Normative Conflict and the Fuzziness of the International *ius cogens* Regime

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1. Introduction

Over the last five to ten years, the resort to *ius cogens* arguments in international legal discourse has increased profusely. Once regarded by international lawyers as an idea of little more than academic interest,[1] today "peremptory international law" is part of the common rhetoric of the international legal profession. Academics, NGOs, governmental legal advisors and experts, domestic courts, and increasingly, international courts and tribunals – in modern international legal discourse, they are all users of *ius cogens*. Scholars debate whether this proliferation of the *ius cogens* argument is a sound development or not.[2] This discussion is certainly very

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[1] Compare the comment made by Ian Brownlie in 1985: "I think *jus cogens* has become part of *lex lata*. At the same time, as has been pointed out, the vehicle does not often leave the garage. In other words the concept does not seem to have a lot of obvious relevance". (Brownlie, I., "Comment", Change and Stability in International Law-Making, eds. Cassese, A. and Weiler, J.H.H. (1988), 110.) See also the remark by Czaplinski and Danilenko in 1990: "*jus cogens* … is, however, *de lege lata* more a theoretical concept rather than a practical regulation". (Czaplinski, W. and Danilenko, G., "Conflict of Norms in International Law", Netherlands International Law Review, Vol. 21 (1990), 3, at 42.)

[2] See e.g. Paulus, A., "*Jus Cogens* in a Time of Hegemony and Fragmentation", Nordic Journal of International Law, Vol. 74 (2005), 297-334; Fischer-Lescano, A. and Teubner, G., "Regime Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law", Michigan Journal of International Law, Vol. 25 (2004), 999-1046; Paulus, A., "Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and the Role of the State", Michigan Journal of International Law, Vol. 25 (2004), 1047-1058; Linderfalk, U., "The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences", European Journal of International Law, Vol. 18 (2008), 853-871; Bianchi, A., "Human Rights and the Magic of *Jus Cogens*", European Journal of International Law, Vol. 19 (2008), 491-508; Weisburd, M., "The Emptiness of the Concept of *Jus Cogens*, As Illustrated by the War in Bosnia-Herzegovina", Michigan Journal of International Law, Vol. 17 (1995-1996), 1-51; Chinkin, C., "*Jus Cogens*, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution", Finnish Yearbook of International Law, Vol. 17 (2008), 63-90; Kornicker Uhlman, E.M., "State Community Interests, *Jus Cogens* and Protection of the Global Environment: Developing Criteria for Peremptory Norms", Georgia International Environmental Law Review, Vol. 11 (1998-1999), 101-135; Koskenniemi, M., "Hierarchy in International

interesting; depending on how it proceeds, it may have great influence on the creation and organization of the international legal system in the future. As it now seems, however, the discussion leaves a great deal to be desired. More than anything else, it requires a better understanding of the way *ius cogens* arguments are constructed.

Generally speaking, a *ius cogens* argument is an argument drawing on the specific quality of *ius cogens* norms. It assumes that just because a rule classifies as peremptory, different legal consequences should ensue from its application than from the application of rules of international law in general. For example, although extradition belongs to the *domaine réservé* of a state, commentators argue that because of *ius cogens*, states are prevented from extraditing a person to a country where she runs the risk of being tortured.[3] Although economic sanctions decided by the UN Security Council must be accepted and carried out by all members of the organization, commentators argue that because of *ius cogens*, such decisions shall not be acted upon when they entail a breach of basic international human rights law.[4] Although a reservation to a treaty may be compatible with the provisions laid down in Article 19 of the 1969 Vienna Convention on the Law of Treaties (VCLT), commentators argue that because of *ius cogens*, it shall still be prohibited if it is "contrary to an essential principle of the continental shelf institution".[5] Although state recognition is a discretionary act, commentators argue that because of *ius cogens*, recognition shall be withheld if it concerns a state of affairs created in contravention of the principle of self-determination.[6] Although sovereign immunity prevents a person from successfully bringing civil lawsuits for damages against a state agency in the domestic court of another country, commentators argue that because of *ius cogens*, such suits are possible when originating in a serious breach of international humanitarian law.[7]

Law: A Sketch", European Journal of International Law, Vol. 8 (1997), 566-582; Carillo Salcedo, J.A., "Reflections on the Existence of a Hierarchy of Norms in International Law", European Journal of International Law, Vol. 8 (1997), 583-595; Shelton, D., "Normative Hierarchy in International Law", American Journal of International Law, Vol. 100 (2006), 291-323; Tasioulas, J., "In Defence of Relative Normativity: Communitarian Values and the *Nicaragua* Case", Oxford Journal of Legal Studies, Vol. 16 (1996), 85-128.

[3] See e.g. de Wet, E., "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law", European Journal of International Law, Vol. 15 (2004), 97, at 99.

[4] Separate Opinion of Judge Lauterpacht, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, ICJ Reports 1993, 325, at. 440.

[5] See e.g. Dissenting Opinion of Judge Tanaka, International Court of Justice, *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, ICJ Reports 1969, 3, at 182.

[6] See e.g. Hannikainen, L., "The Case of East Timor from the Perspective of Jus Cogens", International Law and the Question of East Timor (1995), 103-117.

[7] *Princz v. Federal Republic of Germany*, United States Court of Appeals, District of Colombia Circuit, Judgment of 1 July 1994, Dissenting Opinion of Judge Ward, 26 F.3d 1166, at 1179-1185 (International Law Reports, Vol. 103, 604, at 615-621).

