25

A Higher Law for Treaties?

Enzo Cannizzaro

1. Introductory Remarks: *Jus Cogens* across the Boundaries between the Law of Treaties and the Law of State Responsibility

Articles 53 and 64 of the Vienna Convention establish special rules of conflict applicable in the relationship between treaties and *jus cogens* rules. Treaties conflicting with a prior *jus cogens* rule are invalid; treaties conflicting with a rule of *jus cogens* that emerges after their conclusion terminates. It is well established that the mere existence of a conflict triggers the normative consequences envisaged by these provisions, regardless of whether the treaty has been implemented, and regardless of whether an actual breach of a *jus cogens* rule has occurred.

Jus cogens can also be offended, and this is a more frequent occurrence, by unilateral conduct. The idea that the notion of *jus cogens* is not confined to the law of treaties but also produces consequences under the law of state responsibility was pioneered by legal scholars[1] and eventually inspired the drafting of the Articles on State Responsibility, adopted by the International Law Commission (ILC) in 2001.[2]

In this context, the notion of *jus cogens* is employed in order to establish a special form of state responsibility which arises for serious violations of fundamental interests of the international community as a whole.[3] As is well known, conduct in breach of *jus cogens* entails, beyond the ordinary form of responsibility, additional obligations incumbent on third states. According to Articles 41(1) and 41(2), states must cooperate in order to bring the *jus cogens* breach to an end; they

[1] This idea was expressed in particular by Giorgio Gaja in his famous cycle of lectures, 'Jus Cogens *Beyond the Vienna Convention*', at the Hague Academy. See 172 *Recueil des Cours* (1981-III) 271 *et seq.*

[2] The text is reproduced in *YILC* (2001), vol. II (2), A/CN.4/SER.A/2001/Add.1 (Part 2).

[3] See J. Crawford, 'First Report on State Responsibility', A/CN.4/490/Add.2, paras 68 *et seq.* For various views on the use of the *jus cogens* notion in the field of state responsibility, see J.H.H. Weiler, A. Cassese, and M. Spinedi (eds), *International Crimes of State* (Berlin–New York: de Guyter, 1988); N. Jorgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000).

must not recognize as lawful a situation created by the breach, and they must not render aid or assistance in maintaining such a situation.

The two legal regimes—ie the rules of conflict established by the Vienna Convention and the additional secondary rules established under the law of state responsibility—are formally distinct. Indeed, they were developed to govern distinct situations. The law of treaties concerns normative conflicts and tends to provide, *ex ante,* for a preventative defence in cases where states intend to violate *jus cogens.* The secondary rules on state responsibility apply once actual measures in breach of *jus cogens* have already been performed.

In practice, however, the strict separation between these two legal regimes is less clear than it might appear, and this can create uncertainty and difficulties. It is not uncommon for states to conclude treaties in the aftermath of a *jus cogens* breach with a view to regulating the factual situation created by the breach.

According to the classical view, the conclusion of a treaty of this type must be treated as a measure whose legality must be assessed in the light of the law on state responsibility and, in particular, in light of the secondary obligations entailed by the breach for the responsible state and for third states.

Yet this view is not entirely convincing. First, the law of state responsibility does not provide an exhaustive list of the consequences of a breach of *jus cogens.* After stating, in paragraphs 1 and 2, the consequences of a *jus cogens* breach for third states, Article 41 refers in its third paragraph to further consequences provoked by a *jus cogens* breach under international law, among which one can also reasonably group normative consequences.

Secondly, and perhaps more importantly, the law on state responsibility establishes secondary obligations flowing from a *jus cogens* breach, but it does not determine the fate of a treaty inconsistent with these obligations.[4] States parties to a treaty regulating the consequences of a *jus cogens* breach would thus be under conflicting obligations, deriving respectively from the treaty and from the secondary rules on state responsibility. For example, states are under an obligation not to recognize the illegal situation arising from a breach under the law of state responsibility. However, a treaty containing such a recognition would nonetheless be valid and binding upon the parties.

This difficult situation could be avoided if one addressed the issue from the different methodological angle of the law of treaties. However, this perspective encounters a preliminary difficulty. As mentioned above, Articles 53 and 64 of the Vienna Convention provide for the invalidity or the termination of a treaty conflicting with *jus cogens.* Undoubtedly, treaties governing situations created by breaches of *jus cogens* interfere to a certain extent with *jus cogens.* Yet the Vienna Convention does not pronounce on the invalidity or termination of treaties interfering with *jus cogens.* Rather, it refers to the technically more precise

[4] For an analogous notation, see A. Gattini, 'A Return Ticket to Communitarisme, please', 13 *EJIL* (2002) 1181, at 1190.

notion of conflict. It follows that the scope and content of the notion of conflict assumes a decisive role for evaluating whether the normative sanctions envisaged by Articles 53 and 64 of the Vienna Convention also apply to treaties concluded in the aftermath of a *jus cogens* breach.

