federal Republic of Germany*, Case 137/1997, as described by Bantekas, 92 *AJIL* (1998) p. 765. On the effects of *ius cogens* on domestic legal system, see E. de Wet, 'The Prohibition of Torture as an International Norms of *Jus Cogens* and its Implications for National and Customary Law', *EJIL* (2004), vol. 15, No.1, pp. 97-121.

legislative modification or constitutional amendment, the non-compliance of which would be sanctioned with nullity.[1064]

Finally, doctrine also provides widespread acceptance and recognition of the prohibition of torture as a norm of *ius cogens* nature.[1065] In his first report to the UNCHR in 1986, the then Special Rapporteur on Torture, Peter Kooijmans, stated that "the prohibition of torture can be considered rules of jus cogens. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture."[1066] In a statement before the General Assembly in 2009, the Chairperson of the Committee Against Torture, Claudio Grossman unambiguously reaffirmed the *ius cogens* nature of the prohibition of torture.[1067]

The peremptory scope of the prohibition of torture

In general, the interpretation of the material scope of the prohibition of torture has been as wide as possible, with a view to encompass a variety of methods amounting to "cruel, inhuman, or degrading treatment" as a means to extend the broadest possible protective universe. According to this reasoning it includes not only acts causing physical pain or injury but also those inflicting mental suffering, such as threats against family or loved ones.[1068]

[1064] Art. 139 Initiative populaire tendant à la révision partielle de la Constitution (3) Lorsqu'une initiative populaire ne respecte pas le principe de l'unité de la forme, celui de l'unité de la matière ou les règles impératives du droit international, l'Assemblée fédérale la déclare totalement ou partiellement nulle.
Art. 193 Révision totale (4) Les règles impératives du droit international ne doivent pas être violées.
Art. 194 Révision partielle (2) Toute révision partielle doit respecter le principe de l'unité de la matière; elle ne doit pas violer les règles impératives du droit international.

[1065] As noted by Cançado Trindade, obligations under the CAT (he actually takes the view that under all Conventions for the protection of the human person) are not simply duties of behaviour (conduct), but rather obligations of result. He says that "it is the conduct of the State that is conditioned by the attainment of the result aimed at by the norms of protection of the human person," and those obligations are necessarily of result "as we are here in the domain of peremptory norms of international law, of *jus cogens*, generating obligations *erga omnes partes* under the Convention against Torture." See A.A. Cançado Trindade, IACtHR, case of the *Dismissed Employees of the Congress versus Peru* (Interpretation of Judgment of 30.11.2007), Dissenting Opinion of Judge Cançado Trindade, p. 50, para. 175. See also A.A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case Law", in *XXXV Curso de Derecho Internacional Organizado por el Comite Juridico Interamericano - 2008*, Washington D.C., General Secretariat of the OAS, 2009, pp. 3-29; K. Parker and L.B. Neylon, above n 1050, p. 411; L. Hannikainen, above n 277, pp. 504-513; and I. Brownlie, above n 487, p. 489.

[1066] "[T]orture is now absolutely and without any reservation prohibited under international law whether in time of peace or war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made." P. Kooijmans, Report of the Special Rapporteur on Torture, E/CN.4/1986/15, para. 3.

[1067] "By ratifying the Convention against Torture, which codifies a norm of *jus cogens* (the prohibition against torture and its absolute character as a non-derogable right), States Parties have the obligation to implement all Convention provisions." Statement by the Chairperson of the Committee Against Torture to the 64th Session of the General Assembly, October 20, 2009.

[1068] As noted by the ICTY, the consensus at the international level of customary international law is that the prohibition of torture should be as wide as possible with a view to protect individuals from those acts, whatever their methods and political justifications. The ICTY repeatedly affirmed a broader understanding of

Today, the material scope of the peremptory prohibition of torture encompasses two main areas, namely the right to be protected from torture *stricto sensu*, and the right of "non-refoulement".[1069] The right to be protected from torture is its normative core. It is a non-derogable right aimed at the protection of human beings and their physical and intellectual integrity. It derives from the explicit obligations imposed upon all States to refrain from those acts and to enact domestic legislation establishing torture as an offence under domestic criminal law.[1070] In turn, the rule of "non-refoulement" inscribed in article 3 of the CAT requires that "no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." That provision governs over the obligations related to the rendering of individuals to States when there may be a risk of torture or other cruel, inhuman or degrading treatment. In those cases, the compulsory return is prohibited provided that there are substantial grounds for assessing that the individual could suffer from acts of torture as a result of his/her return to a given State.[1071] Such a prohibition of "non-refoulement" overrules existing treaty obligations providing for the rendering of individuals in an *inter se* basis.[1072]

While accepting the peremptory character of the general prohibition of torture, some authors suggest, however, that its scope does not encompass the overall normative arch established by the CAT. It is argued that several Parties submitted reservations regarding issues such as the competence of the Committee Against Torture established by Article 20 of the CAT, or the understanding on the definition of torture as regards issues such as "mental harm". Also, on the basis of allegedly different levels of "intensity and cruelty," only torture *strictu senso* would

the scope of the prohibition of torture. In *Delalic* and *Furundzija* case, the Court stated that the definition of torture under the 1984 UN Convention was broader than that established by the 1975 UN Declaration against Torture or the 1985 Inter-American Convention against Torture. *Delalic* case, above n 1018, para. 459; *Furundzija* case, above n 491, para. 160.

[1069] The third main aspect of the prohibition of torture is the duty to prosecute those responsible for acts of torture (articles 5, 6 and 8 of the CAT). To ensure their accountability and combat impunity under the principle of *aut dedere aut judicare*, the CAT obliges all States to initiate prosecution themselves or to extradite those who torture for prosecution by another State which may hold a direct and objective legal interest on the issue. Article 5 of the CAT enumerates the specific requisites for the exercise of jurisdiction over those cases on the basis of territorial or nationality aspects of the crime. However, there is a lack of consensus on its peremptory character because of the possibility of immunity for those responsible for those acts. The efficacy of the duty of States to punish those responsible for torture in accordance with CAT obligations is hindered as a consequence of lack of willingness or the influence of political considerations.

[1070] In other words, the obligation to take effective legislative, administrative, judicial, or other measures to prevent acts of torture in their respective territories.

[1071] Those considerations should include, *inter alia*, the analysis whether there is a consistent pattern of gross, flagrant or mass violations of human rights in the requesting State.

[1072] As a consequence, States cannot argue treaty obligations as admissible grounds for the non-observance of their duties under article 3 of the CAT and other relevant provisions of international human rights law. In this regard, it is worth noting that the obligation under CAT is both wider and deeper when compared to the rule of "non-refoulement" established in the 1951 Convention Relating to the Status of Refugees, whereby the prohibition of "refoulement" depends on an actual persecution on the basis of race, religion, nationality, political opinion or membership of a particular social group, in accordance with the definition of "refugees" provided by the 1951 Convention.

be peremptory, excluding therefore the prohibition of other cruel, inhuman or degrading treatment or punishment, regardless of the fact that all those practices are prohibited in peremptory terms under the CAT.[1073] But these suppositions can hardly be admitted, because the absolute character stemming from the legal regime of *ius cogens* overrules any minimizing interpretation derogating from it on grounds of more or less pain inflicted upon the victim, as recognized by the comprehensive interpretation on "torture" held by the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case.[1074]

Unfortunately though, torture is still a practice in several parts of the world, regardless of the level of development of the countries that applies it or in which it occurs.[1075] But the disregard for CAT cannot be construed as impacting upon the

[1073] See the case *Ireland v. the United Kingdom*, in which the European Court of Human Rights regarded some techniques of interrogation used by British authorities not as torture, but as "inhuman treatment", which would not attach the "particular intensity and cruelty implied by the world torture". *Publications of the European Court of Human Rights*, Series A: Judgments and Decisions, Vol. 25, Case of Ireland v. the United Kingdom, Judgment of 1978, pp. 65-67 and 94. Indeed, there has been some disagreement as well on the normative scope of protection encompassed by the definition of torture as regards issues such as corporal punishment and death penalty. Several countries argue that article 1 of the CAT, which excludes "pain or suffering arising only from, inherent in or incidental to lawful sanctions" from the protective scope of the prohibition of torture would allow such practices as lawful criminal penalties under international law. Although it is hard to deny such a distinction in the light of the practice of some States, it is surprising that an institution that should be concerned on raising the standards of international human rights law, and that cannot be characterized exactly as upholding positivist-voluntarist tenets, the OHCHR seems to concede that death penalty in permitted under international law, in accordance with a strict interpretation on the relevant provisions of the CAT (pain or suffering inherent to lawful sanctions) and the ICCPR (article 6 restricts its application to the "most serious crimes"). The UN Human Rights Committee interprets Article 6 as "strongly suggest[ing] that abolition is desirable" and the Second Optional Protocol to the ICCPR commits its signatories to the abolition of the death penalty within their borders. See Human Rights Committee General Comment No. 6 "The Right to Life" UN OHCHR. 1982-04-30; and Christof Heyns, Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/20/22. In any case, death penalty is not prohibited as a peremptory norm in current international law.

[1074] ICTR, case of *J.P. Akayesu*, Decision (Chamber I) of 2 September 1998, para. 681. See also *Question relating to the Obligation to Prosecute or Extradite*, above n 285, Separate Opinion of Judge Cançado Trindade, p. 521, para. 90.

[1075] The occurrence of practices amounting to torture has significantly increased after the terrorist attacks of September 11. It been used as a means of interrogation in order to obtain information in the context of the "war on terror" promoted by the US Government and several other countries. These States try to circumvent the protective framework by labeling prisoners as "unlawful combatants" who would not deserve the status of protection under the Geneva Conventions (See Amnesty International, *Counter terror with justice. No hiding place for torture*, 1 June 2008, available at www.amnesty.org and *The Road to Abu Ghraib*, June 2004, accessible at http://www.hrw.org/sites/default/files/reports/usa0604.pdf), and claim that international humanitarian would prevail over CAT as *lex specialis* during war time, in an effort to prevent the application of the provisions of the Convention, while ICCPR and CAT provisions are interpreted in the narrowest possible terms with a view to "legalize" abusive and coercive forms of interrogation which in fact amounted to cruel, inhuman and degrading treatment. Most surprisingly, several self-appointed "experts" and proponents of the so-called "ticking bomb" scenario's theories take the view of a derogable and non-absolute nature of the prohibition of torture when the interests of the State are under risk. According to Dershowitz, torture could be used as a non-lethal method of interrogation if permitted by a judicial authority ("torture warrant"). Such a method would "legitimize" an already existing practice in many countries, since it would provide "guarantees" for the victims on how it would be performed. A. Dershowitz, 'The Torture Warrant: A Response to Professor Strauss' (2003-2004), 48 New York School Law Review, p. 275. Heymann and Keyyem admit the use of torture when expressly determined by high officials, namely the Chief of State. As they are fundamentally concerned with the US exclusiveness in the world, they point out that only the US President would be in such a position

level of acceptance and recognition of the peremptory status of the prohibition of torture. It attests only to the non-observance of international obligations, a matter that should be dealt with from the perspective of international responsibility, both of States and individuals.

Section III – The Prohibition of Genocide

Genocide is perhaps the most atrocious recurring event in human history.[1076] Attempts to annihilate, or the actual extermination of, another group on the basis of race, religion, culture, ideology, ethnicity, nationality or sexual orientation can be found in the history of all peoples in all regions. Barbarity is how history reminds us that we are all equals.[1077] As a response to this, the objective of preventing genocide and ultimately holding to account those responsible for it is one of the main achievements of mankind in the twentieth century. In the field of public international law, this process was translated *inter alia* into the universal acceptance and recognition of the peremptory character of the prohibition of genocide and the progressive development of criminal international law.[1078] The peremptory nature of the prohibition of genocide arose as an undisputed matter in the aftermath of World War II. The massacres of Jews, Eastern Europeans and Roma people promoted by the Nazi regime shocked the conscience of humankind.[1079] The fresh memory of those atrocities was central to the

to derogate from the prohibition of torture provided that American lives are at stake. P. Heymann and J. Kayyem, 'Preserving Security and Democratic Freedoms in the War on Terror Cambridge', Report for Belfer Center for Science and International Affairs, November 16, 2004. Another disturbing model was suggested by Daniel Rothberg in his description of "public presentational torture" aimed at combatting non-regular forces such as guerrillas and terrorist groups. He says that "assuming that this practice could actually reduce recruitment and support for the guerrilla terrorists and thereby save countless lives should this policy be supported". D. Rothberg, "What We Have Seen is Terrible, Public Presentational Torture and the Communicative Logic of State Terror", (2003-2004) 67 Albany Law Review, p. 465. In the midst of the uncertainties and unilateralist approaches that succeeded the tragic events of September 11, those voices have been used as arguments aimed at legitimizing practices amounting to torture and therefore to weaken the international normative framework applicable to those circumstances, regardless whether in times of war or peace. For our purposes, all those measures amount to a an unlawful derogation from a peremptory norm, a result that would simply render null and void any interpretation contrary to the provisions of the CAT. Fortunately, regional and domestic courts have already rejected those theories. See, e.g., Public Committee Against Torture v Israel H.C.J. 5100/94.

[1076] The preamble of GA Resolution 96 (I) reads that "[m]any instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part."

[1077] This phenomenon has been accentuated in the past two centuries as a result of the technological advancements in contemporary warfare.

[1078] J. Wouters & S. Verhoeven, 'The Prohibition of Genocide as a Norm of *Ius Cogens* and its Implications for the Enforcement of the Law of Genocide', (2005) 5 *International Criminal Law Review*, Koninklijke Brill NV., pp. 401-416.

[1079] However, the prohibition of genocide was not expressly defined as such in the Charters of the Nuremberg and Tokyo Tribunals. The Tribunal itself did not use the term "genocide" in its final judgment in 1946. The term "genocide", which was first used by Raphael Lemkin in 1944 in his work *Axis Rule in Occupied Europe*, was only referred to in the Indictment against Nazi war criminals at the Nuremberg Tribunal. Acts amounting to genocide were interpreted within the categories of war crimes and crimes against humanity. *Trial of the*

establishment of the legal regime inaugurated by the UN Charter. After the War, several measures were taken at the international level in order to codify the crime of genocide and to declare it as a peremptorily prohibited act.[1080] The main result of this process was the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), which was concluded in 1948 as a result of the mandate given by the GA to the ECOSOC.[1081] Article II of the Convention defines genocide as a crime of intentional destruction of a national, ethnic, racial and religious group, in whole or in part. That same definition would be reproduced in the statutes of the *ad hoc* tribunals for the former Republic of Yugoslavia[1082] and Rwanda,[1083] and the Rome Statute of the ICC.[1084] The Convention not only recognized the crime of genocide but also placed specific obligations upon the parties, such as the duty to prevent, enact legislation and punish (including those guilty of complicity or incitement, Article III), and the requirement to cooperate in extraditing those responsible for whether perpetrated during wartime or otherwise.[1085]

Major War Criminals before the International Military Tribunal, vol. I, Nuremberg, 1947, pp. 43-44. Nonetheless, other tribunals, including national ones, would condemn Nazi war criminals on accounts of the crime of genocide. See L. Hannikainen, above n 277, p. 458.

[1080] In its first session, in 1946, on the basis of a draft introduced by Cuba, India and Panama, the General Assembly approved Resolution 96 (I), which affirmed that genocide is a denial of the right of existence of entire human groups, and which is contrary to moral law and to the spirit and aims of the United Nations. The Resolution also declared genocide as a crime under international law which is condemned by the international community. Although Resolution 96 (I) declared that genocide was a matter of international concern, there was no clarification as to its effects to a potential universal jurisdiction over those crimes, which was one of the intents of the drafters.

[1081] The 1948 Genocide Convention was the first international treaty approved by the United Nations in the area of human rights. Accordance to the UN Treaties Collection, the Genocide Convention had 142 parties by 26 April 2013. See treaties.un.org, access on 26/4/2013. The original idea of establishing a universal jurisdiction was replaced by the principle of territorial jurisdiction, or the jurisdiction of an international criminal tribunal, which would eventually be somehow embodied by the ICC. The ICJ was given jurisdiction over disputes between States on the interpretation and application (article IX) of the Genocide Convention. The interpretative role of the ICJ is thus limited *ratione personae* by the number of reservations submitted by the parties, in which the specific and explicit consent is required in each case as a prerequisite for the exercise of the jurisdiction of the Court. As of 29 April 2013, reservations in this regard have been submitted by Algeria, Argentine, Bahrain, Bangladesh, China, India, Malaysia, Montenegro, Morocco, Myanmar, Philippines, Serbia, Singapore, United Arab Emirates, USA, Venezuela, Viet Nam and Yemen. In it interesting to note that in 1989, the Governments of the Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic notified the Secretary-General that they had decided to withdraw the reservation relating to article IX.

[1082] Statute of the International Criminal Tribunal for the former Yugoslavia, Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993) (S/25704), 3 May 1993.

[1083] Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 (1994) of 8 November 1994.

[1084] Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, *Treaty Series*, vol. 2187, p. 3.

[1085] The legal framework of the crime of genocide was strengthened by other instruments, such as the 1968 Convention on Non-Statutory Limitations, in which article 1 stipulates that no statutory limitation shall apply to the crime of genocide, and the 1978 UNESCO Declaration on Race and Racial Prejudice, which states that genocide is a crime against humanity. For a certain period, the definition provided by the Genocide Convention was criticized for being very narrow. Drafters would have aimed only at the intent to destroy "permanent" groups of persons which possesses certain distinct features or traditions in a permanent manner. (see UN Doc. E/CN.4/Sub.2/384/Add. 1, para. 4; and L. Hannikainen, above n 277, p. 461). Accordingly, only the

International jurisprudence dealt with aspects related to the peremptory character of the prohibition of genocide on several occasions. In the *Barcelona Traction* case, the obligation to refrain from genocide was mentioned by the ICJ as an example of obligations owed towards the international community as a whole, and the same understanding was confirmed in the Advisory Opinion on *Reservations to the Genocide Convention*.[1086] In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case,[1087] the imperative character of the prohibition of genocide as a norm of general international law was reinforced when the Court stated that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." It also considered that the rights and obligations in that convention were *erga omnes*[1088] and highlighted its universal scope of application as a means to "liberate mankind from such an odious crime."[1089] Judge Lauterpacht expressly stated in his separate opinion, that "the prohibition of genocide has long been regarded as one of the few undoubted examples of *jus cogens*."[1090] More recently, the ICTY declared that "most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or jus cogens, i.e. of a non-derogable and overriding character."[1091] Doctrine also held that the prohibition of genocide is a peremptory norm. The list of authors supporting the peremptory character of the prohibition of genocide contains as many internationalists as all theoretical approaches on the concept of *ius cogens*.[1092]

enumerated groups (national, ethnic, racial or religious) can be subjected to genocide. "Voluntarily" groups, such as political ones, would not be covered by the definition. However, political groups were included among those who could suffer genocide in the GA Resolution 96 (I), and the Charters of the Nuremberg and Tokyo Tribunals persecution on political grounds. Nowadays the prevailing interpretation is that genocide is a distinct crime in international criminal law from those related to crimes against humanity. The interpretation by national and international tribunals on the normative scope of the crime of genocide has remained relatively confined to the intentional physical destruction of a group, instead of other heinous crimes such as "ethnic cleansing". Such a restricted materiality is not tantamount to a typological gap in international criminal law. The material universe of the crime of genocide has been progressively complemented by the enlargement of the number of types considered crimes against humanity. Significantly, to-day the notion of crimes against humanity also encompasses crimes committed in time of peace. See in particular, International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, 19 April 2004; and A. Cassese, *International Criminal* Law, Oxford, Oxford University Press, 2003, p. 103.

[1086] ICJ Reports 1951, p. 15.

[1087] For Schwelb, the *Reservations to the Genocide Convention* case recognized that the provisions of the Convention are not only universal but peremptory norms in accordance with article 53 of the VCLT. E. Schwelb, above n 283, p. 955. In this same reasoning, Suy states that the ICJ confirmed the absolute nature of the prohibition of genocide. E. Suy, above n 280, p. 61.

[1088] *Genocide Convention* case, Judgment on Preliminary Objections, above n 493, para. 52, p. 23.

[1089] "The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope", *idem*, p. 23.

[1090] *Genocide Convention* case, Separate Opinion of Judge Lauterpacht, above n 493, para. 100, pp. 439-441.

[1091] *Prosecutor v. Zoran Kupreškić et al*, Judgment of 14 January 2000, IT-95-16-T, para. 520 p. 203.

[1092] See, for instance, M. Virally, above n 297, p. 11; I. Brownlie, above n 487, p. 489; L. Alexidze, above n 274, p. 262; L. Hannikainen, above n 277, p. 464; P. Daillier and A. Pellet, *Droit international public*, L.G.D.J., Paris, 2002, p. 205, para. 127.

As pointed out by Hannikainen, "it is difficult to find authors who would consider genocide permissible in any circumstances."[1093]

In conclusion, the prohibition of genocide appears as another undisputed peremptory norm in contemporary international law. It is imperatively considered prohibited in all circumstances. Its absolute prohibitive character[1094] encompasses reprisals as well,[1095] i.e., the actual occurrence of genocide cannot be responded by genocide.[1096] Second, its universal scope is firmly based on the *opinio iuris* of States and the jurisprudence of international tribunals, all of which have reiterated in several occasions the universal, imperative and non-derogable character of the prohibition of genocide. It also counts with the well-founded support of scholars, who have highlighted its wide level of recognition and acceptance by the international community as a whole. Finally, it cannot be derogated from by treaties (even in the event of reservations to the Genocide Convention)[1097] or by customary international law, and it is quite unlikely in the foreseeable future that it will be modified by another rule having the same character, unless of course for widening its protective scope.

It remains the case, however, that the international community failed to react to these crimes in a timely and effective manner. In spite of the concerted efforts to achieve its peremptory prohibition in multilateral forums, genocide and crimes against humanity remain an urgent concern of the international community in the light of large-scale massacres against civilians both in wartime and in peacetime. International bodies have shown some reluctance when applying the criminal types provided for the Genocide Convention in order to address specific circumstances.[1098] Nonetheless, the jurisprudence of international criminal courts,

[1093] L. Hannikainen, above n 277, p. 463.

[1094] Genocide is widely interpreted as one of the most serious crimes under international law.

[1095] Even in an allegedly circumstance of gross and systematic human rights violation, genocide is not a lawful form of reprisal because it runs manifestly contrary to the principles of necessity and proportionality as a means to compel contrary troops to abide to *ius in bello*.

[1096] As pointed out by the ICTY, the general rule set out in Article 60 of the VCLT, which provides the principle *inadimplenti non est adimplendum*, "does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions prohibiting any form of reprisals against persons protected by such treaties." *Kupreškić* case, above n 1091, para. 520 p. 203.

[1097] "At least Arts. II, III and IV of the Genocide Convention, which are agreed to codify customary international law, therefore represent *jus cogens.* This means that no derogation from these provisions is permissible, so long as the international community of States as a whole does not develop a new rule. Therefore, to the extent that any reservations to the Genocide Convention purport to derogate from the scope or nature of any State's obligations in respect of genocide, as set out in the core provisions of the Genocide Convention, those reservations would be void under the *jus cogens* doctrine," M. M. Sychold, 'Ratification of the Genocide Convention: The legal effects in light of reservations and objections', (1998) 4 *Schweizerische Zeitschrift für internationales und europäisches Recht,* p. 551.

[1098] Competent international bodies such as the UN Security Council were criticized for its silence on several occasions. Except for specific circumstances, there has been some hesitation also by governmental authorities when considering as genocide some heinous crimes committed in several parts of the world. Hannikainen recalls the situations of Ibos and Biafra (Nigeria), in the late 1960's; in Bangladesh, in the early 1970's; the massacre of Hutus by Tutsis in Burundi, in 1972; the case of the Khmer Rouge regime in Cambodia between 1975 and 1978; the atrocities perpetrated by Idi Amin in Uganda during the 1970's; the Indonesian repression in East Timor in the 1970's. As exceptions, he mentions the massacres in Shabra and Shatila in Lebanon as a

as well as the work carried out so far by the ICC, provides outstanding examples of how the existing normative framework can be used as a means to avoid impunity and to hold accountable those responsible for the crime of genocide.[1099] But in no way does the above detract from the peremptory nature of the prohibition of genocide: it is just another reminder of the deficiencies of the international system.

Section IV – The Prohibition of Slavery, the slave trade, and slavery-like practices

The prohibition of slavery is placed among the first undisputable peremptory norms that emerged in contemporary international law. Although the imperativeness of that prohibition initially concerned first and foremost the legitimization and encouragement of slavery and slave trade,[1100] the peremptory and non-derogable nature of slavery and analogous practices has attained a universal level of recognition and acceptance throughout the last century.[1101]

In contemporary international law, the first positive source stemming from treaty law is the 1926 Convention to Suppress the Slave Trade and Slavery.[1102] Established under the auspices of the former League of Nations, the Convention expressly bans slave trade and slavery by adopting a typology of those practices (article 1) and by setting forth the obligations both to suppress the slave trade (article 2) and to promulgate severe penalties for slave trading, slaveholding, and enslavement (Article 5). But the 1926 Convention did not peremptorily abolished slavery. Article 2 only stipulates that States Parties agreed upon the obligation to progressively bring about the complete elimination of slavery in all its forms.[1103]

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case considered by the Security Council as a "criminal massacre", res. 521 (1982). See L. Hannikainen, above n 277, p. 464. The fact that the Genocide Convention is one of the most important core treaties on human rights without a body of experts charged with it supervision is also an element of weakness.

[1099] As a matter of fact, it seems even more adequate for the purposes of achieving the objective of punishing the crime of genocide that its occurrence is determined in the context of jurisdictional activities instead of political deliberations. The question is how effective in its functions and universal in its scope international criminal justice can be in the light of contemporary international politics.

[1100] For an overview on the historical evolution on the prohibition of slavery and slave trade, see L. Hannikainen, above n 277, Chapters I and II.

[1101] In spite of the fact that the UN Charter has no specific provision on the issue, the peremptory character of the prohibition of slavery was recognized by the 1948 Universal Declaration of Human Rights, which states that no one shall be held in slavery or servitude and that slavery and the slave trade shall be prohibited in all their forms. In any event, it seems undisputable that slavery and other similar practices are totally incompatible with the purposes of the United Nations in the area of human rights.

[1102] The 1926 Slavery Convention was preceded by the 1919 Convention of Saint-Germain-en-Laye, in which the signatories "affirmed their intention of securing the complete suppression of slavery in all its forms and of the slave trade by land and sea."

[1103] Instead of a universal obligation, it left the door open for States to seek different timings in this process, in accordance with each domestic situation. In 1930, the International Labor Organization adopted the Convention concerning Forced or Compulsory Labour (No.29). As one of the 8 ILO fundamental conventions, it addresses the issue of slavery in an implicitly manner by defining forced labour as "all work or service which is

The material scope of the 1926 Convention was enlarged in 1956 by the Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices similar to Slavery.[1104] As a result of an intergovernmental process initiated at the ECOSOC,[1105] the Supplementary Slavery Convention established specific commitments both at the international and domestic levels as regards the abolishment of slavery and slave trade. Internationally, the Convention sets forth a wider material scope as a means to cover all forms of institutions and practices similar to slavery which could have been left outside the 1926 Convention.[1106] At the domestic level, the Convention displays obligations in the area of criminal law, such as the obligation to enact minimum ages of marriage and the criminalization of slave trafficking and slavery under the laws of the Parties.[1107] Although the 1956 Convention did not abolish slavery and its analogous practices, it strengthened the sense of imperativeness by stating that the Parties "shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition" of slavery.[1108]

Later on, several other international treaties further reinforced the prohibition of slavery and similar practices in peremptory terms. Article 4 (2) of the Additional Protocol II of the 1949 Geneva Conventions establishes that slavery and the slave trade in all their forms "are and shall remain prohibited at any time and in any place whatsoever." From the standpoint of human dignity and the right to legal status, article 5 of the 1981 African Charter on Human Rights and Peoples' Rights expressly prohibits "all forms of exploitation and degradation of man particularly slavery, slave trade." More recently, it was also included in the 1999 ILO Worst Forms of Child Labour Convention (No. 182), which deals with all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict the term, as the worst

exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

[1104] 123 parties by 22 April 2013. See United Nations Treaty Collection, see https://treaties.un.org.

[1105] ECOSOC Resolution 608 (XXI) of 30 April 1956.

[1106] Article 1 refers also to the obligation "to abolish and abandon debt bondage, serfdom, servile marriage and child servitude." It also extends a right to the parties of taking as refugees in vessels of their flags runaway slaves aiming at attaining their freedom. Those provisions were reinforced by Art. 13 of the 1958 Geneva Convention on the High Seas and by article 99 of the 1982 Convention on the Law of the Sea.

[1107] In this regard, the Convention calls upon States Parties to inflict "very severe penalties" for persons convicted thereof.

[1108] This is an implicit recognition that slavery and other similar practices were still in force as a customary or social rule in certain societies, in spite of the existence of legal provisions under the legislation of concerned countries, and that those practices should be abolished. This is precisely the idea of prohibiting "legitimizing" slavery and slave trade, i.e., an interdiction imposed upon States to refrain from adopting any piece of legislation that could in any manner lawfully legitimize the occurrence of those still existing social practices in the territory under the jurisdiction of the Parties. For that end, the Convention adopted a strategy in which the definition targets the broadest possible universe of behaviours similar to slavery and also obligates the Parties to enact legislation penalizing those practices in the most severe terms. Interestingly enough as regards its non-derogable nature, the 1956 Supplementary Convention interdicts reservations by the Parties and includes non-self-governing territories under the jurisdiction of the Parties as *ratione loci* of its application.

forms of child labour that are prohibited in peremptory and non-derogable terms under the Convention. The Rome Statute also expressly included sexual slavery as a crime against humanity under the jurisdiction of the ICC.[1109]

The peremptory nature of the prohibition of slavery, the slave trade and other similar practices has been reinforced by customary international law and other subsidiary sources, such as the work of publicists[1110] and international jurisprudence.[1111] During the preparatory work for the 1969 VCLT, the members of the ILC referred in numerous occasions to the *ius cogens* nature of the prohibition of slavery and slave trade.[1112] According to the ILC "the basis of the rule against slavery, which was unquestionably a rule of *jus cogens,* was established custom."[1113] The ILC even used the prohibition of slavery and slave trade to illustrate the nullity effects of a new peremptory norm over existing treaties.[1114]

The practice at UN *fora* also reinforces the peremptory character of the prohibition of slavery and slave trade. In 1974, the ECOSOC established the Working Group on Contemporary Forms of Slavery with the mandate, *inter alia*, to monitor the application of the slavery conventions and review the situation in various parts of the world.[1115] The Durban Declaration and Programme of Action strongly condemned the fact that slavery and slavery-like practices still exist today in parts of the world and urged States to take immediate measures as a matter of priority to end such practices, which constitute flagrant violations of human rights. And in 2007, the Human Rights Council replaced the Working Group by a Special Rapporteur on Contemporary Forms of Slavery in order "to better address the issue of contemporary forms of slavery within the United Nations system."[1116] The individual practice of States also shows that there is no country in the world currently legitimizing slavery or the slave trade.[1117] Instead, problems today are mostly due to the sociological legacies of slavery and the continuation of clandestine slavery-like practices (domestic servitude and servile marriage, for

[1109] Article 7 of the Rome Statute. For the effects of the ICC, sexual slavery was also considered a serious violation of the laws and customs applicable in international and non-international armed conflict, within the established framework of international law.
[1110] See L. Hannikainen, above n 277, pp. 446-447.
[1111] In the seminal judgment on the *Barcelona Traction* case, the protection from slavery was expressly included by the ICJ among other principles and rules concerning the basic rights of the human person that should be considered obligations *erga omnes*. Above n 465, p. 32.
[1112] See in particular the discussion of the retroactivity effects of the legal regime of *ius cogens* as legal consequences of the nullity of a treaty. YbILC, 1966-I, Part II, p. 10-15.
[1113] YbILC, 1966-I, Part II, p. 166. According to Hannikainen, "it appears to be without doubt that universal customary norms have emerged prohibiting States from legitimizing or encouraging slavery or slave trade." L. Hannikainen, above n 277, p. 446.
[1114] See commentary to draft article 61, YbILC, 1966, p. 261.
[1115] Se ECOSOC decisions 16 (LVI) and 17 (LVI), of 17 May 1974.
[1116] See Human Rights Council Resolution 6/14.
[1117] L. Hannikainen, above n 277, p. 446; and UN Docs.E/CN.4/Sub.2/1984/23. According to the Special Rapporteur on Contemporary forms of Slavery, "as a legally permitted labour system, traditional slavery has been abolished everywhere, but it has not been completely stamped out." See http://www.ohchr.org/EN/Issues/Slavery/SRSlavery/Pages/SRSlaveryIndex.aspx.

example) which are hard to punish and to completely eliminate.[1118] But it seems undisputable that the general prohibition of slavery and the slave trade has reached a universal peremptory nature in public international law.

The question arises, however, as to whether that peremptory scope should encompass all forms and institutions of slavery and slavery-like practices which effectively subject a person to the arbitrary will of another person. The interpretation of the main treaties on the issue indicates that the prohibition of institutions and practices similar to slavery, as mentioned in article 1 of the 1956 Supplementary Slavery Convention should have a peremptory character. As recalled by the special rapporteur on the contemporary forms of slavery, Ms. Gulnara Shahinian, "slavery was the first human rights issue to arouse wide international concern yet it still continues today." Accordingly, all cognate behaviours to "institutions and practices similar to slavery" should be understood as prohibited in absolute terms in analogy with the concept of "servitude' established by the ICCPR, the ECHR and the ACHR. This seem to be particularly the case of those prohibitions of debt bondage, serfdom, and subjection of women and children to institutions and practices similar to slavery, which cannot be derogated from by States both domestically and internationally (*inter se* agreements) under no circumstances. The same should be said about the prohibition of "enslavement". While limitations to forced or compulsory labour exacted by the State may be suspended from in certain circumstances (public emergencies, such as war time) under article 8 (3) of the ICCPR, contemporary international law criminalizes the practice of "enslavement" as a crime against humanity having a peremptory nature.[1119]

Section V – The Prohibition of Crimes against humanity

The peremptory nature of the prohibition of crimes against humanity is inscribed within the same normative development of other norms of *ius cogens* such as the prohibition of genocide, the prohibition of torture and the prohibition of the gravest breaches of international humanitarian law. It is therefore intimately related to the development of international human rights law in the aftermath of World War II, particularly as regards the notion of "elementary considerations of

[1118] Indeed, most of the concerns and repulse over slavery and its similar forms have fallen over sexual slavery and slavery-like practices, particularly in the context of armed conflicts. See the reports of the United Nations High Commissioner for Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflicts E/CN.4/Sub.2/2000/20, E/CN.4/Sub.2/2001/29, E/CN.4/Sub.2/2002/28, E/CN.4/Sub.2/2003/27 and E/CN.4/Sub.2/2004/35. The former *Sub-Commission on the Promotion and Protection of Human Rights* also set forth important international standards. See Resolutions 2005/27; 2003/26 and 1999/16.

[1119] Hannikainen points out that the defining elements of the crime of enslavement are (i) the subjection of a population by a State to severe forced or compulsory labour meant to be permanent; and (ii) the subjection of a group of persons by the State into slavery or into conditions similar to slavery under the heel of private persons. L. Hannikainen, above n 277, p. 456.

humanity".[1120] The Charters of the Tribunals of Nuremberg and Tokyo first established a typology of certain crimes considered "crimes against humanity." Those behaviours included murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, as well as persecution on political, racial or religious grounds.[1121] This process of codification was progressively reinforced by treaty law, particularly after the establishment of international criminal tribunals aimed at ensuring individual accountability at the international level. The lists of behaviours considered "crimes against humanity" provided by the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[1122] and by the respective Statutes of the ICTY,[1123] the International Criminal Tribunal for Rwanda (ICTR),[1124] the Special Court for Sierra Leone (SCSL)[1125] and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC),[1126] as well as the 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind[1127], provide remarkable pieces of evidence of the material universe encompassed by the concept of "crimes against humanity".[1128] More

[1120] *Corfu Channel* case, above n 688, p. 22.

[1121] Both Charters restricted the subjective scope of its jurisdiction over "crimes against humanity" committed by Germany and Japan against foreigners during war time, and excluded from it crimes committed by the Nazi regime against the German population.

[1122] The Convention reproduced the material content of crimes listed by the Charter of the Nuremberg and Tokyo Tribunals as "crimes against humanity", "whether committed in time of war or in time of peace", and aggregates into that definition "the inhuman acts resulting from the policy of apartheid and the crime of genocide." See Article 1 (b), Convention on the Non-Applicability of Statutory Limitations to War Crimes and CrimesAgainst Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970.

[1123] Article 5: "…the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts."

[1124] Article 3: "…the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial and religious grounds; (i) Other inhumane acts."

[1125] Article 2: "the following crimes as part of a widespread or systematic attack against any civilian population: a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic or religious grounds; i. Other inhumane acts."

[1126] Article 5: "any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts."

[1127] Article 18: "any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) Murder; (b) Extermination; (c) Torture; (d) Enslavement; (e) Persecution on political, racial, religious or ethnic grounds; (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) Arbitrary deportation or forcible transfer of population; (h) Arbitrary imprisonment; (i) Forced disappearance of persons; (j) Rape, enforced prostitution and other forms of sexual abuse; (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm."

[1128] According to contemporary doctrine, "crimes against humanity" refer to offenses against all individuals both in time of war and peace.

recently, the definition of article 7 of the Rome Statute has put forth the most authoritative *opinio iuris* on which behaviours are typified as crimes against humanity.[1129] The intent of the international community to prosecute those responsible for crimes against humanity indicates the level of acceptance and recognition of the imperative nature of their prohibition in current international law.[1130] Accordingly, the peremptory character of the prohibition of crimes against humanity encompasses today the wide normative spectrum of brutal or cruel forms of treatment of civilian population, such as atrocities (mass extermination, arbitrary killings and summary executions), the rape of women, cruel forms of execution, keeping persons in detention indefinitely or permanently *incommunicado*, the policy of enforced disappearances, injurious biological experiments, as well as mutilation and other forms of treatment or punishment committed in large scale.[1131] Today, there is virtually no doubt among internationalists as to the *ius cogens* nature of the prohibition of crimes against

[1129] "Article 7 - Crimes against humanity
1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1: (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack; (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law; (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy; (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

[1130] On the effects of *ius cogens* for international crimes, see M. Cherif Bassioni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*, *Law and Contemporary Problems - Accountability for International Crimes and Serious Violations of Fundamental Rights*, Vol. 59 ", No. 4, (Autumn 1996), pp. 63-74.

[1131] L. Hannikainen, above n 277, pp. 509-510.

humanity. As a matter of fact, doctrine has widely supported the peremptory nature of crimes against humanity as one of the most elucidative examples of the universal, imperative and non-derogable nature of certain norms of general international law.[1132]

Section VI – The Prohibition of Systemic Discrimination

The general prohibition of discrimination is closely related to the worldwide shock caused by the heinous crimes committed by totalitarian regimes during World War II. Although discrimination among human beings, particularly of a racial nature, existed long before the rise of the Nazi regime in Germany and the Japanese Empire, and even continued at different levels afterwards in several countries (e.g., under the colonial rule of former Western powers, the *apartheid* regime in South Africa or even in democratic societies such as the United States until the end of segregationist regimes in Southern states), the outcry against the practice of discrimination became universal in the aftermath of World War II.[1133]

The *vis directiva* of the prohibition of systemic discrimination is the repulse in the most strongest terms of any hierarchy among human beings. That concern was expressed in unequivocal terms in the preamble of the Convention on the Elimination of All forms of Racial Discrimination, which underlines that "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere" and that "the existence of racial barriers is repugnant to the ideals of any human society." The general prohibition of systemic discrimination among human beings therefore stems primarily as a corollary of the principle of equality before the law.[1134] This ideal would provide the legal and political basis for the development of a *corpus iuris* in international law that would be accepted and recognized as having a peremptory nature.

[1132] Brownlie, for instance, includes crimes against humanity among the least controversial examples of *ius cogens* norms in public international law. I. Brownlie, above n 487, pp. 488-489. Bassiouni says that "sufficient legal basis exists to reach the conclusion that all these crimes are part of *jus cogens*." M. Cherif Bassioni, above n 294, pp. 63-74.

[1133] Concerns over those forms of discrimination were a central element in the Charters of the Nuremberg and Tokyo tribunals, which included persecutions on political, racial or religious grounds in the definition of "crimes against humanity".

[1134] Article 26 of the International Covenant on Civil and Political Rights expressly attaches the principle of non-discrimination as a fundamental element of the right to equality before the law, and requests States to prohibit all forms of discrimination and guarantee effective protection against it on any ground. The same rationale was reproduced in the preamble of the Convention on the Elimination of All forms of Racial Discrimination, which reads that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination".