As can be seen from the examples, a *ius cogens* argument presupposes the existence of a particular international legal regime. The legal rules constituting this regime are of two kinds. For the purpose of this article, they will be referred to as first and second order rules of *ius cogens*, respectively. The first order rules of *ius cogens* provide the substantial contents of the regime. By international lawyers, typically, they are referred to as "peremptory norms of general international law".[8] First order rules of *ius cogens* command or prohibit certain actions, such as, for instance, acts of genocide, aggressive warfare, and acts that deprive a people of its right of self-determination. The second order rules of *ius cogens* provide the institutional framework, within which the first order rules of *ius cogens* are applied. They address conflicts that occur in the application of international rights and obligations. For instance, second order rules of *ius cogens* apply when the performance of an international right or obligation entails a breach of a first order rule of *ius cogens*.

Although, lately, legal scientists have taken considerable interest in the international *ius cogens* regime, overall the requirements entailed by that regime have still not been defined with any great certainty. Drawing on the terminology of the late Professor Jerzy Wróblewski,[9] I do not hesitate to describe the prevailing international *ius cogens* regime as exceptionally *fuzzy*. Traditionally, this fuzziness has been thought by commentators to turn on the difficulty of identifying the specific first order norms that classify as peremptory.[10] Certainly, most international lawyers would probably agree to categorize as peremptory the principle on the non-use of force, the law of genocide, the prohibition of racial discrimination, the right of self-determination, and the rules prohibiting crimes against humanity, torture, piracy and trades in slaves.[11] But those remain examples. When international lawyers move beyond exemplification and try to make the list of *ius cogens* complete, their various compilations of norms come out as widely disparate. They range from extremely sweeping statements such as, for instance, "most norms of international humanitarian law",[12] and "all rules of general international law created for a

[8] VCLT, Art. 53 reads:

"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."

[9] See eg. Wróblewski, J., "Legal Language and Legal Interpretation", Law and Philosophy, Vol. 4 (1985), 239-255.

[10] See e.g. Hannikainen, L., Peremptory Norms (Jus Cogens) In International Law (1988), 724.

[11] See e.g. the Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, ILC, Report on the Work of its 53rd Session, 20, at 85 (Draft Art. 26).

[12] See *Prosecutor v. Zoran Kupreškić et al.* (Case No. IT-95-16-T), ICTY, Trial Chamber, Judgment of 14 January 2000, 203, § 520, available through the webpage of the Tribunal: <http://www.icty.org>.

humanitarian purpose",[13] to more concrete suggestions such as the principle of *non-refoulement*,[14] the right to legal personhood,[15] the right to adequate food,[16] "the freedom of navigation on the high seas",[17] the international law prohibiting massive pollution of the atmosphere or of the sea,[18] and the principles of good faith and *pacta sunt servanda*.[19] As any systematic reading of such compilations shows, in the end, very little agreement exists.

As I will argue in this article, the reason traditionally given to explain the fuzziness of the prevailing international *ius cogens* regime does not account for the full scope of the problem. The fuzziness of the regime derives only partly from the difficulty of identifying the relevant first order rules. Partly, it derives also from the fuzziness of the second order rules of the regime; and this is the proposition that I intend this paper to establish. For reasons of space, I will confine treatment to the resolution of such normative conflicts that occur in the context of international treaty law.

2. The Concept of Normative Conflict

The second order rules of *ius cogens* that pertain to the application of international treaties can be stated as follows:

> (1) If it can be shown that a treaty is in conflict with a first order rule of *ius cogens* created prior to the conclusion of the treaty, then the treaty shall be considered void.[20]
>
> (2) If it can be shown that a treaty or a single treaty provision is in conflict with a first order rule of *ius cogens* created subsequent to the conclusion of the treaty, then the treaty or the single provision – if separable from the remainder of the treaty – shall be considered void.[21]

[13] Verdross, A., "Jus Dispositivum and Jus Cogens in International Law", American Journal of International Law, Vol. 60 (1966), 55, at. 59.

[14] See Allain, J., "The *Jus Cogens* Nature of *Non-Refoulement*", International Journal of Refugee Law, Vol. 13 (2001), 533-558.

[15] Forrest Martin, F., "Delineating a Hierarchical Outline of International Law Sources and Norms", Saskatchewan Law Review, Vol. 63 (2002), 333, at 347.

[16] Forrest Martin (*supra* note 15), 350-351.

[17] Roberto Ago, at the 684th meeting of the International Law Commission in 1963, Yearbook of the International Law Commission, Vol. 1, 71, § 53.

[18] See e.g. Frowein, J.A., "Jus Cogens", Encyclopedia of Public International Law, 2nd ed., Vol. 3 (1997), 65, at 67, referring to Article 19 of the Draft Articles on State Responsibility provisionally adopted by the International Law Commission on first reading in 1996.

[19] See e.g. Lukashuk, I.I., "The Principle *Pacta Sunt Servanda* and the Nature of Obligation under International Law", American Journal of International Law, Vol. 83 (1989), 513-518.

[20] Compare VCLT, Arts. 53 and 44.

[21] Compare VCLT, Arts. 64 and 44.

(3) If it can be shown that the purport of a treaty reservation is in conflict with a first order rule of *ius cogens*, then that reservation shall be considered void.[22]

(4) If it can be shown that a treaty provision is in conflict with a first order rule of *ius cogens* relative to some specific case or state of affairs, then the *ius cogens* rule shall prevail.[23]

As can be seen from the list, all four rules require the existence of a *normative conflict*. By normative conflict we mean a *genuine* normative conflict. Consequently, we assume that there is a difference between normative conflicts and conflicts that hold only *prima facie*.[24] In the final analysis, this difference is one between the mere perception by a person of the existence of a normative conflict and the justified perception of the existence of such a conflict. When we read the text of a treaty (T), at first appearance we might understand T to be in conflict with some other rule of international law (R), as for instance a first order rule of *ius cogens*. Obviously, this understanding entails an assumption about the normative content of T.[25] The assumption might be correct, or it might not, depending on whether or not it can be justified by reference to the rules of interpretation laid down in Articles 31-33 of the 1969 VCLT.[26] When our spontaneous reading of T can be confirmed by interpretation of the treaty in accordance with Articles 31-33, only then will we be justified for saying that there is a conflict between T and R. Only then is the conflict between T and R a genuine normative conflict. Stated differently, whether a normative conflict holds in the relationship between T and R is a thing

[22] Compare the Dissenting Opinion expressed by Judge Tanaka in the *North Sea Continental Shelf Cases* (*supra* note 5), p. 182. In the same vein, Pellet, A., Special Rapporteur, Tenth Report on Reservations to Treaties, submitted to the International Law Commission at the occasion of its 57th session (UN Doc. A/CN.4/588/Add.1), 34-35, §§ 135-137. For a further discussion on this rule, see Linderfalk, U., "Reservations to Treaties and Norms of *Jus Cogens* – A Comment on Human Rights Committee General Comment No. 24", Reservations to Human Rights Treaties and the Vienna Convention Regime, ed. Ziemele, I. (2004), 213-234.

[23] See e.g. Karl, W., "Treaties, Conflict Between", Encyclopedia of Public International Law, 2nd ed., Vol. 4 (2000), 935, at 936-937, 938; Pauwelyn, J., Conflict of Norms in Public International Law (2003), 98; *Prosecutor v. Furundžija* (Case No. IT-95-17/1-T), ICTY, Trial Chamber, Judgment of 10 December 1998, 58-59, § 153; Orakelashvili, A., Peremptory Norms in International Law (2006), 9; Matz, N., Wege zur Koordinierung völkerrechtlicher Verträge (2005), 3; Meron, T., "On a Hierarchy of International Human Rights", American Journal of International Law, Vol. 80 (1986), 1, at 18 and 16; de Wet (*supra* note 3), 99; Akehurst, M., "The Hierarchy of the Sources of International Law", British Yearbook of International Law, Vol. 47 (1974-1975), 273, at 281 and 275. See also "Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law", Report of the Study Group of the International Law Commission, Chaired by Martti Koskenniemi, Report of the International Law Commission on the work of its 58th session, 1 May-9 June and 3 July-11 August 2006, UN Doc. A/CN.4/L.682, 176. (Henceforth, this report will be referred to as the "ILC Study on Fragmentation of International Law".)

[24] For this terminology, see Pauwelyn (*supra* note 23), 6

[25] Of course, the understanding entails an assumption also about the normative content of R.

[26] According to what is today generally assumed, Arts. 31-33 of the Vienna Convention are reflective of customary international law. For a detailed list of references, see Linderfalk, U., On the Interpretation of Treaties (2007), 7.

that can only be determined after T has been interpreted. This role of treaty interpretation for the avoidance of normative conflict has been highlighted by several commentators, notably the International Law Commission.[27] However, considering the specific context of this paper, it should be added that, typically, there is less possibility of harmonizing two rules through a process of interpretation when only one of them finds the expression of a treaty. Since by very definition a first order *ius cogens* rule is always a rule of general customary international law,[28] this is the case that we are here concerned with.

By tradition, the concept of normative conflict has long been associated with logical inconsistency in the sense of two mutually exclusive legal obligations. According to an often quoted article by Professor Wilfred Jenks, for instance, "[a] conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties".[29] According to Professor Wolfram Karl, "there is a conflict between treaties when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously".[30] According to Sadat-Akhavi, "[a] conflict of norms arises when it is impossible to comply with all requirements of two norms".[31] According to the view expressed by Czaplinski and Danilenko, "[o]ne can speak of the conflict of treaties when one of the treaties binding on the parties obliges party A to take action X, while another stipulates that A should take action Y, and X is incompatible with Y".[32] Stated differently, according to the definition assumed by Professors Jenks, Karl, and others, if someone argues that two rules (R_1 and R_2) are in conflict, this is tantamount to saying that, according to R_1, a legal subject S shall act in a certain way φ, whereas according to R_2, S shall act in the exact opposite way –φ.

In the more recent international legal literature, this definition has drawn criticism.[33] First, as noted by several commentators, by the mere reason of how we define the concept of normative conflict, we will automatically give preference to commands and prohibitions over permissions.[34] To illustrate this, let us take the example of Norway and Russia. The relations between Norway and Russia with

[27] See ILC Study on Fragmentation of International Law (*supra* note 23), 206-244.

[28] For the sake of clarity it should be added that by "general customary international law" I mean law applicable between at least all states of the world (and in some instances between other international legal subjects as well). Naturally, for the very same reason as a treaty or a treaty provision can be reflective of general customary international law, it can be reflective of *ius cogens*.

[29] Jenks, W., "The Conflict of Law-Making Treaties", British Yearbook of International Law, Vol. 30 (1953), 401, at 426.

[30] Karl (*supra* note 23), 936.

[31] Sadat-Akhavi, S.A., Methods of Resolving Conflicts between Treaties (2003), 5.

[32] Czaplinski and Danilenko (*supra* note 1), 12.

[33] Pauwelyn (*supra* note 23), 169 ff.; Matz (*supra* note 23), 1-24; Vranes, "The Definition of 'Norm Conflict' in International Law and Legal Theory", European Journal of International Law, Vol. 17 (2006), 395, at 403-405.