There is a wide array of material references to the general prohibition of discrimination stemming from sources of treaty and customary international law. Article 1 (3) of the Charter of the United Nations places among the main purposes of the Organisation the promotion of respect for human rights and for fundamental freedoms "for all without distinction as to race, sex, language, or religion."[1135] The 1948 UDHR specifies the scope of the prohibition of discrimination by stating that that all human beings are born free and equal in dignity and rights, and that all the rights and freedoms set forth in the Declaration are provided for without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. This same language was reproduced in the two 1966 Covenants on Human Rights, which refer to the duty undertaken by the Parties to respect and ensure the rights provided therein "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." In quite similar terms, common article 3 of the four 1949 Geneva Conventions prohibits discrimination on the basis of "race, colour, religion or faith, sex, birth or wealth, or other similar criteria." Recent international human rights instruments have a more comprehensive material universe of "discrimination." But other definitions of "discrimination' can be found, for example, in article 1 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. In a more detailed manner, article 1 (1) of the Convention on the Elimination of All forms of Racial Discrimination defines as 'racial discrimination' any distinction, exclusion, restriction or preference which has those same unaccepted purposes. The common element among these sources is the restrictive nature of measures legally taken by governmental authorities in order to curb the universe of human rights of individuals on discriminatory grounds *vis-à-vis* other individuals in a given society.

The prohibition of systemic discrimination does not imply, however, the prohibition of positive derogation, that is, a particular regime of discriminatory practices established with the aim of further advancing and protecting certain groups of peoples in specific circumstances, such as indigenous peoples, people of African-descent or those belonging to the poorest layers of society. Those measures, commonly known as affirmative actions, are permitted to the extent to which they are oriented towards the realization of the principle of equality of all,

[1135] The Constitution of UNESCO, besides reproducing the language of the Charter, also recalls in its preamble that the great and terrible war resulted from "the denial of the democratic principles of the dignity, equality and mutual respect of men" and by the propagation of "the doctrine of the inequality of men and races."

therefore as a means of ensuring factual equality.[1136] Also, the existing normative framework allows some distinctions as regards the rights of citizens and non-citizens,[1137] insofar as such practices are applied in a narrow manner and in exceptional circumstances regarding political (such as the right to vote) and specific economic rights.[1138] In any event, the general rule is that human rights under different international instruments must be guaranteed without any form of discrimination. The central element is the principle of equality before the law, which is guaranteed by several conventions,[1139] including as regards the rights of non-citizens. This principle has been recognized as a peremptory norm by the Inter-American Court of Human Rights, which declared that the principle of non-discrimination and the right of equality before the law were *ius cogens* norms applicable to all residents regardless of their respective immigration status.[1140]

The peremptory scope of the general prohibition of systemic discrimination

In spite of the growing concern and repulsion over all forms of discrimination in contemporary international law, questions arise as to whether all grounds of discrimination should have a peremptory nature. There seems to be no doubt about the peremptory nature of the prohibition of racial discrimination.[1141] As a

[1136] Article 1 (4) of the Convention against Racial Discrimination expressly provides for that exception by allowing temporary special measures "in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms." And the practice of States provides several examples of those "affirmative actions" aimed at promoting factual equality for all.

[1137] Art. 2 of the Convention on the Elimination of All forms of Racial Discrimination reads that "This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." See also Art. 2 (3) of ICESCR; and Arts. 12 (4), 13 and 25 of ICCPR.

[1138] According to Weissbrodt, "distinctions drawn between citizens and non-citizens must be narrowly construed, serve a legitimate State objective and be proportional to the achievement of that objective." David Weissbrodt, *The rights of non-citizens: Final report of the Special Rapporteur*, UN Doc. E/CN.4/ Sub.2/2003/23, May 26, 2003.

[1139] The protection for non-citizens stems directly from the ICCPR (see General Comment No. 15 of the Human Rights Committee), the ICESCR and the ICERD. See also the Convention on the Rights of the Child, the Convention on the Reduction of Statelessness, the Convention relating to the Status of Stateless Persons. See also relevant provisions of the Durban Declaration and Programme of Action relating to non-citizens.

[1140] "The Court considers that the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating
mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals." *Yean and Bosico Girls v The Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 8 September 2005, Series C No .130.

[1141] In accordance with article 1 of the ICERD, the scope of racial discrimination encompasses all forms of discrimination based on "race, colour, descent, or national or ethnic origin". We respectfully disagree with Hannikainen, who argues that discrimination based on "national origin" would not have a peremptory nature because it would not be included in those non-derogable provisions of article 4 of the ICCPR. In this case, the interpretation has to follow the principle of *pro homine*. This idea will be further developed below as regards the peremptory scope of the general prohibition of discrimination.

result of the wide level of acceptance and recognition by the international community, it is by far the least controversial ground of discrimination the prohibition of which has a *ius cogens* quality. In treaty law, the universal imperativeness and non-derogability of that prohibition has been stipulated in unequivocal terms by the Convention on the Elimination of All forms of Racial Discrimination (ICERD),[1142] and has been reinforced by the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid (article 1 declares apartheid as a crime against humanity), and the 1968 Convention on Non-Statutory Limitations, which also considers apartheid a crime against humanity. As regards customary international law, the 1963 UN Declaration on the Elimination of All Forms of Racial Discrimination had already affirmed the necessity of eliminating racial discrimination throughout the world in all its forms and manifestations.[1143] The 1978 Programme of Action of the World Conference to Combat Racism and Racial Discrimination expressly recognized the principle of racial discrimination as a peremptory norm. Later on, in 2002, the UN Commission on Human Rights stressed that that the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted.[1144] Finally, both the 2001 Durban Declaration and Programme of Action and the 2009 Outcome Document of the Durban Review Conference further reinforced the universal imperativeness and non-derogability of the prohibition of racial discrimination. Doctrine has also unanimously recognized the prohibition of racial discrimination as a peremptory norm.[1145] Expressing the most authoritative *opinio iuris doctorum* on the issue, the Committee on the Elimination of Racial Discrimination declared that "the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted."[1146] International jurisprudence has also recognized aspects of its *ius cogens* nature, although in an implicit manner.[1147]

[1142] Article 2 of ICERD strongly condemns racial discrimination and establishes imperative obligations to pursue "by all appropriate means and without delay" a policy of eliminating racial discrimination in all its forms. In particular, the Convention stipulates imperative obligations at both national and international levels, including through public authorities and public institutions, to engage in no act or practice of racial discrimination. It also requests State Parties to take effective measures at the domestic level in order to review and eventually nullify "any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists". Finally, the ICERD expressly declares that each State Party "shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization".

[1143] General Assembly Resolution 1904 (XVIII) of 20 November 1963. Several other resolutions adopted by the General Assembly reinforced the *opinio iuris* that racial discrimination is a serious denial of human rights and a violation of the UN Charter.

[1144] Article 40 of HRC Resolution 2002/68 on Racism, racial discrimination, xenophobia and related intolerance. Adopted by a recorded vote of 37 votes to 11,with 5 abstentions. E/2002/23 - E/CN.4/2002/200, chap. VI.

[1145] J. Crawford, above n 293, p. 188. I. Brownlie, above n 487, p. 515.

[1146] *Statement on racial discrimination and measures to combat terrorism*, A/57/18 (Chapter XI)(C.) (11 January 2002), at para. 4.

[1147] In the *Barcelona Traction* case, the ICJ included the prohibition of racial discrimination as an example of obligations *erga omnes*, see above n 465, p. 32. In the *Namibia* case, the ICJ declared that "to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour or national

Nonetheless, other grounds of discrimination do not count with the same level of acceptance and recognition as to their peremptory character. The majority of writers who dealt with the issue argued a restricted peremptory scope limited to the prohibition of racial discrimination. But this can hardly be correct. The point of departure in the analysis of the peremptory scope of the prohibition of systemic discrimination is the principle of equality before the law, which is considered a peremptory norm itself[1148] that provides the fundamental rationale for arguing the wrongfulness of any type of discrimination in the area of human rights,[1149] including racial discrimination. From the standpoint of the non-derogable aspect of peremptory norms, the question should also be approached from article 4 of the ICCPR, which requires that measures derogating from the obligations under the Convention in time of public emergency should never involve discrimination "on the ground of race, colour, sex, language, religion or social origin."[1150] On the basis of the principle of *pro homine* (in favour of the human being), which requires that the law must be applied and interpreted in the most advantageous and extensive manner to the human being in cases related to the recognition of protected rights under international law,[1151] all other forms of discrimination provided for by article 4 of the ICCPR should thus also have a peremptory nature.[1152]

In summary, while admitting that this is still *de lege ferenda*, all forms of severe and systemic discrimination must be prohibited in peremptory terms under

ethnic origin" constitute a denial of fundamental human rights and a flagrant violation of the purposes and principles of the Charter." Above n 100 p. 57.

[1148] McKean argues that the principles of equality before the law and non-discrimination are part of *ius cogens*. McKean, 1983, p. 283. This view was confirmed by Inter-American Court. *Maya Indigenous Community*, Case 12.053, para. 4; and *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03, para. 101.

[1149] Of course discriminatory practices in the area of international trade law, such as in the WTO, are not considered here for the purposes of *ius cogens*, since the prohibition of discrimination is based on the idea of equality before the law as a fundamental human right.

[1150] The same rationale is reproduced in article 27 of the American Convention on Human Rights.

[1151] "Es un criterio hermenéutico que informa todo el derecho de los derechos humanos, en virtud del cual se debe acudir a la norma más amplia, o a la interpretación más extensiva, cuando se trata de reconocer derechos protegidos e, inversamente, a la norma o a la interpretación más restringida cuando se trata de establecer restricciones permanentes al ejercicio de los derechos o su suspensión extraordinaria. Este principio coincide con el rasgo fundamental del derecho de los derechos humanos, esto es, estar siempre a favor del hombre," Mónica Pinto, 'El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los derechos humanos', Archivo electrónico en la página del Programa de Naciones Unidas para el Desarrollo – Oficina en Venezuela, available at http://pnud.org.ve. This principle has guided the work of the Inter-American Commission on Human Rights.

[1152] "[T]anto la guerra internacional, como los conflictos armados internos, al igual que las fuertes tensiones o perturbaciones interiores que resultan de factores políticos, económicos, sociales o culturales, cuando van acompañados de enfrentamientos, actos de violencia, vandalismo, confrontaciones interétnicas, atentados terroristas, etc., en la medida en que configuren una amenaza actual o al menos inminente para el conjunto de la comunidad, constituyen un 'peligro público' o 'situaciones excepcionales' en el sentido que le confieren a ambos términos los instrumentos internacionales antes mencionados." L. Despouy, "Informe del relator especial sobre los derechos humanos y los estados de excepción' (Distr. General. E/CN.4/Sub.2/1997/19), *Comisión de Derechos Humanos Subcomisión de Prevención de Discriminaciones y Protección a las Minorías*, 49º período de sesiones, 23 de junio de 1997, para. 34.

contemporary international law.[1153] The above does not neglect the current disparities as to the existence of legal and actual discrimination in several domestic legal systems on grounds of sex, religion or social origin.[1154] Nonetheless, those existing practices should not be construed as amounting to an allegedly non-universality and non-imperativeness of the prohibition of the discrimination when related to those other grounds. The progressive development of international law by both treaty and customary law has been oriented towards the prohibition and elimination of all forms of unjustified discrimination,[1155] as a means of widening the protective normative spectrum under international law. This is particularly the case as regards severe and consistent patterns of substantial and comprehensive violation of the prohibition of discrimination[1156] when the latter may involve a risk to life, cruel or degrading treatment, threats to physical or mental integrity, deliberate oppression, or the denial of fundamental freedoms.

Section VII – The Prohibition of the most serious violations of International Humanitarian Law (IHL)

Although war has been a part of the common history of mankind, the term "humanitarian law" is "a relatively recent one."[1157] As conveyed by the Hague,[1158] the Geneva Conventions[1159] and the two 1977 Additional Protocols[1160] it concerns mainly the codification of the customs of war in the late nineteenth and mid-

[1153] The question now seems to be rather on whether other forms of discrimination, such as those based on sexual orientation or political grounds, should not have a peremptory character as well, particularly when there is severe and substantial discrimination. The author is of the opinion that they should do so.

[1154] Regardless of the comprehensiveness of the principle of equality before the law as stipulated by contemporary international instruments dealing with issues such as women (1979 Convention on the Elimination of all Forms of Discrimination against Women), religion (1981 unanimously approved Declaration on the Elimination of all Forms of Intolerance and Discrimination based on Religion or Belief), and social origin, there are continuous practices of discrimination in several parts of the world.

[1155] As mentioned by Vierdag, the general prohibition of discrimination "has reduced the different grounds to mere examples of the general principle" so that they "no longer constitute but only clarify the notion of discrimination". E. W. Vierdag, above n 48, p. 128.

[1156] B.G. Ramcharan, 'Equality and Non-discrimination', in L. Henkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights*, New York, Columbia University Press, 1981, p. 269.

[1157] Nonetheless, the law of armed conflict developed *pari passu* to the development of public international law. Concepts and rules related to the laws of war (*ius in bello*) can be found in the works of Spanish scholastics who dealt with the theories of *bellum justum* and the conducts of belligerents in warfare. *See* H. Nussbaum, *A Concise History of the Law of Nations* (Spanish Edition, undated), p. 22 (original 1954).

[1158] "The Hague International Peace Conferences held in 1899 and 1907 had the most important impact and resulted in, *inter alia,* the promulgation of The Hague Conventions II (1899) and IV (1907) together with those related to the prohibition of certain weapons. These became known as the laws of The Hague." R. Nieto-Navia, above n 332, p. 632.

[1159] "The laws of Geneva encompass the four Geneva Conventions of 12 August 1949 together with the protocols adopted on 10 June 1977." *Idem*, p. 632.

[1160] Although technically and operationally independent from the original conventions, Protocols I and II respectively dealt with the regulation of international and non-international armed conflicts.

twentieth centuries.[1161] As a result of this process, some unaccepted behaviours in warfare are now prohibited in absolute terms[1162] both by treaty law and customary international law.

The peremptory nature of International Humanitarian Law (IHL)

By pertaining to general international law, norms of IHL are very well positioned for receiving the quality of *ius cogens*.[1163] After previous attempts to establish general provisions prohibiting certain behaviours in absolute terms in the context of the law of armed conflict,[1164] the four 1949 Geneva Conventions finally succeeded in the task of setting forth compulsory provisions, several of which are now considered to have a peremptory nature. Their non-derogable character is the

[1161] G. Abi-Saab, 'Specificities of Humanitarian Law', in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Leiden, Martinus Nijhoff Publishers, 1984, p. 265.

[1162] See article 75 of Protocol I and article 4 of Protocol II.

[1163] The customary status of international humanitarian law is expressed, for example, in the so-called "Martens clause" which was first inscribed in the preamble of the Hague Conventions respecting the Laws and Customs of War on Land of 1899 (II) and 1907 (IV), and subsequently reproduced in Additional Protocol I of 1977, which expressly recognized international humanitarian law as part of customary law (Article 1, paragraph 2, of Additional Protocol I of 1977 reads as follow "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience"). See A. Cassese, 'The Martens Clause: Half a Loaf or simply Pie in the Sky?' (2000) 11 (1) *EJIL*, pp. 187-216. International jurisprudence also recognized the customary nature of IHL. In 1945, The Nuremberg Tribunal declared that the humanitarian rules included in the Resolutions annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war." *Trial of the Major War Criminals, 14 November 1945-1 October 1946*, Nuremberg, 1947, Vol. I, p. 254. In the *Nuclear Weapons* case, the ICJ reaffirmed this interpretation not only by quoting the Nuremberg Tribunal, but also by referring to the Secretary General's Report concerning the subject-matter jurisdiction of the ICTY, in which it is recognized that the Hague and the Geneva Conventions, as well as the Genocide Convention and the Charter of the Nuremberg Tribunal, are "part of conventional humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict." See above n 187, para. 81, referring to the Secretary General's Report, paras. 34–35.

[1164] Seminal aspects of the peremptory nature in IHL acan to be found in the Hague Conventions of 1899 and 1907, and the 1929 Conventions on the treatment of injuries, sicks and war prisionners. Those treaties established a general limitation to the capacity of states to perform military activities by stipulating "no unlimited right to choose the means to harm enemies." It is interesting to note that such a limitation – so a constraint to the limitless will of states – took place in a time when not only war itself was not forbidden, but also a period in which absolute sovereignty was at its zenith in public international law. In that sense, more than simply representing the willingness of states to freely put a limit to their own unlimited power, these limitations might signify as well the positive recognition of the emergence of a certain normative spectrum from which no state can be exempted. In other words, those treaties embodied the beginning of the emergence of norms of *ius cogens* through conventional sources. As put by Hannikainen, "[i]n the *law of war* there was a great need for absolute norms for the safeguarding of the minimum fairness, orderliness, civilization and humanity of warfare and to prevent superfluous devastation." L. Hannikainen, above n 277, p.211. But as noted by Sztucki, "the proposition that "the Hague Conventions of 1899 and 1907," treated summarily, constitute an example of "general conventional law" incapable of lawful derogation, seems to be too far-reaching." J. Sztucki, above n 287, p. 47.

first aspect indicating their peremptory nature.[1165] Article 6 common to the first three Conventions and article 7 to the Fourth Convention (so article 6/6/6/7) creates objective limitations for other international arrangements dealing with the *ius in bellum*, by stipulating that "no special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them."[1166] The non-derogable nature of the provisions of the four Geneva Conventions is further reinforced by common article 7/7/7/8, which relates to the non-renunciation of rights of protected persons, who "may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements."[1167] And the rule established in article 60 (5) of the VCLT further reinforced the non-derogability of humanitarian norms by limiting the effects of termination and suspension of treaties as a consequence of breaches in the area of IHL.[1168] Finally article 47 the Fourth Geneva Convention guarantees that, in imperative terms, no agreement or unilateral acts of States can derogate from the normative universe protecting civilians in the context of an external occupation.[1169] Several authors interpreted the explicit non-derogable nature of these provisions as an expression of the legal regime of *ius* cogens, i.e., that derogatory agreements are null and void as a result of the legal regime operated by the peremptory nature of all Geneva Conventions.[1170]

[1165] It is important to understand "non-derogability" as the prohibition of "negative derogation" ("dérogation au sens proper") as opposed to "positive derogation" ("dérogation au sens impropre"). Positive derogation understood as derogatory agreements aiming at facilitating or widening the protective universe of the 1949 Geneva Conventions are permitted. For a thorough analysis on this distinction, including with some examples related to the common articles 6/6/6/7 and 7/7/7/8. See R. Kolb, above n 659, pp. 309-312.

[1166] Article 6 of the First Geneva Convention is slightly different by specifying the application to wounded and sick, and to members of the medical personnel or chaplains. "No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, nor restrict the rights which it confers upon them."

[1167] "Article 7/7/7/8 also confirms the peremptory status of the rights of protected persons by prohibiting them to renounce in any circumstance their rights in total or in part", A. Orakhelashvili, above n 355, p. 62. Its absolute nature was clarified by the official commentary that says that the absolute nature of that provision is due to "the danger of allowing the persons concerned the choice of renouncing their rights, and the difficulty, or even impossibility, of proving the existence of duress or pressure." Commentary - Art. 8. Part I : General provisions, at www.icrc.org.

[1168] Article 60(5): "Paragraphs 1 to 3 [on the conditions of termination or suspension of treaties as a consequence of their breach] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".

[1169] "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention Protected by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."

[1170] See T. Meron, 'The Humanisation of Humanitarian Law', (2000) 94 *AJIL*, p. 252. According to Orakhelashvili, the criterion of non-derogation would be tantamount to accepting and recognizing that "the Geneva Conventions are in principle non-derogable in their entirety." He takes the view that the prohibition of derogation, "in combination with the structure of denunciation clauses, criminalization of breaches, and limits on reciprocity evidenced by prohibition of reprisals could perhaps cumulatively confirm that these obligations are part of *jus cogens*", A. Orakhelashvili, above n 355, pp. 62-63. In any case, potential derogations from the

A second dimension concerns the imperativeness inscribed in those Conventions as reflected in the recurrent use therein of terms such as "shall be respected and protected in all circumstances."[1171] The compulsory character of those provisions is reinforced by articles 46/47/13/33, which prohibit reprisals against protected persons, and by the non-applicability of the principle of reciprocity in humanitarian law,[1172] which implies its imperativeness regardless of the actual compliance with it by other belligerents in the battlefield. Common Article 1 of the 1949 Geneva Conventions provides the obligation to respect the provisions established therein "in all circumstances," and article 2 clarifies that the application of the Conventions is due regardless of "armed resistance."[1173] Furthermore, common article 3 stipulates a minimum of imperative obligations to be observed even in armed conflicts not of an international character. It expressly declares that some acts "are and shall remain prohibited at any time and in any place whatsoever" as regards persons taking no active part in the hostilities. Those obligations of an absolute character, which include violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the carrying out of summary executions without due process of law, are widely accepted and recognized as having a *ius cogens* nature.

Finally, the peremptory nature of certain norms of IHL is confirmed by the actual universal membership of the 1949 Geneva Conventions. Together with the UN

Geneva Conventions would be invalid not only as a result of colliding with a peremptory norm, but also as a result of the legal operation deriving from the application of those very treaty provisions. In other words, a supposed individual renunciation of the rights provided for by Geneva Conventions should be declared as null as a consequence of the treaty provisions established therein.

[1171] For Hannikainen, those phrases indicate that the "Geneva Conventions endeavour to offer the categories of protected persons respect for their rights in *absolute* terms." L. Hannikainen, above n 277, p. 605.

[1172] The rationale of the principle of reciprocity (*si omnes* clause) in the application of IHL was inscribed in Article 2 of the Hague Convention IV of 1907: "The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention."

[1173] "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof." The same article 2, however, gives rise to some dubious interpretation as regards the issue of reciprocity. For some authors, such as Nieto-Navia, article 2 would have preserved the principle of reciprocity. R. Nieto-Navia, above n 332, p. 635. However, Abi-Saab is of the opinion that article 2 common to the four Geneva Conventions "expressly refute[s]" the rationale of reciprocity. G. Abi-Saab, above n 1161, p. 267. This understanding, at least as regards the core of obligations stemming from IHL, was confirmed by the ICTY. According to the ICTY, "the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity." *Kupreškić* case, above n 1091, para. 518, p. 202 And in an extensive and systemic interpretation, it should also be noted that during negotiations on common Article 3 to the four Geneva Conventions, any language that could be interpreted as entailing the principle of reciprocity was avoided by Member States. "The obligation is absolute for each of the Parties. The reciprocity clause, which appeared in the Stockholm draft of the Fourth Convention, has been deliberately dropped. That represents a great step forward -- offset, it is true, by the fact that it is no longer the Convention as a whole which will be applicable, but only the actual provisions of Article 3 itself." ICRC commentary to common Article 3, in Jean Pictet, (ed.), *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* International Committee of the Red Cross, Geneva, 1958, p. 44.

Charter, it has the largest number of State Parties,[1174] in spite of the significant number of reservations submitted thereto. These elements, namely the non-derogable nature of provisions stemming from the Geneva Conventions, their imperative character and their universal scope of application are strong indications of the existence of peremptory norms of IHL.

The peremptory nature of international humanitarian law has also been recognized in international jurisprudence. The ICJ referred to aspects of the peremptory character of norms of IHL in several terms.[1175] In the seminal reference in the *Corfu Channel* case, the Court recognized that many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person that they embodied "elementary considerations of humanity."[1176] This interpretation was reiterated by the Court in 1996, when it stated that humanitarian law "prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives." Not only did the Court expressly reaffirm the fundamental importance of "great many rules of humanitarian law applicable in armed conflict" as reflected in the level of accession to the Hague and Geneva Conventions, but it also declared that "these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[1177] In the *Nuclear Weapons* case, some judges expressly recognized the peremptory character of IHL in separate or dissenting opinions.[1178] The President of the ICJ, Judge Bedjaoui, declared he had no doubt that "most of the principles and rules of humanitarian law" form part of *jus cogens*.[1179] *Judge* Weeramantry for his part, stated that the rules of the humanitarian law "have clearly acquired the status of *jus cogens,* for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect."[1180]

The peremptory nature of IHL has been dealt with in a more detailed manner by international criminal tribunals. In the *Kupreskic* case, under the auspices of Antonio Cassese as its President, the ICTY recognized the *ius cogens* nature of

[1174] 195 Parties as of May 5 2013, at www.icrc.org.
[1175] R. Nieto-Navia, above n 332, pp. 633-4.
[1176] *Corfu Channel* case, above n 688, p. 22.
[1177] *Nuclear Weapons* case, above n 187, para. 79. This last expression "intransgressible" does not belong to the existing legal vocabulary, and it was previously unknown in international law. But as Condorelli rightly observed, "it is unlikely that the Court merely meant (...) that those principles must not be transgressed." Rather, it means that they are peremptory norms of general international law.
[1178] The ICJ lost a valuable opportunity when dealing with the *Nuclear Weapons* case to clarify the peremptory nature of humanitarian law once and for all. It decided not to deal with the *ius cogens* nature of IHL by stating that the request by the General Assembly raised the question of the applicability of humanitarian law with regard to the use of nuclear weapons, but not the question of the legal character of these norms.
[1179] *Idem*, para. 21, p. 273.
[1180] *Idem*, Judge Weeramantry, Dissenting Opinion, p. 496.

norms of humanitarian law.[1181] The ICTY declared the peremptory nature of obligations arising from IHL regardless of reciprocity by enemy combatants, since they have an absolute and non-derogable character.[1182] The Tribunal regarded the core obligations of IHL as absolutely necessary in armed conflicts, and declared that they must be complied with in an unconditional manner by belligerents.[1183] Domestic courts also recognized the peremptory nature of norms of humanitarian law in different manners. In the *Distomo* case, the Greek court understood some specific obligation of the occupying power as regards the duty to respect the lives, property and family as stipulated in article 46 of the 1907 Hague Regulations as having a *ius cogens* nature.[1184] However, the District Court of Tokyo had a different understanding as regards those obligations, particularly on the peremptory nature of the duty to respect private property.[1185]

Finally, there is also a widespread level of doctrinal acceptance and recognition of the peremptory nature of IHL norms.[1186] Jalil noted that "there is a narrow connection between *ius cogens* and humanitarian law (…). IHL or principles of humanity have many aspects of peremptory character, what implies that their violation is not accepted because the most part of these principles or norms are essential for the community or its common interests to survive."[1187] For Fitzmaurice,[1188] international humanitarian law would embody superior norms of

[1181] "[M]ost norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character," *Kupreškić* case, above n 1091, para. 520, p. 203.
[1182] "As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State", *idem*, para. 520, p. 203.
[1183] "Article 60(5) provides that such reciprocity or in other words the principle *inadimplenti non est adimplendum* does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions prohibiting any form of reprisals against persons protected by such treaties." *Ibidem*, para. 520, p. 203.
[1184] Distomo case, Prefecture *of Voiotia v. Federal Republic of Germany*, Case 137/1997, p. 599.
[1185] Decision of the Tokyo Disctrict Court, 28 February, 1966, 13 *Japanese Annual of International Law* (1969), p. 115; quoted in A. Orakhelashvili, above n 355, p. 61.
[1186] "[T]he fundamental rules concerning the safeguarding of peace, and notably those which forbid recourse to force or threat of force; *fundamental rules of a humanitarian nature* (prohibition *of* genocide, slavery and racial discrimination, *protection of essential rights of the human person in time of peace and war);* the rules prohibiting any infringement of the independence and sovereign equality of States; the rules which ensure to all members of the international community the enjoyment of certain common resources (high seas, outer space, etc.)." R. Ago, above n 600, p. 324. "A number of factors in the 1949 Geneva Conventions make them appear *particularly to satisfy criteria drawn from the perspective of jus cogens*: (i) Many provisions stipulate the protection of persons in absolute terms. Each Convention contains a provision prohibiting reprisals against the persons protected by the Convention. (The provision in Convention IV does this only in a limited scale). (ii) The Conventions prohibit the conclusion of special agreements which would adversely affect the situation of protected persons or would restrict their rights as defined by the Conventions. Thus, derogations by treaties *inter se* which would have adverse effects are prohibited. (iii) The Conventions deny the validity of any renunciations of their rights by protected the persons. (iv) The Conventions single out the grossest violations as 'grave breaches', and prohibit the parties from absolving any other party of any liability incurred in respect of the 'grave breaches. There is a strong presumption that at least the prohibitions of the 'grave breaches' of the Conventions are peremptory. (v) The Conventions have received a nearly universal degree of ratification." L. Hannikainen, above n 277, pp. 605-6.
[1187] Kasto Jalil, '*Ius cogens* and humanitarian law', (1980) *Institute international de droit humanitaire*, p. 98.
[1188] G. Fitzmaurice, above n 377, p. 122.

ius cogens. Orakhelashvili argues that the peremptory character of norms of IHL is primarily due to the fact that it does not aim to protect State interests, but instead "to protect human beings *qua* human beings."[1189]

The peremptory scope of IHL

The aforementioned raises the question of which specific norms of IHL have a peremptory character.[1190] State practice has been inconclusive. Several resolutions approved by the General Assembly and the Security Council have proclaimed respect for basic principles of the law of armed conflicts and have condemned their violations in absolute terms.[1191] Those resolutions, which primarily dealt with a variety of issues (basic principles of the law of armed conflict, the prohibition of the use of bacteriological and chemical weapons, specific reactions to violations of IHL, and the use of nuclear weapons), consolidated the need to abide by the basic principles of IHL, namely "(a) [t]hat the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) [t]hat it is prohibited to launch attacks against the civilian populations as such; (c) [t]hat distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."[1192] Those basic principles of a general nature, which reflect dispositions of Resolution XXVIII adopted at the XXth International Conference of the Red Cross held at Vienna, in 1965, are imposed upon all States in armed conflicts as accepted and recognized norms of *ius cogens*.[1193]

It is also widely accepted that the fundamental principles of common Article 3 is part of *ius cogens*.[1194] This is particularly true not only as a result of the virtual

[1189] Orakhelashvili recalls the words of Cassese in the *Kupreškić* case: "norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings." *Kupreškić* case, above n 1091, para. 518, pp. 201-202. He alludes, in this regard, to the non-reciprocal nature of obligations stemming from IHL norms, which "incorporate the concept of morality." A. Orakhelashvili, above n 355, p. 61.

[1190] According to Hannikainen, many of the norms provided for by the Geneva Conventions and its Additional Protocols are not necessarily considered *ius cogens*. L. Hannikainen, above n 277, p. 606.

[1191] For an overview, see L. Hannikainen, *idem*, pp. 612 and ss.

[1192] "Respect for Human Rights in Armed Conflicts." Resolution 2444 (XXIII) of the United Nations General Assembly, 19 December 1968. According to Article 3 of Resolution 2674 (XXV) of the General Assembly, "the principles of the Geneva Protocols of 1925 and the Geneva Conventions of 1949 should be strictly observed by all States and that States violating these international instruments should be condemned and held responsible to the world community."

[1193] "In examining the law of armed conflicts *in the light of the different criteria of peremptory norms*, it appears that many basic normative principles and norms of the law of armed conflicts have unequivocally been accepted by the international community of States as a whole, and are universally obligatory." L. Hannikainen, above n 277, p. 622.

[1194] "[T]he principles underlying common Article 3 of the four Geneva Conventions satisfy the criteria set out above for it to be designated a norm of *jus cogens*. It lays down fundamental standards which are applicable at all times, in all circumstances and to all States and from which no derogation at any time is permitted." R. Nieto-Navia, above n 332, p. 638.

universal membership of the four 1949 Geneva Conventions, but also due to the specific and unequivocal sense of imperativeness and non-derogability expressed in that provision ("at any time and in any place whatsoever)."[1195] Those rules have been recognized as the minimum yardstick in any type armed conflict, either of an international or a non-international character,[1196] as declared by the ICJ[1197] and the ICTY.[1198] As such, the principles underlying common article 3 of the Geneva Conventions also portray a *ius cogens* character. Moreover, there is widespread acceptance and recognition of the peremptory nature of the prohibition of the "grave breaches" of the four Geneva Conventions.[1199] The fact that these provisions refer to those conducts as "grave breaches" implies a sense of imperativeness, otherwise there would be no reason for differentiating them from other equally prohibited conducts in the law of armed conflicts.[1200]

[1195] Common article 3 reads as follows "[e]ach party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for."

[1196] "Care has been taken to state, in Article 3, that the applicable provisions represent a compulsory minimum," and "[t]he value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say." ICRC commentary to common Article 3, in Jean Pictet, (ed.), above n 1173, p. 44.

[1197] "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity," *Nicaragua* case, above n 281, para. 218, quoting the *Corfu Channel* case, above n 688, p. 22.

[1198] Article 3 "sets forth a minimum core of mandatory rules [and], reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognized humanitarian principles." *Delali* case, *Prosecutor v. Zejnil Delali et al.*, Judgement of 20 February 2001, IT-96-21-A, para. 143.

[1199] "There is a strong presumption that at least the prohibitions of the 'grave breaches' of the Conventions are peremptory." L. Hannikainen, above n 277, p. 606.

[1200] Indeed, with a view to combating impunity and to ensure individual accountability, the Geneva Conventions call upon the parties to prosecute or to extradite for prosecution those responsible of grave breaches of the obligations set forth therein, in accordance with the principle of *iudicare or prosequi*. The Geneva Conventions I and II have an identical list of "grave breaches" of the provisions contained therein (respectively, articles 50 and 51). "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." The same list of offences is reproduced in article

The question on which norms of IHL have a peremptory character should also be examined from the standpoint of the development of international criminal law. Although international criminal responsibility is not to be confused with the legal regime operated by *ius cogens,* both areas reflect the opinion and acceptance of the international community as a whole as regards certain behaviours in contemporary warfare. The list of "war crimes" in article 8 of the Rome Statute offers a conspicuous source of *opinio iuris* on the current "status" of certain norms of the law of armed conflicts.[1201] A comparative analysis shows that the material universe of incidence of article 8 (2) is not only almost identical with those of "grave breaches"[1202] and serious violations of article 3 common to the four Geneva Conventions of 12 August 1949,[1203] which by the way are expressly referred to in the Rome Statute, but also that such a universe of unacceptable behaviours was enlarged with the inclusion of references to other serious violations of the laws and customs applicable both in international armed conflict[1204] and in armed conflicts

130 of the Geneva Convention III relative to the Treatment of Prisoners of War, except for the reference on acts related to extensive destruction and appropriation of property, and the inclusion of "compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention." And article 147 of the Geneva Convention IV combines both aforementioned provisions and further extends the list of acts regarded as "grave breaches" by including "unlawful deportation or transfer or unlawful confinement of a protected person" and the "taking of hostages".

[1201] "The establishment of a permanent international criminal court having inherent jurisdiction over these crimes is a convincing argument for the proposition that crimes such as genocide, crimes against humanity, war crimes and torture are part of *jus cogens*", M. Cherif Bassiouni, above n 294, pp. 63-74. See also *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR 51st Sess., Supp No. 22, U.N. Doc A/51/22 (1996); M. Cherif Bassiouni (ed.), *The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee, and Administrative and Financial Implications*, *13 Nouvelles Études Pénales*, Toulouse, France, 1997.

[1202] Article 8 (2) reads that "For the purpose of this Statute, "war crimes" means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

[1203] Article 8 (c) reads that "In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable."

[1204] Article 8 (b) reads that "Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and

not of an international character.[1205] Indeed, Article 8 (2) goes further in determining which behaviours are prohibited in absolute terms in the light of

severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion; (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury; (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory; (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; (xii) Declaring that no quarter will be given; (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war; (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party; (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war; (xvi) Pillaging a town or place, even when taken by assault; (xvii) Employing poison or poisoned weapons; (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123; (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations; (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions; (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

[1205] Article 8 (e) reads that "Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault; (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions; (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (ix) Killing or

current development of IHL. As such, that provision of the Rome Statute can be construed as conveying the opinion of States[1206] as regards the normative "status" of those specific norms of international humanitarian law which can be regarded as representing positive "elementary considerations of humanity" in contemporary international law, and therefore potentially having a peremptory nature. This understanding, namely that article 8 of the Rome Statute of the ICC embodies peremptory norms of IHL, is in accordance not only with contemporary developments in the field of the law of armed conflicts, as reflected in the level of membership of the 1949 Geneva Conventions, but also with the jurisprudence of international tribunals, in particular those dealing with international criminal responsibility. The aforementioned implies a premise oriented towards the enhancement of the compulsory nature of those fundamental provisions of IHL by means of ensuring their imperativeness, non-derogability and universality in all circumstances of armed conflict, in accordance with the ultimate goal of protecting human beings, in particular civilian populations, from the ravages of warfare.

wounding treacherously a combatant adversary; (x) Declaring that no quarter will be given; (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

[1206] As of 6 June 2013, the Rome Statute of the ICC had 139 signatories and 122 parties.

Part IV – Antinomy Between Norms of *Ius Cogens*

One of the main gaps in the theory of *ius cogens* lies in the absence of an in-depth examination of the specific issue of antinomy between peremptory norms. Most of the approaches to the general theory of *ius cogens* are based on pre-determined legal-philosophical backgrounds, such as jusnaturalist and voluntarist doctrines, which sometimes seem to be primarily concerned in using the emerging concept of peremptory norms for searching the very foundations of the compulsory character of public international law. The result is a wide spectrum of theoretical proposals that not only fail to address the fundamental character of the concept of peremptory norms in a proper manner, but also fall short of indicating a path towards the solution of conflicts between norms of *ius cogens*.[1207]

This Part aims precisely at providing an adequate and reasonable approach for this lacuna. As in any process aiming at solving legal antinomies,[1208] this objective involves two fundamental tasks. First, the inquiry into how a conflict between norms of *ius cogens* may appear in the light of the existing criteria related to the validity of norms within a given legal system. As mentioned in Part I above, these criteria are related to the normative overlaps *ratione personae*, *ratione temporis* and *ratione materiae*. Second, the verification of whether the existing meta-rules for solving antinomies are adequate for addressing conflicting peremptory norms. If meta-rules are not applicable, the conflict between norms of *ius cogens* might be considered a "hard case" in international law, and alternative methods such as "weighing and balancing" techniques might be needed. Both of these tasks will now be undertaken in the following Chapters.

[1207] "Il est étendu que, si la décision du conflit dépend, le plus souvent, de l'argument d'autorité, cette décision est vaine quand les autorités auxquelles on peut faire recours sont nombreuses et quand, comme il arrive souvent, elles sont en opposition." N. Bobbio, above n 17, p. 247.
[1208] N. Bobbio, *idem*.

Chapter I – Identifying a conflict between peremptory norms

Pauwelyn suggests that norms can accumulate or conflict in international law.[1209] The problem with *ius cogens* norms, however, is that they can be characterized both accumulative and conflictive depending on the specificities of the factual circumstances they are applicable to. This particular feature of peremptory norms makes it hard to identify the existence of a clear-cut antinomy between norms of *ius cogens*, at least when compared to other ordinary rules of the international legal system.

On the one hand, peremptory norms are expected to be accumulative by their very nature. First, their peremptory character implies that conflicting norms are equally valid *vis-à-vis* each other. In other words, they co-exist in a harmonious manner within the legal system. Otherwise the emergence of a new peremptory norm would necessarily cause the derogation from the previous norm of the same character, in accordance with articles 53 and 61 of the VCLT. Second, they usually regulate in a general manner different domains of international law. One can observe such a characteristic of norms of general international law in the analysis of the material universe encompassed by the norms such as the prohibition of the use of force, the right to self-determination and the prohibition of the most serious violations of international human rights and international humanitarian law, which are essentially regulating different subject-matters in a general manner.

On the other hand, peremptory norms may be conflictive as a result of their simultaneous application to a same factual circumstance. As a logical consequence of the tenets of legal antinomy, this situation implies the existence of overlaps *ratione materiae*, *personae* and *temporis*.[1210] The overlap *ratione personae* can be easily determined on the basis of the imperative and universal features of peremptory norms. Rights and obligations deriving from norms of that character are imposed upon all States as a consequence of the universal scope of application of the imperative legal regime entailed by the concept of *ius cogens*. Consequently, peremptory norms will always be binding on all States,[1211] which cannot evoke the principle of *pacta tertiis* for avoiding the imperative nature stemming from *ius cogens*. Accordingly, antinomies between peremptory norms are not a type of AB/AC conflict, in which a given State A has conflicting obligations with B and C,

[1209] Accumulative norms may complement, confirm, create an exception or even terminate another norms within the system. The bottom-line is that accumulative norms imply the possibility of their mutual application in all circumstances. See J. Pauwelyn, above n 5, pp. 161-164.

[1210] In the light of the axiological diversity of the international system, there is a great potential for conflicts between peremptory norms as a result of an overlap *ratione materiae*, *personae* and *temporis*. This seems to be a natural consequence of the very essential features of the concept of *ius cogens*.