[34] See e.g. Pauwelyn (*supra* note 23), 166 ff.

respect to fishing in the exclusive economic zone (EEZ) are governed by customary international law. Each of the two states has established an EEZ in the Barents Sea. That would prohibit Norway from conferring on Norwegian fishing vessels a license to fish in the Russian EEZ. It would similarly prohibit Russia from conferring on Russian fishing vessels a license to fish in the Norwegian EEZ. Now, let us assume that the two countries conclude a bilateral fishing agreement permitting each state to confer on its own nationals a license to fish in the EEZ of the other state up to some certain quota (Q). The registered owner (O) of a Norwegian fishing vessel applies to Norwegian authorities for a license to fish in the Russian EEZ. An approval of the application will not encroach upon the yearly limit of Q. From the point of view of Norway, legally the situation can be described as follows:

> Customary int'l law: Norway shall not confer on O a license to fish in the Russian EEZ.
>
> Fishing Agreement: Norway may confer on O a license to fish in the Russian EEZ.

According to traditional analysis, the relevant legal rules are *not* in conflict with each other, because Norway is only permitted but not obliged to confer on O a license to fish in the EEZ of Russia, and because Norway can always abstain from doing what it is permitted to do. Hence, in this case, the definition of normative conflict would seem to give implicit preference to customary international law.[35]

Secondly, as critics further observe, the traditionally given definition of normative conflict tends to overlook that a legal obligation on the part of one legal subject typically corresponds to a right on the part of some other legal subject or subjects.[36] This means that very often, when analyzing legal rules, and asking whether they express prohibitions or commands or permissions, we will have to accept that, depending on which one of the several legal subjects' point of view we are taking, the answer will be different. When we take the perspective of the obligated subject, the answer will be one; when we take perspective of the holder of the corresponding right, the answer will be another. For instance, in the example used earlier, the legal relations between Norway and Russia may also be stated as follows:

> Customary int'l law: Russia may freely ignore the license conferred by Norway on O with respect to fishing in the Russian EEZ.
>
> Fishing Agreement: Russia shall acknowledge the license conferred by Norway on O with respect to fishing in the Russian EEZ.

[35] According to the analysis performed by Joost Pauwelyn, "the alleged conflict is then not solved by a rule on *how to solve* conflict but by the *very definition* of conflict"; "one essentially solves part of the problem by ignoring it". (Pauwelyn (supra note 23), p. 171.) Expressed in this way, his argument is a *petitio principii*. It assumes what remains to be established, namely the proper definition of normative conflict.

[36] See e.g. Pauwelyn (*supra* note 23), 166 ff.

In this case, our definition of normative conflict would seem to give implicit preference to the bilateral fishing agreement. Considering how the two rules were earlier constructed from the perspective of Norway, this does not make sense. Although in the one case we are concerned with the rights and obligations of Norway, whereas in the other focus is upon the rights and obligations of Russia, we are speaking about the same legal relationship established under the very same legal rules.

Briefly, those are the objections to definition of normative conflict as tantamount to logical inconsistency in the sense of mutually exclusive legal obligations. The objections certainly invite further consideration. As should be realized, however, the problems revealed by the examples given in this section do not turn on the equation of normative conflict with logical inconsistency. Problems arise because of the way legal rules are constructed. Problems can be avoided if we can find ways to construct rules in terms other than prohibitions, commands, and permissions, taking into account also that legal obligations are always owed to somebody. Several modes of construction would seem to satisfy this need. In the earlier example concerning fishing in the Russian EEZ, for instance, the relevant legal rules may be constructed as follows:

> Customary int'l law: If Norway confers on O a license to fish in the Russian EEZ, then Norway shall be considered to have breached an international obligation owed to Russia.
>
> Fishing Agreement: If Norway confers on O a license to fish in the Russian EEZ, then Norway shall be considered not to have breached an international obligation owed to Russia.

In the alternative, the two rules may be constructed in Hohfeldian terms as below:[37]

> Customary int'l law: As against Russia, Norway does not have the power to confer on O a license to fish in the Russian EEZ.
>
> Fishing Agreement: As against Russia, Norway has the power to confer on O a license to fish in the Russian EEZ.

Whether we prefer the former mode of construction or the latter, it is plain that in our example, international customary law and the bilateral fishing agreement are in conflict. That would seem to take care of the difficulties inherent in the equation of normative conflict with logical inconsistency in the sense of mutually exclusive legal obligations. At the same time, it forces us to make an adjustment of the definition assumed by Professors Jenks, Karl, and others. Arguably, the more proper definition of the concept of normative conflict would read something along the

[37] See Hohfeld, W., Fundamental Legal Conceptions As Applied in Judicial Reasoning and Other Legal Essays (1923).

following lines: if someone argues that two rules (R_1 and R_2) are in conflict, this is tantamount to saying that, according to R_1, some certain legal relationship (SS) shall be organized in such a way that φ, whereas according to R_2, that same legal relationship SS shall be organized in such a way that –φ.

We are now equipped to return to the particular legal rules that this article is all about: the second order rules of *ius cogens*. According to the proposition I aim to establish, the second order rules of *ius cogens* remain exceptionally fuzzy. This fuzziness does not owe to some *general* difficulty of defining the concept of normative conflict *as such*; I think this much has been shown already. As I will argue in the following, fuzziness is caused by factors of a more particular nature. First, fuzziness is caused by the very special kind of legal relationship created by the first order rules of *ius cogens*. This proposition will be argued in section 3. Secondly, fuzziness is caused by the concern of the second order rules of *ius cogens* with normative conflict as something that occurs in the abstract. This proposition will be argued in section 4.

3. The Special Kind of Legal Relationship Created by First Order Rules of *ius cogens*

A legal relationship holds between an obligated party and a right-holder. This relationship can be organized according to different models.[38] In a bilateral legal relationship, obligations are owed by one legal subject (S_1) to another (S_2). Following the terminology used by most international legal scholars today, henceforth we will refer to such obligations as *bilateral* in character. A bilateral obligation is held on a basis of reciprocity: the obligation held by S_1 to S_2 corresponds to an obligation held by S_2 to S_1, and the performance of the obligation held by S_1 is a necessary condition for the performance of the equivalent obligation owed by S_2 to S_1. Hence, if S_1 breaches its obligation it will affect the future scope of the obligation owed by S_2 to S_1. It will not affect the scope of any other obligations, however, such as for instance those held by S_1 or S_2 to other legal subjects.

In a universal legal relationship, obligations are owed by one legal subject S_1 to "the international community as a whole".[39] In the language of international law, such obligations are referred to as obligations *erga omnes*. Unlike bilateral obligations, an obligation *erga omnes* is not held on a basis of reciprocity: the obligation held by S_1 to the international community does not correspond to an obligation held by the international community to S_1. For the very same reason, the performance of the obligation held by S_1 is not a necessary condition for the performance

[38] See e.g. Sicilianos, L.A., "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility", European Journal of International Law, Vol. 13 (2002), 1127-1145.

[39] Compare the wording of Art. 48, § 1(b) of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts.

of the equivalent obligations held by other legal subjects. Hence, if S_1 breaches its obligation it will not affects the future scope of those other obligations.

In a multilateral legal relationship, obligations are owed by one legal subject S_1 to a group of other legal subjects $\{S_2, S_3, S_4\}$. Obligations classify either as obligations *erga omnes partes* or as *interdependent* obligations. Neither the obligation *erga omnes partes* nor the interdependent obligation is held on a basis of reciprocity – the obligation held by S_1 to $\{S_2, S_3, S_4\}$ does not correspond to an obligation held by $\{S_2, S_3, S_4\}$ to S_1. In the case of the interdependent obligation, the performance of the obligation held by S_1 is a necessary condition for the performance of the equivalent obligations held by S_2, S_3, and S_4. If S_1 breaches its obligation it will affect the future scope of those other obligations. In the case of the obligation *erga omnes partes*, the exact opposite holds. The performance of the obligation held by S_1 is *not* a necessary condition for the performance of the equivalent obligations held by S_2, S_3, and S_4. If S_1 breaches its obligation it will *not* affects the future scope of those other obligations.

For an analysis of the concept of normative conflict, these are crucial distinctions. To explain why, I will have to draw on some example. Consequently, let us assume that Indonesia is illegally occupying the Non-Self Governing Territory of East Timor. Indonesia has an obligation under customary international law not to deprive the people of East Timor of its right of self-determination, including the right of the East Timorese to freely dispose of their natural resources. This obligation follows from a first order rule of *ius cogens*, and hence, it is an obligation *erga omnes* – by very definition, first order rules of *ius cogens* always express such obligations.[40] However, Indonesia has also concluded a bilateral treaty with Australia (the *Timor Gap Treaty*). According to this treaty, the exploration and exploitation of petroleum resources in an area designed as "Area C" shall be under the control of Indonesia. Now, let us assume that a company B turns to Indonesian authorities asking for a concession that will allow it to explore and produce oil in Area C. From the point of view of Indonesia, the prevailing legal state of affairs can be described as follows:

> *Ius cogens*: If Indonesia grants a concession to B allowing the exploration and production of oil in Area C, then Indonesia shall be considered to have breached an international obligation owed to the international community as a whole.
>
> Timor Gap Treaty: If Indonesia grants a concession to B allowing the exploration and production of oil in Area C, then Indonesia shall be considered not to have breached an international obligation owed to Australia.

[40] See e.g. Kadelbach, S., "*Jus Cogens*, Obligations *Erga Omnes* and other Rules: The Identification of Fundamental Norms", The Fundamental Rules of International Legal Order, eds. Tomuschat, C. and Thouvenin, J.-M. (2006), 21, at 25; Byers, M., "Conceptualising the Relationship Between *Jus Cogens* and *Erga Omnes* Rules", Nordic Journal of International Law, Vol. 66 (1997), 211-239; Sicilianos (*supra* note 38), 1137.

We may compare this situation with the earlier example of O and his application to Norwegian authorities for a license to fish in the Russian EEZ:

> Customary int'l law: If Norway confers on O a license to fish in the Russian EEZ, then Norway shall be considered to have breached an international obligation owed to Russia.
>
> Fishing Agreement: If Norway confers on O a license to fish in the Russian EEZ, then Norway shall be considered not to have breached an international obligation owed to Russia.

Most international lawyers, I think, would categorize both examples as cases of normative conflict. Given that lawyers speak about normative conflict in the traditional sense of logical inconsistency, this categorization is only partly correct. Analytically, the two examples remain very different. In the example concerning fishing in the Russian EEZ, clearly, the legal relationships that we compare are identical. Rights and obligations are consistently held by Norway and Russia; no other legal subjects are involved. In the example concerning the exploitation of the East Timor Gap, the compared legal relationships are different. The obligation created by the first order rule of *ius cogens* applies *erga omnes* – it is owed by Indonesia to the international community as a whole. The obligation created by the Timor Gap Treaty, on the other hand, applies bilaterally – it is owed by Indonesia not to the international community as a whole, but to Australia. Consequently, according to the analysis, only in the example concerning fishing in the Russian EEZ, but not in the example concerning the exploitation of the East Timor Gap, would we be excused for saying that a normative conflict exists.