[1211] On the universal character of peremptory norms, see definition of *ius cogens* in Part II, Chapter IV, Section IV above.

and the compliance with an existing and valid norm with B may imply the non-observance of an equally valid right or obligation that is provided by an existing norm with C. Briefly, there is no type of AB/AC conflict in *ius cogens* because conflicting peremptory rights and obligations imposed to A are also imposed indistinctively to B and C.

The criterion *ratione temporis* is also a logical corollary of their peremptory character. Norms of general international law can only portray a peremptory character if they are valid *vis-à-vis* all other rules within the international legal system, including those having an equally peremptory character. This is particularly relevant because otherwise there would be no ground for suggesting that there is an antinomy between two peremptory norms. For instance, it would be irrelevant to ask whether there was a conflict between peremptory norms in the allegedly "humanitarian interventions" of the XIXth century, since the prohibition of the use of force did not even exist as a norm of *ius cogens* at that time. The same could be said about the principle of self-determination. In short, the overlap *ratione temporis* is a consequence of the very fact that two peremptory norms do exist within the international legal system in a given point of time.

The analysis of the criterion *ratione materiae* is the most complex aspect in the process of identifying an antinomy between norms of *ius cogens*. It was said above that peremptory norms tend to deal with different subject-matters in a general manner at the abstract level of their mutual existence within the legal system. As such, in principle there should be no overlap *ratione materiae* between them. But these exceptional situations of conflict may take place if peremptory norms produce contradictory consequences when simultaneously applied to a given factual circumstance. In those cases, the conflict does not occur at the abstract level of their mutual existence within the system, but rather as a consequence of the contradictory results stemming from their respective application. The material overlap between two conflicting peremptory norms is thus placed in a "point de contact objectif" when a same subject-matter or connected subject-matters are regulated in a general manner by different norms,[1212] but the overlap can only be determined in the light of the specificities of each concrete situation. This is the case, for example, of gross and systematic human rights violations. There is no conflict at the abstract level between the peremptory norms in the area of human rights (prohibition of genocide and the most serious violations of international humanitarian law) and the peremptory prohibition of the use of force. So both norms accumulated within the system. But while peremptory norms on human rights require states to abstain from committing those international crimes (prohibitive norm) and to take concerted action through the competent bodies of the international legal system, including the UNSC, with a view to cease the continuance of those acts (command); the prohibition of the use of force prohibits

[1212] F. Capotorti, 'Interférences dans l'ordre juridique interne entre la Convention et d'autres accords internationaux', in *Les droits de l'homme en droit interne et en droit international*, Brussels, 1968, p. 123.

States to take forcible unilateral action to stop mass killings. In this circumstance, there is an antinomy (even one of an apparent nature only) between these legal provisions, since the compliance with one of the norms may imply the non-observance of the other and vice-versa, with negative effects to the imperative character of peremptory norms.

In view of the above, it is possible to ascertain that valid peremptory norms are expected to accumulate at the abstract level of their existence within the legal system. But they may conflict because their simultaneous application to factual circumstances may produce contradictory results. This aspect, which is a hint of its character as a "hard case" type of conflict, will be analysed in Chapter III below. But first it is necessary to determine whether traditional meta-rules may be used for addressing this type of antinomy, or if recourse to other alternative means is needed as a means of solving the problem of conflicting norms of *ius cogens*. This is the topic of the next Chapter.

Chapter II - The insufficiency of traditional meta-rules

If it is clear from the above that conflicts between peremptory norms may arise in the application of their normative commands to factual circumstances, it is still unclear whether these situations can be solved exclusively on the basis of the traditional meta-rules. In most of the cases, problems related to the solution of antimony between peremptory norms are due to the very distinctive characteristics of these norms. For example, the rule of *lex superior* is pointless for solving a conflict between peremptory norms, since there is no hierarchy between them (*ius cogens* rules are positioned at the same level of the international legal system). And even if the interpreter accepts that there is a hierarchy entailed by the emergence of the legal regime operated by *ius* cogens,[1213] one could not envisage the hypothesis that there is a "fixed axiological hierarchy" between peremptory norms, because all norms of *ius cogens* deal with material contents of an equally high axiological importance.[1214]

As regards the *lex posterior* criterion, the sole situation in which it can be applied is when there is a newly emerging peremptory norm overlapping *ratione materiae* with a previously existing norm of that same character. But in this case, it is the regime established by articles 53 and 64 of the VCLT, rather than article 30 (3) that is applied. Besides that specific provision in the VCLT for successive norms of a peremptory character, the rule of *lex posterior* can hardly be used because it is difficult to determine the exact point in time in which rules emerge as accepted and recognized peremptory norms. As a matter of fact, the time dimension of peremptory norms tends to be coincident. It is the likely result of the slow and progressive development of customary law reinforcing the level of acceptance and recognition of the *ius cogens* character of prior treaty rules. For instance, existing peremptory norms ultimately derive from the law of the UN Charter, with the likely exception of international humanitarian law. And even the peremptory character of certain rules of international humanitarian law is also founded on the Charter's provisions, which places human rights among the main goals and purposes of the UN system. Such a dynamics hinders a proper utilization of the criterion of *lex posterior* as a means of solving conflicts between *ius cogens* norms.

Conflict prevention techniques can also hardly be applied between rules of *ius cogens* because one of the norms in conflict cannot lawfully derogate from the other, since they all have a peremptory character. As there is virtually no succession in time between two equally valid peremptory norms (unless one is a newly emerging peremptory norm in accordance with Art. 53 of the VCLT), the interpreter cannot have recourse to methods such as presumption against conflict

[1213] See Part II, Chapter II on Hierarchical theories.

[1214] By following the rationale suggested by Kelsen, there would be no antinomy between rules at a same hierarchical level, but only a situation of anomia. But this is a quite radical interpretation.

(the presumption that new norms of international law are consistent with pre-existing law) as a means of solving an antinomy between norms of *ius cogens*.[1215] Peremptory norms not only are assumed to be consistent with existing international law (otherwise prior contrary norms are null and void), but they may actually operate as a criterion of validity for successive emerging ordinary norms within the system, the validity of which will hinge upon their consistency with pre-existing peremptory norms. To put it differently, new norms are presumed to be valid insofar as they do not derogate from *ius cogens*, unless, of course, the new norm is an emerging norm of that same character. This understanding guarantees the need for change and evolution in the law, "whilst preserving the principle of legal stability".[1216]

Finally, it seems even less adequate to have recourse to the rule of *lex specialis*. By their very definition it is not possible to contract out from peremptory norms: a special regime cannot be created from a general regime of a *ius cogens* nature (*lex specialis non derogat legi generali*). The sole possibility is the lawful application of article 64 of the VCLT. But that provision cannot be confused with the rule of *lex specialis*. And even if one applied, for theoretical purposes, the rule of speciality for solving conflicts between peremptory norms, it should be noted that the regime of *lex specialis* requires that a valid derogation from a general norm must be explicitly expressed by the later norm.[1217] Accordingly, the derogating norm would have to explicitly contract out of the prior peremptory norm, that is, it should explicitly creating an equally peremptory regime of *lex specialis* from the previous norm of that same character. And as a result of the regime of *ius cogens*, the emergence of the new norm would also imply the existence of an unequivocal acceptance and recognition of its peremptory character either as derogating from the previously existing norm of *ius cogens* (nullity of previous peremptory norm as the effect entailed by article 61 of the VCLT), or as *lex specialis*, a situation in which it would not necessarily cause the nullity of the previously existing peremptory norm. But even this hypothesis seems to be a lawful modification of a previously existing norm instead of a means of solving a normative conflict on the basis of the *lex specialis* rule, since such a modification would necessarily imply the emergence of a new peremptory norm, or a change on the level of acceptance and recognition of previous *ius cogens*.

In view of the above, some could argue that there is a lacuna, and consequently the interpreter should use his/her own discretion to apply any of the conflicting

[1215] See J. Pauwelyn, above n 5, p. 240.
[1216] On the problem of intertemporal law, see the '1975 Resolution of the institute of International Law', *Yearbook of the Institute of International Law* (1975), p. 537, preamble 2.
[1217] As commented by the ILC on article 55 of the 2001 Draft Article on state responsibility, "For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other." Commentary to article 55, in 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries', YbILC, 2001-II, Part Two, p. 358.

norms in the light of the spirit of the system.[1218] But admitting that the legal interpreter could choose the absolute application of one of the two applicable peremptory norms would necessarily lead to the non-observance of the other norm, and therefore impact upon the imperative nature of the latter. In other words, it would contradict one of the fundamental features of *ius cogens*. In this same vein, the possibility of interpreters to create new law in a casuistic manner is not acceptable either, since the emergence of peremptory norms hinges upon the level of acceptance and recognition by the international community as a whole. Consequently, the interpreter would never be in a position to create a new norm of an equally *ius cogens* character derogating from another conflicting peremptory norm. That solution would not only contradict the imperative character of peremptory norms, but also be contrary to the need of guaranteeing the predictability and harmony in the application of norms in the international legal system. When dealing with *ius cogens*, the role of legal interpreters is circumscribed to the application and the interpretation of the normative scope of the conflicting norms.

To sum up, none of the traditional meta-rules offer an appropriate solution for the problem of conflicting peremptory norms. The reason is that the solution of the conflict between peremptory norms does not involve the suspension, the modification or the derogation from one of the conflicting norms, unless a new norm of that same character emerges according to articles 53 and 64 of the VCLT.[1219] In other words, in cases of conflicts between peremptory norms, one of the contradicting norms does not cease to exist or to apply because the solution of the normative conflict does not entail the invalidity or termination of one of the conflicting norms. In view of these particularities surrounding the problem of conflicting norms of a peremptory character, the use of methods such as weighing and balancing appears as a reasonable alternative in circumstances in which the natural result would be the declaration of *non liquet* as a consequence of the impossibility of applying other traditional methods for solving legal antinomy. Unless, of course, that one imagines that the interpreter would be in a position to create the law himself and therefore close the legal gap, which seems unlikely to be the case in international law.[1220]

[1218] See Part I, Chapter II, Sections II and III above.
[1219] In this case, however, it is not a matter of a conflict between provisions equally applicable stemming from two equally valid norms, since one of the conflicting norms would precisely have been derogated from the other as a consequence of the newly emerged norm of *ius cogens*.
[1220] That could be more likely to happen in jurisdictional activities of Courts of a virtually constitutional character, such as the European Court of Justice.

Chapter III - Antinomy between peremptory norms: a "hard case" in international law?

In view of the inadequacy of traditional meta-rules for solving the problem under examination, it should be asked whether antinomies between norms of *ius cogens* are "hard cases" in international law. As suggested above, the specificities of a "hard case" can be examined in the light of the criteria suggested by Champeil-Desplats in her analysis of axiological-teleological norms, such as constitutional principles in domestic legal systems.[1221] The bottom-line for this analogy is that norms of a *ius cogens* character are general in their scope of application, while they also aim at attaining common goals and equally relevant values.[1222] As such, they can be compared to the function of principles in a given legal system.

The analogy with the criteria suggested by Champeil-Desplats reads as follows. First, antinomies between peremptory norms are most likely to be one of a partial-partial type, that is, conflicting norms are not contradictory in absolute terms. In other words, it is not a contradiction in which a given norm "A" allows a certain conduct while norm "B" prohibits that same conduct. For example, in the conflict between the prohibition of the use of force and the principle of self-determination, the overlap occurs between the specific provisions related to the nullity of agreements recognizing the territorial acquisition through the use of force and the autonomous right of peoples to enter into arrangements related to the establishment of mutually agreed boarders with its neighbouring countries. But the norms themselves are not incompatible in absolute terms, because at the abstract level they are regulating different subject-matters. As mentioned above, if peremptory norms are considered valid, they are supposed to exist in a harmonious manner as abstract norms of the international legal system (accumulation). One can also identify this partial-partial type of conflict in the contradiction between the right of peoples to receive foreign assistance as a means of achieving their right to self-determination and the prohibition of selling arms for military groups that may cause gross and systematic human rights violations. The material overlap is only partial to the extent that it can be determined only in the light of the factual circumstances of a given situation under examination.

Second, such a partial overlap *ratione materiae* only occurs at the moment in which both norms are being applied to a same given factual circumstance. As contradictions between peremptory norms are observed *in concreto*, this type of antinomy cannot be solved through the analysis of the structure of the system because all peremptory norms are placed at the same hierarchical level. Accordingly, the insufficiency of the traditional rules (meta-rules) is the third

[1221] See above Part I, Chapter II, Section II.
[1222] V. Champeil-Desplats, above n 189.

common aspect of "hard cases". As was seen above, the existing methods for solving antinomy in international law are not adequate for solving the problem of colliding norms of a *ius cogens* nature. And they have proved to be insufficient precisely because the material overlap can only be determined in the light of the specificities of a given factual circumstance. Fourth, norms of *ius cogens* are designed in such a general manner so as to cover a wide normative spectrum. For that reason they can also be characterized optimization requirements, as suggested by Robert Alexy in his theory of constitutional rights.[1223] These norms are not expected to be applied in an "all or nothing" manner, but rather to be maximized under factual and legal circumstances. Finally, solving a *ius cogens* "hard case" will not cause the nullity of one of the conflicting peremptory norms either, which will both remain valid in spite of the solution taken by the interpreter in each specific case. Otherwise their very features of imperativeness and non-derogability would be overlooked in the process of solving the normative conflict.

The application of the criteria presented above shows that conflicts between peremptory norms can be characterized "hard cases." This is so because (i) they are essentially of a partial-partial type; (ii) a material overlap between their respective commandments takes place *in concreto*, that is, at the moment of their application to a given factual circumstance; (iii) traditional meta-rules are not enough for solving the antinomy between them, nor can the problem be left to the open discretion of the interpreter; (iv) peremptory norms operate as "optimization requirements" in the international legal system, and as such cannot be applied in an "all-or-nothing" manner,[1224] and (v) the solution to the conflict is not expected to produce the nullity of one of the contradicting norms, in line with the imperative and non-derogable features of *ius cogens*. Under these circumstances, one can ask whether the solution for legal antinomies between peremptory norms could be found in an exercise of weighing and balancing, as developed by those theories aiming at solving "hard cases." This hypothesis implies the process of carefully carving one norm out of the other in order to maximize the application of both normative commands to the factual circumstance under examination.[1225]

As examined in Part I, Chapter II, Section IV above on the problem of hard cases in public international law, there are already several precedents for having recourse

[1223] R. Alexy, above n 15, p. 67.

[1224] "Balancing and weighing" is a technique "qui intéresse aussi les normes impératives, car nombre d'entre elles se présentent commes des principes: non-recours à la force, autodétermination des peuples, droit de l'homme fondamentaux, règles fondamentales du droit international humanitaire, etc." R. Kolb, above n 16, p. 495. Mosler recalls that "[m]any general principles form part of customary law; however, the two concepts are not identical: principles can be more general and less precisely determined than customary rules; in a given case the authority which has to apply them, in particular courts and arbitral tribunals, has a somewhat wider scope to determine their concrete form." H. Mosler, 'General Principles of Law', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, North-Holland, 1984, VII, p. 91.

[1225] Kolb was among the first internationalists to suggest the recourse to methods such as "balancing and weighing" to solve the problem of conflicting peremptory norms. In this article, Kolb expressly refers to Dworkin and Alexy. See R. Kolb, above n 16, p. 485.

to "weighing and balancing" techniques in international adjudication, ranging from issues such as international trade law (WTO), the law of regional regimes (EU) and human rights (ECHR).[1226] In all of these international legal regimes, recourse to the principle of proportionality has been made under the interpretation that this method stemming from legal rationale may be used as a valid source of international law under the concept of "general principles of law" (Art. 38(1)(c) of the Statute of the ICJ). There are two fundamental and common elements in this practice of having recourse to the principle of proportionality at the international level. First, it takes place in situations in which no relationship of priority could be drawn at the abstract level of the legal existence of the competing norms. Second, conflicting norms are characterized by the fact that both rules embody equally important values within a given legal community. Based on this previous experience, there seems to be nothing hindering the application of "weighing and balancing" techniques to the problem of antinomy between norms of *ius cogens*. As a matter of fact, this seems to be even more pertinent in the case of peremptory norms, since the alternative of *non-liquet* would run against the goals of integrity and stability of the international legal system. This approach suggests a reciprocal balancing and weighing of the conflicting norms,[1227] in which norms are carved out from each other, new scopes of delimitations are created, and distinctions are interpreted in the light of the specific legal and factual circumstances in which the norms are being applied.[1228] In any event, both norms must be applied to their maximum extent, even under the rule of conditioned prevalence, and no precedent of priority (fixed hierarchy) is created, since the solution is applied *in casu* in the light of the legally and factually possible. The main goal is the maximum application (optimization) of conflicting normative commands, at least as much as the other contradictory command may allow it.[1229]

A typology of antinomies between peremptory norms

Based on the application of "weighing and balancing" techniques to the problem of antinomy in *ius cogens*, it is also possible to establish a typology of conflicting peremptory norms. The first type of antinomy is one of an essentially apparent

[1226] See Part I, Chapter III, Section III above.
[1227] Alexy has called it as "Güterabwägung". See R. Alexy, above n 15.
[1228] The Swiss scholar argues that, in certain cases, norms "s'appliquent simultanément et il s'agit de trouver une coordination de leurs injonctions en définissant à chaque fois de nouvelles règles de priorité contextuelles. La solution est trouvée en accordant un poids relatif à ces principes dans un contexte donné, non en cherchant à écarter l'un au profit de l'autre". R. Kolb, above n 16, pp. 484-485.
[1229] For an analysis of the notions of "conditioned prevalence" and reconciliation between principles under "weighing and balancing" techniques, see above Part I, Chapter II, Section III, pp. 47-50. By refering to Alexy, Kolb's precisely says that "[l]'opérateur qui met en oeuvre une telle norme générale doit cherher à réaliser le plus possible, dans l'espèce, l'allocation des valeurs juridiques et politiques qu'elle exprime, mais seulement dans la mesure de ce que permet l'égal égard pour d'autres principes et normes concurrents." R. Kolb, above n 16, pp. 484-485.

character that can be solved exclusively on the basis of interpretative techniques aimed at harmonizing and optimizing the application of both normative commandments to a same factual circumstance. These cases can be solved by finding the perfect balance between the two conflicting norms in such a manner that both norms can be optimized without having recourse to the notion of "conditioned prevalence." This approach will be used in Part V as a means of solving the case study of antinomy between the prohibition of the use of force and the prohibition of the most serious human rights violations, as embodied in the concept of "humanitarian intervention". But one could also think of other hypothetical situations emerging from international reality in which there is only an apparent antinomy between peremptory norms. That would be the case, for example, of the antinomy between the right of non-self-governing peoples to receive foreign assistance for achieving their right to self-determination, and the prohibition of trading arms that can be used in gross and systematic human rights violations. On the one hand, the right of peoples to receive foreign assistance in their struggle against foreign subjugation includes the provision of armaments and ammunition. On the other hand, the arms trade must not occur when it may be used to promote gross and systematic human rights violations. One may identify therefore an antinomy between the right of peoples to receive foreign support and the prohibition of providing arms that can be used in gross and systematic human rights violations. But this is an apparent antinomy only that can be solved through an interpretative exercise harmonizing both conflicting norms. The rationale reads as follows: the very legal source (the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations) that establishing the right to receive foreign assistance restricts the provision of support for peoples seeking to realize their right to self-determination to the observance of certain conditions, namely (i) "in their actions against, and resistance to" forcible action aiming at depriving these peoples from the exercise of their right to self-determination; and (ii) that such a support occurs "in accordance with the purposes and principles of the Charter." As such, the provision of arms and ammunition for non-self-governing peoples is restricted to their struggle against foreign subjugation, the concept of which implicitly does not encompass its use for committing gross and systematic human rights violations. The antinomy is thus only apparent and solution can be achieved exclusively on the basis of the interpretation of the scope of application of both conflicting norms.

The second type of antinomy is one of a real character. It means that neither norm can be applied in its entirety to that same factual circumstance. As a result, some sort of prioritization is necessary as a means to avoiding *non-liquet* and thus protecting the integrity of the international legal system. As both norms are of an equally imperative and non-derogable nature, and the interpreter cannot simply decide not to apply one of the conflicting norms in detriment of the other, the

solution must be sought in the notion of "conditioned prevalence", the effects of which are restricted *in casu*. This "conditioned prevalence" approach will be used in Part VI below as a means of solving the antinomy between the peremptory norms on the use of force and the right to self-determination in the case of a hypothetical peace agreement between Israel and Palestine conveying the cession of occupied territories. There are other examples of real antinomy arising from international reality, such as in circumstances of non-self-governing peoples struggling for their right to self-determination *vis-à-vis* the applicable normative universe of human rights and IHL, which could be equally approached from the standpoint of the notion of "conditioned prevalence". In those situations, the limits of the legitimate struggle against foreign subjugation are found in the prohibition of deliberate attacks against civilians as unlawful targets in an armed conflict. These acts may amount to war crimes prohibited in peremptory terms under international humanitarian law. Accordingly, one may establish a relationship of conditioned prevalence in which the prohibition of the most serious violations of human rights and international humanitarian law prevails over the right to attaining self-determination. As a consequence thereof, peoples cannot commit terrorist attacks against civilian populations, or deliberately cause their death in their struggle against foreign subjugation, or even torture and summarily execute enemy combatants, since they must observe the peremptory requirements stemming from applicable international humanitarian law. However, the analysis of this conditioned prevalence can only take place in the light of the specific circumstances of a given situation under examination (*in casu*). There may be other situations in which foreign civilian populations living in territories illegally occupied through the use of force are actively supporting and promoting the subjugation of non-self-governing peoples, as occurred during the Nazi regime, the colonization process or the apartheid regime. In those circumstances, there may be some ground for discussing a potential legitimate recourse to the use of force against military facilities that may also cause the harm of civilian populations. In any event, relationships of conditioned prevalence must be established in the light of the legally and factually possible.

Chapter IV - Conclusion

The problem of antinomy between peremptory norms is therefore an example of a "hard case" in international law. And to a great extent this is due to the very essential features of the concept of *ius cogens*. First, as a consequence of the non-derogable character of peremptory rules, the solution for this type of normative conflict does not entail the derogation, the modification or the suspension of one of the colliding norms. Both will remain equally valid after the antinomy is solved. Second, any way out of this problem must necessarily guarantee the maximum application of the respective commandments stemming from both conflicting peremptory norms. Otherwise one of its essential features, namely its imperative character, would be ignored and the result would be contrary to essential features of the concept of *ius cogens*. Third, and in this same vein, the solution for the problem may imply, when effective interpretation is not possible, a conditioned relationship of priority of one of the conflicting norms over the other *in casu*, that is, the so-called "conditioned prevalence." But no fixed hierarchy is established between the conflicting norms, since that hypothesis would run contrary to the imperative character of peremptory norms.

Recourse to "weighing and balancing" may thus prove to be a useful tool in solving conflict between peremptory norms. But this is not expected to be a simple operation. It involves an exercise of interpretation that requires an in depth analysis of the normative universe not only of each of the conflicting norms, but also of the context in which the norms under examination are being applied. And by dealing with subjects of such a high axiological importance such as peremptory norms, the solution provided by those methods should not be expected to be necessarily aligned with political and economic interests usually underlying these topics in the international agenda. But from the exclusive perspective of international law, such an alternative may contribute to guaranteeing the integrity of the international legal system and thus avoiding *non liquet*. This reasoning will be applied in the next two Parts, which deal respectively with the problems of "humanitarian intervention" and a hypothetical peace agreement between Israel and Palestine, both circumstances portraying conflicts between peremptory norms.

Part V - Collision between the prohibition of the use of force and the prohibition of the most serious human rights violations – the problem of humanitarian intervention

The end of the Cold War and the growing attention to human rights and humanitarian issues pushed forward the discussion on how the international community should react to gross and systematic violations of human rights.[1230] Particularly in the case of a paralysis of the Security Council, certain States and many authors claimed the existence of a right, or even a duty, to unilaterally use force in humanitarian crisis. This so-called doctrine of "humanitarian intervention" aims to legitimize the use of force beyond the provisions of the UN Charter, that is, without an authorization by the Security Council or the consent of the country concerned, in circumstances that do not constitute self-defence.

The doctrine of "humanitarian intervention" raises several questions from the perspective of *ius cogens*. It embodies a latent conflict between two peremptory norms, namely the prohibition of the use of force and the prohibition of the most serious human rights violations, such as genocide, crimes against humanity and war crimes. On the one hand it expresses the idea that gross and systematic human rights violations are absolutely unacceptable in the current international order, and that the international community cannot remain silent in the face of these crimes, otherwise their efficacy as peremptory norms would be severely jeopardized. The occurrence of genocide, crimes against humanity and war crimes is thus understood as an element of destabilization of the international order. The lack of a timely and appropriate response impacts negatively upon the very axiological

[1230] "Ces dernières années on a discuté de manière particulièrement controversée une ancienne antinomie juridique, à savoir la licéité, dans certaines conditions, d'un recours unilatéral à la force pour sauvegarder des populations civiles contre des attaques de grande ampleurs s'en prenant à leur vie et à leur intégrité physique." R. Kolb, above n 16, p. 495.

foundations of the international order.[1231] On the other hand, the peremptory prohibition of the use of force denies the possibility of States unilaterally using force as a means of protecting individuals from those serious human rights violations.

"Humanitarian intervention" as a subject-matter of international law is also surrounded by a great dose of voluntarism and controversy over its significance, scope and eventual operationalization. The use of force as a means to stop massacres and other human rights violations is a complex issue in which axiological and political considerations intermingle with various other strictly legal elements, such as the principles of State sovereignty, non-intervention, international cooperation and peaceful settlement of disputes. Beyond the likely legitimate humanitarian concerns on the part of those advocating for unilateral intervention, the unilateral use of force has a high potential of selectivity and instrumentalisation,[1232] not to say of illegality and devastating effects. Today, it is one of the dilemmas of contemporary international order,[1233] and certainly one of the most sensitive problems in current international law.

The NATO military operation in Kosovo, in 1999, is usually presented as a case of "unilateral humanitarian intervention" in the contemporary world. The absence of express authorization by the Security Council did not prevent a coalition of Western countries from attacking Serbian military positions in Kosovo. It was claimed that there was a need to prevent the occurrence of another genocide in the Balkans after the massacre of Srebrenica. In spite of its flagrant illegality under current international law, NATO's military operation gathered support on the part of several actors in the international system. The then UN Secretary General Kofi Annan said that "it is indeed tragic that diplomacy has failed, but there are times when the use of force may be legitimate in the pursuit of peace,"[1234] and many internationalists supported theories aiming at endorsing the lawfulness of that operation.

From the perspective of *ius cogens*, NATO's operation in the former Yugoslavia highlights the conflict between the two peremptory prohibitions on the use of force and certain human rights violations, such as genocide, crimes against humanity,

[1231] Politically speaking therefore, the question of "humanitarian intervention" also embodies the tension between the values of order and morals.

[1232] The dangers of misuse of "humanitarian intervention" were the object of the remarks put forward by Rougier early in the twentieth century. A. Rougier, "La théorie de l'intervention d'humanité", (1910) 17 *Revue générale* de d*roit international public*, pp. 468–526. In this same vein, Schrijver noted that "[d]e plus et au-delà des opérations militaires qualifiées d'interventions humanitaires apparaît la tentation de « l'intervention pró démocratique »". N. Schrijver, above n 845, p. 463.

[1233] M. Waltzer, above n 792, p. xi; T.M. Franck, above n 841, pp. 167-168; M.J. Glennon, 'The UN Security Council in a Unipolar World', (2003-2004) 44 *Virginia Journal of International Law*, p. 96.

[1234] UN Press Release SG/SM/6938, 24 March 1999. Annan's comments raised a series of criticism for his implicit endorsement of NATO's operation.

general discrimination, and international humanitarian law.[1235] But is it necessarily a real antinomy, at least as regards the recognized material universe of existing norms of *ius cogens*? In the case under examination there is, on the one hand, a prohibition of the most serious crimes such as genocide, crimes against humanity, violations of IHL and discrimination; and, on the other hand, another prohibition of the use of force outside the strict and positive parameters of the UN Charter. Accordingly, these are two *prohibitive* peremptory norms requiring negative obligations, namely the abstention from committing those unlawful conducts. But in accordance with Bobbio's theory on antinomy, two prohibitive rules can hardly be contradictory,[1236] even less when they deal with two different subject matters (respectively abstaining from the use of force in inter-state relationships, and refraining from committing human rights violations). A primary logical conclusion from that is that there can exist no real antinomy in this case, since the strict application of the premises of antinomy implies that a conflict can hardly arise between two prohibitive norms dealing with different subject-matters.[1237] But does that mean that there is no conflict at all?

On the basis of the general tenets of antinomy, there can only be a legal conflict if there is an obligation (command) or a right (permission) to stop those massacres through the use of force deriving from the peremptory norms in the area of human rights, or alternatively, an equally peremptory permission to unilaterally intervene to protect individuals from human rights violations as a valid exemption from the general prohibition of the use of force. Those hypotheses, which are a result of pure legal syllogism, have several implications for the analysis of the potential conflict between the peremptory norms on the use of force and human rights. First, it is necessary to determine how the emergence of peremptory norms in the area of human rights relates to the legal regime on the use of force. Did they derogate or accumulate with article 2 (4) of the UN Charter? And if they accumulated, how could one say that there is an antinomy at all? Also, if there is no conflict at the abstract level of their mutual existence as valid norms within the system, does it mean that current international law leaves no room for the use of force as a lawful means to stop massacres? Or is there a duty deriving from the peremptory norms in the area of human rights requiring actions from the international community to stop massacres, although such an action must occur in accordance with the legal regime on the use of force since there has been no lawful derogation (creation of a particular regime) from the general regime on the use of force?

[1235] Kolb affirms that the prohibition of the use of force and the prohibition of the most serious human rights violations is a classic case of conflict between peremptory norms. He says that "[d]ans le cas de conflit de normes d'ordre public, par exemple entre non-recours à la force et protection de droits de l'homme fondamentaux, le conflit sera classique: une opposition nette, tranchée, comme celle de deux *dramatis personae* se faisant irréconciliablement face." R. Kolb, above n 16, p. 493.

[1236] See above Part I, Chapter I, Section I, pp. 9-11, in particular the analysis of Norberto Bobbio on the question of legal antinomy from the perspective of the functions of norms within the legal system.

[1237] *Idem*.

In summary, the discussion on a potential emergence of a norm establishing an autonomous right or a duty in the area of "humanitarian intervention", or even the question on whether both apparently contradictory commands of a *ius cogens* nature may be harmonized through an exercise of legal interpretation under "weighing and balancing" techniques, requires an analysis of the problem in the light of the existing peremptory norms on the legal regime of the use of force *vis-à-vis* the existing peremptory norms in the area of human rights. This is precisely the object of this Part. The fundamental premise is that one peremptory norm cannot contract out from another unless it has lawfully modified (acceptance of a new exception) or derogated from the other as a newly emerging norm of that same character, as supported by state practice, jurisprudence and the work of publicists. If the reader already does not admit the legality of "unilateral humanitarian intervention", it is possible to move directly to Chapter II, since the author sustains in Chapter I that the peremptory prohibition of the use of force has not been modified or derogated from by an allegedly emerging norm of "unilateral humanitarian intervention." Subsequently, Chapter II will examine the relationship between the peremptory norms in the area of human rights and the peremptory prohibition of the use of force. The main goal here is to determine whether the norms in the area of human rights have accumulated, modified or derogated from the latter. Based on techniques of legal interpretation previously examined, it will be determined also whether there can be overlaps *ratione personae*, *ratione materiae* and *ratione temporis* at the factual level of application of both peremptory prohibitions in actual situations of gross and systematic human rights violations. The conclusion of this Chapter will be relevant for determining how a conflict between these two peremptory norms, even as an apparent antinomy only, may arise in those circumstances. Finally, assuming that there is only an apparent antinomy between these two peremptory norms, Chapter III provides a solution for the normative conflict based on the progressive interpretation of gross and systematic human rights violations as threats and breaches to international peace of security as developed by the practice of the UN Security Council. This premise will allow the use of force under certain conditions arising from an exercise of "weighing and balancing." These conditions are translated into certain fundamental guidelines for the operationalization of the idea of "responsibility to protect," understood as a collective action authorized by the competent bodies of the international system aimed at addressing cases of the most serious violations of international human rights law and international humanitarian law.

Chapter I - A lingering question: Is unilateral humanitarian intervention legally compatible with the peremptory regime on the use of force?

Before analysing the specificities of the relationship between the two peremptory norms, it is necessary first to clarify the status of the notion of "humanitarian intervention" in contemporary international law.[1238] It was mentioned above that several commentators have advocated a right of States to act individually or collectively, but without a mandate of the UN Security Council or the consent of the country concerned, on the sovereign territory of another state for the purpose of protecting foreign individuals under the threat of or subject *inter alia* to genocide, crimes against humanity, and the most serious violations of international humanitarian law.[1239] Under the legal regime of *ius cogens* this assumption can only be considered valid if the peremptory scope of the prohibition of the use of force either encompasses the notion of humanitarian intervention, or alternatively, if the emergence of the notion of humanitarian intervention lawfully modified or derogated from that peremptory prohibition.

Theories on the "right" or the "duty" to intervene are based on an essentially open and teleological interpretation of the international legal system, particularly as regards the goals and purposes of the UN Charter. This specific interpretation of both the UN Charter and the progressive development of international human rights and international humanitarian law maintains that there is a permission stemming from the UN Charter or customary international law permitting the use of force to stop gross and systematic human rights violations beyond the powers of the UN Security Council.[1240] It is important therefore to put this "open" interpretation of the Charter under a thorough analysis. In particular, it is necessary to determine (i) if there are aspects of the peremptory norms in the area of human rights suggesting a unilateral "duty to protect" or a "right to intervene"; and (ii) how this concept of unilateral "humanitarian intervention" relates to the peremptory prohibition of the use of force.

[1238] The idea of humanitarian intervention suggests that, in some "extreme" cases of gross and systematic violations of human rights, the need to protect the victims and to stop massacres prevails over the principles of sovereignty of States, non-intervention and prohibition of the use of force. In the absence of an authorization of the UN Security Council, any State willing to take action may lawfully intervene in the domestic affairs of another States in which those violations are taking place. See C. Tomuschat, above n 462, pp. 218 and ss.

[1239] See L. Oppenheim, above n 83, pp. 312-313.

[1240] Surprisingly though, those authors who are systematically against recognizing any value for the opinion of States on this matter, and usually disregard GA resolutions as mere "soft law", are quick enough to point out to General Assembly resolutions, such as the 2000 World Summit Outcome Document, as solid evidence of the "acceptance and recognition" of the new status of the right or duty to intervene, now under the terminology of "responsibility to protect".

Section I – A brief historical overview of doctrine

The idea of intervening for "humanitarian" purposes is an old topic of public international law.[1241] This debate portrays a central tension between the morals beneath an alleged right to wage wars on behalf of the oppressed, and the principle of non-intervention stemming from the equal sovereignty among States. In classic international law,[1242] Grotius and Vattel were on one side while Wolff and, later, Hegel were on the other. Grotius and Vattel, both under the influence of natural law premises, admitted the lawful use force in another State in the exceptional circumstances of tyranny and oppression.[1243] Wolff and Hegel, on the other hand, took a view firmly based on the principle of sovereignty equality among States, in which intervention in the domestic affairs of another State was illegal under any circumstances.[1244]

[1241] These theories on "unilateral humanitarian intervention" reproduce the same rationale of the concept of "just war" that pre-existed the current legal regime of the UN Charter. The main difference is that now the autonomous capacity of States to unilaterally use force against another State would be restricted to situations in which a given State is willing to protect foreign citizens from oppression and massacres. Waging wars for other aggressive purposes, such as territorial acquisition, would be unlawful.

[1242] References on the issue of a right to intervene can be found in the work of earlier scholars such St Ambrose, Hubert Languet and Gentili. See S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, pp. 10-16.

[1243] The main difference between Grotius and Vattel is that the latter did not recognize an absolute discretionary right to intervene in another State, but simply a right to support an insurrecting people that had demanded foreign support to face oppression. In both cases though, the use of force by another State is understood as a means of supporting the right of legitimate defense of peoples when faced with tiranny. According to the Dutch internationalist, there would be a right of intervention stemming from natural law in situations of extreme injustice, which he described as atrocities that a just person could not tolerate. In those circumstances, foreign States could intervene because the community suffering from tyranny would be entitled with a subjective right to receive foreign support. Grotius admitted as "just causes" to wage "just war" on alleged humanitarian purposes either against those who "excessively violate the law of nature or of nations in regard to any persons whatsoever" (punitive wars), or as legal right deriving from his doctrine on legitimate resistance (war on behalf of the oppressed). H. Grotius, above n 1, II, xx, para. 40. On his turn, Vattel takes a slightly different approach. First, he stresses that no State should intervene or question the manner by which another State is being governed. As a consequence, he denies the "just cause" character of the punitive wars as suggested by Grotius, since this right could only be evoked on the basis of the right of a sovereign to guarantee its own safety. Second, he criticizes Grotius for suggesting this right to "unilateral intervention." He argued that "on est surpris d'entendre le savant et judicieux Grotius nous dire, qu'un souverain peut justement prendre les armes pour châtier des Nations qui se rendent coupables de fautes énormes contre la loi naturelle, qui traitent inhumainement leurs pères et leurs mères, comme faisaient les Sogdiens, qui mangeaient de la chair humaine, comme faisaient les anciens Gaulois, etc. Il est tombé dans cette erreur, parce qu'il attribue à tout homme indépendant, et par là même à tout souverain, je ne sais quel droit de punir les fautes qui renferment une violation énorme droit de la nature, même celles qui n'intéressent ni à ses droits ni à sa sûreté." As a matter of fact, Vattel supported the principle of non-intervention as a general rule of international law. In circumstances of tyranny and oppression, the right of assistance of those in insurrection could justify other States to act under the notion of "offices d'humanité," but only when they have been called upon by the insurrecting people suffering from tyranny. E. de Vattel, above n 1, book II, Chapter I, para. 7, pp. 326-327.

[1244] Wolff, on the other hand, restrains his views to the limits of the Hobbesian state of nature, in which the liberty given to States discards any sort of intrusion from the others. He argued that "since by nature no nation has a right to any act which pertains to the exercise of the sovereignty of another nation, if any nation dares to do anything which belongs to the exercise of the sovereign power of another nation, it does this without right and contrary to the right of the other nation, and consequently does a wrong to it." C. Wolff,

In the period immediately before the creation of the UN Charter, the debate on humanitarian intervention was limited to the theoretical tension between state sovereignty and non-intervention, and the morality of intervening on behalf of oppressed peoples regardless of the risks of abuse and misuse by intervening powers.[1245] It was essentially a debate between moral and legal order, and what limits imposed by law should be respected or disrespected in the absence of a clear prohibition of the use of force among States. Accordingly, the notion of humanitarian intervention was admitted chiefly on the basis of political reasoning instead of legal argumentation,[1246] and many of those who supported it recognized the illegality of such actions.[1247]

In contemporary international law, the debate on the legality of unilateral humanitarian interventions remained controversial in spite of the UN Charter's provisions on the use of force and the suppression of the legality of "just war". The UN Charter itself reflects the tension between the prohibition of the use of force, the principles of sovereignty and non-intervention on the one hand, and the purpose of promoting human rights and fundamental freedoms for all on the other hand. Although some authors insist on an alleged "legality" of humanitarian intervention on the basis of an open interpretation of the UN Charter, most of the reasoning put forward by these authors has remained essentially of a political nature.[1248] Authors arguing a duty or a right of unilateral humanitarian

above n 1, p. 131. Wars could only be waged by those who have directly suffered an injury, and where satisfaction could not be otherwise obtained. Intervention in the domestic affairs of another States was therefore a wrongful act. He expressly denied Grotius opinion "that kings and those who have a right equal to that of kings have the right to exact penalties from any who savagely violate the law of nature or nations." Writing in a historical context under the impact of the religious wars in Europe, he understood that force was not a suitable instrument for promoting moral trues. In situations in which "the ruler of a state should burden his subjects too heavily or treat them too harshly", Wolff was of the opinion that "the ruler of another state may not resist that by force." He admitted, nevertheless, that a foreign State could intercede through political means in the behalf of those subjected to tyranny before the rules of another State. In the progressive consolidation of the principles of sovereignty and non-intervention within the Westphalian model of the modern State, G.W.F. Hegel's theories emerged as the bulk of the so-called legal positivism in international law. In his approach to the rational State, any form of foreign intervention in the domestic affairs of another States would be a violation of sovereignty. G.W.F. Hegel, *Philosophy of Right* (trans. Konx), Oxford, Oxford University Press, 1967, para. 257-8, pp. 155-6. Tesón refers to it as "The Hegelian Myth." Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., New York, Dobbs Ferry, Transnational Publishers, 1997, p. 55.

[1245] For an overview on the doctrinal debate, see S. Chesterman, above n 1242, pp. 36-42.

[1246] As noted by Chesterman, "[t]he major difficulty in evaluating the legal status of humanitarian intervention in this period is that a large number of writers put the question outside the realm of international law." S. Chesterman, *idem*, p. 39.

[1247] Hall, one of the main internationalists of his time, recognized that measures of humanitarian intervention were "confessedly illegal in themselves" that "could only be excused in rare and extreme cases in consideration of unquestionably extraordinary character of the facts causing them, and of the evident purity of the motives and conduct of the intervening state." W.E. Hall, above n 366, p. 265. In any event, however, there was no recognized "right to intervene" in that period, but merely an "inherently vague" political doctrine of foreign intervention in various formats. See I. Brownlie, above n 791, p. 338. In this same line, see S. Chesterman, above n 1242, p. 35-43.

[1248] Rawls, for example, supports a right to unilateral intervention on the basis of an analogy of his ideas on justice in domestic systems and international law (Rawls' ideas on the concept of justice were presented in his influential "A Theory of Justice"). Based on the standards of respect to human rights ("human rights set a

intervention tend to fall into discourses of morality as the ultimate piece of evidence for arguing the legality of military actions without the authorization of the UN Security Council.[1249] In the realm of international law, these approaches can be characterized as an attempt to revive the notion of just war at the expense not only of the peremptory character of the prohibition of the use of force, but chiefly of the connected principles of State sovereignty and non-intervention.[1250] From the exclusive perspective of the conflict between two peremptory norms, though, the remaining question is whether that alleged "unilateral right to intervene" could have accumulated with the peremptory norms prohibiting the use of force without an authorization of the UN Security Council. There are three main hypotheses in this regard: (i) it can be construed as an emerging practice in international customary law (*lex posterior*); (ii) the idea of a "right" or a "duty" to

necessary, though not sufficient, standard for the decency of domestic political and social institutions"), he divides nations between "well-ordered peoples" (liberal peoples and decent peoples) and outlaw states and burdened states (here is also a fifth category of "benevolent states", which honor human rights but their members are denied a meaningful role in making political decisions). From that premise, Rawls suggests the renewal of the notion of "just war" by affirming that "well-ordered peoples" are entitled to go to war against outlaw states to protect human rights. According to Rawls, "liberal and decent peoples have the right … not to tolerate outlaw states." As a consequence, an outlaw states that violates human rights in grave cases "may be subjected to forceful sanctions and even to intervention." This right to intervene, which is exclusive for "well-ordered peoples," would derive from the duty of assisting those individuals suffering from gross and systematic human rights violations, and would be applied as a means of enforcement of the Law of Peoples. J. Rawls, *The Law of Peoples*, above n 1006, pp. 79-81. In this sense, Rawls' views on the issue are quite similar to the ones of Grotius. The main difference is that Rawls circumscribes this "right to intervene" as the discretion of "well-ordered peoples", what in practice means an implied "ethnocentrism" of Western states applied to international law. This fact has raised a great deal of criticism among scholars, particularly concerning his disregard for the disrespect of human rights even among nations that vocalize humanitarian concerns at the international level. For an overall criticism on Rawls' Law of Peoples, see Charles C. Beitz, 'Rawl's Law of Peoples,' (2010) 110 (4) *Ethics*, Chicago, 669.

[1249] The positions of Tesón and other authors such as Reisman, for example, are essentially based on the effort to place the debate of humanitarian intervention within the realms of moral philosophy. F.R. Tesón, above n 1244; and W. M. Reisman, above n 587, p. 15. The former UN Secretary-General Kofi Annan supports the legitimacy of interventions in a world of sovereign states by placing the protection of human rights at the centre of the UN's work. See K. Annan, *The Question of Intervention: Statements by the Secretary-General,* New York, United Nations Department of Public Information, 1999. In addition, there is extensive literature on the issue, both from legal and political perspectives. On the idea of *droit d'ingérence*, see M. Bettati & B. Kouchner (eds), *Le Devoir d'ingérence: peut-on les laisser mourir?*, Conférence internationale de droit et morale humanitaire, Paris, Denoël, 1987; M. Bettati, *Le droit d'ingérence: mutation de l'ordre* international, Paris, Odile Jacob, 1996; O. Corten & P. Klein, *Droit d'ingérence ou obligation de réaction ? Les possibilités d'action visant à assurer le respect des droits de la personne face au principe de non-intervention*, Bruxelles, Bruylant, 1992; J. S. Jamart, 'Le droit d'ingérence: mythe ou réalité?', (1998) (2) *Actualités Du Droit, Revue de la Faculté de Droit de Liège*, pp. 207-263. On the shift from the notion of "right to intervene" to "responsibility to protect", see N. J. Wheeler, 'Legitimating Humanitarian Intervention: Principles and Procedures', (2001) 2 *Melbourne Journal of International Law*; J. Chopra & T.G. Weiss, 'Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention', (1992) 6 *Ethics and International Affairs*, pp. 95–117; F.K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, The Hague, Kluwer Law International, 1999; T. Franck 'Who Killed Art. 2 (4)? Or: The Changing Norms Governing the Use of Force by States', (1970) 64 (4) *American Journal of International Law*, pp 809–837. For a general criticism on those views, see S. Chesterman, above n 1242, p. 21.

[1250] This approach pointing to a renewed concept of "just war" in international law was also the basic result of the International Commission on Intervention and Sovereignty of States. In its final report, the Commission combined classical elements of the concept of "just war" (just cause, good intention and *ultima ratio*), with provisions of contemporary international law, such as the principles of proportionality, reasonable chances of success and submission to an eventual action of the UN Security Council.

intervene" can be interpreted in a harmonious manner with other provisions of the UN Charter; or (iii) it is *lex specialis* of the general prohibition of the use of force. These three hypotheses will be analysed in the following Sections.

Section II – Humanitarian intervention as *lex posterior*?

A first hypothesis suggests that the legal existence of an alleged "right" or "duty" to intervene is an emerging or well-established customary norm. That supposition implies that a new customary rule has modified or derogated from a previously existing norm (*lex posterior* criterion) of a peremptory character.[1251]

In strictly legal terms, this hypothesis lacks all possible credibility. Besides the several doubts that have been raised in regard to the termination or modification of treaty obligations by supervening custom,[1252] and without touching upon the primary objections deriving from the legal regime of *ius cogens*, there is no evidence of an emerging customary norm of "humanitarian intervention" in contemporary international law. First, there are virtually no consistent pieces of *opinio iuris* in favour of unilateral humanitarian intervention. In the *Nicaragua* case the ICJ implicitly denied any possible emergence of a norm of "unilateral humanitarian intervention."[1253] On the sole occasion that the question was brought

[1251] Obviously, the UN Charter has not fallen into desuetude, a situation in which its existence as treaty-law would have been terminated based on the implicit consent of the parties. On the differences between desuetude and treaty modification or revision by supervening custom, see J. Pauwelyn, above n 5, p. 143.

[1252] The main problems are related to (i) potential for violations to the principle of *pacta sunt servanda*; (ii) problems raised in a number of municipal legal orders; and (iii) the lack of the necessary clarity. During the preparatory work of the VCLT, ILC's 1964 draft contained a provision stipulating that treaties could be modified "by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties". YBILC 1964, vol. 2, p. 198. The question also lacked of consensus at the Institute of International Law. Even authors admitting the hypothesis of treaty-law derogation by supervening custom point out that prior conventional law may continue to exist as *lex specialis* to the incompatible general customary rule if this is the intention of the parties. See N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, Oxford, Clarendon Press, 1994, pp. 146-147. Authors admitting that custom may change or derogate from treaty law usually emphasize that this possibility is an exception, since treaties tend to provide for formal procedures of revision and denunciation. The claim of a change or derogation from a treaty by customary norms requires clear pieces of evidence, since the presumption is against the establishment of new customary rules conflicting with pre-existing treaty-law. As noted by Czaplinsky and Danilenko, "the most conclusive evidence that a treaty has been replaced by subsequent custom may be provided by the express statements of the parties. In the absence of such statements, only very definite and consistent conduct by the parties to the treaty which manifests a real intention to modify or terminate treaty obligations could justify the conclusion that such a modification or termination has in fact occurred." See W. Czaplinsky & G. Danilenko, above n 19, p. 40-41. This understanding was confirmed by the ILC, which stated that the modification of a treaty requires "a consistent practice, embracing all the parties" as regards their common consent to the application of a treaty in a different manner from that expressly laid down in its provisions. YbILC, 1964-II, p. 198; and YbILC, 1966-II, p. 236.

[1253] The Court considered whether there was any evidence of a general right of intervention to protect human rights in another State through the armed support of an internal opposition, and its answer was negative. The Court declared that "the use of force could not be the appropriate method to monitor or ensure such respect [for human rights]… The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a justification for the conduct of the United States." *Nicaragua* case, above n 281, pp.

before an international tribunal, in the case of NATO's attacks in the former Yugoslavia, only Belgium among the defendants raised claims explicitly attempting to justify the 1999 air campaign on grounds of an alleged customary right of humanitarian intervention, and it did so in quite generic terms.[1254] And the reaction of the majority of UN Member States to NATO's led military operations in Kosovo and Libya provided relevant pieces of evidence on the existence of *opinio iuris* actually contrary to the idea of unilateral humanitarian intervention.[1255]

In the absence of any reliable evidence of *opinio iuris*, some of the supporters of the right to unilaterally intervene focused instead on an alleged state practice in this area at the expense of the consistent opinion of States.[1256] However, even in this case there is little evidence of a consolidated practice for the purpose of demonstrating the emergence of a valid exception of humanitarian intervention. State practice in the pre-UN Charter period is inconclusive.[1257] Most of the historical examples mentioned as evidence of a consolidated practice of unilateral humanitarian intervention before the UN regime can hardly be characterized as such, either as a result of the absence of the threat of the use of force,[1258] or because the reasons presented or orienting intervening States were far from humanitarian purposes, in spite of their allegation that were made public.[1259] The same level of

134-5, para. 268. As noted by Chesterman, "[t]he ICJ's position is clearly inconsistent with a customary international law right of humanitarian intervention." S. Chesterman, above n 1242, p. 62.

[1254] Among other issues, Belgium claimed that NATO "intervened to protect fundamental human rights enshrined in the *jus cogens*" and to "prevent an impending catastrophe recognized by the Security Council." But in spite of its reference to peremptory norms in the area of human rights, Belgium did not give any indication of how they would relate in that specific circumstance with the peremptory prohibition of the use of force. All other States avoided references to the notion of "humanitarian intervention." *Legality of Use of Force Case (Serbia and Montenegro v. Belgium)* (Provisional Measures) pleadings of Belgium, 10 May 1999, CR 1999/15. See also S. Chesterman, above n 1242, p. 46.

[1255] See above n 910 and below n 1282.

[1256] D'Amato suggested that only acts and not statements could constitute pieces of evidence of state practice for the purpose of the formation of customary international law. *Per contra*, Brownlie called this supposition as "Rambo superpositivism", as quoted in S. Chesterman, *idem*, p. 63. See also M. Akehurst, 'Custom as a Source of International Law' (1974) 47 *BYIL*, p. 8.

[1257] "An analysis of pre-UN Charter state practice illustrates the paucity of evidence of a general right of humanitarian intervention in customary law." S. Chesterman, above n 1242, p. 24.

[1258] See, for example, the diplomatic efforts made by the United States before Turkey on behalf of Armenians between 1904-1917, and before Spain during 1868 and 1878.

[1259] For Brownlie, characterizing the joint intervention of Great Britain, France and Russia in support of Greek insurgents against the Ottoman Empire, in 1827, as humanitarian intervention is "ex post factoism." See I. Brownlie, above n 791, p. 220. Chasterman says that "the incident is at best a questionable precedent for the doctrine if humanitarian intervention." S. Chesterman, above n 1242, p. 32. In this same vein, the US intervention in Cuba in 1898 can hardly be recognized as an example of "humanitarian intervention" neither, precisely because of the less altruistic interests that led the American military forces to invade Cuba and accelerate the end of the Spanish Empire in the Americas. Waltzer characterizes US action in Cuba as "benevolent imperialism" (sic). M. Waltzer, above n 792; T.M. Franck, above n 841, p. 104. The French occupation of Syria in 1860-1861 to protect Christians from mass slaughter is likely the only genuine example of "humanitarian intervention" in the pre-UN Charter period. Although the French intervention had the formal consent of the Ottoman Sultan, something that, in the words of Chesterman, "makes the action a very dubious precedent of a right of unilateral action," the emphasis on its humanitarian aspect and the fact that the occupying forces left the country when the mandate (a Protocol of 1860 agreed upon by Austria, France, Great Britain, Prussia and Russia with the Ottoman Empire) was concluded, were pieces of evidence that there was no hidden interest in the humanitarian intervention. I. Brownlie, above n 791, p. 340.

uncertainty is found in the state practice after the establishment of the UN Charter.[1260] Most of the examples usually mentioned could be interpreted as situations in which force was used primarily in self-defence,[1261] particularly in operations aiming to protect the lives of nationals abroad,[1262] or as military interventions with the consent of the State concerned.[1263] Even the 1971 Indian intervention in East Pakistan (now Bangladesh) and the 1978-1979 Vietnamese intervention in Cambodia, which are usually mentioned as "perfect" examples humanitarian interventions,[1264] were justified mostly on the grounds of self-defence.[1265] Also, the colonial context in which several of those examples took place and the interests of the great powers involved during the Cold War period,[1266] make it even harder to determine the real motivations behind all these operations if one has to describe them as evidence of consolidated state practice of "humanitarian intervention."[1267] And if there is any question on which opinion should prevail, it should be recalled that the presumption against conflict solves the impasse in favour of the party relying on the old law,[1268] what means that the interpretation contrary to the emergence of a customary "right" or "duty" to intervene should prevail in accordance with the tenets of legal interpretation.

As regards its relationship with *ius cogens*, the emergence of an allegedly customary right or duty to intervene has to be dealt with from the standpoint of the corollaries of articles 53 and 64 of the VCLT, which imply that only another norm of *ius cogens* may modify or derogate from another existing peremptory norm. But the hypothesis of a newly emerging norm of humanitarian intervention of that same character derogating from the general prohibition of the use of force is flawed because it would necessarily provoke the modification or derogation from article 2(4) as treaty law.[1269] And the overwhelming majority of States in the UN General Assembly has repeatedly expressed the opposite, that is, that the norm

[1260] Several authors have reviewed the potential existing practice on that matter, and Belgium also invoked some cases as evidence of customary precedents area of humanitarian intervention. "India's intervention in Eastern Pakistan, Tanzania's intervention in Uganda; Vietnam in Cambodia; the West African countries' interventions first in Liberia and then in Sierra Leone." *Legality of Use of Force* case, above n 1254.
[1261] See, for example, the 1978-9 Tanzanian intervention in Uganda.
[1262] See, for example, the 1960 Belgian intervention in the Congo (Léopoldville), the 1976 Israeli intervention in Uganda (the Entebbe Operation), the 1978 Belgian and French intervention in the former Zaïre
[1263] See, for example, the 1964 Belgian and US intervention in the Congo (the Stanleyville operation)
[1264] F.R. Tesón, above n 1244, p. 207.
[1265] For a thorough analysis on both cases, see S. Chesterman, above n 1242, pp. 71-5, and pp. 79-81. Surprisingly, the Cuban military operation in South West Africa (now Namibia) against the openly apartheid South African regime is simply ignored by those arguing the existence of state practice in this area.
[1266] See, for example, the 1965 US/OAS intervention in the Dominican Republic, the 1983 US intervention in Grenada, and the 1989-90 US intervention in Panama.
[1267] S. Chesterman, above n 1242, p. 67.
[1268] J. Pauwelyn, above n 5, p. 244.
[1269] "Such a provision could not sensibly apply to the UN Charter." S. Chesterman, above n 1242, p. 60. Indeed, if one understands the legal regime operated by *ius cogens* as genuinely peremptory, there is no other possible alternative to arrive at but this absurd conclusion, namely the voidness and termination of the UN Charter. But advocates of a unilateral and unrestricted (no checks and balances) right to intervene usually disregard, on purpose or not, this logical consequence of their allegedly "moral" premises.

embodied in article 2 (4) of the UN Charter not only was not modified by the notion of "humanitarian intervention", but also, and most importantly, that it remains paramount for the stability of the international legal order.[1270] So beyond the much ado made by some publicists, and the individual and dubious position of Belgium on that matter, there is no concrete evidence of a shift as regards the *opinio iuris* of States[1271] on the "acceptance and recognition" of the general prohibition of the use of force as a peremptory norm.[1272] And if anyone still thinks that there was enough evidence of a right or a duty to intervene prior to the come into existence of the UN legal system, the emergence of the prohibition of the use of force as a norm of *ius cogens* has certainly abrogated these customary norms, since its peremptory character prevails over past, present and future contrary norms of both a treaty or a customary nature not having the same character.

In conclusion, there is no trustworthy evidence of the existence of a customary norm of unilateral humanitarian intervention. Authors who advocate such an idea tend to overstretch the tenets of public international law, such as by disregarding the need of *opinio iuris sive necessitatis* or by depending profoundly on extra-positive aspects related to moral and political considerations.[1273] They end up by overlooking the requirement of the proof of a well-settled practice in order for a valid customary norm to emerge in public international law.[1274]

Section III – Humanitarian intervention and *ius cogens*: the perspective of the UN Charter

From a strictly normative perspective, and particularly for the purposes of conflicting norms of *ius cogens* within the realm of treaty-law, the validity of any right or duty to intervene lies on whether there is a valid conventional norm in the UN Charter authorizing (permission) or requiring (command) military intervention as a means of stopping gross and systematic human rights violations. As there has been no positive modification in this regard within the treaty-law of

[1270] Interestingly, there is no single piece of evidence that old or new members of the United Nations have presented any reservation whatsoever in this regard before the UN Secretariat.

[1271] "Even if the dissatisfaction with the existing law is generally shared by all States, simple expressions of such dissatisfaction cannot in themselves change the law. The creation of new customary rules require a change in the actual practice of States." W. Czaplinsky & G. Danilenko, above n 19, p. 32. This view was reinforced by the ICJ in the *Nicaragua* case, in which the Court dealt with an alleged customary practice in the area of non-intervention.

[1272] In this regard, the author is not even considering the possibility that unilateral acts of States could amount to a shift in the peremptory status of the prohibition of the use of force as regards third parties. On the role of unilateral acts of States, see Nguyen Quoc Dinh, *Droit international public*, Paris, LGDJ, 1975, paras. 235-49.

[1273] "[W]riters who claim that state practice provides evidence of a customary international law right of humanitarian intervention grossly overstate their case." S. Chesterman, above n 1242, p. 84.

[1274] *Nicaragua* case, above n 281, p. 109, para. 207; the *North Sea Continental Shelf* cases, above n 1; the *Asylum* case, above n 487, p. 265; and *Rights of Nationals of the USA in Morocco (France v. United States of America)*, ICJ Reports, 1952, p. 200.

international peace and security, that is, the UN exemptions provided for by the UN Charter have not been enlarged beyond the provisions of article 51,[1275] a second hypothesis supported by the doctrine of humanitarian intervention has been built upon an interpretation suggesting that existing conventional law would allow for the use of force in spite of the fact that there is no exception expressly agreed upon by States in this regard.[1276]

Two main hypotheses have been advanced in this connection, both based on a particular interpretation of the phrasing "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations" contained in Article 2 (4).[1277] The first is a restrictive interpretation that says that the normative scope would be restricted to the use of force "against the territorial integrity or political independence" of States. As, in principle, the material scope of the idea of "humanitarian intervention" would not amount to an aggressive use of armed force, one would infer that other formats of unilateral use of force are not prohibited in peremptory terms.[1278]The second possibility is a rather extensive interpretation of the notion of "purposes and goals" inscribed in the Charter, which would allow the unilateral use of force for the "purpose" of protecting and promoting human rights[1279] under the idea of "functional sovereignty,"[1280] or on the basis of "necessity."[1281] Under this interpretation, the right or duty of humanitarian intervention would not be "inconsistent with the Purposes of the United Nations." Both alternatives imply the lawfulness of humanitarian intervention as a positive right (permission) provided for each and every State to unilaterally intervene in another State (individually or collectively, but without a mandate of the UNSC) regardless of the consent of the later.

[1275] The exception of the African Union Charter is a particular treaty-regime restricted to the parties of the African continent. It may be approached from the perspective of unilateral acts of states and international organisations, which validity hinge upon the existence of evidence of an intention to be bound by these rules. Also, it is anyway circumscribed to the regime of the UN Charter, to the extent that it requires an authorization of the UN Security Council under the priority rule set forth by Art. 103 of the UN Charter. See Part I, Chapter II, Section II, pp. 28-31.

[1276] NYIL, vol. 34, 2003, p. 285.

[1277] See S. Chesterman, above n 1242, pp. 26-33.

[1278] However, the peremptory scope of the prohibition of the use of force also encompasses the prohibition of unilateral humanitarian intervention. See above Part III, Chapter I, pp. 172-178.

[1279] This position was submitted by Belgium in the *Legality of the Use of Force* case, above n 1254.

[1280] F.R. Tesón, above n 1244.

[1281] Some authors, such as Rytter and Harhoff, argue the use of the doctrine of necessity as a circumstance to preclude the wrongfulness of disrespecting article 2 (4) of the UN Charter. See J. E. Rytter, 'Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond' (2001) 70 *Nordic Journal of International Law*, pp. 128–130; and F. Harhoff, 'Unauthorised Humanitarian Interventions – Armed Violence in the Name of Humanity?' (2001), 70 *Nordic Journal of International Law* 65, p 106. This approach is unacceptable not only because the rule of non-use of force is a norm *iuris cogentis*, but also because resort to the necessity principle should be convergent to the already existing exception of self-defense. The reason is simple: *ex dolo malo actio non oritur*. Also, international state practice cast some doubts over Rytter's distinction between *lege lata* and *lege ferenda* in the case of "humanitarian intervention."

However, there is little evidence that the peremptory binding scope of the general prohibition of the use of force would not encompass the notion of discretionary and unilateral humanitarian intervention. First, as a prohibitive norm, Article 2 (4) of the UN Charter must be interpreted in a narrow manner, what implies that there must be no exceptions besides those expressly accepted and recognized in the Charter. And existing exceptions are to be interpreted in a restricted manner (*exceptiones sunt strictae interpretationis*). Otherwise, the normative scope of a norm of such a central importance for the entire international legal system would be let to the individual, circumstantial and discretionary interpretation of States. Second, restricting the interpretation to "against territorial sovereignty and political independence of States" contradicts the prevailing *opinio iuris* in the United Nations, which is manifestly contrary to the suggestion that the scope of article 2 (4) would not encompass other forms of the use of force.[1282] Such a prevailing *opinio iuris* is reflected in the *travaux préparatoires* of the UN Charter,[1283] the numerous resolutions of the GA and the UN Security Council, the consolidated interpretation of the ICJ in the *Corfu Channel* and the *Nicaragua* cases, and the largely majoritarian view of the doctrine on this matter.[1284] Third, arguing that humanitarian intervention is valid on the basis of an intertemporal interpretation of article 2(4) is also incorrect, not only because it contradicts the principle of contemporaneity (interpretation at the time of the conclusion of the UN Charter) but also because there is no relevant piece of evidence of such an interpretation under an evolutionary approach (changes produced to a given norm by the evolution of its meaning in the light of other norms) in the light of the prevailing

[1282] The well-known declaration of the G-77 in 1999 in reaction to the NATO intervention in Kosovo provides a clear piece of *opinio iuris* on the legal status of the notion of humanitarian intervention. On that occasion, the G-77 rejected in clear and strong terms an allegedly right of humanitarian intervention. See above n 910. The Group of 77 (G-77) was established on 15 June 1964 by seventy-seven developing countries signatories of the "Joint Declaration of the Seventy-Seven Countries" issued at the end of the first session of the United Nations Conference on Trade and Development (UNCTAD) in Geneva. Although the members of the G-77 have increased to 131 countries, what accounts for a third of the UN Membership, the original name was retained due to its historic significance. See also I. Brownlie, 1974, p. 218. As a matter of fact, admitting the validity of such an interpretation would imply that the opinion of some publicists and very few states should prevail over the view of the large majority of UN Members, which consider the prohibition of the use of force as entailing a broad range of behaviours in international practice. Drawing an analogy with domestic legal systems, it is as if individuals could take the functions of justice and enforcement of sanctions in their own hands, regardless of the exclusiveness of law enforcement concentrated in public authorities, which is the bottom-line of the social contract in contemporary societies. In the case of the international system, those functions are directly related to the system of collective security of the United Nations and can only be performed through multilateral means. Without underestimating the deficiencies of that body in the light of urgencies on the ground, the Security Council is the sole authority that can take into its hands the responsibilities towards the cessation of violence within the existing system of collective security.

[1283] The propositions of authors such as D'Amato and Tesón that State delegates at the San Francisco Conference did not know what they intended, or that if the drafters of the Charter wanted to prohibit all use of force they would have done so, are simply pure pieces of political activism when examined in the light of the *travaux préparatoires* of the UN Charter (see, in particular, the statement of the US representative, who expressly declared that there were no "loophole" in that provision). Anthony D'Amato, *International Law: Process and Prospect*, New York, Dobbs Ferry, Transnational, 1987, pp. 31-73; and F.R. Tesón, above n 1244, p. 150.

[1284] In this same reasoning, see S. Chesterman, above n 1242, pp. 48-52.

views on the issue as expressed by States, international tribunals and the work of publicists.

The second hypothesis ("or in any manner inconsistent with the Purposes of the United Nations") is also flawed. This interpretation runs contrary to the very legal regime operated by *ius cogens* and to all rules of interpretation in public international law.[1285] Besides the fact that this open interpretation can be hardly maintained in the light of the context of the Charter, in which the subject of human rights is dealt with under the Chapter IX on international cooperation,[1286] suggesting that "unilateral humanitarian intervention" is lawful is an interpretation manifestly *contra legem vis-à-vis* the general framework (context and purposes) of the UN Charter.[1287] In this connection, it should be asked whether it is possible to adopt an open interpretation of treaty-law running contrary to norms of *ius cogens*, that is, whether it is possible to reach interpretations *contra legem* and *ultra legem* in the particular case of peremptory norms. The answer appears to be negative. Under the rule of effectiveness, an extensive interpretation on the general regime of the use of force cannot go beyond what has been expressed in that norm. Particularly when it comes of *ius cogens*, the peremptory character of those norms implies that they are imperative in all circumstances and require their full observance by all States. One can say that there is some ground to think of an obligation to stop massacres stemming from the prohibition of the most serious human rights violations, but within the limits of legality of international law, i.e., in harmonization with the general peremptory prohibition of the use of force. As this is not the case of "unilateral humanitarian intervention", which aims at creating a valid exemption contrary to the general rule, one cannot accept that it can create exempting rights or obligations beyond those already explicitly provided for by the normative universe on the prohibition of the use of force.[1288] And on the basis of the principle *in dubio mitius*, "if the meaning of the term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of the party, or involves less general restriction upon a party."[1289] In conclusion, if the general theory on legal interpretation interdicts interpretations *contra legem*, it seems that that would be even less acceptable to suggest that an

[1285] See Part I, Chapter III, Section I, pp. 18-25.

[1286] See Section below. As noted by Chesterman, "to interpret this [international cooperation] as in any way justifying a right of unilateral humanitarian intervention would stretch even the Orwellian school of interpretation." S. Chesterman, above n 1242, p. 53.

[1287] A careful examination of existing UN law provides undisputable evidence not only on the lack of consensus on the meaning, the scope and, most importantly, the means of implementation of the political notion of "humanitarian intervention", even under its RtoP format, but also that the definite opinion of a majority of States is that the so-called "humanitarian intervention" has not and should not derogate from the Charter's regime on the prohibition of the use of force.

[1288] In this regard, it is noteworthy to recall that the 2001 draft articles on state on responsibility limited the possibilities of countermeasures precisely by making reference to *ius cogens*.

[1289] R. Jennings and A. Watts, above n 95, p. 1278. This principle has been applied in international adjudication by the WTO Appellate Body report on *EC-Hormones*, quoted in J. Pauwelyn, above n 5, p. 186.

interpretation can be contrary to the imperative commandments stemming from a peremptory norm. The reason is that such an open interpretation would amount to an actual derogation from the peremptory norm *ius cogens* on the use of force.

Section IV – Humanitarian intervention as *lex specialis*?

A third and final hypothesis assumes that the notion of "humanitarian intervention" is *lex specialis* of the general prohibition of the use of force. Exceptions regarding the use of force in the UN Charter, namely those stemming from an authorization of the Security Council and self-defence, are indeed *lex specialis*. They create lawful exemptions from the article 2 (4). As such, they are *lex specialis* within the general peremptory regime on the use of force. But could the same be said to any other means of use of force, such as a right or a duty to intervene on unilateral basis? This is hardly the case in the absence of a peremptory norm either of treaty or customary international law authorizing or commanding the use of force in the event of gross and systematic violations of human rights. As a straightforward consequence of the very rationale that operates the legal regime of *ius cogens* (*lex specialis non derogat generalis*) there could be no other exception to the general prohibition of the use of force than those that are an intrinsic part of the peremptory prohibition as inscribed within the UN Charter.

First, a regime *lex specialis* contracting out of the general regime would require an express intention of States on their intent to derogate from that general norm. In that scenario, the assumption that "humanitarian intervention" is construed as *lex specialis* to article 2 (4) requires an amendment to the UN Charter contracting out from the current regime, a situation that could moreover have effects upon the peremptory nature of the general prohibition of the use of force. Second, the theory of "negative permission"[1290] (as humanitarian intervention is not expressly prohibited in the UN Charter, it would be acceptable under international law) cannot be used either as a means to justify a non-positive exemption of the peremptory prohibition of the use of force. Any implied "right" stemming from the residual negative principle would be contrary to the principle of the general theory of law according to which a "permissive" or an "exempting" norm must be expressed in positive and identifiable terms.[1291] Accordingly, there could only be a permission or an exemption *lex specialis* allowing a "right to intervene" if this right was positively declared by a valid norm within system, and by a norm of a

[1290] This notion stems from the "residual negative principle". As recognized by the PCIJ in the *SS Lotus case*, it suggests that "everything which is not expressly prohibited is allowed." *SS Lotus* case, above n 187.
[1291] These norms (negative permissions) "do not cover areas where conduct is left unregulated (absence of norms) and where one could, according to some, fall back on the 'what it not prohibited is allowed' or 'negative permission' principle." J. Pauwelyn, above n 5, p. 161.

peremptory character.[1292] Third, the possibility of the right to intervene to become *lex specialis* modifying the material scope of the general prohibition of the use of force requires also its acceptance and recognition as a new emerging peremptory norm modifying the general one, in accordance to articles 53 and 64 of the VCLT. Finally, the idea of an implicit "permission" or "exemption" as *lex specialis* of the general prohibition of the use of force runs contrary to the principle of "effective treaty interpretation," according to which an exception is a conditional norm that must be aligned with the very rationale of the main command prescribed by the general rule.[1293] And for that effect, the permission or exemption must be explicitly stated, otherwise it unlawfully derogates from the general rule. The contrast could not be clearer between a lawful *lex specialis* such as the right to self-defence, and the unlawfulness of an allegedly right to intervene which cannot be found in any positive norm of universal scope in international law.

Section V - Conclusion on unilateral humanitarian intervention

In conclusion, the notion of "humanitarian intervention" cannot be construed as a valid exemption from the general regime on the use of force. First, that hypothesis requires proof (*ei qui dicit incumbit probatio*) that a new emerging norm of "humanitarian intervention" has explicitly and lawfully modified or derogated from the pre-existing peremptory norm on the use of force.[1294] But this is hardly the case because the concept of "humanitarian intervention" is not a positive norm of international law either of a treaty or a customary nature.[1295] And even if one assumes, for theoretical purposes only, that it became a norm, it is not a right because it did not contract out of the peremptory prohibition of the use of force. That hypothesis would implicate its nullity as an effect of articles 53 and 64 of the VCLT, since its validity as an existing norm within the system would necessarily hinge upon its consistency with the general peremptory prohibition of the use of

[1292] This hypothesis would run contrary to the imperative character of the general prohibition of the use of force. It would imply admitting that a non-written and not widely accepted and recognized rule such as the right to intervene would be able to derogate from a norm of *ius cogens*.

[1293] In the words of Pauwelyn, the special rule "must simply be carved out to the extent required to give effect to the exception." J. Pauwelyn, above n 5, p. 163.

[1294] "Any exception to this rule (*ius cogens*) should be expressly provided in the treaty." W. Czaplinsky & G. Danilenko, above n 19, p. 21.

[1295] The lack of conventional provisions in this regard includes those norms having a peremptory nature in the area of human rights. On the contrary, though, positive international law is undisputedly oriented towards the express and absolute prohibition of the use of force, with the sole exceptions (so exempting norms) of the principle of self-defense and the authorization of the UN Security Council. Except for the legal regime of the African Union, which by the way does not contract out of the UN Charter but actually accumulates with it, there is no positive norm of general international law commanding or permitting the intervention in sovereign states in order to stop mass and grave violations of human rights. See Part III, Chapter I above, on the peremptory scope of the prohibition of the use of force.

force, and most importantly with the absence of positive exemptions other than those related with self-defence, the authorization of the UN Security Council or consent of the concerned State. Any other supposition but the emergency of a new norm of *ius cogens* would therefore run contrary to the peremptory character of article 2 (4) and would imply the very nullity of the emerging concept of "humanitarian intervention", either as "responsibility to protect" or "unilateral humanitarian intervention", as a consequence of the legal regime operated by *ius cogens*.[1296]

In addition, while focusing almost exclusively on the contradiction between human rights and state sovereignty, this debate usually overlooks other implications to international law, such as those impacting upon the principles of non-intervention, peaceful settlement of disputes, self-determination and international cooperation among nations, which should also be taken into account in accordance with the cannons of legal interpretation. Bearing in mind that these principles are valid and binding, the legal debate on how to react to gross and systematic human rights violations should also be intertwined with the legal relationships between all UN applicable principles legally placed at an equal hierarchical status.

Notwithstanding the foregoing, the actual occurrence of gross and systematic human rights violations requires timely and effective responses due to the imperative character of the peremptory prohibition of the most serious human rights violations. The prohibition of the use of force cannot be tantamount to an excuse for inaction by the international community under the paradigm of absolute sovereignty, with fatal consequences for the victims on the ground. But the solution for this conflict is not to be found in an alleged precedence of one norm over the other. It should instead be the result of the harmonization of existing applicable norms. This solution must simultaneously guarantee that the use of force occurs in accordance with the peremptory regime on the issue, while also guaranteeing that gross and systematic human rights violations will not elicit an appropriate response from the international community.

[1296] In other words, the concept of "humanitarian intervention" and other cognate notions such as "right to intervene" or "duty to intervene" cannot contract out of article 2 (4) of the UN Charter, unless a new norm of that same character emerges in the international legal system. This should be a fundamental and inescapable premise from which should start any serious discussion on how to deal with the problem of gross and systematic human rights violations in the light of current international law. The only reasonable alternative to the suggestion of an autonomous norm of "humanitarian intervention" would be an amendment to the UN Charter in order to change the legal regime of the prohibition of the use of force with a view to include another explicitly recognized exception for the general rule of article 2 (4). In this event, the new general regime on the use of force, which would expressly include "unilateral humanitarian intervention," could be construed as having a peremptory character and therefore lawfully modifying a previously existing norm of that same character, in accordance with article 64 of the VCLT. In sum, this alternative would imply the emergence of a new legal regime on the use of force having an equally peremptory nature.

Section VI - The concept of "responsibility to protect"

Before concluding this Chapter it is important to address the recently developed notion of responsibility to protect. As recognized in the 2005 UN World Summit Outcome Document,[1297] the concept of responsibility to protect (RtoP) is placed among the main results of the discussion on how the international community should react to the most serious human rights violations.[1298] After a meaningful debate on the issue,[1299] the concept of RtoP encompasses now "a spectrum of different normative propositions that vary considerably in their status and degree of legal support."[1300] Its objective legal source is Resolution 60/1 (the outcome document of the 2005 World Summit), which is potentially the instrument of public international law that most contributes to allegedly establishing a legal character[1301] to aspects of the concept of RtoP.[1302] But it is not a norm of general international law originating either from treaty or customary law, and it did not derogate either from the general prohibition of the use of force, which is expressly recognized and reiterated in the very conceptualization of RtoP by the GA. It is only a political construction not fully developed into law yet that stems from efforts at the UN with the objective of strengthening the universal promotion and

[1297] 2005 World Summit Outcome, above n 993, paras. 138-140.

[1298] The 2005 UN World Summit also resulted in the establishment of the Peacebuilding Commission and the Human Rights Council, *Ibid*.

[1299] In recent years, a series of official and non-official documents have dealt with the issue in the most various formats. The concept of responsibility to protect as one of the formats of the notion of "humanitarian intervention" emerges, *inter alia*, from the report of "The International Commission on Intervention and State Sovereignty" (although lacking an intergovernmental mandate, "The International Commission on Intervention and State Sovereignty" stated that the central issue is "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe - from mass murder and rape, from starvation- but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states"); the report of the High-Level Panel on Threats, Challenges and Change, entitled "A More Secure World: Our Shared Responsibility" (in December 2004, the UN High-Level Panel declared that "an emerging norm of a collective inter-national responsibility to protect", which encompasses not only the 'right to intervene' of any State, but the 'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe (*A More Secure World: Our Shared Responsibility*, (2004) Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, at 56-57, para. 201); and the UN Secretary-General 2005 Report "In Larger Freedom: Towards Development, Security and Human Rights for All" endorsed such a view by referring to the High Level Panel Report and by stating that the idea of a "responsibility to protect" must be "embrace[d]", and, "when necessary, act[ed] on." (*In Larger Freedom: Towards Development, Security and Human Rights for All*, (2005) Report of the Secretary-General, UN Doc. A/59/2005, para. 6-22). Subsequently, the concept of RtoP gained weight after its incorporation into the outcome document of the 2005 High-Level meeting of the 60th General Assembly.

[1300] S. Carsten, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101 *AJIL*, p. 99-120.

[1301] On the nature of UN General Assembly resolutions, "[I]n general those resolutions are not binding on member states, but, when they are concerned with general norms of international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinion. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of costumary rules." I. Brownlie, above n 487, p 15. See also *Nicaragua* case, above n 281, pp. 98-104, paras. 187-95; pp. 107-8, paras. 203-5.

[1302] 2005 World Summit Outcome, above n 993, paras. 138 and 139.

protection of international human rights and humanitarian law, particularly as a means to react to the most serious forms of human rights violations.[1303]

The existing consensus on RtoP is reflected in paragraphs 138 and 139[1304] of the unanimously approved 2005 Outcome Document, which establish that (i) States are primarily responsible for preventing and protecting their populations from genocide, war crimes, crimes against humanity and ethnic cleansing; (ii) that the international community must encourage and support States in the exercise of their primary responsibility; (iii) that the international community must also support the prevention of those most serious crimes through the UN, in particular through peaceful settlement of disputes (Chapters VI and VIII of the UN Charter); and (iv) that the international community must be ready to act collectively in a timely manner through the UN Security Council, including with measures under Chapter VII, if peaceful means prove to be inadequate and national authorities fail to protect their own populations from those crimes. The subsequent 2009 Report of the UN Secretary General "Implementing the Responsibility to Protect" interpreted the outcome document as having three fundamental pillars: the primary responsibility of States to protect their populations; the duty imposed upon the international community to provide assistance to States in building capacity to protect their populations; and the responsibility of the international community to take timely and decisive action to prevent and halt those crimes in case the State fails to comply with its primary responsibility to protect.[1305] The report emphasizes that the notion of "appropriate and necessary" response to those situations

[1303] See Sections I to III above.

[1304] "138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out."

[1305] The report underscored that the concept of RtoP is anchored in the principles of international law. In other words, the report recognized that that notion should be based on the observance of the existing legal framework of public international law, including the fundamental principles of the UN Charter, such as the principles of non-intervention, peaceful settlement of disputes, and State sovereignty. The main impact to international law though, is the interpretation of "sovereignty as responsibility," which emphasizes the compulsory nature of certain imperative obligation in the area of human rights, namely those to which the application of RtoP is restricted: genocide, war crimes, ethnic cleansing and crimes against humanity. In any event though, the idea is that the new concept does not derogate from sovereignty, but actually reinforces it.

includes a wide range of prevention and protection measures available to Member States, the UN, regional and sub-regional organizations.[1306]

The remaining question now is how the notion of RtoP can be implemented. The international practice in this regard is still incipient and non-conclusive, and has been surrounded by scepticism and a great dose of political voluntarism. But there is an important practice being consolidated in the UN Security Council that can be regarded as the most authoritative piece of evidence on *opinio iuris* and state practice on the issue as international law stands to-day. The first explicit attempt[1307] to operationalize the new concept of RtoP took place in 2006, with Resolution 1706 on Darfur. Acting under Chapter VII of the Charter, the UNSC authorized the United Nations Mission in Sudan (UNMIS) "to use all necessary means", "without prejudice to the responsibility of the Government of the Sudan," "to protect civilians under threat of physical violence." In spite of the various problems in the implementation of its new mandate,[1308] UNMIS built upon the precedent on DRC[1309] and, from a strictly legal perspective, represented a consolidating practice in the UNSC as regards the authorization for the use of force ("all necessary means") in order to stop gross and systematic human rights violations, including in the context of a peacekeeping operation.