There seems to be no way to get around this conclusion. Some lawyers might argue that in fact obligations *erga omnes* are an illusion, since a collective right held by a group of subjects can always be analyzed as amounting to a series of rights held individually by each and every one of those subjects. This argument does not hold, however, for the simple reason that a collective right cannot be subdivided in this way. One plain example will suffice to show this. Let us assume that I have made a promise to the other three individuals that are part of my family: for the sake of simplicity, I will call them Mary, Mike, and Milly. I have promised Mary, Mike, and Milly to always drive my car carefully. Based on this promise we may say that I have an obligation to always drive my car carefully. The corresponding right is held by Mary, Mike, and Milly. Obviously, this is a collective right held jointly by the three family members. It simply does not make sense to say that Mary, Mike, and Milly each has a claim that I always drive my car carefully, because if they had, and I was to perform the obligation hypothetically owed to one of them, I would simultaneously bring about the state of affairs claimed by the others. Stated differently, because of the very nature of the interest protected, logically I cannot possibly satisfy the right belonging to either one of the three family members, and at the same time act in violation of the right belonging to one of the others.

Let us return to the example concerning the exploitation of the East Timor Gap. As we concluded, in this example, because identical legal relationships are not involved, a normative conflict does not hold. This conclusion has general consequences. As earlier stated, the obligation created by a first order rule of *ius cogens* always applies *erga omnes*. By very definition, the obligation created by a treaty never does. It is owed either bilaterally or to a limited group of legal subjects. As a result, the obligation created by a first order rule of *ius cogens* and the obligation created by a treaty will never be owed to the same legal subject or subjects. Stated differently, according to the analysis, a first order rule of *ius cogens* will never be in conflict with a treaty or a treaty provision, or the purport of a treaty reservation. This would seem to leave the four second order rules of *ius cogens* stated in part 2 of this article without all practical meaning. Of course, this is not a very satisfying conclusion, which is part of the reason for why I refer to the second order rules of *ius cogens* as fuzzy.

4. Second Order Rules of *ius cogens* Envisage Normative Conflict as Something that Occurs in the Abstract

Commentators argue that in the context of some international rules for the resolution of normative conflict, possibly, "conflict" might not stand for logical inconsistency at all. They suggest that, instead, it might stand for something like teleological frustration.[41] If we apply this suggestion to the four second order rules of *ius cogens* stated in section 2, in the sense of those rules, a conflict exists when a treaty or a treaty provision prevents the realization of the *telos* of a first order rule of *ius cogens*.[42] At first sight, this may look like an attractive solution. Obviously, by the understanding of "conflict" as tantamount to teleological frustration, we avoid all the problems laid out in part 3 of this article.[43] For the assessment of whether or not the realization of the *telos* of a first order rule of *ius cogens* is prevented by a treaty or a treaty provision, or a treaty in the modified form implied by a reservation, the legal relationships created by those norms are of no crucial importance. So, we need not be disturbed by the fact that an obligation created by a first order rule of *ius cogens* and the obligations created by a treaty are never

[41] See e.g. ILC Study on Fragmentation of International Law (*supra* note 23), 19.

[42] Note that it is not a requirement that a treaty or a treaty provision be an *immediate* means for the obstruction of the *telos* of a first order rule of *ius cogens*. It seems that, according to the suggestion, obstruction can also be effected *intermediately*. Hence, if I understand the suggestion correctly, a conflict would exist not only in cases where a treaty or a treaty provision itself obstructs the realization of the *telos* of a first order rule of *ius cogens*. It would also exist in cases where the treaty or treaty provision contributes to a state of affairs, which, in combination with other factors, prevents the realization of the *telos* of a first order rule of *ius cogens*.

[43] Of course, this understanding would have the rather odd effect that of the three rules that exist in customary international law for the resolution of normative conflict – *lex superior*, *lex specialis*, and *lex posterior* – only two would build upon the concept of logical inconsistency. Obviously, Rule No. 4 (the *lex superior*) would not.

owed to the same legal subjects. On further analysis, however, I find reason to be more skeptical. As I will argue in the following, by the equation of "conflict" with teleological frustration, only Rule No. 4 will make sense. Rules Nos. 1-3, depending on how they are interpreted, will either be non-sensical, or they will assume the impossible.

Typically, when international lawyers determine the instrumental relationship holding between a treaty or a treaty clause and its *telos*, they do it relative to some specific case or some specific state of affairs. Assume, for instance, that one state (A) accuses another (B) of having acted in violation of some specific treaty in force for those two states, and that state B objects to the accusation. Assume, furthermore, that the dispute can be explained by the fact that the two states are interpreting the treaty differently. The ordinary meaning of the treaty is ambiguous, and depending on which one of the two possible ordinary meanings is adopted, different conclusions ensue with respect to the assessment of the behavior of state B. In such a situation, according to an established rule of interpretation, if it can be shown that, depending on whether we apply the treaty in the one ordinary meaning or the other, the treaty will work more or less efficiently as a means for the realization of its *telos*, then the former meaning shall be adopted.[44] To be able to apply this rule of interpretation, we need to make an assumption about the instrumental relationship holding between, on the one hand, the interpreted treaty in each one of its two ordinary meanings, and, on the other hand, the *telos* of the treaty relative to the specific case at hand. The question that we need to answer is this: when we apply the interpreted treaty to the specific behavior of state B, depending on whether we adopt the one ordinary meaning or the other, to what extent will the treaty be working as a means for realization of its *telos*?[45]

Because of the way this line of reasoning relates to the *application* of law, it cannot easily be translated to the context of the second order rules of *ius cogens* stated in section 2 of this article. Certainly, international legal doctrine works on the assumption that normally normative conflicts occur relative to a specific case or a specific state of affairs, just like cases of teleological interpretation. This can be seen from the statements by Professors Jenks, Karl, and others quoted in section 2 of this article. It can be seen also from Articles 30 and 59 of the 1969 VCLT.[46] The situation envisaged is this: two or more legal subjects are in dispute with respect to some specific behavior on the part of one of those subjects, or with respect to some specific state of affairs; two rules can be applied to settle the situation, but the con-

[44] Compare VCLT, Art. 31, para. 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 the light of its object and purpose."