In 2011, the UN Security Council adopted Resolutions 1970 and 1973 on Libya. In the first of these decisions the Council deplored "the gross and systematic violation of human rights" in Libya and expressly considered "that the widespread and systematic attacks" "against the civilian population may amount to crimes against

[1306] In particular, and in accordance with the spirit of the 2005 Summit, the report underscores that early warning is a crucial element to prevent and protect, with the need for the UN to access and analyze information in a timely and reliable fashion.

[1307] The UN Security Council first referred to the concept of RtoP in 2006, in its Resolution 1674 that deals with the question of protection of civilians in armed conflicts. The Council reaffirmed paragraphs 138 and 139, and expressed its readiness to address gross violations of human rights, as genocide and mass crimes against humanity under the interpretation that these crimes may constitute threats to international peace and security. Later, the Council renewed its commitment to RtoP as a means to prevent and to end violence against civilians in Resolution 1894. The Council then only noted that it would "adopt appropriate steps" and consider the "appropriate measures at the Security Council's disposal in accordance with the Charter of the United Nations" to address "systematic, flagrant and widespread violations of applicable international humanitarian and human rights law in situations of armed conflict." These two resolutions did not explicitly reproduce the classic formula regarding the authorization of "the use of all necessary means" in order to protect civilians in armed conflicts.

[1308] That may explain why another express intent to implement RtoP would take other five years to come.

[1309] Attempts to use force for addressing human rights violations preceded the 2005 outcome document under the authorization of the UNSC to use "all necessary means" to protect civilians. In 2004, the Council adopted Resolution 1565 on the mandate of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), in which the main elements of RtoP suggesting a harmonious application of the peremptory norms on the use of force and human rights were already present. First, it recognized that the situation in the Democratic Republic of the Congo (DRC) continued to constitute a threat to international peace and security in the region, a fact that legitimated action under Chapter VII of the UN Charter. Second, the MONUC was authorized to use all necessary means "to ensure the protection of civilians, including humanitarian personnel, under imminent threat of physical violence." Following UNSC resolutions on the DRC reproduced this consolidating formula, with the respective references to the primary responsibility of the Government of the DRC for "protecting its civilians with respect for the rule of law, human rights and international humanitarian law." See also UNSC Resolution 1925, which renamed the peacekeeping operation as United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

humanity." It recalled Libya's primary responsibility to protect its own population from those crimes and, acting under Chapter VII, the Council imposed several sanctions upon Libya under Article 41.[1310] In its Resolution 1973 the Council did not expressly refer to the concept of RtoP.[1311] However, using the well-established interpretation that gross and systematic human rights violations constitute a threat to international peace and security, the Council acted under Chapter VII and authorized Member States "to take all necessary measures" "to protect civilians and civilian populated areas under threat of attack," "while excluding a foreign occupation force of any form on any part of Libyan territory."[1312] Also in 2011, the Security Council unanimously adopted Resolution 1975 on the situation in Côte d'Ivoire. Besides characterizing the gross and systematic human rights violations perpetrated by all sides in the conflict as potentially amounting to crimes against humanity, and while reaffirming "the primary responsibility of each State to protect civilians," the resolution authorized the UN Operation in Côte d'Ivoire (UNOCI) to "to use all necessary means … to protect civilians under imminent threat of physical violence," "including to prevent the use of heavy weapons against the civilian population." Although the use of force was also inscribed within a broader universe of sanctions, the UNSC acted under Chapter VII explicitly under the interpretation that the human rights violation in Côte d'Ivoire constituted a threat to international peace and security.

The case of situation in Mali is also an important precedent in the area of RtoP, particularly because it involves efforts taking place at bilateral (France), regional (ECOWAS and African Union) and multilateral (UNSC) levels. At the request of the Economic Community of West African States (ECOWAS),[1313] the UNSC authorized the transformation of the previously established African-led International Support Mission in Mali (AFISMA)[1314] into the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). According to resolution 2100 (2013), the approved mandate of MINUSMA encompassed a wide array of competences and objectives, but it reflected the same rationale previously displayed in other resolutions related to the reaction of the organized international community to the most serious violations of human rights. First, the UNSC condemned "strongly all abuses and violations of human rights and violations of international humanitarian law" and determined that "the

[1310] Namely referring the situation to the Prosecutor of the International Criminal Court, an arms embargo, travel bans and asset freezes of Libyan authorities.
[1311] In Resolution 1970, the UNSC expressed "its determination to ensure the protection of civilians and civilian populated areas" and stressed that "those responsible for or complicit in attacks targeting the civilian population, including aerial and naval attacks, must be held to account" to the ICC.
[1312] It also established "a ban on all flights in the airspace" of Libya "in order to help protect civilians."
[1313] In a letter, dated 26 March 2013, addressed to the UN Secretary-General, the President of the ECOWAS Commission requested the "transformation of AFISMA into a United Nations stabilization mission."
[1314] Under resolution 2085 (2012), which was unanimously adopted under Chapter VII of the UN Charter, the Council tasked the African-led International Support Mission in Mali (AFISMA) with helping to strengthen Mali's defence and security forces, in coordination with the European Union and other partners; supporting the Malian authorities in their primary responsibility to protect the population.

situation in Mali constitutes a threat to international peace and security." Second, acting under Chapter VII of the UN Charter, the UNSC authorized the "use all necessary means" expressly for the purposes of (i) the stabilization of key population centres and support for the reestablishment of State authority throughout the country," (ii) the protection of civilians and United Nations personnel, (iii) support for humanitarian assistance, (iv) support for cultural preservation; and (v) support for national and international justice. Although the establishment of MINUSMA occurred not only with the consent, but actually at the request of the concerned country, and bearing in mind also that resolution 2100 also reiterates that the transitional authorities of Mali had "primary responsibility to protect civilians," it provides nonetheless a conspicuous example on how the UNSC reacted by authorizing the use of force as a means of addressing situations of gross and systematic violations of human rights and humanitarian law.

The UNSC reacted in a quite similar manner to the crisis in the Central African Republic (CAR). After several warnings and inputs received from other multilateral actors,[1315] and on the basis of a request made by the concerned country, the UNSC finally approved resolution 2127 (2013). The Council strongly condemned "the continued violations of international humanitarian law and the widespread human rights violations and abuses," and acting under Chapter VII of the UN Charter, determined "that the situation in the CAR constitutes a threat to international peace and security." Accordingly, it authorized the newly established AU "African-led International Support Mission in the CAR" (MISCA)[1316] "to use all necessary means", *inter alia*, to (i) the protection of civilians and the restoration of security and public order; (ii) the stabilization the country and the restoration of State authority over the whole territory of the country, and (iii) the creation of conditions conducive to the provision of humanitarian assistance to populations in need. The mandate of MISCA also included a wide array of measures, such as a sanctions regime, but the core of its powers under Chapter VII remained the possibility of using force as a means of addressing the most serious violations of international humanitarian law and human rights.

In both legal and political terms, all those resolutions are implicit or explicit pieces of evidence of the effort at the UNSC to find the appropriate balance between all applicable principles of the UN Charter to situations of gross and systematic human rights violations, including the principle of State sovereignty, when

[1315] In particular, see the report on the situation in the CAR presented by the UN High Commissioner for Human Rights Navi Pillay, pursuant to the Human Rights Council's request made earlier that year; and the joint statement made by the UN Special Advisers on the Prevention of Genocide, Mr. Adama Dieng, and the Responsibility to Protect, Dr. Jennifer Welsh.

[1316] Decision of the African Union Peace and Security Council (AU-PSC), on 19 July 2013. In a Communiqué of 13 November 2013, AU-PSC urged the Security Council to quickly adopt a resolution endorsing and authorizing the deployment of MISCA.

implementing the concept of RtoP.[1317] Most importantly, they reflect the evolving practice at the UNSC aiming at optimizing the conflicting peremptory norms on the use of force and human rights on the basis of a "progressive approach," in which the use of force is the last recourse in the face of the failure of other preventative and non-military measures (appropriate measures through peaceful means) and the deterioration of the situation on the ground (need of timely response).[1318] The authorization of "the use of all necessary means" emerges therefore inscribed within a broader array of measures that may include targeted sanctions under article 41 of the UN Charter, and attempts to reach a political solution to stop the occurrence of massacres. Also, it is usually the last step of an current process at the UNSC and other multilateral bodies and mechanisms of the UN system that have equally dealt with that same given situation.[1319] For our purposes, namely a conflict between two peremptory norms, this practice at the UNSC provides pieces of evidence of state practice and *opinio iuris* on the rightness of using force as a collective means to address gross and systematic human rights violations, as corollary of the consolidated interpretation according to which these violations constitute threats to international peace and security under article 39 of the UN Charter.

However, attempts to operationalize the concept of RtoP have been criticized because of the potential to use it for purposes other than the prevention of gross and systematic human rights violations.[1320] The very implementation of UNSC Resolution 1973 on Libya raised serious concerns not only as regards its political and actual effects on the ground, but also its legal implications for public

[1317] Resolutions 1674, 1706 and 1894, reaffirm in explicit terms the "strong commitment to the sovereignty, unity, independence, and territorial integrity" of the concerned countries and the full respect to State sovereignty when assisting States in their primary responsibility to prevent and stop human rights massacres.

[1318] In Resolution 1975 on Côte d'Ivoire, for instance, the UNSC first "condemned the decision of Mr. Gbagbo not to accept the overall political solution proposed by the High-level Panel put in place by the African Union," and then "firmly condemned the violence and other violations and abuses of human rights, in particular enforced disappearances, extrajudicial killings, killing and maiming of children and rapes and other forms of sexual violence," "which could amount to crimes against humanity."

[1319] This practice is in full accordance with the recommendations of the 2009 UNSG Report "Implementing the Responsibility to Protect," which underlines the role of other bodies and mechanisms of the UN system in the task of preventing and monitoring the situation of specific countries. This is particularly the case of the Human Rights Council, the International Criminal Court, the UN High Commissioner for Human Rights, the UN High Commissioner for Refugees and the Special Adviser on the Prevention of Genocide.

[1320] In 2007, some Western States (particularly France, the United Kingdom and the United States) submitted a draft resolution in the UNSC that authorized a military humanitarian intervention in Myanmar allegedly to assist the country in a situation of natural disaster (Myanmar was suffering the effects of the cyclone Nargis at that time) under the notion of "human security." Although the draft did not provide for coercive means or refer to the concept of RtoP as such (paragraphs 138 and 139 of the Outcome Document), the initiative was interpreted as an attempt to use the concept of RtoP for other purposes. Several countries fiercely rejected such an open interpretation of the possibilities of the use of force, and accused Western countries of misusing the notion of RtoP for their own interests. China, South Africa and Russia voted against it under the allegation that the situation in Myanmar did not constitute a threat to international peace and security. And even the then Special Adviser to the Secretary General with a focus on the Responsibility to Protect, Edward C. Luck, publicly criticized the French draft because the concept of RtoP would not be applicable in that circumstance, since it did not constitute a case of genocide, war crime, crime against humanity and ethnic cleansing.

international law.[1321] These concerns are particularly relevant for the topic under examination, since a lawful operationalization of RtoP hinges upon a harmonious interpretation of the peremptory norms on the use of force and human rights.[1322]

[1321] Many countries criticized NATO's role in the enforcement operations of Resolution 1973 as going beyond the primary objective of protecting civilians, under which the coalition of countries had the mandate to "use all necessary means" under Chapter VII of the UN Charter. Criticism was particularly directed against NATO's regular strikes against the military forces of the Libyan Army and the destruction of the regime's infrastructure in circumsntances not directly related to the protection of civilians. While also taking the explicit side of the rebels in the Libyan conflict, NATO's involvement in the Libyan civil war would culminate in its participation in the operation that led to Gadaffi's execution by Libyan rebels.

[1322] The operationalization of RtoP, as an essentially political process, requires the full observance of the current regime on the use of force. As a consequence, only valid norms of international law may serve as the legal foundations for a potential political operationalization of the concept of RtoP, namely the capacity of acting collectively through the competent multilateral body of the international system (the UNSC) towards the objective of protecting human beings from the most serious violations of international human rights and humanitarian law, as developed both in doctrinal, jurisprudential, customary and treaty law. Indeed, "responsibility to protect" cannot be confused with unilateral "droit d'ingerence" or "right to intervene". Unilateral operations on RtoP grounds would inevitably amount to a breach of international law, *inter alia*, of the principles of non-intervention and prohibition of the use of force. Nonetheless, the operationalization of the concept of RtoP can potentially be the proper result of the exercise of harmonization of the two peremptory norms on the use of force and human rights. See also UN document A/59/565, p. 7.

Chapter II – The accumulative process of human rights norms of a peremptory character and the prohibition of the use of force

The analysis of the potential antinomy between the contradictory but equally peremptory commands emanating from the prohibition of the use of force and the prohibition of the most serious human rights violations starts from the assumption that the emergence of peremptory norms in the area of human rights did not create an exception to, or derogate from, the prohibition of the use of force. Given that the emergence of peremptory norms in the area of human rights has been subsequent to the whole legal regime on the prohibition of the use of force as established by the UN Charter,[1323] it is implied that their emergence as *ius cogens* did not cause the voidness and the termination of the latter as an effect of article 64 of the 1969 VCLT.[1324] The reason for that is quite simple: the alternative to accumulation, namely the hypothesis that human rights norms of a peremptory character would have derogated from the pre-existing peremptory norm on the use of force, is misleading. By simple syllogism, it would be tantamount to accepting the voidness of article 2 (4). As a consequence of the existence of one sole possibility for applying the criterion of *lex posterior* in the area of peremptory norms (article 64), these norms in the area of human rights are expected to have accumulated with pre-existing *ius cogens* norms, otherwise the very foundations provided by the UN Charter would have been affected.

As this is certainly not the case, the emergence of peremptory norms in the area of human rights necessarily occurred in a harmonized manner in the light of pre-existing peremptory norms, in this case the rule embodied in article 2(4) of the Charter. This is the particular aim of this Chapter. Section I will demonstrate, on the basis of the interpretative techniques described in Part I above, that the emergence of peremptory norms in the area of human rights occurred through an accumulative process with the peremptory norm on the use of force. And Section II will examine whether there can be a conflict between these two peremptory norms (overlap *ratione materiae*, *ratione personae* and *ratione temporis*), and, in such a case, whether this is an apparent or real antinomy.

[1323] See Section above on the peremptory nature of the legal regime on the use of force of the UN Charter.
[1324] According to the Final Report of the ILC, a new rule of *ius cogens* "does not anul the treaty; it forbids its further existence and performance." II YbILC 1966, p. 261. In this same reasoning, the ILC declared previously that "any situation resulting from the previous application of the treaty could only retain its validity after the emergence of the rule of *jus cogens* to the extent that it was not in conflict with that rule." II YbILC 1963, p. 216-217.

Section I – Accumulation as a result of legal interpretation

The assumption of accumulation arises from the interpretation of the legal status of those peremptory norms in current international law, particularly under the UN Charter. This process shows that the peremptory human rights norms cannot have lawfully derogated from the prohibition of the use of force. This supposition relies on the basic understanding that legal interpretation is essentially a matter of giving meaning to normative terms. Accordingly, interpretations *contra legem* are prohibited, as well as interpretations either overstretching or restricting the respective normative scopes of the peremptory norms on human rights and on the use of force. This premise is the starting point to determine how these peremptory norms have accumulated in the international legal system, and how they may be simultaneously applicable with different normative commands to a same given circumstance.

Interpreting peremptory norms of human rights

The starting point in this analysis is the question of how the peremptory provisions in the area of human rights (the law of armed conflicts, the law of genocide, the general prohibition of discrimination, and the prohibition of crimes against humanity) and the respective conventional instruments within which they are inscribed relate to the peremptory prohibition of the use of force. This is a question of interpreting treaties in the light of other international agreements, namely the UN Charter and the several subsequent agreements in the area of human rights, and if and how these conventional sources addressed the question of the use of force for protecting human rights.

First, as norms resulting primarily from the contractual freedom of States, these peremptory norms in the area of human rights show no positive evidence whatsoever of the intent of the parties to address, either explicitly or implicitly, the matter of the use of force, even as regards its relationship with the objective of protecting human rights. None of these conventional instruments deals in any manner with the subject-matter of the use of force. If the treaties themselves do not establish commands or permissions related to an authorization of the use of force for stopping massacres, the suggestion of modification or derogation from the prohibition of the use of force would therefore go beyond the intention of the lawmakers expressed thereto. To put it differently, one cannot interpret those norms as creating an exemption – in this case another exception in the area of the use of force – beyond the rights and obligations explicitly provided for by that specific normative universe in the area of human rights. At the abstract level of

their existences therefore, there is no material overlap because these treaties deal with different subject-matters (*ratione materiae*).[1325]

However, although there is no express provision calling for (command) or authorizing (permission) measures aimed at putting an end to the violations of the human rights protected under these treaties, the imperative nature of those peremptory norms is usually translated into a language that calls for their full observance by States in imperative terms. From that one can say that there is some ground to think of an implicit obligation to stop massacres, but only if and when it occurs within the limits of legality of international law, that is, only if and when it happens in accordance with the general regime on the prohibition of the use of force as established by the UN Charter, and in accordance with the compatibility clauses provided for by these very instruments. This interpretation would be aligned with the principle of "effective interpretation," which requires the examination of the normative scope of a given norm in the light of its objective and purpose, but within the material limits of its specific meaning.[1326] This is the core of any potential conflict between the peremptory norms in the areas of human rights and the use of force, as it will be examined below. For now one should keep in mind that the examination of the main conventional sources in the area of human rights shows no evidence whatsoever of an exception or derogation from the peremptory regime on the use of force.

Second, within the conventional regime of the UN Charter, human rights are placed among the main purposes of the organization,[1327] among which the one can also find the intention to "to save succeeding generations from the scourge of war", which entails the central value of the prohibition of the use of force in inter-state relationships. Both are fundamental goals to be pursued through the work of the United Nations. However, while the prohibition of the use of force is a clear-cut provision enumerated not only as a purpose (Article 1) but also as a fundamental principle (Article 2) of the UN Charter, the achievement of the objective of "promoting and encouraging respect for human rights and for fundamental freedoms for all" is to be pursued through international cooperation.[1328] The operative part of the Charter that deals with the purpose of

[1325] Indeed, these human rights treaties did not explicitly derogate from or from the previously existing norms on the prohibition of the use of force. On the contrary, these agreements explicitly refer to the Charter and its fundamental principles, among which the prohibition of the use of force. The will of the parties translated into the texts of these international treaties is that these instruments are expected to accumulate with the UN Charter and its fundamental principles in a harmonious manner. To state the contrary runs contrary to the explicit meaning to these provisions.

[1326] See above the specific analysis of the application of the principle of "effective interpretation" to the notion of "humanitarian intervention" in Part I, Chapter II, Section III, pp 18-25.

[1327] The Preamble reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."

[1328] "Article 1 - The Purposes of the United Nations are: (…) 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

"promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" is given by Articles 55 and 56, which places human rights in the context of Chapter IX that deals with economic and social cooperation.[1329] At a purely theoretic level therefore, efforts aimed at the promotion and the protection of human rights should take place primarily, if not exclusively under the UN Charter,[1330] through international cooperation in accordance with the mandates of the competent bodies established by the General Assembly.

State practice at the UN shows that the GA and its subsidiary bodies have worked in order to enhance the promotion and protection of human rights on the basis of the principle of international cooperation, *inter alia* by expressing concerns over human rights violations in accordance with the prevailing opinion among States that flagrant and mass violation of human rights and humanitarian law constitute violations of the Charter's obligations. The GA has expressed those concerns in a number of country resolutions over the last decades, particularly after the easing of Cold war tensions and when it no longer had to cope with the opposition consistently expressed by the Western former colonial powers during the process of de-colonization.[1331] In 1967 and 1970 the ECOSOC expressly invested the former Human Rights Commission with the capacity to investigate flagrant and mass violation of human rights in specific countries.[1332]

In any event, and beyond the politics of the international system, the claim that the principle of international cooperation would provide lawful grounds for permitting a humanitarian intervention is a manifestly overstretched interpretation. The practice at the UN shows a clear shift in the relationship between the principles of non-intervention and the promotion and protection of human rights. But throughout the most recent decades no resolution whatsoever of the UN human rights machinery has provided even a single piece of evidence of an emerging changing state practice or *opinio iuris* suggesting a potential exception

[1329] "Article 55 - With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

[1330] Of course bilateral actions on human rights are essentially of a cooperative nature. Those other measures such as embargoes and other related actions are not being addressed here.

[1331] Today, the opposition to monitoring and assessing activities in the area of human rights comes mainly from developing countries.

[1332] See ECOSOC Resolutions 1235 (XLII) and 1503 (XLVIII). At that time, however, the principle of non-intervention in the domestic affairs of States was still a prevailing notion when addressing matters related to human rights violations in specific countries. The rationale was that investigations by *ad hoc* committees established by the former Commission should be undertaken only with the express consent of the State concerned and should be conducted in constant co-operation with that State and under conditions determined by an agreement with it. In any event, the investigation could be undertaken only if all available means at the national level have been resorted to and exhausted, and if the situation did not relate to a matter being dealt with under other procedures prescribed in international treaties. The consent of the State concerned was therefore a central element, and also a barrier, one could say, for the treatment of human rights situation in specific countries.

or derogation from the use of force. On the contrary, all those resolutions invariably begin by reaffirming their attachment to the fundamental principles of the UN Charter, among them the principles of the non-use of force and non-intervention. Second, and most importantly, a systematic interpretation of human rights in the Charter suggests that the primary approach for achieving the goals in this area must start from the principle of international cooperation. As the operative part in the area of human rights, Chapter IX could not be used for legitimizing the use of force for addressing human rights because there is no reference in articles 55 and 56 even vaguely related to the idea of the use of force. On the contrary, Article 55 says that the achievement of its purposes should be based on the equal rights of states, among which one can find the subjective right not to suffer a military aggression from another State.[1333] At least under the UN Charter therefore, there can be no interpretation suggesting that Chapter IX, which is the operative part dealing with human rights within the legal regime of the Charter, allows the use of force for humanitarian purposes outside the framework of the competences of the UN Security Council.[1334]

Finally, the normative scope of the peremptory norms of human rights and international humanitarian law *vis-à-vis* the legal regime on the use of force should also be interpreted from the perspective of their relationship with the compatibility clause[1335] of the UN Charter. The premise of accumulation implies that the emergence of peremptory norms in the area of human rights has occurred in accordance with the rule of priority conveyed by Art. 103 of the UN Charter establishing that obligations under the UN Charter prevail over obligations under other international treaties.[1336] As an effect of that rule of priority, all conventional norms in the area of human rights are subject to their examination not only in the light of other peremptory norms but also in the light of other rights and obligations

[1333] Also, there is no piece of state practice or *opinio iuris* in the UN that could be interpreted as a lawful derogation by articles 55 and 56 from the general regime on the use of force. As a matter of fact, article 60 of Chapter IX states that the "responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council," which is a body that has no competence whatsoever in the area of the use of force. The former Commission on Human Rights and its replacement, the Human Rights Council, which were subsequently created as the specialized bodies of the UN in this area, have no mandate whatsoever in the area of the use of force.

[1334] As a matter of fact, the correct interpretation on how both norms relate to each other in the light of the UN Charter is that the prohibition of the use of force should prevail over the promotion of human rights within that specific legal instrument. Chesterman says that "the Charter clearly privileges peace over dignity: the threat or use of force is prohibited in Article 2(4); protection of human rights is limited to the more or less hortatory provisions of Articles 55 and 56." See S. Chesterman, above n 1242, p. 45.

[1335] See Part I, Chapter III, Section II.

[1336] The regime entailed by article 103 implies that the legal regime of the prohibition of the use of force established in Art. 2 (4) should prevail over obligations and rights under any other international agreements, including those of a human rights nature. *Contrario sensu*, the rules of *lex posterior* and *lex specialis* could not be used therefore as justification to circumvent the strict observation of the regime on the prohibition of the use of force as an essential part of the UN Charter, even in circumstances involving human rights violations, since those conventional obligations in the area of human rights can only be construed as accumulating with the content of the UN Charter. See also the interrpeation of the ICJ in the *Lockerbie* cases, above n 136.

under the Charter, including the principles of non-intervention and the sovereign equality among States. The application and interpretation of norms stemming from successive treaties in the area of human rights, such as the Genocide Convention, the 1949 Geneva Conventions and the two 1966 Covenants are presumed therefore to take place in full respect to the regime of the Charter. Should there be any conflict in their respective application and the principles of the UN Charter must prevail as a result of the rule of priority set out by Art. 103. Human rights norms of a *ius cogens* nature conveyed by subsequent conventional sources are thus expected to have emerged in a harmonious manner with the prohibition of the use force inscribed in the Charter.

Section II - A real or an apparent antinomy?

From the above one can conclude that the peremptory provisions in the area of human rights cannot be construed as modifying or contracting out of the current scope of the peremptory regime on the use of force. The legal regime set forth by human rights treaties can only be construed under an interpretation according to which the successive norms in the area of human rights, namely the peremptory prohibition of the most serious human rights violations, have accumulated with the peremptory prohibition of the use of force at the abstract level of the international legal system. But if those peremptory norms have accumulated, is it possible to say that there is no conflict at all between the prohibition of the use of force and the prohibition of the most serious human rights violations?

Let us consider the question from the standpoint of the functions of norms within a given legal system. There can be no real antinomy in the case under examination because there is no positive peremptory norm exempting or commanding the unilateral use of force for stopping massacres. At the abstract level, the specific normative contents of the human rights prohibitions of a *ius cogens* nature have not established a right or a duty to intervene contracting out of the prohibition of the use of force. The prohibition of massacres stops precisely at this point: a call upon all States not to commit these serious crimes. As such, there is no objective norm of a *ius cogens* character requiring or permitting States to intervene by force in another sovereign State in order to protect human beings from the menace of the most serious violations of international human rights and humanitarian law, which have attained the status of *ius cogens*. As regards the material universe of peremptory norms, there are only two prohibitions dealing with essentially two different subject-matters. Within the realm of positive law, that would be tantamount to accepting the existence of a lacuna, namely the absence of a norm requiring or permitting massacres to be stopped by the use of force. Nonetheless, could the actual non-compliance with the prohibition of the most serious human rights violations not lead to the necessary actions of enforcement? Wouldn't that affect

the very premises of stability of the international legal system, since the disrespect of one of its most fundamental norms, namely the peremptory prohibition of the most serious violations of international humanitarian law and international human rights law, would be left without any consequences? Hence, the fundamental question to be answered seems to be whether there exists an obligation to stop the occurrence of the most serious forms of human rights violations and, if there is such an obligation, what is its character. Is it an autonomous duty (the foregoing analysis demonstrates the opposite) or just an accessory obligation, the existence of which can only be admitted under an harmonious interpretation *vis-à-vis* the pre-existing legal regime on the use of force? The answer to this question will determine the existence of an apparent of a real antinomy between two peremptory norms.

The author is of the opinion that the prohibition of the most serious human rights violations also entails the obligation to interrupt their occurrence. Although this is not a positive obligation (command) expressly established in unequivocal terms under treaty law,[1337] this is a logical conclusion to be drawn from the peremptory prohibition of gross and systematic human rights violations. In particular, the imperative and universal characters of *ius cogens* norms imply the need to guarantee their full observance. It is worth recalling, in this regard, the difference suggested by Cançado Trindade between obligations of behaviour and obligations of result.[1338] The prohibition of the most serious human rights violations cannot be regarded simply as obligations of conduct, since they also assume the existence of an obligation of result, namely the non-occurrence of this type of violations. However, such an obligation does not encompass the lawfulness of unilateral humanitarian intervention, because the peremptory legal regime on human rights did not modify or derogate from the regime on the use of force. Nonetheless, the duty to stop massacres (not to be confused with the duty to intervene) is an obligation imposed *erga omnes* as a result of the imperative and universal character of the prohibition of the most serious human rights violations.[1339] The actual occurrence of the most serious violations of human rights and humanitarian law

[1337] The sole possible exception is the general goal to prevent genocide. Article I of the Genocide Convention reads that "the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." But it does not expressly refer to the unilateral use of force for that end, and there is nothing implicitly suggesting this possibility in the *travaux préparatoires* of the Genocide Convention.

[1338] A.A. Cançado Trindade, Dissenting Opinion, p. 15 and ss. See also IACtHR, *Case of the Dismissed Congressional Employees (Aguado – Alfaro et al.) v. Peru. Request for Interpretation of the Judgment on Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 30, 2007. Series C No. 174, paras. 13-29; and IACtHR, *Case of the Indigenous Community Sawhoyamaxa versus Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, para. 23.

[1339] This interpretation is aligned with the conclusions of the ILC to the 2011 draft articles on State responsibility, particularly as regards breaches of peremptory norms. According to draft article 41 "States shall cooperate to bring to an end through lawful means any serious breach" of *ius cogens*. In its commentaires, the ILC clarified that "States are under a positive duty to cooperate in order to bring to an end serious breaches" of peremptory norms and further noted that cooperation should be "organized in the framework of a competent international organization, in particular the United Nations." YbILC, 2001-II, Part Two, p. 85.

might therefore justify measures of cooperation on the part of the international community through the competent bodies of the international system, with a view to bring them to an end.[1340]

This conclusion, namely that there is an obligation imposed upon the organized international community to stop massacres, has led some authors to identify a conflict between the prohibition of the use of force and the prohibition of the most serious human rights violations. Indeed, if one admits that the peremptory prohibition of the most serious human rights violations also implies an obligation *erga omnes* to stop those massacres, it is possible then to identify an overlap between both norms. First, an overlap *ratione materiae* arises from their simultaneous application to such situations. On the one hand the use of force is restricted to threats to international peace and security. On the other hand the prohibition of the most serious human rights violations suggests an implicit duty to prevent their occurrence. The use of force might therefore be required as a last resort in order to bring these violations to an end. Consequently, while one norm prohibits the use of force, the other may be interpreted as requiring or allowing it as a last resort to halt gross and systematic human rights violations. Second, the overlap *ratione personae* is corollary of the fact that both norms are universally imperative and non-derogable. Both the prohibition of the use of force and the prohibition of the most serious human rights violations are binding upon all States because both have a peremptory character. In the case of the promotion and protection of human rights there are two dimensions: each individual state is primarily responsible within its jurisdiction; and as default ("fall-back") the organized international community is responsible for taken the necessary measures in order to stop those massacres. But there is no obligation such as a duty to protect imposed individually on states. Once individual states have failed to comply with the prohibitive commands stemming from the peremptory prohibition of the most serious human rights violations, only the organized international community could act collectively, on the basis of the principle of international cooperation and through the specific mandates of multilateral main. Finally, the simultaneous occurrence (*ratione temporis*) of both norms is a logical conclusion from the actual occurrence of gross and systematic human rights violations, a situation from which the very problem of a normative conflict would arise. As a result, while both norms harmoniously co-exist in a harmonious manner at the abstract level, they may collide as a consequence of the requirement of their simultaneous application in certain circumstances of widespread and uncontrolled violence, in which the use of force may be the only and last efficient measure that could objectively put an end, as a last resort, to gross and systematic human rights violations.

[1340] In this regard, it is worth recalling Kolb's remarks in the sense that peremptory norms are also usually obligations *erga omnes*, which as such require sanctions with a view to guarantee their observance. In his view, «aucunce dérogation n'est admise; de proche en proche, il est venu s'ajouter l'idée force qu'aucune violation de telles normes ne doit être laissée sans conséquences ». R. Kolb, above n 16, p. 504.

But given that there is an overlap between both norms, is this an apparent or a real antinomy? The answer must be given in accordance to the same criteria related to the function of norms, as previously referred to in this Section: as there is no peremptory command requiring or allowing the unilateral use of force as a means of stopping gross and systematic human rights violations, this can only be an apparent antinomy between the relevant provisions in the area of human rights and those in the domain of the use of force. Accordingly, as an apparent conflict only, it might be solved by having recourse to the effective interpretation of both colliding norms. This solution implies the mutual carving out of both norms in the light of legal and factual possibilities, but without establishing any type of conditioned prevalence between them.

In concrete terms, such a hypothesis implies that the organized international community may take action through its competent bodies in order to stop gross and systematic human rights violations. This type of international crime jeopardizes the very axiological basis of contemporary international community, and requires the appropriate and timely measures. But instead of a newly emerging norm authorizing unilateral humanitarian intervention, which would ultimately amount to the anarchical result of providing each member of the international community with the right to intervene in another State in accordance with their own discretion, this objective is to be achieved by respecting the current legal regime on the use of force, in which the UNSC may authorize the use of "all necessary means" to address gross and systematic human rights violations by interpreting these violations as "threats to international peace and security." This harmonized interpretation of both peremptory norms will be dealt with in a more detailed manner in Chapter III below.

Chapter III – Solving the conflict through legal interpretation

There is no peremptory norm permitting the unilateral use of force in order to stop mass massacres, and even less there is a norm of *ius cogens* commanding the unilateral use of force by States for humanitarian purposes. Theoretically therefore there could be no conflict between two equally prohibitive norms. There is, however, a peremptory prohibition of gross and systematic human rights violations. From this peremptory normative universe there arises an obligation *erga omnes* requiring the organized international community to take the necessary measures, in both a preventive and timely manner, in order to stop the non-observance of the imperative prohibition of those most serious human rights violations having a peremptory character. At the abstract level of the definition of the specific normative content of the peremptory human rights prohibitions, this obligation has not modified or derogated from the previously existing peremptory norm on the use of force.[1341] As was seen above, this is not the case between the peremptory norms on the use of force and human rights.[1342] At the factual level, however, there is a latent potential conflict between the commands stemming from the prohibition of the use of force and the need to stop human rights massacres.[1343] Indeed, in cases of gross and systematic human rights violations, the use of force may prove the be the last and sole measure capable of bringing those violations to a halt, whenever all other non-military means have proved to be ineffective. In those extreme circumstances, both norms appear to be mutually exclusive: on the one hand the recourse to military means is prohibited; on the other hand there is an obligation *erga omnes* requiring that those violations are brought to a halt. Since there can be no derogation from *ius cogens* without a new peremptory norm, the only logical solution to this apparent antinomy is to be found in an exercise of harmonization on the basis of weighing and balancing techniques.

In this exercise, the interpreter must carve one norm out of the other. The point of departure (protected values and goals to be achieved) is the assumption that the organized international community must take all necessary means in order to halt the occurrence of gross and systematic human rights violations, and that such an action must occur through the competent bodies of the multilateral system legally

[1341] In this regard, it is worth recalling Jenks' definition of conflict in international law, to whom there would be no conflict between these two peremptory norms because a command or a prohibition should prevail over a permission or exemption, unless that the later had been expressly established, a hypothesis in which there is a relationship of *lex generalis* or *lex specialis*. See also J. Pauwelyn, above n 5, p. 185.

[1342] See Chapter I above.

[1343] "[N]o conflict arises in case the second norm explicitly states that it derogates from, or is an exception to, the first norm. In that event, one norm simply carves out the scope of application of the other, and both norms accumulate. Conflict arises only when the question of whether the two norms are in a 'rule-exception' relationship is not explicitly regulated in either norm." J. Pauwelyn, *idem*, p. 185.

mandated to perform or to authorize such an action in accordance with the general regime on the use of force as set forth by the UN Charter.[1344] Nonetheless, no necessary relationship of priority is created between them *in casu*.[1345] On the one hand the prohibition of the most serious human rights violations carves out from the prohibition of the use of force by allowing a lawful interpretation on the meaning and scope of the notion of "threats and breaches to international peace and security" that includes the occurrence of gross and systematic human rights violations. In this regard, the emerging practice at the UN Security Council provides the appropriate legal framework for all action to be taken by the organized international community. Such a practice is based on an evolving interpretation on the capacities of the body to deal with threats to "peace and security" that also includes the protection of human rights "by all necessary means." On the other hand, the prohibition of the use of force and other applicable provisions of the Charter and general international law carve out from the prohibition of the most serious human rights violations by imposing a series of requirements for any action to be taken by the competent bodies of the so-called organized international community. These norms are translated into various

[1344] It is worth noting, at this point, that this premise is fully aligned with the conclusions of the ILC in its draft articles on State responsibility. When the Comission was dealing with breaches of peremptory norms, the ILC stated in draft Article 41 (1) that "States shall cooperate to bring to an end through lawful means any serious breach." This means that any measure of cooperation should be first of all lawful, what excludes unilateral recourse to the use of force. As regards what measures of co-operation could be taken by States, the ILC itself clarified in its comments that cooperation should "be organized in the framework of a competent international organization, in particular the United Nations." YbILC, 2001-II, Part Two, p. 85.

[1345] In one of the few studies on the problem of antinomy between peremptory norms, Kolb also suggested the application of "weighing and balancing" techniques for dealing with the antinomy between these two norms of *ius cogens* character. But instead of an optimization of both applicable normative commands, he favours the precedence of the prohibition of the most serious human rights violations over the prohibition of the use of force in cases of gross and systematic human rights violations. By referring to the conclusion reached by the International Commission on Intervention and Sovereignty of States, which recognized the lawfulness of unilateral humanitarian intervention under certain circumstances, Kolb takes the view that the prevalence of human rights over the use of force would actually result from an exercise of balance and weighing between the two peremptory norms. While admitting that this solution also leaves some problems unsolved, he says, nonetheless, that the solution suggested by the Commission would represent "un effort suprême de mise en équilibre des intérêts." R. Kolb, above n 16, pp. 497-498. But this is hardly a case of prevalence of one of the two conflicting peremptory norms. In the hypothesis of precedence of human rights over the use of force, the normative commands stemming from the prohibition of the use of force would be manifestly ignored in a unilateral humanitarian intervention. As seen in Chapter I above, unilateral humanitarian intervention is not a valid exemption from the peremptory prohibition on the use of force. As a consequence, the contents of the peremptory norms in conflict cannot be optimized under this hypothesis because one could not interpret unilateral humanitarian intervention as lawfully "carving out" from the prohibition of the use of force. Also, a right to unilateral intervention would amount to a complete derogation from the general regime on the use of force. In fact, rather than "balancing and weighing", the acceptance of unilateral intervention as a lawful derogation from the peremptory prohibition of the use of force amounts to the application of teleological-evaluative justification in which one of the conflicting norms prevails over the other in a general manner. Indeed, how can one admit the non-observance of a peremptory norm, since it would contradict essential features of the concept of *ius cogens*, such as its imperativeness and non-derogability? Would that be acceptable under the legal regime of *ius cogens*? Also, how can one admit the precedence of one peremptory norm over another norm of that same character if the conflict is only apparent? As this is hardly the case, since the very imperative nature of the *ius cogens* regime would be affected, the solution to this antinomy must necessarily start from the understanding that the application of both normative commands must be optimized in order to solve an acceptable solution under current international law.

parameters that must be observed at the moment of both designing and implementing the decisions of the UN Security Council aimed at stopping human rights massacres, such as in the context of operationalizing the concept of RtoP. One can mention, in this regard, the duties of transparency, reporting, monitoring and assessing; the respect to the highest standards of international human rights and international humanitarian law; and the premise that force can only be used to protect civilians and humanitarian personnel and in self-defence. This interpretative exercise will be further developed in the following Sections.

Section I – Gross and systematic human rights violations as threats to international peace and security

Since the end of the Cold War in the early 1990's the UN system of collective security has substantially increased its activities.[1346] As a consequence of the growing attention to human rights issues, and mainly as a result of the tragic consequences of the silence and lack of action during the 1990's that led to several cases of genocide, ethnic cleansing, mass murders and huge flows of refugees and internally displaced people,[1347] gross and systematic human rights violations were increasingly invoked as a factor of destabilization. More importantly, they were interpreted by the UNSC as a threat to international peace and security allowing legitimate recourse to Chapter VII of the UN Charter. But since this relationship was not expressly foreseen in the UN Charter, there was a need for bridging the interpretative gap between the abstract notion of the "promotion and protection of human rights" and that of "threats and breaches of international peace and security."

The complex nature of contemporary international conflicts is at the centre of this evolutionary practice at the UNSC with regard to the interpretation of which situations may constitute threats to peace, or breaches of peace. The great majority of armed conflicts these days are of a domestic nature. But they may spill over, directly or indirectly, throughout the region, impacting upon the stability of other countries. Conflicts in central Africa provide several examples of the potential for

[1346] Putting aside some of the ideological and Manichean positions that in in the past compromised consensual decisions by the Western and Communist blocks, the permanent Members of Security Council progressively cooperated towards a common voice for addressing the most important threats to international peace and security. In the fifteen years after the end of the Cold War the UNSC has adopted twice as many resolutions than in the previous forty-five years. "On every conceivable measure, the Security Council has played a far more active role since 1990. At the most basic level, it simply did more. Between 1946 and 1989 it met 2,903 times and adopted 646 resolutions, averaging fewer than 15 a year; between 1990 and 1999 it met 1,183 times and adopted 638 resolutions, an average of about 64 per year," S. Chesterman, above n 1242, p. 121.