[45] Compare Linderfalk (*supra* note 26), 205-206.

[46] Article 30 applies in cases of conflict between an earlier and a later treaty. In the sense of this provision, no doubt, normative conflicts occur in the *application* of law, relative to some specific case or state of affairs. The same goes for Art. 59, which provides for the termination and suspension of a treaty implied by the conclusion of a later treaty. According to Art. 59, all parties to the earlier treaty must be parties also to the later, and the provisions of the two treaties must be incapable of being applied at the same time.

clusions that ensue from the applications of the two rules are logically inconsistent. In such situations it makes good sense to say that, according to international law, one of the two conflicting rules shall be given priority, and that, consequently, the one rule shall be applied but not the other. It makes sense, because next time the two rules apply, due to their general scope of application and the rich variation of brute facts, there is a good chance conflict will not arise.

The second order rules of *ius cogens* call for a different understanding. Only Rule No. 4 envisages normative conflict as something that occurs in the application of law. The others do not. Rule No. 1, in a very general sense, requires the existence of a conflict between a first order rule of *ius cogens* and an entire treaty:

> If it can be shown that a treaty is in conflict with a first order rule of ius cogens created prior to the conclusion of the treaty, then the treaty shall be considered void.[47]

The same applies to Rules Nos. 2 and 3. Rule No. 2 requires the existence of a conflict between a first order rule of *ius cogens* and either an entire treaty or a single treaty clause.

> If it can be shown that a treaty or a single treaty provision is in conflict with a first order rule of ius cogens created subsequent to the conclusion of the treaty, then the treaty or the single provision – if separable from the remainder of the treaty – shall be considered void.[48]

Rule No. 3 requires the existence of a conflict between a first order rule of *ius cogens* and the entire purport of a treaty reservation.

> If it can be shown that the purport of a treaty reservation is in conflict with a first order rule of ius cogens, then that reservation shall be considered void. [49]

From the point-of-view of Rules Nos. 1-3, obviously, normative conflict is something that occurs in the abstract. This renders Rules Nos. 1-3 ambiguous. Depending on how we conceive the normative content of a legal norm, Rules Nos. 1-3 can be read in two different ways.

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[47] See *supra*, section 2. Compare the wording of VCLT, Art. 53: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."

[48] See *supra*, section 2. Compare the wording of VCLT, Art. 64: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

[49] See *supra*, section 2. Compare the Dissenting Opinion expressed by Judge Tanaka in the *North Sea Continental Shelf Cases* (*supra* note 5). The relevant passage reads: "[I]f a reservation were concerned with the equidistance principle, it would not necessarily have a negative effect upon the formation of customary international law, because in this case the reservation would in itself be null and void as contrary to an essential principle of the continental shelf institution which must be recognized as *jus cogens*." (182).

One possible approach to the normative content of a legal rule is to think of it as the equivalent of the definite or indefinite group of cases or states of affairs, to which the rule can be applied. Applied to the context of the second order rules of *ius cogens*, this approach provides a first alternative reading of those rules. According to this reading, in the sense of Rule No. 1, a conflict exists when it can be said for good reasons that, regardless of what specific case or state of affairs a treaty is applied to, the application of that treaty will prevent the realization of the *telos* of a first order rule of *ius cogens*. In the sense of Rule No. 2, a conflict exists when it can be said for good reasons that, regardless of what specific case or state of affairs a treaty clause is applied to, the application of that clause will prevent the realization of the *telos* of a first order rule of *ius cogens*. In the sense of Rule No. 3, a conflict exists when it can be said for good reasons that, regardless of what specific case or state of affairs a treaty is applied to, in the modified form implied by a reservation to that treaty, the treaty will prevent the realization of the *telos* of a first order rule of *ius cogens*.

Another approach to the normative content of a legal rule is to think of it in generic terms, as the equivalent of an imaginary typical case or state of affairs. This approach provides a second alternative reading of Rules Nos. 1-3. According to this reading, in the sense of Rule No. 1, a conflict exists when it can be said for good reasons about the imaginary case or state of affairs thought of as typically coming within the scope of application of a treaty, that it prevents the realization of the *telos* of a first order rule of *ius cogens*. In the sense of Rule No. 2, a conflict exists when it can be said for good reasons about the imaginary case or state of affairs thought of as typically coming within the scope of application of a treaty clause, that it prevents the realization of the *telos* of a first order rule of *ius cogens*. In the sense of Rule No. 3, a conflict exists when it can be said for good reasons about the imaginary case or state of affairs thought of as typically coming within the scope of application of a treaty in the modified form implied by a reservation to that treaty, that it prevents the realization of the *telos* of a first order rule of *ius cogens*. Whether we adopt the one alternative reading of Rules Nos. 1-3 or the other, we run into trouble.