[1347] Several circumstances were characterized by their "uniqueness" in the UNSC, such as those of Somalia, Rwanda and Haiti.

regional instability arising from a domestic conflict.[1348] The UNSC has progressively reacted to those situations by coming to the view that in spite of an originally domestic cause, those conflicts deserve the attention of the international community due to their potential to impact upon international peace and security.[1349]

With the end of the Cold War[1350] the UNSC broadened its interpretation as regards the determination of what acts should constitute threats to or breaches of international peace and security. The role of the UNSC became more associated with the enforcement of international obligations, and the procedural limits on enforcement actions were "watered down."[1351] In this process, the capacity of the UNSC provided for by article 39 to determine whether there is "any threat to the peace, breach of the peace, or act of aggression" became increasingly associated with situations of human rights violations, and the coercive powers inscribed into Chapter VII provided the appropriate means for addressing those situations. In this process, Chapter VII was used not only to authorize "all necessary means" in order to address gross and systematic violations of human rights, but also to set up international tribunals for the former Yugoslavia and Rwanda, to apprehend international criminals in Somalia, to establish the United Nations Compensations Committee (UNCC) for Iraq,[1352] to increase the number of mandatory sanction's regimes[1353] and to create new peacekeeping operations.[1354]

In several other circumstances, however, the Council acted without being able to demonstrate that the conflict in question had spilled over the borders of the country in question. In the area of international human rights and humanitarian law, the UNSC thus adopted a broader interpretation of the notion of threats of

[1348] The level of instability in sub-Saharan countries such as Mali, for example, has been impacted by the uncontrolled flow of arms and militants from Libya.

[1349] Kolb described this phenomenon as a growing approximation between domestic and international armed conflicts. R. Kolb, above n 717.

[1350] The record of the UNSC when acting under Chapter VII was very inconsistent before the 1990's. The existence of "threats of peace" was determined on only three occasions: in Palestine in 1948 (S/RES/54), in Southern Rhodesia in 1965 (S/RES/217) and in South Africa in 1977 (S/RES/418), in the latter case as a result of its nuclear program. The Council expressed its "concern" that the situation in Congo, in 1961 (S/RES/161), and Cyprus, in 1974 (S/RES/353) could "threaten international peace and security." A "breach of the peace" under Article 39 was determined in only three occasions: in Korea in 1950 (S/RES/82), in the Flakland Islands/Islas Malvinas in 1982 (S/RES/502), and in the conflict between Iran and Iraq, in 1987 (S/RES/598). And only after the 1974 GA Declaration on the definition of aggression would the UNSC determine and condemn acts of "aggression" as such, and once again in only a few occasions: Israel in 1985 and 1988 (S/RES/573 and S/RES/611), South Africa in 1976 S/RES/387, and Southern Rodhesia (S/RES/455). S. Chesterman, above n 1242, p. 115.

[1351] S. Chesterman, *idem*, p. 113.

[1352] The United Nations Compensation Commission (UNCC) was created in 1991 by Resolution 687 as a subsidiary organ of the UN Security Council. Its mandate is to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait.

[1353] Iraq in 1990 (S/RES/661), former Yugoslavia in 1991 (S/RES/713), Somalia in 1992 (S/RES/733), Libya in 1992 (S/RES/748), Liberia in 1992 (S/RES/788), Haiti in 1993 (S/RES/841), Rwanda in 1994 (S/RES/918), Sudan in 1996 (S/RES/1054), Sierra Leone in 1997 (S/RES/1132), and Afghanistan in 1999 (S/RES/1267).

[1354] Until 1989, only 18 peacekeeping operations had been created. Today, the total of peacekeeping operations is 69. See www.un.org/en/peacekeeping.

and breaches of international peace and security that also encompassed gross and systematic human rights violations, even when restricted to the territory of a single country. The Council based its action on the need to protect the core values of the UN Charter against serious threats of acts such as genocide, that is, not in terms of the actual internationalization of the situation on the ground, but rather on the threat posed by the violation of some of the most fundamental norms of the UN system.[1355] This progressive practice of the UNSC implies that the internationalization of the conflict was no longer a pre-requisite for the enforcement of the system of collective security as provided for by the UN Charter. Other considerations, such as the intensity of the conflict, the level of violation of human rights and international humanitarian law, and the means applied in an armed conflict, could justify, both from a political and a legal perspective, the enforcement of the UN machinery in the area of peace and security.[1356] As a consequence, the UNSC paid increasing attention to internal armed conflicts, and the formula of "the use of all necessary means" became the implicit authorization for the use of force in accordance with Chapter VII of the UN Charter.[1357]

This renewed practice at the UNSC, the legality of which has been confirmed by international jurisprudence,[1358] led to the currently prevailing understanding that the meaning of "threats and breaches of international peace and security" also includes the occurrence of gross and systematic human rights violations, in particular genocide, war crimes, discrimination, crimes against humanity and the most serious violations of IHL, the prohibition of which has a *ius cogens* character. Although the language used by the UNSC has not been precisely coherent (there are references to several sources of international law)[1359] and the determination of

[1355] As mentioned by Kolb, the applicability of Chapter VII became a direct consequence of the character of the violated norms. R. Kolb, *idem*, p. 96.

[1356] In the last decades, the UN Security Council authorized the use of "all necessary means" with the objective of countering grave offences against human dignity, in both international and non-international conflicts. Similarly, most UN peacekeeping operations have included in their mandates subjects related to the protection of individuals. Current "multidimensional" operations, some of which were adopted under Chapter VII, include such tasks as protecting civilians and humanitarian personnel under immediate threat of physical violence.

[1357] As a matter of fact, though, the formula "all necessary means" first appeared in Resolution S/RES/678 of 1990 dealing with Iraq's invasion of Kwait. It resulted from an arrangement made between the then US Secretary of State James Baker and former USSR's Foreign Minister Eduard Shevardnadze, and it aimed at authorizing Member States (namely the coalition of countries led by the US) to enforce UNSC Resolution 660. See S. Chesterman, above n 1242, p. 164. Besides the situation in the former Republic of Yugoslavia (see in particular S/RES/816 (1993) and S/RES/836 (1993)), and in spite of the multiple formats and objetives of the mandates provided for in those resolutions, the Security Council used the formula of "all necessary means" in several other circumstances, such as for the authorization of the use of force in operations in Somalia (S/RES/794, 3 December 1992), Bosnia and Herzegovina (S/RES/824 (1993)), Haiti (S/RES/940 (1994) and S/RES/1529 (2004)), East Timor (S/RES/1264 (1999)), Côte d'Ivoire (S/RES/1528 (2004)), Burundi (S/RES/1545 (2004)), Liberia (S/RES/1561 (2004)), Afghanistan (S/RES/1386 (2001) and S/RES/1563 (2004)) and Iraq (S/RES/1546 (2004)).

[1358] In the *Tadic* case, the ICTY stated that "there is a common understanding … that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts." *Prosecutor v Tadic*, Judgment of October 1995, IT-94-1-AR72, para 30.

[1359] The language used in these attempts combines general principles of the Charter of the United Nations, dispositions of the Universal Declaration of Human Rights, rules of international humanitarian law and

what constitutes a threat or a breach is not necessarily uniform,[1360] it reveals a pattern according to which the use of force is authorized for addressing some gross and systematic human rights violations through the use of the expression "all necessary means" under Chapter VII of the UN Charter. It is therefore an innovative legal interpretation to the extent that it represents an attempt to harmonize or, more appropriately, to bridge the interpretative gap between the prohibition of the use of force and the prohibition of the most serious human rights violations.

From the perspective of the conflicting peremptory norms now under examination, one could say that that practice of the UN Security Council entailed seminal aspects of weighing and balancing both peremptory norms.[1361] Peremptory norms in the area of human rights have carved out from the general prohibition of the use of force, while the result of this interpretative process occurred in full compliance with the peremptory regime set forth by the UN Charter in the area of peace and security. In other words, this practice of the UNSC reflects an exercise of weighing and balancing both conflicting peremptory norms, in which the peremptory norms in the area of human rights lawfully carved out from the peremptory prohibition of the use of force without entailing its derogation from the system.

Section II – A coherent operationalization of the concept of "responsibility to protect" as a result of weighing and balancing

In practical terms, the discussion on how to solve the antinomy between the peremptory prohibitions on the use of force and the most serious violations of human rights is embodied in the operationalization of the concept of "responsibility to protect,"[1362] as the most appropriate and available tool in the multilateral system of collective security for addressing gross and systematic human rights violations (genocide, war crime, crime against humanity and ethnic

concepts of international human rights and refugee law. For a thorough analysis on this matter, see S. Chesterman, above n 1242, pp. 127-160.

[1360] "In practice, such action (UNSC) has been taken on a very selective basis and has been shadowed by *ad hoc* geopolitical reasons unconnected with human rights." I. Brownlie, above n 487, p. 557. Indeed, the practice of the UNSC is far from being perfect. The various measures and resolutions adopted by the Council have led to concepts that are imprecise in legal terms. Their relationship with the fundamental principles enshrined in the UN Charter is also unclear. But in being imperfect and not above criticism, the practice of the UN does nothing but reflecting the shortcomings of both international law and the international system. One should focus his or her criticism therefore on reforming the structures of the multilateral system such as the UNSC, instead of trying to ignore international law.

[1361] In a historical note, the idea of a right to intervene ("droit d'ingérence") is at the origins of important resolutions of the UNSC, such as Resolution 43/131 that supports the action of the international community in cases of natural disasters and situations of emergencies. It was also invoked as justification by the UNSC to establish a humanitarian corridor for Kurds fleeing Iraq in 1990 and 1991.

[1362] See Chapter I, Section VI above.

cleansing). Inscribed into a broader evolution of the implementation of the capacities of the UN Security Council to act under Chapters VI and VII of the UN Charter in the context of efforts to protect civilians and to stop gross and systematic human rights violations, the lawful implementation of RtoP requires a harmonious interpretation of these two conflicting peremptory norms. This exercise of interpretation is based not only in the balancing and weighing between the two conflicting peremptory norms, but also in the application of all other fundamental principles of public international law equally applicable in those circumstances, namely the principles of peaceful settlement of disputes, international cooperation and non-intervention.[1363] Several conditions will arise from this exercise of "weighing and balancing", which will provide the legal parameters for a lawful implementation of the concept of RtoP.

Progressive approach: a requirement stemming from the application of the principles of peaceful settlement of disputes and international cooperation

Bearing in mind that the use of force is generally admitted as the *ultima ratio* to stop human rights violations, and that it should be used under the principles of necessity and proportionality, one can identify a rule of "progressive approach" to be applied to RtoP. This is a consequence of the process of mutually carving out between these contradicting peremptory norms, as well as of the application of the fundamental principles of the UN Charter.[1364] First, article 1 of the Charter establishes, among the purposes of the UN, the obligation "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[1365] Second, as it has already been said above,[1366] the universal promotion and protection of human rights is primarily an endeavour to be undertaken under the principle of international cooperation. Third, in accordance with the competences provided by the UN Charter, the use of force as the last resort can only be authorized by the Security Council. Following this

[1363] From a broader perspective, the discussion on how to harmonize the peremptory norms on the use of force and human rights disclosures a tension between arguments in favour of unilateral foreign intervention as a means to protect individuals, and the fears of misuse and abuse of such forcible action by intervening countries. Any solution for this antinomy requires therefore the deconstruction of this tension by means of providing the necessary guarantees on the exclusive use of military action for humanitarian purposes only.

[1364] In practice, the regime of sanctions as applied by the UNSC also follows a progressive dynamic.

[1365] It is not by accident that Chapter VII is preceded by a specific chapter entitled "Pacific Settlement of Disputes." Article 33 of the UN Charter reproduces the well-known list of existing measures of public international law that can be used in order to peacefully address a situation that "is likely to endanger the maintenance of international peace and security." Article 33 (2) reads that "[t]he Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means." See also, *inter alia*, *Nicaragua* case, above n 281.

[1366] See Chapter II above.

reasoning, the concept of RtoP (in particular its third and last pillar)[1367] has to be understood as the last resort in the efforts to bring to a halt the most serious forms of human rights violations.[1368] Although there is no necessary sequence to be followed between these three pillars, it seems logical to conclude that any measure to be taken under the notion of RtoP should be guided primarily by the rules of peaceful settlement of disputes and international cooperation;[1369] and that the use of force is the last resort in the light of the failure of other non-military options.

Of course this rationale is subject to the imperative of taking timely and effective measures, including through the use of force, by taking into due account the evolution and the specificities of the situation on the ground. But one should not jump directly to military coercive means without demonstrating any willingness to solve the problem through non-forcible means and international cooperation, since it would contradict fundamental principles of the UN Charter. Suggesting that military force is the sole and appropriate means for stopping human rights violations requires therefore the proof (*ei qui dicit incumbit probatio*) that others means, particular those of a political and non-military nature, would be inapplicable or inefficient to addressing the situation on the ground.

Also, under the principles of international cooperation and peaceful settlement of disputes, third countries should also avoid any measure that could worsen the human rights situation on the ground. For example, arm embargoes should be respected by all States, regardless of their eventual allegiances with the respective

[1367] In his 2009 Report "Implementing the Responsibility to Protect", the Secretary-General suggested a three-pillar approach (i) the protection responsibilities of the state, (ii) international assistance and capacity building, and (iii) timely and decisive response to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity. UN Document A/63/677, 12 January 2009.

[1368] The need to observe the principle of peaceful settlement of disputes in the area of RtoP was also reflected on paragraph 139 of the 2005 World Summit Outcome.

[1369] Preventive diplomacy is therefore a fundamental aspect of any effort related to the operationalization of the concept of RtoP in its first and second pillars. Under the principle of international cooperation stemming from the UN Charter, the role of other competent bodies of the UN system, as well as the recourse to alternative and innovative means of mediation should be reinforced. The Human Rights Council (HRC), for instance, should be used as a means for achieving political solutions. One should go beyond the monitoring of human rights situations and envisage the establishment of agreed plans (road maps) in which the State concerned and the Council, with the assistance of the UN High Commissioner of Human Rights, agree on concrete measures, benchmarks and deadlines for the prevention or the halting of gross and systematic human rights violations. The monitoring of the compliance with such plans would be a matter of priority both in the HRC and in the GA and the UNSC. The non-compliance with those road-maps could be used as an objective element for referring the case to the ICC. Also, recourse to figures such as the role of Special Representatives of the UN Secretary General should be enhanced, with broader and effective mandates for mediating human rights crisis. Also, the role of the UNSC in preventive diplomacy should be enhanced. Military operations are expected to be a last recource in a series of other measures under Chapters VI and VII, such as arms embargos and the taking of the issue to the ICC under article 13 of the Rome Statute. These measures would be in full accordance to the principles of the UN Charter on international cooperation, state sovereignty and non-intervention, while also contributing to achieving the common goal of stopping human rights violations on the ground. The core here is giving concreteness to the open normative contents of international cooperation and peaceful settlement of disputes in the light of the supreme objective of stopping the continuation of a humanitarian crisis.

sides to a conflict.[1370] One could even say that increasing the level of combats by providing arms and ammunition, and potentially augmenting the occurrence of human rights violations is contrary to the very peremptory prohibition of the most serious human rights violations, besides a violation of other principles such as non-intervention, sovereignty of States and international cooperation.[1371] Instead of taking sides on a conflict, the principles of peaceful settlement of disputes and international cooperation imply that the focus of the international community should fall exclusively on the victims and on how foreign participation may contribute to halt gross and systematic human rights violations. These are the only sides to be taken by the organized international community.

Designing a proper mandate as a guarantee of respect for international law

Whenever other measures prove to be insufficient or inadequate, the recourse to the use of force may be the only measure capable of bringing gross and systematic human rights violations to a halt. However, an UNSC authorization cannot be interpreted as *carte blanche* to lay waste to the country in question or to precipitate widespread and uncontrolled killings. It is for that reason that the exercise of "weighing and balancing" between both peremptory norms assumes its most clear picture when the mandate is being designed in the UNSC, a moment in which measures are expected to strike a precise balance between both norms.[1372]

[1370] In recent years, it is impressive to note how third countries have substantially increased their "indirect" participation in escalating armed conflicts by the provision of arms to the sides of a conflict, sometimes even under a human rights rhetoric. All that without mentioning the destabilizing effects of uncontrolled arms in the territory as regards indiscriminate banditism, sexual abuse, use of child soldiers, and severe impairment of basic services of health, sanitation and education. To a great extent, these recent cases may be interpreted as a step backwards the Cold War period, in which the capitalist and the socialist blocks poured stockpiles of arms and ammunition into Africa, Asia and Latin America in their efforts to extend their respective areas of influence at the expense of the lives of those living in those regions. This process would ultimately lead to the 1990's, and the characterization of light and small weapons as weapons of mass destruction by Kofi Annan.

[1371] It should be asked, as a matter of *lex ferenda*, whether third states and individuals providing support through arms and ammunition to the sides to a conflict should not be held accountable on grounds of co-responsibility for potential human rights violations. The recent cases of Libya and Syria have provided outstanding examples of how the conflict aggravated not only as a result of the undisputed bloodiness of Gadhafi and Assad's regime, but also as a consequence of the substantial support of arms and ammunition for combatants on all sides of the conflict. It seems needless to say that the increase in the level of weaponry impacts negatively on the promotion and protection of human rights during an already complex humanitarian crisis on the ground. In a realistic pattern that exposes interests and allegiances instead of exclusive humanitarian concerns, this practice unveils the aim of reinforcing the bargaining and potentially the capacity of armed groups to overthrown the regimes in power. The humanitarian outcome of this practice is reflected in recent cases. The figures of Libya and Syria are outstanding on this regard, and provide shocking but recurrent evidence that this type of armed conflict requires first and foremost politically negotiated solutions.

[1372] This appears to be particularly true in the absence of the implementation at any point of the foreseable future of the arrangements provided for in Article 43 of the UN Charter. "Article 43: 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining

As a corollary of the principles of necessity and proportionality, the first aspect to take into consideration is whether the use of armed force would have the potential to improve, or in fact to worsen, an already complex humanitarian situation. This is a preliminary question to be answered in the negotiating process that may eventually lead to an authorization of the use of force by the UNSC. The concrete benefits and the aims of an operation based on the use of force must be subjected to a thorough analysis in the Council.[1373] This is potentially the most important aspect to bear in mind when taking the political decision of authorizing the use of force for stopping massacres. The responsibility that the international community is undoubtedly entitled with to stop massacres comes together with the responsibility to guarantee the minimum number of casualties, not only as regards first and foremost the civilian population, but also among the lines of those committing human rights violations. Ideally, those responsible for the worsening of the situation up to the point that it has justified an international intervention, such as military personnel and public officials, should not be killed, but rather be brought to international criminal justice instead. In other words, there is no "sliding scale" in humanitarian interventions.[1374]

Second, the exclusive humanitarian purposes of the authorized use of force must be translated into the several aspects of a given mandate by the UNSC. Some of the principles governing over peacekeeping operations should be applied in this regard,[1375] in particular the ideas of impartiality in the conflict and the use of force for the exclusive purpose of self-defence and enforcement of the mandate.[1376] It has already been said that gross and systematic human rights violations may be

international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."

[1373] This is not a utilitarian view in which bodies must be counted in order to measure up to what extent foreign use of force is to be admitted or not. But simply that an authorization of the use of force on behalf of the international community is a serious issue, and requires a careful examination of all possibilities, since it is and must be an inherently last recourse to stop gross and systematic human rights violations.

[1374] On the idea of "sliding scale" as a justitication for widely disrespecting human rights and international humanitarian law, see M. Waltzer, above n 792. The idea is simple: in the face of supreme morally evil, those waging a "just" war may disrespect international human rights and humanitarian law and thus cause widespread massacres among civilian populations. He uses as examples to present his case the American and British "terrorist" bombing and destruction of German cities during World War II. But under current international law, the coallition representing the "international community" in RtoP operation has no "license to kill" as a minor and unavoidable price to pay to "make a better world."

[1375] One could say that, in some circumstances, RtoP actions may be peacekeeping operations with a more robust mandate. This appears to be particularly true when there is already a peacekeeping operation on the ground, such as in the case of Darfur and Côte d'Ivoire.

[1376] Indeed, in Resolution 1975 on Libya, the UNSC stressed that the use of force was authorized under the principle of impartiality. In another occasion, dealing with Côte d'Ivoire, India's representative said that, although he had voted in favour of the resolution, peacekeepers should not be agents of regime change and UNOCI should neither become part of the political stalemate nor be drawn into a civil war. The mission and its staff should strictly and impartially follow their mandates as set out in Council resolutions.

considered threats to international peace and security in accordance with recent practice in the UNSC. And it is precisely this interpretation of the Charter that provides the legal basis for understanding massacres as attempting against the interests of the international community as a whole. However, in accordance with the principles of non-intervention and sovereignty of States, this legitimacy to act in exclusively domestic circumstances implies an impartial stance on the matters underlying the conflict, or between the parties to a conflict. In no case the use of force can be interpreted as a *carte blanche* for a "regime change" strategy, even though this can eventually be the ultimate result of the action. The above does not mean inaction or neutrality, but simply that there is only one side to be taken in RtoP operations: the side of the civilians who are being victimized to a widespread degree (genocide, ethnic cleansing, crimes against humanity and war crimes).

Third, high standards in the area of human rights and international humanitarian law must be respected by those entitled or willing to enforce a mandate of the UN Security Council when implementing a RtoP strategy. The rationale is quite simple: if human rights provide the requested legitimacy and legality for the use of force against gross and systematic human rights violation, those entitled to act on behalf of the victims as representatives of the so-called "international community" should be obliged to maintain the same or even more strict standards when it comes to respecting human rights and IHL standards.[1377] Indeed, if the principles of proportionality and necessity stemming from the law of armed conflicts are applied to the exercise of the right of self-defence, should not they also apply to RtoP? Troop-contributing countries should therefore act in full accordance with the normative of international human rights law and international humanitarian law. The UN High Commissioner of Human Rights and other international agencies could play an important role in this regard as a means of supervising and guaranteeing that international human rights standards are being respected.[1378]

Fourth, RtoP operations should be under constant control and monitoring at the UNSC. The authorization for States to use "all necessary means" implies a certain type of delegation of powers by the UNSC and the international community at large,[1379] since the enforcement of UNSC resolutions depends on the political

[1377] Nonetheless, one of the most striking observations to make from the analysis of the political discourse in favour of unilateral interventionism is that the limits and the framework within which the use of force is expected to be circumscribed are scarcely mentioned.

[1378] One could even suggest that RtoP opoerations should also be submitted to the principle of complementarity of international adjudication of bodies such as the ICC in cases of failure of domestic jurisdiction to ensure accountability in the event of serious cases of misconduct in the exercise of the UN mandates, at least for those countries who are parties to the Rome Statute.

[1379] According to Chesterman, "the delegation of Chapter VII powers now appears to have gained relatively broad acceptance," in S. Chesterman, above n 1242, p. 169. Indeed, the legality of delegation of powers by the UNSC was recognized by the ICJ in the *Certain Expenses* case, in which the delegation to the UN Secretary General was considered legal by the Court. See *Certain Expenses of the United Nations*, ICJ Reports, 1962, p. 177. On the differentiation between "delegation" and "authorization" of the enforcement powers of the UNSC, see Danesh Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, Oxford, Clarendon Press, 1999, pp. 167-246.

willingness of States to participate in this type of operation.[1380] These means of oversight may provide, along with time limits and well-defined objectives, the appropriate normative framework for avoiding a broad discretion on the use of force by those States entitled or willing to perform a given specific mandate.[1381] In other words, the powers of the UNSC must be occasionally transferred to the Member States in the absence of a standing UN army and in light of all the difficulties in implementing the collective security system as envisaged in Articles 43, 46, 46 and 47 of the Charter.[1382] But the competence (political legitimacy and legality) of authorizing the use of force remains an exclusive attribute of the UNSC, and for that reason all use of force authorized by the UNSC must be placed under its permanent scrutiny by means of reporting proceedings.[1383] Indeed, the practice of delegation of powers by the Council has not occurred without problems to the normative framework of the collective security system, to a large extent because of the lack of checks and balances between the UNSC and the countries engaged in enforcement operations.[1384] Means of control and monitoring are therefore necessary as a means to continuously reinforcing the legitimacy and the very legality of all acts taken on behalf of the international community as a whole.[1385] That is important not only under a legal and political paradigm, but also for practical reasons: the sake of the very operation, since monitoring and reporting lines can convey requests for changes in the mandate in the light of the needs on the ground.[1386] This seems to be even more important in contemporary warfare,

[1380] It is widely known that this type of resolution is most likely the result of the political pressure made by States which are willing to recourse to the use of force against other States. It is for that reason that in certain occasions the authorization of the UNSC came only after as a means of legitimizing an already occurring operation. Such was the case of ECOWAS intervention in Liberia and Sierra Leone in the 1990s. Nonetheless, from an exclusive legal perspective, the authorization by the UNSC remains as the keystone of legality for enforcement actions in international relations.

[1381] This is particularly important because "the practice of delegating its enforcement powers [by the UNSC] has depended more upon a coincidence of national interest than on procedural legality." S. Chesterman, above n 1242, p. 165.

[1382] When presenting his "Agenda for Peace", the then UN Secretary General recalled that neither the UN Secretariat nor the Security Council had the military "capacity to deploy, direct, command, and control" of operations involving the use of force. *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc A/50/60-S/1995/1, para. 77.

[1383] The model used in peacekeeping operations, by means of which representatives of UN Secretary General must report to the UNSC in a permanent basis, should be used in these international coalitions, not only as a means to ensure that the use of force is constantly under the ovsersight by the competent body, but also to guarantee that mistakes can be corrected and shifts can be made whenever needed.

[1384] For a thorough analysis on this issue, see S. Chesterman, above n 1242, pp. 163-218.

[1385] Sarooshi argues that the delegation of powers by the UNSC requires certain requisites in the mandate, such as clarity, supervision by the Council, and reporting. D. Sarooshi, above n 1379, pp. 155-163.

[1386] There are important pieces of evidence in the practice of the UNSC. Several countries have expressed their views on the need for reporting lines between the countries enforcing UNSC resolutions through the use of force and the main body of the UN system in the area of peace and security. As noted by the representative of Malaysia when analyzing the situation in Iraq-Kwait, countries enforcing mandates of the Council should be "fully accountable for their actions to the Council through a clear system of reporting and accountability." S/PV.2963 (1990) p. 76, Malaysia. Also, Resolution 794 (1992) on Somalia appears to have been adopted unanimously "due to the stricter control mechanisms incorporated into the resolution." See S. Chesterman, above n 1242, p. 188. The same thing happened with *Opération Turquoise* in Rwanda that was led by France and was subject to reporting lines with the Council on a "regular basis." See S/RES/929 (1994). As noted by

characterized by vertical or asymmetrical combat, in which many countries with the capacity to launch an RtoP operation may prefer to bomb their targets from thousands of miles away instead of deploying military personal on the ground.[1387]

Along these same lines, mandates are expected to provide clear timeframes for attaining the goals set forth by the UNSC. Whenever these goals have not been attained and there is a need for the mandate to be extended, the Council should further deliberate on its convenience. Existing UNSC practice provides some examples of how serious the issue can be for the purpose of the continuing legal and political legitimacy of the authorization to recourse to force as a means of implementing resolutions.[1388] A mandate authorizing the use of force ("all necessary means") should be accompanied by long-term strategies for recuperating and alleviating the suffering of the victims. Not only must the impact on civilian population be taken into account as a matter of priority, but also long term strategies that concretely help to promoting and protecting all human rights in the intervened State.

Critics may say that the possibility of multilateral oversight could have the negative effect of creating fear among countries and impact upon their willingness to "intervene".[1389] It is argued that some situations require prompt action, and

Chesterman "[o]ne of the few aspects of delegation that has been the subject of significant debate in the Council is the question of reporting requirements." *Idem*, p. 188. Even in one of the first authorizations of the use the use force by the UNSC, in Korea, which only occurred because the former USSR left its seat at the Council, the United States was requested to provide the body with reports as appropriate. S/RES/84 (1950).

[1387] The recent military operation of NATO in Lybia provides striking evidence of this tendency.

[1388] In the case of Iraq, for instance, S/RES/678 (1990) did not specify a clear end to the use of "all necessary means" and the lack of a deadline resulted in the continuing bombing of Iraq by US and United Kingdom air forces even though the objetives of restoring "international peace and security in the area." For a thorough analysis of this case, see S. Chesterman, above n 1242, pp. 196-206. In other situations, the UNSC provided clearer mandates, such as in the 1994 *Opération Turquoise* (S/RES/929 (1994)).

[1389] Indeed, in a recent discussion promoted by Brazil at the UN, the representatives of countries such as Australia questioned whether the idea of "responsibility while protecting" would not affect the readiness of some countries to intervene. In its position paper circulated among Member States, Brazil suggested the following parameters for the implementation of RtoP strategies: (a) Just as in the medical sciences, prevention is always the best policy; it is the emphasis on preventive diplomacy that reduces the risk of armed conflict and the human costs associated with it; (b) The international community must be rigorous in its efforts to exhaust all peaceful means available in the protection of civilians under threat of violence, in line with the principles and purposes of the Charter and as embodied in the 2005 World Summit Outcome; (c) The use of force, including in the exercise of the responsibility to protect, must always be authorized by the Security Council, in accordance with Chapter VII of the Charter, or, in exceptional circumstances, by the General Assembly, in line with its Resolution 377 (V); (d) The authorization for the use of force must be limited in its legal, operational and temporal elements and the scope of military action must abide by the letter and the spirit of the mandate conferred by the Security Council or the General Assembly, and be carried out in strict conformity with international law, in particular international humanitarian law and the international law of armed conflict; (e) The use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent; (f) In the event that the use of force is contemplated, action must be judicious, proportionate and limited to the objectives established by the Security Council; (g) These guidelines must be observed throughout the entire length of the authorization, from the adoption of the resolution to the suspension of the authorization by a new resolution; (h) Enhanced Security Council procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting; (i) The Security Council must ensure the accountability of those to whom authority is granted to resort to force. Document A/66/551-S/2011/701.

intervening states cannot wait for a clearly designed mandate. In other words, states want to intervene but do not want to be submitted to any type of external oversight. One must admit that the RtoP enforcement actions hinge upon the willingness of States to participate in military operations. For that reason it is important that these States have the necessary operational command and flexibility for adopting the corresponding military measures with a view to implementing the terms of a given mandate. But any action to be taken on these grounds must occur in the light of the exclusive objectives provided for the mandate of the UNSC, while also respecting the principles of necessity and proportionality, as well as the need for guaranteeing transparency and accountability.[1390] In order to ensure that participating countries are complying with those requirements, reporting and monitoring activities appears as an unavoidable conditions complying with all these objective requirements stemming from the exercise of weighing and balancing between both peremptory norms.

Finally, on the factual and timely aspects, situations generally don't evolve into widespread and uncontrolled violence, leading to gross and systematic human rights violations, without there being warning signs in days of real-time information and worldwide monitoring due to technological advances. Although violence may break out in a matter of hours (and the genocide in Rwanda was an example of that), it normally evolves over weeks, and there is certainly enough time – a few days at least – for the UNSC to take an informed and appropriate decision. The main question therefore is not necessarily one of time but one of political willingness, and on the growing lack of representativeness of the UNSC.[1391]

[1390] No matter how realistic that piece of criticism may appear, it has the only result of raising more doubts on the very intents of the countries showing willingness to use force against another States on allegedly "humanitarian" grounds. Indeed, why would a country willing to intervene in another sovereign country exclusively for "humanitarian" purposes refuse to collaborate and to provide the international community at large all information on the progressive implementation of the mandate?

[1391] Critics on the "paralysis" of the UNSC should focus their activism on reforming the main multilateral body in the area of peace and security instead of using it as a pretext to bypass and disregard international law.

Chapter VI - Conclusion

Nobody can reasonably question the importance of finding concrete and timely solutions for avoiding and, most importantly, stopping massacres and gross human rights violations. This is certainly one of the most legitimate and urgent concerns for the international community nowadays. Information is shared in real time, impacting upon public opinion all around the globe, and compels governments to act. But one must be careful not to confuse political with legal arguments, regardless of the fact that both deal with inter-subjective relationships and are intrinsically related. This seems to be even more important in the case of international law, which is still characterized by a lack of democratic supranational institutions with compulsory competences in the legislative, enforcement and jurisdictional areas. The inescapable logical corollary from this conclusion is that any legal interpretation on the lawful means for stopping massacres must occur in a harmonized manner with the existing norms on the use of force, since that suggesting the legality of the "humanitarian intervention" on the basis of the UN Charter overstretches the limits imposed by the tenets of legal interpretation.[1392] Solutions are to be found within the law, and not by bypassing the existing legal framework, as some "free-riders" seem to advocate simply or solely on grounds of "good intentions."[1393] This seems to be precisely the case as regards "humanitarian intervention" nowadays, when the political activism of some scholars has led them to disregard basic fundaments of international law.[1394]

[1392] As noted by Chesterman, "one of the reasons for this failure is that many proponents of humanitarian intervention justify it as promoting human rights, and are loath to do so at the expense of the closest thing international law has to a constitution." S. Chesterman, above n 1242, p. 46.

[1393] It is worthwhile to recall the comments of Hulsroj as regards what could be considered excessive combativeness on the part of some scholars, who in several cases seem to "have surely felt unconstrained in the area of custom and have superimposed their own political ideas. But these ideals did not always correspond to the political will – and politicians saw, felt, that political decisions were taken away from them. This is, to me, one of the reasons why there is, in general, a movement away from international law as a regulatory mechanism – and why only treaty law is effective." P. Hulsroj, 'Three Sources – No River: A Hard Look At the Sources of Public International Law with Particular Emphasis on Custom and General Principles of Law' (1999) 54 *Zeitschrift für öffentliches Recht*, p. 227.

[1394] "The most noticeable aspect of the debates (….) is the disjunction between the positions of publicists and state practice. No state has ever justified an intervention in terms corresponding to the doctrine as articulated by its most enthusiastic academic proponents." S. Chesterman, above n 1242, p. 47. Without even bothering to demonstrate how it could be so in the light of the law of state responsibility, which precisely rejects the preclusion of wrongfulness on grounds of necessity in cases of contradicting peremptory norms, Rytter and Harhoff argue the use of the doctrine of necessity as a circumstance to preclude the wrongfulness of disrespecting article 2 (4) of the UN Charter. This approach is unacceptable not only because the rule of non-use of force is a norm *iuris cogentis*, but also because resort to the necessity principle should be convergent to the already existing exception of self-defense. In this regard, the ILC clearly stated that, in the context of the necessity principle, the prohibition of the non-use of force International state practice cast some doubts over Rytter's distinction between *lege lata* and *lege ferenda* in the case of "humanitarian intervention." See J. E. Rytter, 'Humanitarian Intervention without the Security Council: From San Francisco to Kosovo – and Beyond' (2001), 70 *Nordic Journal of International Law (NJIL)*, 121, at 128–130; and F. Harhoff, above n 1281, p. 106.

One of the main problems in this debate results from a merging of morality with legality. But if this can hardly be taken for granted even in domestic systems, how can one sustain it in the international legal system? And nor can one argue that morals or extra-positive rationale should prevail over positive law merely because international law is imperfect as a system. If the claim in favour of humanitarian intervention is essentially one of a political nature instead of being solidly grounded in law, it should be noted that, as an equally political argument, in practice only the most powerful states are in a position to unilaterally recourse to the use of force to allegedly "enforce peace and protect human rights." Consequently, from an equally political and moral point of view, advocating for the unilateral capacity of States to intervene on humanitarian grounds implies the acceptance that only some States can intervene in other States. That would be tantamount to saying that some states are more equal than others, and that States can be divided into "good" and "evil" ones. This is a very undemocratic (perhaps even reactionary) way of seeing things, particularly at a time in which the balance of power in the world is undergoing profound changes. And the inherent dangers of such an approach not only contradict the whole development of the legal principle of prohibition of the use of force in the last seventy years, but also bring more insecurity and unpredictability into international relations.[1395] Most importantly, it weakens even further the fundamental principles of public international law. Of course there are authoritarian regimes that violate human rights in many ways, and public and high-ranking officials should be held accountable for that. But the political pressure should be directed at efforts both to reform the competent bodies of the international system, with a view to enhancing the representativeness and efficiency of the multilateral system of collective security, and to expand the universal character of international criminal jurisdiction in a manner that all States, regardless of their ideology, religion and political allegiances, are subject to.

In exclusively legal terms, the acceptance of the right or duty of unilateral humanitarian intervention means a step back towards the international legal system prior to the UN Charter. It brings back the notion of "just war", in which the decision on the legality of the use of force was inherently subject to the unilateral discretion of individual States on what is just and moral in international relations. It increases the potential for abuses and misuse of the alleged "legitimacy" that would ultimately justify a unilateral humanitarian intervention. Also, it means the arbitrary discretion of a few countries that would be held to account only by their own domestic instruments, the efficacy and impartiality of which might obviously be doubted.[1396] This is the logical conclusion to be drawn from the progressive development of the law on the use of force in contemporary

[1395] *Per contra*, see M. Walzer, *Just and Unjust Wars: a Moral Argument with Historical Illustrations*, London, Basic Books, 1977.
[1396] See above n 1248, on the criticism of Rawls' Law of Peoples.

international law. The moral question is therefore whether it is worth taking this backwards step or if we should instead seek to improve the existing framework of the international legal system. History seems to give us the answer by providing several examples of the risks posed by unilateral interventionism.

Moreover, in a more utilitarian and realistic tone, beyond the pressure and the outcry of the public opinion in face of gross and systematic human rights violations (the so-called "CNN effect"), there remains the question of demonstrating that forcible measures are appropriate and efficient as a means of limiting, preventing and solving the concrete problem and its root causes. In general, however, foreign military force tends to exacerbate the sense of lawlessness with the potential to increase the vulnerability of certain groups, particularly the most vulnerable ones, such as women and children.[1397] It also usually overlooks the same aspects, namely those of a humanitarian nature that would ultimately provide a military operation with the necessary legitimacy for enforcing respect for human rights. If human rights are a supreme moral value the enjoyment of which is expected to be enhanced as a result of indiscriminate and discretionary military intervention, how can one justify the death of innocents, particularly of civilians, and the destruction of infrastructure and the impairment in the enjoyment of other human rights such as health, education, sanitation, freedom from hunger and the rights of the child, women and elderly, on the very grounds of protecting human rights? Would there not be a conflict within the conflict, which is to say an antinomy between the rights of a part of the population affected by widespread violence and the rights of those affected by the intervention, which are most likely to be exactly the same? The limits of such a "utilitarian" argument[1398] are exemplified in recent humanitarian interventions in Iraq and Libya,[1399] and even in Kosovo.[1400] Instead of a universal unilateralism that neglects actual disparities of power among States in current international politics, a systemic interpretation of international law points to the need to balance the

[1397] As mentioned by Kolb in his description of "utilitarian" arguments, "il n'est pas évident que plus de force, avec son cortége de destruction et de victims, servira davantage la cause humanitaire… Ce que précède est d'autant plus vrai si l'on songe au fait que les Etats n'entreprennent guère des interventions coûteuses en argent et en vies s'ils n'ont pas un quelconque intérêt tangible en jeu." R. Kolb, above n 16, p. 496.

[1398] The "utilitarian" approach implies that any military intervention must take into account the reasonable potential of success and well-being resulting from it. See, for example, M. Frost, *Towards a normative theory of international relations*, Cambridge, Cambridge University Press, 1986, pp. 139-40; and D. Luban, 'Just Wars and Human Rights', (1980) 9 (2) *Philosophy and Public Affairs*, Princeton, pp. 160-181.

[1399] According to Kuperman, NATO's 2011 humanitarian military intervention in Libya backfired. He says that the "intervention extended the war's duration about sixfold; increased its death toll approximately seven to ten times; and exacerbated human rights abuses, humanitarian suffering, Islamic radicalism, and weapons proliferation in Libya and its neighbors." Alan J. Kuperman, 'A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign', (Summer 2013) 38 (1) *International Security*, pp. 105-136. See also the Report of Amnesty International entitled *Libya: The forgotten victims of NATO strikes*, 19 March 2012, available at "http://www.amnesty.org/en/library/info/MDE19/003/2012/en."

[1400] See the Report of Amnesty International entitled *Federal Republic of Yugoslavia (FRY) /NATO: Collateral Damage or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, 5 July 2000, available at "http://www.amnesty.org/es/library/info/EUR70/018/2000/en."

unquestionable need to stop this type of atrocity, which should no longer be tolerated on the grounds of safeguarding State sovereignty, with the existing law on the use of force. That means the need for the Security Council to authorize the use of force, and Security Council practice in recent years provides some pointers for the future. Clear and well-designed mandates must provide the framework for this type of action, while also ensuring that medium and long-term strategies are put in place through the various agencies of the multilateral system.

The solution suggested above is certainly a complex one from both legal and political perspectives. It reflects the difficulties faced by decision-makers in their efforts to balance and weigh conflicting peremptory normative provisions simultaneously applied to concrete situations. At least in the eyes of international public opinion, driven by the "CNN effect", the cry for a fully-fledged, unrestrained intervention could appear natural from a perspective juxtaposing the values of justice and morals against the evil nature of certain regimes. However, gross and systematic human rights violations are usually inscribed in much more complex circumstances in which elements of various natures – economics, politics, culture, religion, history and foreign influence – are intermingled. A solution is necessary that not only prevents and halts massacres but also creates the conditions for a sustainable peaceful environment. But for that purpose, simplistic assumptions based exclusively on good and evil are often useless. Most importantly, current international law already provides an answer for that problem: the most serious violations of international human rights and international humanitarian law are now considered as threats to international peace and security justifying the "use of all necessary means" under Chapter VII of the UN Charter. It is now fundamentally a question of how States act politically in this regard.

For the purposes of *ius cogens*, this exercise of weighing and balancing has shown that apparent antinomies between peremptory norms can be solved on the basis of interpretative techniques aiming at optimizing both normative commands in the light of factual circumstances. The next Part will turn to the inquiry into the problem of real antinomies, which in the case of conflicting peremptory norms might be considered "hard cases" in public international law.

Part VI – Antinomy between the prohibition of the use of force and self-determination: the case of a peace agreement between Israel and Palestine

The Israeli-Palestinian conflict is probably the most urgent problem in current international politics. It is an obstacle to achieving sustainable stability in the Middle East and to enhancing international peace and security. It is no surprise therefore that it is also the issue that has attracted most attention in the various political forums of the multilateral system. In the United Nations the matter has been dealt with at the UN Security Council, the General Assembly,[1401] the International Court of Justice, the Human Rights Council (where it is a permanent topic of the agenda) and in the main UN agencies and related mechanisms.

From the perspective of *ius cogens*, the political objective of solving the Israeli-Palestinian conflict also unveils relevant legal questions. In the context of both a paralyzed peace process and the expansion of the Israeli occupation, negotiations have developed towards the aim to achieve a feasible solution for the conflict on the basis of the cession to Israel of at least a part of the occupied Palestinian territory as a bargain in the context of a larger peace agreement. As a consequence, *inter alia*, of the continuous failure in the implementation of the two 1993 Oslo Accords[1402] several recent documents have referred to the integrity and indivisibility of the internationally recognized Palestinian territory in a more open manner. For example, the trilateral statement issued at the end of the 2000 Camp

[1401] About 10 resolutions on the question of Palestine are approved by the General Assembly each year. See http://unispal.un.org.

[1402] The "Declaration of Principles on Interim Self-Government and Interim Agreement on the West Bank and the Gaza Strip" expressly aimed at the implementation of UNSC Resolutions 242 and 338. Of course though, it could be argued that the Oslo Accords derogated from the general rule since it did not transfer full responsibilities in the security area for the Palestinians. Also, it left issues such as Jerusalem, settlements, military locations, and Israelis outside the jurisdiction of the Palestine Council over the West Bank and Gaza Strip territory, and subject the permanent status negotiations. But from a legal perspective, the explicit references to UNSC Resolutions 242 and 338 imply a guarantee on the applicability of the rule rejecting the territorial acquisition by aggressive means.

David Summit only referred to the fact that both sides agreed that "negotiations should be based" on UNSC Resolutions 242 and 338,[1403] and reports on the 2000 negotiations indicate that the pre-1967 West Bank territory would never be entirely transferred to Palestine.[1404] In this same trend, the 2012 GA Resolution 67/19 also adopted a general and milder formula suggesting that the two-state solution would occur "on the basis of the pre-1967 borders," without a harder stance on the indivisibility and integrity of Palestinian territories.[1405] Contrary to the principle of "land for peace" inscribed in Resolution 242 of the UN Security Council, that new tendency would rather imply "land for sovereignty," in which the Palestinian people would cede parts of their territory for obtaining autonomy under their right to self-determination.

In the light of these developments it is pertinent to ask what would be the potential consequences stemming from the application of a legal regime of *ius cogens* to a hypothetical peace agreement providing for the cession of parts of the original pre-1967 Palestinian territory. That possibility apparently runs contrary to the peremptory prohibition of the territorial acquisition by forcible means as a corollary of the peremptory prohibition of the use of force. It should be analysed therefore whether such an agreement should be considered null and void for contradicting a peremptory norm[1406] as a consequence of conveying the cession of illegaly occupied territories. The effects entailed by article 53 of the VCLT for contrary agreements are widely known: any treaty contrary to a peremptory norm must be considered null and void.[1407] Here, the limits imposed upon the free will of States are clearly manifested: treaties cannot contract out from *ius cogens*, and nullity is the sanction imposed to the conflicting agreement as a means of guaranteeing the universal imperativeness and non-derogability of peremptory norms. However, one should ask whether such a hypothetical peace agreement would not also convey the lawful expression of the peremptory right of the Palestinian people to self-determination. If that agreement is signed in good faith and none of the other causes of invalidity of treaties is observed (Articles 46 to 52

[1403] As the negotiations in Camp David were based on the notion of single undertaking ("nothing was considered agreed and binding until everything was agreed"), and proposals were mostly verbal, there is a lot of disagreement and controversy over the actual content of the proposals submitted by the parties.

[1404] In particular, meaningful parts of Eastern Jerusalem and populous Jewish settlements blocks in in the West Bank would be ceded to Israel. Israeli representatives, such as the ex-Prime Minister Ehud Barak, declared then that the Palestinian territory in the West Bank would expand to a maximum of 94 percent, excluding greater Jerusalem, of the 1967 boarders.

[1405] Nonetheless, it reaffirmed the principle of inadmissibility of the acquisition of territory by force.

[1406] See, as a precedent, the reaction of the international community to the 1983 Israeli-Lebanese Agreement, which was signed in the aftermath of Israel's successful use of aggressive armed force against its neighboring country. At that moment, the international community gave signals of approving that agreement as an element that could contribute to a peaceful settlement of the dispute between the two countries. However, Lebanon eventually did not ratify it and the agreement was abandoned. See L. Hannikainen, above n 277, p. 352.

[1407] An agreement between Israel and Palestine providing for the concession of occupied territories would therefore be null on grounds of contradicting the peremproty corollary establishing that the illegal acquisition of territory cannot be subjected to an agreement *inter partes*.

of the VCLT, namely coercion of the State, notified restrictions on the authority to express the consent of the State, error, fraud, corruption or coercion of the representative of the State), the cession of occupied territories could also be interpreted as a lawful exercise of Palestinians to dispose of their own territory as corollary of their right to self-determination, in particular in the context of a peace agreement aiming at bringing the armed conflict to an end.

In principle therefore, this hypothetical situation entails a conflict between two peremptory norms, namely those related to the regime on the use of force and the principle of self-determination. On the one side, the peremptory prohibition of the use of force implies that any territorial acquisition through the use of force cannot be the lawful object of a bilateral agreement; and nullity is the sanction to be applied to that treaty as a result of the legal regime of *ius cogens*. On the other side, the consent to such an agreement can be interpreted as a valid expression of the peremptory right to self-determination. The analysis of this conflict and the search for a solution for this antinomy between two peremptory norms is the objective of this Part.[1408]

[1408] Two clarifications are needed: this Part does not aim at analyzing several aspects both of a political and legal nature related to the Israeli-Palestinian conflict because they are not directly related to the problem of antinomy in *ius cogens*, in spite of their unequivocal importance for the understanding of the many particularities surrounding the issue, such as the legal capacity of the Palestine Liberation Organization (PLO) or the current Palestinian Authority to enter into international agreements with Israel as the legitimate representatives of the Palestinian people, nor is addressed the legal existence of Palestine as a subject of public international law; an account on the history of the Israeli-Palestinian conflict, neither of the respective responsibilities of each side on igniting confrontations throughout all those decades, nor does it intends to exam all the details of the longstanding negotiation peace process between the two countries; and all questions arising from the exam of the application of international humanitarian law in the occupied Palestinian territories (the ICJ and doctrinal views say that it does apply), neither with the potential relationships between the violations of the most serious human rights in Palestine as a matter of *ius cogens*.

Chapter I – The illegal character of the Israeli occupation of Palestinian territories

The question of how an international agreement may contradict a peremptory norm has been the subject of a wide array of works in international law. In general, it is accepted that its validity under *ius cogens* hinges upon the fact that its material object as well its subsequent execution do not contravene a peremptory norm.[1409] The meaning of "conflict" between a treaty and *ius cogens* involves therefore a normative spectrum encompassing not only what is expressly contrary to a peremptory norm in a given international agreement, but also any contrary factual results stemming from the enforcement of treaty provisions.[1410] In other words, a conflict between a treaty and a peremptory norm arises not only at the abstract level of their mutual normative existence, but also as a result of the actual execution of conventional provisions. In the hypothetical peace agreement between Israel and Palestine under examination, it should be determined therefore whether and how its provisions or its subsequent execution may be contrary to the peremptory norms on the use of force and self-determination. These questions will be further developed in the following Sections.

Section I - Illegal occupation of foreign territories through the use of force – an overview

The peremptory prohibition of territorial acquisition through the use of force is a fundamental corollary stemming from the peremptory prohibition of the use of force and the principle of self-determination, as reflected in several norms of general international law. The most important ones are those inscribed in the UN Charter. Article 2 (4) of the UN Charter interdicts the use of force beyond the lawful exceptions provided for in the Charter, namely in self-defence, under the authorization of the UN Security Council or with the consent of the concerned country. And even the lawful use of force under these explicitly provided exemptions is qualified: the use of force in self-defence must occur in accordance with the principles of necessity and proportionality, since the notion of reprisal has been outlawed under the contemporary law on the use of force, and should never be used as a means for achieving territorial acquisition. It also reflects logical corollaries stemming from the right to self-determination as provided for by article

[1409] See, in particular, the opinion of Special Rapporteurs Fitzmaurice and Waldock in the preparatory work of the ILC, II YbILC 1958, p. 26 and II YbILC 1963, p. 52.

[1410] "[T]his refers to what is prohibited by a peremptory norm, what is contrary to it, aiming at a result outlawed under a peremptory norm, allowing or obliging States to do what peremptory norms prohibit or abstain from what peremptory norms require them to do." A. Orakhelashvili, above n 355, p. 137.

1(2) of the Charter, which entails the principle of territorial integrity for non-self-governing peoples, and the distinction between these territories and those of the administering State or Occupying power.[1411]

In addition to the framework of the UN Charter, several other international arrangements explicitly prohibit the territorial acquisition through the use of force: the 1908 Hague Convention,[1412] the so-called Stimson doctrine,[1413] the Statute of the Nuremberg Tribunal,[1414] the Rome Statute of the ICC,[1415] and the Fourth Geneva Convention.[1416] This corollary of *ius cogens* also finds support in vigorous State practice related to the obligations of non-recognition of and non-assistance to territories illegally acquired through the use of armed force.[1417] The UN Security Council had recourse to that rule in its Resolution 662 (1990), which declared that the Iraqi invasion and subsequent annexation of Kuwait in 1990 had "no legal validity, and is considered null and void", and further "called upon all States, international organizations and specialized agencies not to recognize that annexation and to refrain from any action or dealing that might be interpreted as a recognition of it, whether direct or indirect." The GA also referred to this principle in unequivocal terms in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, according to which "States shall not recognize as legal any acquisition of territory brought about by the use of force,[1418] and States have referred to that principle as an element of justification of their conducts in several occasions.[1419] In this same vein, the ILC Articles on State responsibility

[1411] See above, Part III, Chapter II, Section I, pp. 185-186.

[1412] According to Article 46, confiscation of private property in occupied territory is prohibited,, and Article 55 sets forth that "the occupying state shall be regarded only as administrator of public buildings, real estate, forests and agricultural estates (…) It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct."

[1413] On January 7, 1932, the former U.S. Secretary of State Henry Stimson sent notes to China and Japan in which the United States declared that it would not recognize any situation, treaty, or agreement brought about by forcible means. The target was the Japanese invasion of Manchuria after the Mukden Incident in 1931. The Stimson Doctrine was echoed in March 1932 by the Assembly of the League of Nations, which unanimously adopted an anti-Japanese resolution incorporating the Stimson Doctrine of non-recognition.

[1414] The territorial acquisition through the aggressive use of force was considered a crime against peace.

[1415] It is enrolled among the criminal conducts by Art. 5 on the Crime of Aggression of the Rome Statute.

[1416] Article 49, paragraph 6 of explicitly stipulates that "the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies." For an overview on the norms related to protected persons in occupied territories, see R. Kolb, 'Etude sur l'occupation et sur l'article 47 de la IVème Convention de Genève du 12 août 1949 relative à la protection des personnes civiles en temps de guerre: le dégrée d'intangibilité des droits en territoire occupé', (2002) 10 *African Yearbook of International Law*, pp. 267-321.

[1417] The duty of non-recognition has a "constitutional character". R. Kolb, above n 16, p. 491.

[1418] General Assembly Resolution 2625 (XXV), annex. Part III, Chapter I, Section II, pp. 171-172.

[1419] During the Manchurian crisis of 1931–1932, the then US Secretary of State, Henry Stimson, rejected "legality of any situation de facto nor (...) recognize any treaty or agreement entered into between those Governments, or agents thereof, which may impair the (...) sovereignty, the independence or the territorial and administrative integrity of the Republic of China, (...) [nor] recognize any situation, treaty or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928." See Note of the US Secretary of State to the Chinese and Japanese Governments, in G.H. Hackworth, *Digest of International* Law, Washington, D.C., United States Government Printing Office, 1940,

established specific obligations both not to contribute to breaches of *ius cogens* and to cooperate to bring them to an end,[1420] while Article 71[1421] of the VCLT called upon all States to eliminate the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and to bring their mutual relations into conformity with *ius cogens*.

Existing obligations in this area encompass therefore not only obligations of abstention, such as the duties of non-assistance and non-recognition, but also the positive duty of States to "cooperate to bring to an end through lawful means any serious breach" of peremptory norms."[1422] The scope of application of the legal regime of *ius cogens* extends beyond the contrary treaties themselves, reaching also all acts of States (including of third parties) derogating from or in any manner contributing to the continued occurrence of a measure contradicting peremptory provisions.[1423] In other words, not only the intent of the parties cannot be contrary to peremptory norms, but not do also its voluntarily concealed purposes or indirect consequences.[1424] The rationale appears to be straightforward: State's acts contrary to *ius cogens* cannot benefit in any manner whatsoever from their illegal character.[1425] If States cannot derogate *prima facie* from peremptory norms, the

vol. I, p. 334; endorsed by Assembly resolutions of 11 March 1932, *League of Nations Official Journal*, March 1932, Special Supplement No. 101, p. 87. See also J. Dugard, above n 432, pp. 24–27.

[1420] Article 41 determines that "States shall cooperate to bring to an end through lawful means any serious breach" of peremptory norms, and shall not "recognize as lawful a situation created by a serious breach" of *ius cogens*, "nor render aid or assistance in maintaining that situation." YbILC, 2001-II, Part Two, p. 85. According to Orakhelashvili, the duty of non-recognition of treaties and acts contrary to *ius cogens* "refers to the general duty to refrain from acts and actions, or from taking attitudes, that imply the recognition of the acts offending against peremptory norms in a variety of international legal relations." A. Orakhelashvili, above n 355, p. 282.

[1421] *Article 71 - Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law*

1. In the case of a treaty which is void under article 53 the parties shall: (*a*) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and (*b*) bring their mutual relations into conformity with the peremptory norm of general international law.

2.In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(*a*) releases the parties from any obligation further to perform the treaty; (*b*) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

[1422] In its commentaries to the draft article 41, the ILC stated that such cooperation should be organized preferably "in the framework of a competent international organization, in particular the United Nations." YbILC, 2001-II, Part Two, p. 85.

[1423] "Such character of the duty of non-assistance causes this duty to go beyond the mere obligation to refrain from complicity in wrongful acts and is mainly aimed at the prohibition of acts and actions of third States that can help the State that has committed a breach of *jus cogens* in consolidating the effects of that breach and the gains that such breach can potentially produce. Therefore, this duty can be applicable in a variety of fields and outlaw acts of various kinds." A. Orakhelashvili, *idem*, p. 283.

[1424] Cassese recalls that "there are more subtle, consequential or indirect ways in which a treaty can come into conflict with *jus cogens*." A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Hersch Lauterpacht Memorial Lectures), Cambridge, Cambridge University Press, 1995, p. 173.

[1425] As noted by Tomuschat, the obligation of non-recognition and non-assistance is "an essential legal weapon in the fight against grave breaches of the basic rules of international law." C. Tomuschat, "International crimes by States: an endangered species?," in K. Wellens (ed.), *International Law: Theory and Practice — Essays in Honour of Eric Suy*, The Hague, Martinus Nijhoff, 1998, p. 259.

same rationale should apply to all of its corollaries and related acts, such as the recognition of or the assistance to behaviours contrary to *ius cogens*. Consequently, acts of recognition or assistance to a breach of *ius cogens* must be sanctioned with the nullity entailed by article 53 of the VCLT.[1426]

In summary, any treaty or normative unilateral acts of States contradicting the prohibition of the territorial acquisition through the use of force is in principle null and void, or cannot produce legal consequences. The rationale underlying that rule reflects a fundamental principle of justice, according to which an unlawful act cannot create any benefit whatsoever for those who commit it (*ex iniuria ius non oritur*). The reason is that peremptory character of norms of *ius cogens* aims not only at sanctioning contrary treaties and acts, but also at inhibiting States of performing those prohibited conducts. Otherwise, it would be implied that unlawful acts could amount to a situation of *fait accomplit* in which wrongfulness could be converted eventually into lawfulness.[1427] The contrary of this is precisely the idea conveyed by the prohibition of territorial acquisition through the use of force.[1428]

Section II - The Israeli occupation of Palestinian territories – historical overview

Under the legal framework described above, it should be determined whether the Israeli occupation of Palestinian territories is contrary to that peremptory corollary, and if it should be considered null and void as a consequence of the legal regime operated by *ius cogens*. The Plan of Partition agreed upon in the United Nations created the original, internationally recognized borders between Israel and Palestine. To a large extent they reproduced the limits of the Mandate for Palestine established by the United Kingdom in 1922, and the 1928 Anglo-Transjordanian Treaty. These documents provided the basis for the 1947 General Assembly Resolution 181 (II), which recommended the implementation of the "Plan of Partition" of the territory between two independent States, one Arab, the other Jewish, as well as the creation of a special international *régime* for Jerusalem. However, as a consequence of its rejection by the Arab population of Palestine and

[1426] "When a treaty conflicts with *jus cogens*, third States are under a duty to recognize such a nullity. This is also the consequence of a legal duty not to recognize illegalities such as forcible acquisitions and to treat unlawful annexations as void." A. Orakhelashvili, above n 355, p. 143. See also J.A. Frowein, 'Nullity in International Law', (1984) 7 *EPIL*, Amsterdam, p. 363.

[1427] As a matter of fact, not even the principle of *uti possidetis juris can contract out of the peremptory norms of self-determination and prohibition of the use of force.*

[1428] The bottom-line is that "[l]e *jus cogens* relative à l'interdiction de l'agression peut aussi viser tout traité conclu suite à l'agression si celui-ci conforte l'agresseur dans son usurpation." R. Kolb, above n 16, p. 490.

the Arab States on grounds that it was "unbalanced", the Plan of Partition was abandoned after the Arab-Israeli War broke out in 1948.[1429]

At the UN, the term "occupied territories" was only used after the Six-Day War in 1967. Henceforth, it has been generally accepted, Israel revealed an intention to annex territories on a permanent basis by occupying portions of the Palestinian territories of the West Bank lying to the east of the Green Line.[1430] The UN Security Council unanimously reacted by adopting Resolution 242, which *inter alia* stresses the inadmissibility of acquisition of territory through the use of force and calls for the "withdrawal of Israel armed forces from territories occupied in the recent conflict." But Israeli measures aiming at the territorial occupation of Palestinian territories were not restricted to the West Bank. A series of measures were taken in Jerusalem, many of which were condemned by the UN Security Council on grounds of violating the principle of illegality of territorial acquisition through the use of force.[1431] Today, approximately 16.6 per cent of the West Bank lie between the Green Line and the wall, i.e., would have been unlawfully attached to the Israeli territory.[1432] All those occupied Palestinian territories fall under the incidence of the peremptory rule prohibiting the territorial acquisition through the use of force.[1433]

[1429] Following the armistice established in 1949 by Resolution 62 (1948) of the UN Security Council, Israel and Jordan agreed upon an armistice demarcation line between Israeli and Arab forces (the so-called "Green Line"). According to the agreement though, the Green Line should "not be interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties," as well as "without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto."

[1430] For the effects of the Israeli occupation of Palestinian territories, the Green Line is also used to determine the territories militarily seized in the West Bank and the Gaza Strip in the Six-Day War of 1967.

[1431] In Resolution 298 (1971) of 25 September 1971, the Security Council recalled several previous decisions on the "the principle that acquisition of territory by military conquest is inadmissible" and condemned those measures by stressing that "all legislative and administrative actions taken by Israel to change the status of the: City of Jerusalem, including expropriation of land and properties, transfer of populations and legislation aimed at the incorporation of the occupied section, are totally invalid and cannot change that status." For the purposes of the legal regime entailed by *ius cogens*, it is worth mentioning Resolution 478 (1980) of 20 August 1980, in which the Security Council declared that the adoption by Israel of the Basic Law (30 July 1980) making Jerusalem the "complete and united" capital of Israel constituted a violation of international law and that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem (...) are null and void." It further decided "not to recognize the 'basic law' and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem."

[1432] Advisory Opinion on the *Wall*, above n 859, para. 84, p. 38.

[1433] The set of applicable provisions to the specific Israeli occupation of Palestine was summarized by the ICJ in its Advisory Opinion on the *Wall*. First, it referred to the customary character of the legal regime entailed by Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907, according to which territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised. Consequently, the territories situated between the Green Line and the former eastern boundaries of Palestine under the Mandate are considered illegally occupied by Israel in 1967. The Court recalled that "[s]ubsequent events in these territories … have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power." Above n 859, para. 83, p. 35.

From the standpoint of the peremptory obligations stemming from the prohibition of the territorial acquisition through the use of force,[1434] there are also relevant pieces of evidence from State practice and international jurisprudence with regard to the duties of non-recognition of and non-assistance to the illegal occupation of the Palestinian territory. In the UN, the GA approves several resolutions each year reaffirming the illegal character of the Israeli occupation,[1435] including as a result of the legal regime of *ius cogens*, and the ICJ reaffirmed the need to observe the duty of non-recognition of the Israeli occupation in its Advisory Opinion on the *Wall*.[1436]

The application of the legal regime of *ius cogens* also encompasses the Israeli settlements in Palestinian territories. The occupation was accompanied by a campaign both to remove Palestinians from occupied territories and to promote Jewish settlements therein.[1437] These policies are contrary to norms of general international law, such as Article 49, paragraph 6, of the Fourth Geneva Convention, which provides that "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies." As noted by the ICJ, this "provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory."[1438] In this same vein, article 46 of Section III of the Hague Regulations of 1907 requires that private property should be "respected" and prohibits it to be "confiscated." Although this rule is subject to Article 53, which authorizes, "within certain limits, requisitions in kind and services for the needs of the army of occupation," the scope of these exceptional measures of appropriation cannot be construed as encompassing the right to acquire territory through the use of force in a permanent basis. With regard to the forceful transfer of Palestinian populations from their territories, Article 49 of the Fourth Geneva Convention specifically prohibits, "regardless of their motive," "[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not." As an exception that must be interpreted in a restrictive manner and always in accordance with the main goals

[1434] See Chapter I above.
[1435] See above n 1401.
[1436] It stated in its *dictum* that "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around Eats Jerusalem", and added further that States are under an obligation "not to render aid or assistance in maintaining the situation created by such construction." Advisory Opinion on the *Wall*, above n 859, para. 159. It is interesting to note that the language used by the Court suggests an implicit reference to the obligations of abstention related to breaches of peremptory norms contained in the 2011 ILC's draft articles on State responsibility, namely the duties of non-recognition and non-assistance. YbILC, 2001-II, Part Two, p. 85.
[1437] According to the report of UN Secretary General, some 80 per cent of the settlers living in the Occupied Palestinian Territory would lie within the enclave between the wall and the Green line.
[1438] The Court concluded "that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law." Advisory Opinion on the *Wall*, above n 859, para. 120, p. 184.

and aims inscribed within its constitutive legal instrument, "the Occupying Power may undertake total or partial evacuation of all given area if the security of the population or imperative military reasons so demand." However, the construction of civilian settlements in a permanent and expansive manner over a period of decades can hardly be legally construed as responding to strictly military considerations.[1439] For that same reason, the policies of settlements and forceful transfer of Palestinians cannot be construed as lawful under the legitimate and peremptory right of Israel to self-defence, as inscribed in article 51 of the UN Charter. There is no relationship of cause-and-effect between those two unlawful measures (policies of transfer of populations and construction of settlements in occupied territories) and the lawful exercise of the right to self-defence, since these permanent and continuously repeated policies, which reveal *animus occupandi*, cannot be regarded as "necessary and proportionate" responses on the Israeli side, as Judge Buergenthal explicitly suggests in his separate declaration in the ICJ's Advisory Opinion on *the Construction of the Wall*.[1440]

The Security Council also subscribed to this same view in several of its decisions. UN Security Council Resolutions 446 (1979) and 465 (1980) condemned Israeli settlements in the Occupied Palestinian Territories. In Resolution 446, the body affirmed "that the policy and practices of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East," and called upon "Israel, as the occupying Power, to abide scrupulously" by the Fourth Geneva Convention in order to "to rescind its previous measures and to desist from taking any action which would result in changing the legal status and geographical nature and materially affecting the demographic composition of the Arab territories occupied since 1967, including Jerusalem and, in particular, not to transfer parts of its own civilian population into

[1439] Indeed, the same Article 49 explicitly and unequivocally determines "[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."

[1440] However, Judge Thomas Buergenthal supported the idea that occupation and transfer of populations could be justified under the principle of self-defense. In his declaration in the ICJ he argued that the performance by Israel of its inalienable right to self-defense would preclude any wrongfulness arising from the construction of the wall in the occupied Palestinian territory. He alludes, in support of his reasoning, to article 21 of the ILC's Articles on Responsibility of States for International Wrongful Acts. But Buergenthal forgets to allude also to Article 25 of the ILC's Articles, which expressly excludes violations of *ius cogens* from the circumstances precluding wrongfulness, such as that arising from the illegal acquisition of territory through the use of armed force and contrary to the principle of self-determination. Consequently, the wall could only be considered lawful under the right to self-defense if it was built within the limits of the Israeli internationally recognized borders. It could not have been constructed in the occupied Palestinian territory, and more importantly, for the purposes also of forcefully transferring Palestinian populations from that area and to constructing Israeli settlements. Should the Wall have been limited to the Israeli borders, and no civilian settlements and transfers of Palestinians occurred to the occupied area, and the circumstances would have been entirely different. Above n 859, Opinion of Judge Thomas Buergenthal, paras. 4-5, p. 241.

the occupied Arab territories."[1441] In Resolution 465, the Security Council again called upon Israel to "dismantle the existing settlements."[1442]

In the light of the above, if one considers, as the ICJ did, that the military occupation, the construction of the wall, the displacement of Palestinians from their homes and the construction of illegal settlements in that area constitute an objective measure of illegally seizing foreign territory through the use of force, there seems to exist no doubt, at least based on the assumption that acts of reprisal are illegal under current international law, that the territorial acquisition of Palestinian territories and all acts related to the occupation must be considered not only unlawful, but also null and void as an effect of the legal regime of *ius cogens*.

In this regard there are two additional and fundamental consequences stemming from Article 71 of the VCLT for the Israeli occupation of Palestinian territories. First, as the codification of *ius cogens* took place in 1969, two years after the start of the Israeli occupation of Palestinian territories following the Six-Day War, it would be necessary to determine whether the maintenance of the occupation "is not in itself in conflict with the new peremptory norm of general international law" (article 71 (2) of the 1969 VCLT). In view of the factual circumstances described above, there seems to be no doubt that the Israeli occupation beyond pre-1967 borders runs contrary to the peremptory prohibition of the territorial acquisition through the use of force. Since article 71 requires the parties to bring their mutual relations into conformity with the relevant peremptory norm, Israel must therefore remove all forms of occupation from Palestinian territories in the light of the pre-1967 boarders, including the dismantlement of Jewish colonies and settlements.[1443] These are self-existing obligations *vis-à-vis* Israel and are independent of any eventual peace agreement with Palestine.[1444]

The second dimension relates specifically to the hypothetical peace agreement entailing the cession of occupied Palestinian territories to Israel now under examination. In principle, that treaty would be invalid in its entirety since it would have been concluded after the concept of *ius cogens* had come into existence. In other words, the cession of occupied territories in itself would be contrary to an already existing peremptory norm, and that hypothetical agreement should be

[1441] Resolutions 446 (1979) of 22 March 1979.See also UNSC Resolutions 452 (1979) of 20 July 1979 and 465 (1980) of 1 March 1980.

[1442] In February 2010, in one of the most relevant initiatives on the matter, a draft was introduced and supported by 14 members of the Security Council, reaffirming that Israeli settlements (including East Jerusalem) are illegal and constitute a major obstacle to the achievement of a just, lasting and comprehensive peace. It also demanded once again Israel to immediately cease all settlement activities. However, as the sole dissenter, the US delegation vetoed the adoption of the resolution.

[1443] As a consequence of the legal regime of *ius cogens*, Israel shall "eliminate as far as possible the consequences of any act performed" "which conflicts with the peremptory norm of general international law" (article 71 (1) (a)) and bring its acts "into conformity with the peremptory norm of general international law" (article 71 (1) (b)).

[1444] Although approaching the issue from the standpoint of international responsibility (remedies for breaches of *ius cogens*), Orakhelashvili argues that "[t]he duty to withdraw from the illegally occupied territory is restitution which is not negotiable." A. Orakhelashvili, above n 355, p. 252.

considered null and void as a consequence of the peremptory prohibition of the territorial acquisition through the use of force. A final word on this matter hinges upon the potential application of another peremptory norm to the present case, namely the principle of self-determination, which is the subject of the next Chapter.

Chapter II - Consent to international agreements as an exercise of the right to self-determination by non-self-governing territories

It was seen in Part III, Section II above that the normative universe of the principle of self-determination encompasses a series of rights endowed to non-self-governing peoples, as well as obligations imposed upon all States. Among those principles, non-self-governing peoples have the right to freely decide on their status under international law. This rule implies that these peoples might express their will not only in regard to the desired modality of autonomy (independence, association or integration), but also in regard to the terms according to which they will enjoy their autonomy under international law. For that purpose, non-self-governing peoples may enter into international negotiations and agreements with a view to attaining autonomy under international law.[1445] The consent of non-self-governing peoples to those agreements is in principle a valid manifestation of their right to self-determination, and accordingly may convey a peremptory character as regards their validity under international law.

Following this reasoning, this Chapter will analyse whether agreements and negotiations based on the right to self-determination may also involve questions related to the territories pertaining to non-self-governing peoples, such as in Palestine. The central premise is that if a people has rights over a certain non-self-governing territory in which it will eventually exercise its autonomy, either as a sovereign independent State, or as freely associated with or integrated with another independent State, the exercise of the right to self-determination may be translated into the cession of parts of that territory, whenever certain conditions are met. This is a corollary of the right to self-determination that implies a lawful exemption from the general rule of territorial integrity of non-self-governing territories.[1446]

[1445] State practice provides several examples of non-self-governing territories that entered into negotiations with other States on the basis of their right to self-determination. The cases of Northern Ireland and the very precedent of Palestine are relevant examples of non-self-governing peoples that entered into negotiations in this regard. The former Palestine Liberation Organization (PLO) signed various agreements with Israel since 1993, most of which regarding the transfer of certain powers over occupied Palestinian territories. The Palestinian Authority also signed several agreements, such as the Oslo agreements. In any event, these agreements were only partial and limited, and full autonomy remains to be achieved under the principle of self-determination of peoples.

[1446] As described above, the rule of territorial integrity should not be construed as a norm that unconditionally stipulates the absolute maintenance of territorial integrity. Its main objective is to prohibit the use of external force or threat of use of force against territorial integrity and political independence. Peacefully agreed upon changes are certainly lawful though under international law as a result of the rights of States to dispose of their territories. See Part III, Chapter II, Section I above.

Section I - Could Palestinian consent preclude the effects of the prohibition of territorial acquisition through the use of force?

The main obstacle to the exercise by non-self-governing peoples of their right to dispose of their territory under the principle of self-determination lies at the prohibition of waiver and acquiescence of breaches of peremptory norms. In the hypothesis under examination, the cession of territory by the Palestinian people could be interpreted as derogating from the peremptory prohibition of acquiescence to a territorial acquisition through the use of force.[1447] Such a hypothetical agreement could also be construed as derogatory from IHL, in particular from Article 47 of the IV Geneva Convention on the rights of protected persons in occupied territories,[1448] which also has *ius cogens* features.[1449]

The only way out of this problem is the possibility that the cession of occupied territories also has a peremptory character. In the hypothesis under examination, that would be the case of the peremptory right to self-determination of non-self-governing peoples. The fundamental question therefore is whether the Palestinian people could lawfully express its consent to a treaty the provisions of which are potentially contrary to a peremptory norm and its corollaries. Should this hypothesis be accepted, the consent under the right to self-determination would operate not as a waiver to the wrongfulness of the occupation (this is a matter to be dealt with as an issue of international responsibility), but rather a means to preclude the nullity effects entailed by the legal regime operated by *ius cogens* stemming from the prohibition of the use of force, since such a consent is stemming from an equally peremptory norm.

It is a well-established principle that unilateral waiver and acquiescence by States of acts and treaties contrary to peremptory norms are not acceptable. In its preparatory work for the VCLT, the ILC stressed that subsequent waiver and

[1447] As noted by Orakhelashvili, "[a]n agreement not to perform a peremptory norm or to ignore the effects of that norm in *inter se* relations is itself an attempt to make a peremptory norm *inter se* inoperable and to deprive it of its legal force." A. Orakhelashvili, above n 355, p. 137.

[1448] Art. 47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

[1449] "[L]'article 47 contient un volet de droit impératif (*jus cogens*). Il interdit toute dérogation à des droits conventionelles qui s'analyserait en une restriction des droits accordés par la Convention (dérogation négative) … l'article 47 organise ainsi un régime de *standard minimum impératif*, protégé contre tout accord visant ou ayant pour effet d'en abaisser le seuil." R. Kolb, above n 1416, pp. 299-300. In his study on the issue, Quigley takes the view that agreements negotiated with Israel as the Occupying Power cannot contract out of the rights of the Palestinian population protected under Art. 47 of the IV Geneva Convention. Any derogatory agreement in those terms would be invalid. J. Quigley, 'The PLO-Israeli Interim Agreements and the Geneva Civilians Convention,' in S. Bowen (ed), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, La Haye/Boston/London, 1997, pp. 25 and ss.

acquiescence are not accepted when contradicting peremptory norms.[1450] The rationale is quite reasonable: if the normative universe of *ius cogens* is defined also as to the limits it imposes upon the will of States, an expression of that autonomy should not, in any manner, entail the lawfulness of a treaty or an act derogating from a peremptory norm. In short, the consent of individual States cannot validate a treaty conflicting with *ius cogens* either through waiver or acquiescence.[1451] Not even the consent of the affected State, that is, from the State that has suffered a territorial loss, can preclude the nullity imposed to an act or an instrument contrary to a peremptory norm. A hypothetical treaty conveying the cession of occupied Palestinian territories to Israel would therefore be null and void as a consequence of that legal regime of *ius cogens*.

The situation under examination is different, however. Unlike an ordinary expression of the will of States, the consent of the Palestinians derives directly from their right to self-determination as a non-self-governing people, which is also a peremptory norm of general international law. Most importantly, this is a case in which the expression of the right to self-determination aims at liberating a people from external subjugation, which is a fundamental goal to be achieved under the principle of self-determination. So denying the validity of consent in this case is in itself contrary to *ius cogens*. Consequently, and unless it falls within the circumstances of invalidity under articles 46 to 52 of the VCLT, the consent of the Palestinian people is in principle a valid an expression of their peremptory right to self-determination.

Section II – Consent of non-self-governing peoples and self-determination

Under current international law, the capacity of States to enter into a treaty and cede parts of their territories through peaceful means is a corollary of their sovereign powers.[1452] In other words, the capacity to acquire or to transfer territory stems from the dispositive rights of States deriving directly from the principle of

[1450] In its commentaries to the 2001 draft articles on State responsibility, the ILC stated that "evidently, the responsible State is under an obligation not to recognize or sustain the unlawful situation arising from the breach [of peremptory norms]. Similar considerations apply even to the injured State: since the breach by definition concerns the international community as a whole, waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement. These conclusions are consistent with article 30 on cessation and are reinforced by the peremptory character of the norms in question." YbILC, 2001-II, Part Two, p. 85.

[1451] As noted by Orakhelashvili, "[r]estriction of the contractual autonomy of States inherently implies that the will of States cannot transform certain illegalities into legal rules, because the illegalities are objective, not depending on the will and attitudes of States. Objective invalidity ensues even if all parties to a treaty take opposite view." A. Orakhelashvili, above n 355, p. 134. *Per contra*, Rozakis suggests that the execution for a long time of an illegal treaty could amount to its *de facto* validation. C. Rozakis, above n 302, p. 172.

[1452] According to Brownlie, the content of sovereignty "by and large … denotes the legal competence which a state enjoys in respect of its territory." I. Brownlie, above n 487, p. 163.

sovereign equality among States.[1453] It implies, therefore, that the territory lawfully belonging to a State may be the object of a cession through a treaty, as a result of an important aspect of its legal capacities, namely the power of disposition of its territory. This implies a lawful exception or derogation from the principles of national unity and territorial integrity whenever there has been no cause to invalidate the consent thereto.[1454]

These same powers of disposition of the territory stemming from the principle of State sovereignty may be exercised under the right to self-determination in cases of non-self-governing peoples.[1455] Although lacking full autonomy, the consent of these peoples may be interpreted as a valid derivative right stemming from their right to self-determination, within which lies the eventual sovereign rights over a given territory. *Contrario sensu*, an occupying power or mandatory State cannot transfer territory of the occupied or mandated non-self-governing territory because they lack the capacity to do so in the light of the principle of *nemo dat quod non habet*. Under the principle of self-determination, therefore, the right of a non-self-governing people to dispose of its territory reflects these same rights and powers encompassed in the principle of sovereign equality among States. The main difference, of course, is that non-self-governing territories lack a fundamental attribute under international law, namely sovereignty. But the rights and powers to dispose of the territory are already contained in the principle of self-determination, although only as a potential to be eventually exercised under certain circumstances. The rationale is that if the protective universe stemming from the principle of self-determination aims at safeguarding the fundamental rights of non-self-governing peoples, such as the right to territorial integrity, the exercise of these powers may be considered lawful whenever it occurs in accordance with the very principle of self-determination. Consequently, the right

[1453] It is worth recalling Kolb's view in this regard: "la règle de la stabilité des frontières (dont l'*uti possidetis*) n'est certainement pas impérative, car toute frontière peut être modifiée par accord. Ce qui est interdit, c'est une modification unilatérale, éventuellement violente. Or, pourrait-on s'accorder *inter partes* à permettre des corrections unilatérales *ad libitum* des frontières ?" R. Kolb, above n 16, p. 487.

[1454] The Helsinki Final Act reflects this rule in unequivocal terms by establishing in Chapter 1 that "frontiers can be changed, in accordance with international law, by peaceful means and by agreement," as a result of the sovereign powers of States. See also C. Rozakis, 'Territorial Integrity and Political Independence', in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, v. IV, Amsterdam, 2000, pp. 812-813.