On the adoption of our first alternative reading, Rules Nos. 1-3 require an assumption about the instrumental relationship holding between the *telos* of a first order rule of *ius cogens* – to facilitate reference, we will designate this *telos* as Z – and either a treaty, a single treaty clause, or a treaty in the modified form implied by a reservation – designated as T – relative to its full scope of application. The relevant question that we need to answer is this: judged by the total number of cases that come within its scope of application, to what extent will T work as a means for the realization of Z? This is to require the impossible. We cannot ever claim to know in advance each and every one of those cases or states of affairs, to which a treaty or a treaty clause, or a treaty in the modified form implied by a reservation, can be applied.

With the adoption of our second alternative reading of Rules Nos. 1-3, obviously, we avoid this practical difficulty. Arguably, even if we cannot say exactly to

which concrete cases or states of affairs a rule can be applied, there is always a determinable core of clear meaning, which means an imaginary typical case can always be constructed. On the other hand, with this particular reading of Rules Nos. 1-3, our interest is not any more with the practical working of treaties and that poses a problem. Rules Nos. 1-3 require an assumption about the instrumental relationship holding between the *telos* of a first order rule of *ius cogens* and either a treaty or a single treaty clause, or a treaty in the modified form implied by a reservation, relative to the imaginary case or state of affairs thought of as typically coming within its scope of application. This requirement implies that something that exists as part of a thought-process only can be a means for the realization of the *telos* of a first order rule of *ius cogens*. It cannot; for the simple reason that it does not correspond to something that a treaty or a treaty clause or a treaty reservation can be applied to. An imaginary typical case or state of affairs neither prevents nor fosters the realization of a *telos*. This is why I conclude that, on the adoption of this second alternative reading, Rules Nos. 1-3 are nonsensical.

5. The Fuzziness of *ius cogens* – Whether It Poses a Problem or Not

I have written this article for a purpose. As I insist, it is important that *ius cogens* arguments be correctly understood and assessed. Hence, when I discover that not only the prevailing international *ius cogens* regime is exceptionally fuzzy, but also international lawyers are largely inattentive to the true causes of this fuzziness, I consider this problematic. The recent proliferation of the *ius cogens* argument in international legal discourse, I think, gives me even more reason for this reaction. I do realize that perhaps not all readers of this journal will share my concern. Considering the manifold role of the international lawyer, whether lawyers will consider the fuzziness of the international *ius cogens* problematic or not depends on the perspective that he or she takes.

Some lawyers approach international law from the perspective of the practicing international lawyer. Their commitment is to serve the particular interests of the employer or client as effectively as possible. The better argument the practicing international lawyer can produce in support of the interests of the employer or client, the better it is. Considering this commitment, from the perspective of the practicing international lawyer, the *ius cogens* concept attracts. This is so not only because of the legal strength borne by *ius cogens* arguments. Also, and perhaps even more importantly, the *ius cogens* concept attracts because of the strong pathos that a *ius cogens* argument always expresses. According to the descriptions typically given, *ius cogens* safeguards "the overriding interest and values of the international community";[50] it embodies "a transcendent common good of the interna-

[50] See e.g. Hannikainen (*supra* note 10), 2.

tional community";[51] it protects the "basic values of the international legal order".[52] Inevitably, such language makes the individual lawyer reluctant to criticize *ius cogens* arguments, whatever their merit, thus conferring on such arguments a rhetorical strength far beyond that of legal arguments in general. The fuzziness of the *ius cogens* regime does not impair this conclusion – rather the opposite. Fuzziness makes is even easier for a discussant to impose upon a reader or a listener the particular understanding of the *ius cogens* regime that she happens to find fitting at the particular occasion. Considered from the perspective of the practicing international lawyer, then, the fuzziness of the international *ius cogens* regime would seem to be a positive thing.

Personally, I approach international law from a different perspective. My perspective is that of the international legal scholar. The task that I have assumed is to describe and assess international law and to convince other international lawyers that my descriptions and assessments are correct. Correct, as far as I understand this tricky word, means *coherent*.[53] Hence, in my capacity as an international legal scholar I am committed to the assumption that there is something like an international legal system.[54] As I perceive international law, legal decisions, norms, and values are not randomly related to each other; and if I am not entirely mistaken, I share this idea with most international legal scholars. Given this commitment, the idea of an international *ius cogens* puts the international legal scholarship to a test. As we all know, the concept of *ius cogens* introduces into the international legal order two elements. First, it introduces a set of values said to be essential for the international legal order; sometimes this set of values is referred to as the international *ordre public*.[55] Secondly, in order to protect and sustain the international *ordre public*, *ius cogens* introduces into the international legal order the concept of normative hierarchy: there is never a legitimate excuse for departing from a first order rule of *ius cogens*, and consequently, normative conflicts involving such rules should always be resolved in their favor. Obviously, the less the international *ius cogens* regime is able to satisfy this criterion, the less the international legal scholar will be able to reinforce the idea of international law as a normative system. This is the reason for why, in my perspective, the fuzziness of the international *ius cogens* regime poses a problem.

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[51] Brundner, "The Domestic Enforcement of the International Covenant on Human Rights", University of Toronto Law Journal, Vol. 35 (1985), 219, at 249.

[52] Frowein (*supra* note 18), 67.

[53] See e.g. Alexy, R. and Peczenik, A., "The Concept of Coherence and its Significance for Discursive Rationality", Ratio Juris, Vol. 3 (1990), 130-148.

[54] This is an assumption that I share with most international legal scholars. See, for instance, the Conclusions of the ILC Study Group on Fragmentation of International Law, which open with the following blunt statement: "International law is a legal system." (International Law Commission, Report of the work of its 58th session (1 May to 9 June and 3 July to 11 August 2006), UN Doc. A/61/10, 407.)

[55] See Orakelashvili (*supra* note 23), 7 ff.