[1455] In the relation between the principles of self-determination and sovereignty, the former norm "informs and complements" the rights and powers entailed by the latter by qualifying its exercise under international law, including in circumstances of transfer of territory. I. Brownlie, above n 487, p. 163. Some authors even support the view according to which all transfers of territory should occur in accordance with the principle of self-determination. See, for instance, L. Oppenheim, above n 83, pp. 712-15. However, there is little evidence of state practice in this regard. As noted by Brownlie, "[a]t present most claims are made in terms which do not include a condition as to due consultation of the population concerned," in I. Brownlie, *idem*, p. 161. It is worth noting though, that the principle of sovereignty cannot be confused with nor reduced to the right to self-determination and vice-versa. They operate in different domains of validity, either as regards *ratione personae* or *ratione materiae*. As noted by Kohen, "[l]es Etats sont titulaires du premier, les peuples du second. Le premier consacre l'égalité juridique des Etats souverains existants, le second accorde à tous les peuples, y compris – et surtout – ceux qui ne sont pas dotés d'un appareil étatique, le droit à l'autodétermination." M. G. Kohen, 'Article 2, Paragraphe 1', in Jean-Pierre Cot, Alain Pellet & Mathias Forteau (dir.), *La Charte des Nations Unies : Commentaire article par article*, Paris, Economica, 3rd. ed., p. 406.

of a non-self-governing people to dispose of its territory under the principle of self-determination also applies to circumstances of alienability of territories by peoples living external subjugation.[1456] The difference in comparison to the exercise of these same rights under the principle of sovereignty is that, in the case of non-self-governing peoples, the strict observance of the requisites stemming from the right to self-determination is a precondition for a lawful derogation from the general rule of territorial integrity.[1457] The main question is to determine which these requisites are and how a non-self-governing people may express its lawful consent under some exceptional circumstances. For that end, weighing and balancing techniques will be used in order to address the hypothesis of an agreement providing for the cession of territories illegally occupied through the use of force.

[1456] "During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation," *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Request for Advisory Opinion, ICJ Reports 2010, p. 436, para. 79.

[1457] The analysis here cannot be confused with the potential conflict between the right to self-determination and the principles of territorial integrity in the context of the decolonization process, such as in Gibraltar and the Falkland/Malvinas Islands. In those later, the right to self-determination operates in the opposite sense, as a means of supporting the continuous attachment of non-self-governing territories to the sovereignty of the occupying powers. Indeed, both referendums carried by the United Kingdom in Gibraltar (1967) and the Falkland/Malvinas Islands showed the support of the inhabitants of these two territories for the continuation of their status as British territories.

Chapter III - Where the conflict lies: the real antinomy between the prohibition of territorial acquisition by the use of force (prohibition) and the principle of self-determination (permission) as a "hard case" of public international law

In the previous Chapters it was viewed that the hypothetical peace agreement between Israel and Palestine entails two normative dimensions, both of a peremptory character. On the one hand the cession of occupied Palestinian territories was considered contrary to the prohibition of territorial acquisition through the use of force, the corollary of which is the prohibition of any form of acquiescence and recognition in *inter se* agreements. On the other hand, it was established that the consent of the Palestinian people to such a hypothetical agreement might convey a peremptory character as the legitimate expression of the right to self-determination. The existence of these two contradictory aspects – respectively prohibition and permission as regards the function of norms within a legal system - indicates that there is a normative conflict, the determination and solution of which is the main objective of this Chapter.

Section I – Determining whether there is an antinomy

According to Bobbio, a legal antinomy arises when there is an overlap in the simultaneous application of two norms as regards their validity *ratione personae*, *ratione materiae* and *ratione temporis*.[1458] In the hypothesis under examination, the overlap *ratione personae* is a consequence *prima facie* of the *erga omnes* effects of the obligations stemming from both peremptory norms. Israel and Palestine (the latter a non-self-governing people) are bound to observe the imperative nature of those obligations when entering into such a hypothetical agreement. The overlap *ratione temporis* is determined in an equally simply manner: both peremptory norms are considered legally valid at the moment of the negotiations, signature, ratification and application of such a hypothetical agreement.

The determination of the overlap *ratione materiae* is a more complex task. As it is usually the case as regards peremptory norms, these two norms regulate different subject matters at the abstract level of their validity in public international law. The prohibition of aggressive territorial acquisition is a corollary of the peremptory prohibition of the use of force and reflects the general principle of *ex iniuria ius non oritur*. Accordingly, the illegal use of force in inter-state relationships cannot result

[1458] See Part I, Chapter I, Section I above, pp 9-11.

in a lawful territorial acquisition. The general rule of territorial integrity of States can only be lawfully derogated from when the consent of a State to cede part of its territory occurs in good faith and in a peaceful manner, and when any other cause of invalidity of treaties is observed (Articles 46 to 52 of the VCLT, namely coercion of the State, notified restrictions on the authority to express the consent of the State, error, fraud, corruption or coercion of the representative of the State). The principle of self-determination, in turn, aims at safeguarding the exercise by States and non-self-governing peoples of their autonomous powers and rights *vis-à-vis* other States and members of the international community. In principle, therefore, there is no conflict between both norms as regards their material scope at the abstract level of validity.

However, one may find a material overlap in concrete and specific circumstances in which both norms are simultaneously applied. This is precisely the case of such a hypothetical peace agreement in which there is a cession of occupied territories to the Occupying Power. Here, there is an overlap in the sense that the nullity of the territorial acquisition through the use of force is opposed to the valid consent under the right to self-determination. Both normative peremptory universes are thus contradictory because their actual and simultaneous application to such a hypothetical peace agreement between Israel and Palestine will produce contrary results. Also, the absolute application of one norm would necessarily entail the non-application of the other and vice-versa, in contradiction to their respective imperative nature as peremptory norms as well. As the simultaneous application of both norms in their entirety is not feasible, one can conclude that there is an antinomy between these two peremptory norms.

Section II - A "hard case" in international law?

After determining that there is an antinomy, the following step is to analyse whether any of the methods and traditional meta-rules would apply to solve this normative conflict. The first thing to note is that it is not possible to have recourse to presumption against conflict[1459] because both norms cannot be applied in a harmonious manner to the case under examination. The application of each norm would eventually lead to completely contradictory results, since the prohibition of the territorial acquisition through the use of force conveys the nullity of such a hypothetical agreement while the consent given under the principle of self-determination entails its validity. As a consequence of that impossibility of reaching a harmonious application of both norms, the conflict might be considered

[1459] As maintained by Pauwelyn, "[i]f a harmonious reading of the two norms is not feasible within the realm of treaty interpretation, the presumption must be seen as rebutted and the existence of conflict [real antinomy] acknowledged." J. Pauwelyn, above n 5, p. 251.

a case of real antinomy, the solution of which might be sought in the various methods aiming at dealing with real antinomies in international law.

However, the criteria of *lex specialis*, *lex posterior* and *lex superior* are not applicable either because an absolute relationship of precedence cannot be established between these two conflicting norms of *ius cogens*. First, the rule of hierarchy is useless in circumstances involving two peremptory norms because both norms are placed at the same level of the international legal system.[1460] Second, the rule of speciality cannot be used either, since each norm regulates different subject-matters at the abstract level of their respective existences.[1461] Finally, although in the present case it could be argued that the norm of self-determination has been subsequent in time in comparison to the norm on the use of force, its emergence as a peremptory norm has accumulated in the international legal system with the previously existing norm of that same character on the use of force. In other words, the right to self-determination did not modify or derogate from the legal regime of the use of force, and as such cannot be considered as contradicting the latter as regards their mutual existence at the abstract level of public international law.[1462] Consequently, this is not only a real antinomy between both peremptory norms, but also a "hard case" in which the traditional meta-rules cannot solve the normative conflict.

Section III – Balancing and weighing between the peremptory norms on the prohibition of the use of force and the right to self-determination

In view of the impossibility of solving the normative conflict on the basis of the traditional meta-rules, the case under examination may be solved by having recourse to techniques such as "weighing and balancing," as discussed in Parts I[1463] and IV above. In the case of real antinomies, these methods are based on the idea of optimizing the application of the contradictory commandments stemming from both conflicting norms on the basis of the rule of "conditioned prevalence," in which relative priority is given to one of the conflicting norms in the light of the specific circumstances *in casu*. This conditioned priority is construed, however, as allowing the absolute application of one norm in detriment to the other. Under the idea of balancing and weighing, the interpreter must optimize both fundamental norms, that is, the conflicting norms must be "realized to the greatest extent

[1460] See Part I above.
[1461] See Section I above.
[1462] Otherwise, the rule provided for by article 64 of the 1969 VCLT would solve the normative conflict, while also entailing the nullity of the previous norms of the same peremptory character.
[1463] See Part I, Chapter III, Section III, for the application of the proportionality approach as a means of solving antinomies in public international law.

possible given the legal and factual possibilities."[1464] In order to achieve the so-called "scope of the legally possible"[1465] the interpreter must carve one norm out of the other in the light of the specific circumstances surrounding the normative conflict. In order to determine which normative aspects should have more weight than others, the so-called principle of proportionality will be applied on the basis of the three steps analysis: suitability, necessity and proportionality *stricto sensu*.[1466]

The test of suitability aims at avoiding results that are contrary to the pursued objectives under each of the conflicting norms. This task is undertaken by analysing if the application of the countervailing and equally valid norm would not produce undesirable consequences absolutely contrary to the commands stemming from one of the norms in conflict. In the case under examination, the end of the military occupation and the achievement of self-determination by the Palestinian people are the legally protected values to be achieved in this exercise of weighing and balancing. It expresses at once the objection to the unlawful use of force in international relations, and the need to realize the principle of self-determination. Also, this is a goal in the interest of both the concerned self-governing-people and the international community as a whole, since it would pave the way for reaching an end for such a long-lasting conflict of multiple impacts for the maintenance of international peace and security. In the light of this central objective of attaining peace, the right to self-determination arises as the most suitable norm to entail such a "conditioned prevalence" *vis-à-vis* the prohibition of the use of force, and accordingly to guaranteeing the validity of the hypothetical peace agreement under certain specific conditions arising from the mutual carving out between the two conflicting norms.[1467]

Second, in accordance with the criterion of necessity, priority should be given to the less intrusive of the two conflicting norms. In comparing the effects stemming from each peremptory norm, the more intrusive consequences are those stemming from the application of the corollaries of the prohibition of the use of force. This possibility would imply the nullity of the peace agreement on the grounds of contradicting the prohibition of acquiescence and recognition of the territorial titles acquired as a result of the unlawful use of force. Following this reasoning, the exercise of the right to self-determination is less intrusive when compared to the application of the rule of non-territorial acquisition through the use of force, which would cause the absolute nullity of the hypothetical agreement. This conclusion under the criterion of necessity is aligned with recent doctrinal interpretations on the issue of territorial integrity of non-self-governing peoples. Hannun, for

[1464] R. Alexy, above n 15, p. 47; and R. Alexy, above n 214, p. 295.
[1465] R. Alexy, above n 15, p. 50.
[1466] For a description of 'weighing and balancing' techniques with some practical examples, see Part I, Chapter II, Section II above.
[1467] In a realistic tone, this premise is particularly relevant because it would seem rather difficult to advocate, exclusively on grounds of the legal regime of *ius cogens*, the nullity of an agreement that would bring the Israeli-Palestinian conflict to an end.

instance, takes the view that one "should accept the primacy of people over borders." [1468]

The final step involves a true balancing and weighing of the two colliding principles. In order to properly address this matter, the analysis should start from the standpoint of the non-self-governing people endowed with rights over an occupied territory. The rationale of the peremptory unlawfulness of territorial acquisition by armed force aims primarily at protecting the rights of the non-self-governing people the territory of which is under foreign occupation. It also aims at ensuring that states do not benefit from unlawful acts, in accordance with the adage *ex iniuria ius non oritur*. This is what justifies the fact that the peremptory obligation not to recognize such an unlawful territorial acquisition is applied *erga omnes*. But the material core of that peremptory norm lies at the protection of the interests of the non-self-governing people under foreign occupation. The very interests the international community as a whole are primarily translated into the protection of the rights of non-self-governing peoples, and only secondarily into the goal of guaranteeing the stability of the international system. The interests of the concerned non-self-governing people that suffered the territorial loss should therefore prevail over other questions in any decision affecting its territory. Following this reasoning, the application of the legal regime of *ius cogens* must be oriented primarily towards the protection of those rights, which have been compromised by the unlawful use of force, and to safeguard the interests of a non-self-governing people under the peremptory principle of self-determination. Denying the possibility of a non-self-governing people to dispose of its own territory in the light of its own interests and for the purpose of achieving peace and ending an armed conflict would therefore contradict the alleged interests of the international community underlying the peremptory norm on self-determination, namely protecting the interests of non-self-governing peoples under foreign subjugation, which concretely are the primary legally protected goals under *ius cogens*.[1469]

[1468] In his view, "[t]he increasing fluidity of borders should encourage states and "peoples" alike to think more broadly about their real needs and interests, both political and psychological … self-determination has become a more flexible and more useful concept than it has been for decades, and we should welcome developments that have made "negotiating self-determination" not only more possible but also more meaningful." H. Hannun, 'Self-Determination in the twenty-First Century,' in Hurst Hannun & Eileen F. Babbit (eds.), *Negotiating Self-Determination*, Lanham, Lexington Books, 2006, p. 77. And as observed by Janne, "[N]ational self-determination *based on territory* is a recipe for a never-ending cycle of violence." Erin Janne, 'National Self-Determination: a Deadly Mobilizing Force', in Hurst Hannun & Eileen F. Babbit (eds.), *Negotiating Self-Determination*, Lanham, Lexington Books, 2006, p. 29.

[1469] Indeed, the consent of the non-self-governing people should be considered valid unless of course other forms of invalidity of treaties are observed, such as those provided for the 1969 of the VCLT or as a result of not complying with the objective requirements stemming from the very principle of self-determination. As provided for Section II of the 1969 VCLT, the invalidity of treaties may also be caused (besides the *ius cogens* rule of article 53) by a violation of a provision of internal law regarding competence to conclude treaties, Specific restrictions on authority to express the consent of a State, error, fraud, corruption of a representative of a state, Coercion of a representative of a State and Coercion of a State by the threat or use of force.

The conclusion above implies that such a hypothetical peace agreement cannot be construed as a simple derogation from the peremptory prohibition of the territorial acquisition through the use of force. Rather, it represents the result of the weighing and balancing of the two peremptory norms under the rule of conditioned prevalence. Otherwise, claims could be raised on the invalidity and unlawfulness of that treaty on grounds of derogating from a peremptory norm of general international law.[1470] However, admitting that conditioned priority should be given to the right to self-determination does not mean the absolute non-application of the normative universe of the prohibition of the use of force. On the contrary, the test of proportionality *stricto sensu* requires a true weighing and balancing of the two colliding norms as a means of guaranteeing the optimized mutual application of both norms.

In the case under examination, this process involves certain premises, such as (i) whether the consent of the Palestinian people has been expressed in a free manner and without any form of external interference; and (ii) if the imperative character of the prohibition of the territorial acquisition through the use of force can be optimized to its maximum extent, otherwise the very notion of *ex iniuria ius non oritur* would not be complied with. In practical terms, the mutual carving out between both principles would be translated into the following requirements: (i) if the treaty entails a final and definite peace to the conflict, (ii) if it establishes mutually recognized boarders as close as possible from pre-1967, so as to guarantee that there is no "meaningful" cession of the Palestinian occupied territories; (iii) if it is subjected to a consultative process of the Palestinian people as a means to ratify the exercise of the right of self-determination; and (iv) if it obtains the support of the organized international community. The compliance with these objective requirements could be construed as a concrete solution to the legal conflict in accordance with weighing and balancing techniques, and consequently as a guarantee of the validity of the hypothetical peace agreement. Each one of these requirements will be analysed in depth below.

An end to the conflict

The first of these objective requirements assumes that there must be an end to the conflict between Israel and Palestine. This is key for validating such a peace agreement, not only as a consequence of the normative scope of the principle of self-determination but also as a result of IHL imperative provisions, in particular article 47 of the IV 1949 Geneva Convention safeguarding the rights of protected persons in occupied territories *vis-à-vis* agreements concluded between the

[1470] In this regard it is worthwhile to recall GA Resolution A/RES/35/65, 29 November 1979, which condemned and declared as invalid the Camp David agreements signed between Israel and Egypt.

authorities of the occupied territories and the Occupying Power.[1471] This rationale implies that the hypothetical peace agreement can only be construed as a "positive derogation" (*dérogation impropre*), that is, a treaty complying with the rights of protected persons under peremptory provisions of IHL, if it puts an end to the Israeli occupation.[1472]

Among other relevant issues which have been dealt with in the hypothesis under examination,[1473] the hypothetical peace agreement should therefore provide for the end of the Israeli occupation of Palestinian territories, the mutual recognition of the statehood of Israel and Palestine as sovereign subjects of international law,[1474] and the exercise of autonomy by the Palestinian people in accordance with the right to self-determination. Such an interpretation should also be aligned with article 71 of the VCLT, which determines that States shall eliminate the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and to bring their mutual relations into conformity with the peremptory norm of general international law. Under these suggested terms, the notion of final peace entailed by the agreement can be interpreted as a means of eliminating acts contrary not only to the peremptory norms on self-determination (exercise of autonomy by the Palestinian people), but also against peremptory provisions encompassed by the general regime on the use of force (end of the military occupation and dismantlement of Jewish settlements in Palestinian territories).

Borders as close as possible to those of 1967

As a general rule stemming from the prohibition of territorial acquisition through the use of force, the military occupation must end and Israeli settlements in Palestinian territories must be dismantled. However, on the basis of the rule of conditioned preference, the foregoing does not prevent the lawful cession of a non-meaningful part of the Palestinian occupied territory as an element within a more comprehensive set of rights and obligations provided for by the hypothetical peace agreement. To put it differently, the cession of occupied territories may be permitted insofar it is not meaningful, i.e., to the extent to which it does not represent the cession of a significant part of the territories that are internationally

[1471] See above n 1448 and n 1449.

[1472] "L'article 47 n'interdit que la dérogation négative, celle tendant à diminuer les droits et les garanties conventionelles, non les accords élargissant ces droits et garanties … La Convention de Genève n'interdit pas des accords qui mettent fin à l'occupation. Dans un tel cas, la Convention cesse de s'appliquer et la situation est régie par l'accord conclu ainsi que par le droit international général de la paix." R. Kolb, above n 1416, pp. 310-311.

[1473] First and foremost, the right of return of Palestinian refugees, which is one of the most complicated issue in the peace process with Israel.

[1474] That would include also the commitment of Palestinian authorities to curb any type of criminal activities against Israel from their territory, as a means of ensuring safe boarders between the two countries.

recognized as belonging to Palestine (pre-1967 borders). For example, the cession of a small percentage of territory as negotiated in the 2000 Camp David talks could be considered valid. At once it would express the right to self-determination, while also guaranteeing the territorial integrity of Palestine in its almost entirety, in accordance with the peremptory prohibition of the territorial acquisition through the use of force and the principle of self-determination. Under such conditions the hypothetical peace agreement could be considered valid under international law as a result of weighing and balancing techniques, since it could be construed as an optimization of both peremptory norms.

The idea of a "meaningful" cession is not restricted, however, to the percentage of the territorial area that has been ceded under the agreement. In order for a territorial cession to be considered "balanced" it is necessary to take other issues into consideration, such as the relevance of the areas ceded to Israel as regards their strategic, geographical, political and historical relevance to the Palestinian people. Questions such as water sources, religious sites, roads, agricultural crops and other means of infrastructure, are all relevant elements for the well-functioning of an autonomous Palestinian State, and as such are considered "meaningful" elements. The central issue, therefore, is not only a matter of the actual area that has been ceded, but also of the overall balance of the territorial cession in the light of the factual circumstances on the ground. Although this is certainly a very complex equation, the important principle to be followed is that by no means can the territorial cession be meaningful, either from an empirical or a political perspective.

Agreement subject to the consultation of the Palestinian people

The third objective requirement emerging in this process of "weighing and balancing" is the consultative process of the Palestinian people on the terms of the peace agreement, in particular as regards the cession of the occupied territories. At this point the key aspect to be determined is how the will of non-self-governing peoples can be expressed in a free manner and without external interference, particularly *vis-à-vis* the Occupying Power.[1475] Unfortunately, there is no positive norm establishing clearly agreed mechanisms for guaranteeing the free decision of

[1475] The consent of non-self-governing people is capable must be free and without foreign interference. The importance of this later aspect was underscored by the ICJ in its Advisory Opinion on *Western Sahara*. On that occasion the Court stressed that the exercise of the right to self-determination as enunciated in the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV) "requires a free and genuine expression of the will of the peoples concerned." And it recalled, In this regard, that principle VII of Resolution 1541 (XV) required that the result of such a consultative process, such as free association, "should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes." Above n 946, para. 55, p. 32.

peoples on matters related to the exercise of the right to self-determination.[1476] Nonetheless, there are relevant examples of how non-self-governing peoples may decide on their status and on how to achieve autonomy under international law.[1477] Without excluding the possibility of other modalities, such as the *a priori* election of representatives entitled with the capacity to engage into international agreements with other States, the practices of plebiscite and referendum are relevant precedents in this area.[1478] Under the auspices of the United Nations there are relevant precedents stemming from the plebiscites that took place in several countries in Africa and Asia during the decolonization process, such as in Togo (1956), Cameroon (1959 and 1961), Western Samoa (1961) and East Timor (1999).[1479] More recently one can also refer to the independent consultative processes held in Slovenia (1990 plebiscite), Croatia (1991 *referendum*) and Bosnia and Herzegovina (1992 plebiscite) during the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY).[1480] The replication of this practice can contribute to satisfying the requirements of the principle of self-determination in circumstances of cession of territory. In the case of Palestine this seems to be particularly the case, since it does not fully enjoy autonomy yet. A final peace agreement with Israel would most likely bring about the full autonomy of Palestine as an independent State

[1476] GA Resolution 1541 only refers to the facts that the exercise of right to self-determination must occur "without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people." According to Dobelle, "[d]e manière générale, l'ONU s'est montrée peu exigeante sur la consultation des populations qui avait été effectué, en admettant, selon les circonstances, aussi bien le référendum que le vote d'une assemblée représentative, l'accord des dirigeants d'un mouvement de libération nationale, voire un simple sondage". Jean-François Dobelle, above n 937, p. 352. And in its Advisory Opinion on Western Sahara, the ICJ stated that "[t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances." Above n 946, para. 59, p. 33.

[1477] General Assembly Resolution 1541 (XV) contemplates the following possibilities for non-self-governing territories: (a) emergence as a sovereign independent State;(b) free association with an independent State; or (c) integration with an independent State.

[1478] Although the principle of self-determination was not enunciated as such in the Covenant of the League of Nations, there are precedents stemming from its practice as illustrated by the minority treaties and plebiscites used to determine State boundaries of what could be considered, in the light of current international law, to be non-self-governing territories. As noted by Jenne with regard to the right to self-determination, "the League's lasting contribution may have been its normative legacy." E. Janne, above n 1468, p. 12.

[1479] The case of Kashmir has not been a successful example, however, in spite of UN Security Council Resolution 47 of April 21, 1948, to a large extent as a consequence of India's reluctance in recognizing the need for a free and impartial consultation of the people in the region. Western Sahara is also a pending issue in the agenda of the UN as regards the principle of self-determination, in spite of the existence of a peacekeeping operation that was established precisely with the aim of organizing and overviewing a referendum on the self-determination of the territory.

[1480] Those modalities of consultative processes in former Yugoslav republics did not occur without problems. The Yugoslav Constitutional Court declared these attempts as unconstitutional, while the Serbs boycotted the 1992 plebiscite in Bosnia and Herzegovina. All those facts did not prevent, however, the international recognition of the newly emerging States in the Balkans. See Hurst Hannun, above n 1468, pp 61-63.

under international law, as a means of achieving the right to freedom from external rule in accordance with GA Resolution 1541.[1481]

It is worth recalling, in this regard, the precedent of the 1979 Camp David Agreements. One of the two accords[1482] signed in 1978 by the then Egyptian President Anwar el Sadat and Israeli Prime Minister Menachem Begin under the auspices of former US President Jimmy Carter, dealt with the establishment of an autonomous self-governing authority in the Palestinian occupied territories in the West Bank and the Gaza strip. It was designed as a means of guaranteeing the full autonomy of the Palestinian people within a period of five years.[1483] The accord was denounced, however, by the organized international community as lacking the participation (consent) of representatives of the Palestinian people (most likely the Palestine Liberation Organization at that time). In its Resolution 34/65 of 1978, the GA declared that the "Camp David accords and other agreements have no validity in so far as they purport to determine the future of the Palestinian people and of the Palestinian territories occupied by Israel since 1967", *inter alia* because these accords "ignore, infringe, violate or deny the inalienable rights of the Palestinian people, including the right of return, the right of self-determination and the right to national independence and sovereignty in Palestine." Although on that occasion the GA did refer explicitly to the legal regime operated by *ius cogens*, one can infer from that Resolution the rationale of the *ius cogens* regime: any agreement is void and null if contrary to a peremptory norm.[1484] This precedent reinforces the need for satisfying the requirements stemming from the normative universe of the right to self-determination as an essential aspect of the validity of the Palestinian consent to such a hypothetical peace agreement.

Support of the organized international community

In its commentaries to draft article 41 on State Responsibility, the ILC took the view that "States are under a positive duty to cooperate in order to bring to an end serious breaches" of peremptory norms[1485] and that such a cooperation should be organized preferably "in the framework of a competent international organization, in particular the United Nations."[1486] The application of this rule to the case under

[1481] See also H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, Philadelphia, University of Pennsylvania Press, 1990, p. 34.
[1482] The second agreement (*A Framework for the Conclusion of a Peace Treaty between Egypt and Israel)* exclusively dealt with bilateral issues between Egypt and Israel. It paved the way for the subsequent 1979 Egypt-Israel Peace Treaty.
[1483] The question of Jerusalem was left out from the agreement.
[1484] Gaja maintains that the most likely cause of invalidity of the Camp David Accords was due to a conflict with *ius cogens*. See G. Gaja, '*Jus Cogens* beyond the Vienna Convention', (1981-III) 172 *R.C.A.D.I.*, p. 282. See also S. Kadelbach, *Zwingendes Völkerrecht*, Berlin, Duncker & Humblot, 1992, pp. 89-90.
[1485] YbILC, 2001-II, p. 85.
[1486] *Idem*.

examination implies that the organized international community should take the necessary measures, preferably through the UN, in order to ensure that such a hypothetical peace agreement complies with the requirements stemming from *ius cogens*.[1487]

At first glance, however, the question may appear to relate to the capacity of the international community to derogate from peremptory norms. Indeed, some authors have suggested that the international community as a whole could validate, in some specific circumstances, a treaty that contradicts *ius cogens*.[1488] However, one can hardly dispute that the legal regime of *ius cogens* provided for by the VCLT does not allow for any type of derogatory measure, including the validation by the so-called international community of a treaty contracting out from a peremptory norm. Otherwise, the very existence of the concept of *ius cogens* would be jeopardized. Consequently, the impossibility of validating a treaty contradicting a peremptory norm is not restricted to States; it is also extended to the organized international community as a whole.[1489] In the case under examination though, the role of the organized international community is not to validate but to reinforce the validity of an agreement that has resulted from the exercise of a right provided for by a peremptory norm, namely the right to self-determination. According to this reasoning, the support of the international

[1487] In the specific case of the Palestinian question, this interpretation is aligned with state practice on the matter as reflected in resolutions of the main bodies of the UN system. Resolution 34/65 of the GA states that "the validity of agreements purporting to solve the problem of Palestine required that they be within the framework of the United Nations and its Charter and its resolutions on the basis of the full attainment and exercise of the inalienable rights of the Palestinian people, including the right of return and the right to national independence and sovereignty in Palestine, and with the participation of the Palestine Liberation Organization."

[1488] Rozakis, for instance, argues that there exists a difference between the validation by the international community and the validation by the parties in the terms of article 45 of the VCLT. In his view, the international community as a whole would hold the capacity to decide on the validity of such a treaty because it is the beneficiary of peremptory norms. C. Rozakis, above n 302, p. 128. In this same reasoning, Jennings accepts that the international community may qualify the nullity of a treaty that has resulted from the legal regime operated by *ius cogens*. He recognizes, however, that this hypothesis would depend upon the question of the relationship between the consent of the international community as a whole and the legal regime of *ius cogens*, since the rule of article 45 applies only to States parties to a treaty. R. Jennings, above n 428, p. 74.

[1489] Orakhelashvili disputes this view by taking the view that the rigid functions of *ius cogens* under international law "includes a limitation on any subsequent validation process." He takes the view that "the descentralized nature of the international community makes it impossible to find a general acquiescence to the illegality, as it is difficult to find evidence of the community attitude," and adds that "multilateral regime treaties can also conflict with *jus cogens*, even as they enjoy the support of important parts of the international community including major powers, such as treaties of collective disposition of territory, establishment of territorial regimes or States, or post-conflict settlement; Article 53 would apply even to such cases." A. Orakhelashvili, above n 355, pp. 136 and 147. However, there are important pieces of evidence of the expression of the will of the organized international community, regardless of its decentralized nature. The UNGA and the UNSC, for example, provide remarkable evidence of *opinio iuris* as to the current status of various issues of international law and international politics. In this case, one could certainly rely on the opinion of States as reflected in UNGA resolutions, in particular those unanimously adopted, as representing the most achievable piece of evidence of the opinion of the international community. It is not the case here, however, to suggest that the organized international community could derogate from a peremptory norm. The normative content of peremptory norms is imperative, and all States, either individually or collectively, cannot derogate from it in any unilateral act or international agreement.

community for the hypothetical international arrangement between Israel and Palestine is not a validation itself; it is rather the recognition of the exercise of the peremptory right to self-determination by the Palestinian people. The reason is that the interests and capacities of the organized international community cannot be confused with the individual interests and capacities of Palestine to cede part of its territory in that hypothetical peace agreement. The UN cannot dispose of the territory pertaining to a given State by assuming the role of the subject that is endowed with territorial rights, because *nemo dat quod non habet*.[1490] Rather, the UN, through its bodies such as the Security Council and the General Assembly, may provide the necessary *opinio iuris* on the legality of a certain treaty or an international political agreement conveying the cession of territory as a means of both enforcing the principle of self-determination of peoples and enhancing international peace and security.[1491] Its role therefore is essentially characterized as to its supervisory functions over the exercise of the right to self-determination, or to the establishment of specific mechanisms creating the appropriate conditions for a peaceful settlement of disputes involving boundaries.[1492]

In any event, the interests of the international community are not restricted to the right to self-determination under this exercise of "weighing and balancing". They also encompass the unlawful character of aggressive territorial titles. The general repulsion over the use of force for unlawful purposes is translated into the goal of avoiding the risks posed by a potential precedent of a 'lawful" territorial acquisition through armed force. Accordingly, the organized international community must safeguard that such a hypothetical agreement complies with the intrinsic requirements stemming from the peremptory prohibition of the territorial acquisition through the use of force, in accordance with draft article 41 on State Responsibilities. The realization of these objectives is a duty imposed upon the international community under the rule of optimization of conflicting norms. It is important, therefore, that the reaction of the international community occurs in such a manner that both maximizes the application of the peremptory norm prohibiting aggressive territorial acquisition and avoids the creation of a precedent in that area. In practical terms, the role of the organized international community is

[1490] One can observe here a clear example of an objective limitation imposed by the legal regime of *ius cogens* upon the powers of the UN Security Council.

[1491] As noted by Brownlie, "The United Nations does not 'confer sovereignty', but merely decides on the manner in which the principle of self-determination shall be implemented." I. Brownlie, above n 487, p. 164.

[1492] For that matter, UN bodies such as the Security Council may create a specific Commission for the demarcation of international boundaries between States, such as it was the case of the United Nations Iraq-Kuwait Boundary Demarcation Commission established by UNSC (SC Res 687, of 3 April 1991, at para. 3) which submitted a report that was adopted as final by Resolution 833 (1993). It is worth noting, however, that the Demarcation Commission was not established to reallocate territory, but for determining the precise coordinates of the border between Kuwait and Iraq on the basis of the agreement between the two countries in 1963. The mandate of the Commission was carried out under the principle of the inviolability of international boundaries. The UN may also organize consultative processes of non-self-governing peoples. "The conditions under which transfers occurs may be influenced by the recommendations of political organs of international organizations and by the principle of self-determination. On a number of occasions plebiscites have been organized under the auspices of the United Nations." I. Brownlie, above n 487, p. 163.

to guarantee that the territorial cession is not meaningful, that the peace agreement conveys the autonomy of the Palestinian people and that the effects of the Israeli occupation have been eliminated to the maximum extent.

Conclusion

In summary, the hypothetical Israeli-Palestinian agreement is an example of a real antinomy between two norms of peremptory character. The importance of reaching a clear and reasonable understanding on this matter is due to the fact that the nullity entailed by *ius cogens* is of an objective and absolute nature.[1493] In the case of such a hypothetical peace agreement between Israel and Palestine, a potential objective invalidity would be an automatic effect that would not depend on its declaration by a multilateral institution or a judicial body. The nullity of such a hypothetical agreement would therefore render impossible its application, and eventually impact negatively in the efforts of bringing the longstanding Israeli-Palestinian conflict to an end. The recourse to the rule of conditioned preference to the conflict between the peremptory norms on the use of force and self-determination suggests instead that such a hypothetical peace agreement could be considered valid under certain specific conditions. In the light of the objective of ending the occupation and finally bringing peace to the Israeli-Palestinian conflict, relative precedence can be given to the right to self-determination *in casu*. But this conditioned prevalence does not mean the absolute non-application of the rule prohibiting the territorial acquisition through the use of force. Under a weighing and balancing exercise, this rule must be optimized in the hypothetical peace agreement, *inter alia* by guaranteeing the end of the occupation and the elimination of all its effects.

[1493] As underlined by Nicoloudis, it is an assumption *de iure* and *de facto* to be asserted by any concerned or interested party. E.P. Nicoloudis, above n 462, p. 113. See also A. Orakhelashvili, above n 355, pp. 140-141.

Conclusion

The problem of *ius cogens* is a high-profile one in international law. And so many years after its codification by the 1969 VCLT and in spite of the great number of doctrinal studies dealing with it, there are still several aspects of the concept of peremptory norms that remain unclear. The objective of this study was precisely to address one of these doctrinal gaps, namely the problem of antinomy between peremptory norms. As a recurrent issue in any domain in legal studies, antinomy itself has also attracted increasing attention from those dedicated to the study of international law. It could hardly be otherwise. The growing densification of norms and the fragmentation of the norm-creating process impact upon the material cohesion of the system and increase the likelihood of antinomies between international rules. Studies aiming at providing methods for solving these normative conflicts are thus a matter of priority in the light of the ultimate goal of safeguarding the integrity and the efficacy of the international legal system.

In this process, interpreters must be provided with a series of legal tools in order to deal with the problem of antinomies in an appropriate manner. Besides the thorough knowledge of the material scope of each of the conflicting norms, they must be aware of all the possibilities offered by the several existing methods for solving legal antinomies in order to proceed with an analysis of how both norms are applicable in the light of the legal and factual circumstances surrounding each situation emerging from international reality. Disregarding those fundamental tenets of an essentially technical nature may jeopardize the objectivity of the interpretative analysis, and therefore lead to results which may reflect personal preferences rather than the normative content of the conflicting norms. Such an outcome would pose unnecessary and additional risks for a legal system such as the international one, which already faces a series of persistent deficiencies due to the lack of institutions with universal and compulsory competences in the areas of jurisdictional activities and law making processes.

It would be just a matter of time therefore, before a specific inquiry into the question of antinomies between *ius cogens* norms would show up in international legal studies. Peremptory norms embody fundamental values for the international community, and reaching a solution for a situation involving two contradicting

norms of *ius cogens* may be key in some actual circumstances emerging from international relations. This is important not only from the standpoint of legal theory, but also, and potentially more importantly, for practical and political purposes. Law is sociologically explained as a means to achieve stability and predictability in inter-subjective relationships. Legal argumentation is preferable, whenever possible, to the argument of power and force. Solving legal antinomies between peremptory norms may therefore provide reasonable alternatives for addressing central topics of the international agenda, which otherwise would be left to the balance of powers among States in the unequal international system.

The problems of "humanitarian intervention" and the Israeli-Palestinian peace process are actual examples of the political tensions underlying antinomies between peremptory norms. In the first case, it was seen that the conflict between the prohibition of the use of force and the prohibition of the most serious violations of human rights and international humanitarian law is an apparent antinomy. This is so because there has been no modification or derogation from the peremptory legal regime on the use of force as a result of existing peremptory norms in the area of human rights and international humanitarian law. As an apparent antinomy only, it could be solved on the basis of legal interpretation. But as both norms had a peremptory character, their imperative and non-derogable features implied their optimization under certain conditions arising from the exercise of their reciprocal weighing and balancing in the light of legal and factual circumstances. This solution was based on the progressive practice of the UNSC of authorizing the use of force as the last and timely resort when addressing humanitarian crisis, under the interpretation that gross and systematic human rights violations constitute threats and breaches of international peace under article 39 of the UN Charter. The conclusion was that a lawful operationalization of the concept of RtoP, as the most appropriate and available tool in the multilateral framework of the UN system of collective security, hinges upon the observance of certain objective conditions resulting from the mutual carving out of both peremptory norms. These requirements were translated into a progressive approach and the design of an appropriate mandate to the RtoP operation, including means of reporting and the respect of human rights and IHL standards.

The second case was a situation of real antinomy, the solution of which required recourse to a relationship of conditioned prevalence. As both peremptory norms could not be applied in their integrity in such a hypothetical Israeli-Palestinian peace agreement, relative priority was given to the right to self-determination in the light of the goal of achieving an end to the military occupation and bringing peace to a longstanding conflict which has had so many repercussions for international peace and security at large. Accordingly, the application of the three-steps analysis of the proportionality approach indicated the existence of certain conditions to be observed under the rule of conditioned prevalence. Both peremptory norms were mutually carved out and optimized under the legal and

practical circumstances surrounding the issue at hand. First, the hypothetical peace agreement should provide for the end of the Israeli occupation and the achievement of autonomy by the Palestinian people. Second, the cession of occupied territories should not be "meaningful" so as to guarantee the respect of the principle *ex iniuria ius non oritur* embodied in the peremptory prohibition of the territorial acquisition through the use of force. Finally, the agreement should be the result of the lawful expression of the consent of the Palestinian people, and it should count with the support of the international organized community through the competent bodies of the multilateral system.

From the analysis of these two case studies it is possible to conclude that the proportionality principle, as a "general principle of law," is suitable for solving antinomies between peremptory norms in public international law. Several aspects justify this assertion. First, antinomies between peremptory norms occur *in concreto* and the solution of the conflict does not entail the nullity of one of the conflicting norms. In other words, this type of conflict does not occur at the level of validity because peremptory norms accumulate at the abstract level of their normative existence within the international legal system. Second, no relationship of priority can be established between conflicting norms, what implies that antinomies between peremptory norms are "hard cases" of public international law that cannot be solved by having recourse to the traditional meta-rules. Third, the material overlap between peremptory norms is not totally contradictory, which means that these are usually conflicts of a partial-partial type. And as both norms are peremptory, there must be either a harmonious application of both normative contents to the case under examination or a relationship of conditioned prevalence *in casu*. Fourth, relationships of conditioned prevalence are restricted to the case under examination and do not affect in any way whatsoever their peremptory nature, their respective material content, or their validity under international law nor do they establish a "fixed hierarchy" to be observed in all other antinomies between the same two conflicting norms. A fifth and last feature arising from the study of antinomies between peremptory norms is that in both situations - harmonious interpretation or conditioned prevalence -, neither of the two norms is applied in an absolute manner. Otherwise a fundamental feature of a *ius cogens* norm (namely its imperativeness and non-derogability), would be overlooked, thereby contradicting the definition of *ius cogens*. Consequently, the application of both norms was maximized in each case under examination.

The hypothesis of "unilateral humanitarian intervention," for instance, was rebutted precisely because it would imply the absolute application of the prohibition of the most serious human rights violations in full detriment of the prohibition of the use of force, the observance of which would be simply ignored in that hypothesis. Instead, the solution for the implementation of RtoP, as suggested above, implied the optimization of both conflicting norms. This type of situation highlighted as well the importance of paying due attention to the

cannons of interpretation when solving antinomies between peremptory norms, such as the rule prohibiting an interpretation *contra legem* when searching for a harmonious application of two conflicting norms of *ius cogens*. Following this same reasoning, even when the interpreter is faced with a real antinomy, in which the traditional meta-rules do not suffice, the recourse to a relationship of conditioned prevalence does not imply either the absolute application of just one of the conflicting norms. Instead, when applying the three-steps analysis of the proportionality approach, the conflicting norms were mutually carved out, and certain objective conditions were established for the application of the prevailing norm in the light of the commandments stemming from the conflicting norm. In proceeding this way, it was possible to recognize the validity of such a hypothetical Israeli-Palestinian peace agreement under some specific conditions set forth by the process of weighing and balancing of both peremptory norms.

In summary, the recourse to "weighing and balancing" techniques is a useful tool in addressing situations of conflicting peremptory norms. It allows the interpreter to reach a solution that combines the imperative of optimizing the application of both conflicting norms while also providing an actual solution for a problem arising from international reality. The hypothesis of *non-liquet* is thus avoided and the integrity of the international legal system is guaranteed. More than that, the role of international law is reinforced at the international level as a means of providing concrete answers to outstanding concerns of the international community. The importance of this last aspect can hardly be overstated these days, when many actors and analysts of the international system still insist on favouring the rule of force and not the rule of law, when addressing the most pressing issues in contemporary international relations.

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