Undoubtedly, the notion of conflict is among the most obscure of the Vienna Convention. Not only does the Convention shed no light on the subject; one also finds that subsequent practice is scant, and, all in all, it is hardly sufficient to sustain a legal doctrine. Furthermore, an analogy with other possible notions of conflict of laws in international law could be misleading.[5] It cannot be taken for granted that a notion of conflict between rules having the same rank is immediately transposable to situations of conflict between rules whose relation is determined by a hierarchical order.

Nonetheless, an attempt to illuminate this notion is well worth the effort.[6] Not only can a clearer understanding provide useful guidance in a number of possible different contexts, as evidenced by the increasing tendency to invoke *jus cogens* in a variety of situations. Determining the notion of conflict between treaties and *jus cogens* can also have a more systematic significance. Indeed, it might contribute to the shaping of a general doctrine on hierarchical methods of conflict resolution in international law, and to that extent it may promote a better grasp of the relationship between the legal regime of *jus cogens* under the law of treaties and its counterpart regime under the law of state responsibility.

2. Conceptualizing the Notion of Conflict under Articles 53 and 64: The Classical Forms of Conflict

First of all, Articles 53 and 64 refer to classical conflicts of laws: those which arise from the coexistence of obligations requiring materially inconsistent lines of conduct. It is unanimously recognized that treaties, whereby the parties purport to contract out of the application of *jus cogens* rules, are in conflict with *jus cogens* and are therefore invalid or terminated.

This quite obvious point can be drawn literally from the phraseology of Article 53 of the Vienna Convention. The provision defines *jus cogens* as a body

[5] It is worth noting that the issue of conflict between treaties and *jus cogens* is not addressed in recent legal writings concerning the notion of conflict in international law. These writings are mainly focused on treaty conflicts, and specifically on conflicts between the WTO Agreements and other treaties. See J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003); E. Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory', 17 *EJIL* (2006) 395.

[6] See A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford, Oxford University Press, 2006) 136 *et seq.*

of rules to which 'no derogation is permitted, which can be modified only by a subsequent norm of general international law having the same character'. The term 'derogation' typically indicates a legal effect whose purpose is to address the impossibility of applying two mutually exclusive rules simultaneously.[7] The paradigm of conflict referred to in Articles 53 and 64 is thus given by a treaty by which the parties contract out of the binding effect of a peremptory obligation. This conceptual scheme can be indicated as a conflict by derogation. Classical examples of treaties conflicting with *jus cogens* refer mostly to that scheme: treaties by which the parties undertake to commit genocide, to use unlawful force, and so on.[8]

This is the scheme presupposed by the International Court of Justice (ICJ) in deciding the dispute between Iran and United States in the *Oil Platform* case. The Court decided that Article XX(1)(d) of the 1955 Treaty, which gives to either party the power to adopt measures 'necessary to protect [their] essential security interests', must be interpreted in accordance with international customary law, and therefore according to the Court it could not be invoked 'in relation to an unlawful use of force'.[9] By curtailing the scope of the provision through a *jus cogens*-consistent interpretation,[10] the Court thus excluded the possibility that the treaty was meant to contract out of the rules of international customary law on the use of force, and it thereby prevented a conflict from arising.

If this were the only type of conflict falling within the scope of Articles 53 and 64, the effect of these provisions would be very limited. Indeed, the conclusion of a treaty containing provisions aimed at contracting out of a *jus cogens* rule among the parties should be considered a rare occurrence. More frequently, an issue of consistency arises when the parties exchange obligations in regard to situations arising out of a *jus cogens* breach that has occurred in the past. These might be conflicts of a particular nature, where there is no direct clash but a different form of interaction among legal rules.

[7] This is the classical definition adopted by, *inter alia*, W. Jenks, 'The Conflict of Law-Making Treaties', 30 *BYIL* (1953) 401. Jenks expressly addresses his analysis to treaty conflicts. Yet even in that narrow field of inquiry he finds a difference between conflict in the strict sense and various forms of divergence (see especially 425 *et seq.*). See also J. Klabbers, *Treaty Conflicts and the European Union* (Cambridge: Cambridge University Press, 2009).

[8] This is the case of the Treaty of Friendship between the USSR and Iran of 1921, whose Article 6 expressly provided that the USSR had the right 'to advance her troops into the Persian interior' in case of an armed attack against Iran by a third state or in case of a threat to Russia coming from the Iranian territory, without any need for Iran's consent.

[9] ICJ, *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment of 6 November 2003, *ICJ Reports* (2003) 161, paras 40–41. A few lines earlier, in para. 38, the Court provided an admonition regarding the function of the rule which prohibits the unilateral use of force 'to all members of the international community'. The Court pointed out that 'both Parties are agreed as to the importance of the implications of the case in the field of the use of force, even though they draw opposite conclusions from this observation'.

[10] See the Separate Opinion of Judge Simma, ibid., at 324 *et seq.*

3. Conflict by Divergence

A classical conflict by divergence arises when states conclude a treaty on the exploitation of the resources of, or on the commercial intercourse in respect of the products of, a non self-determined territory. If the legality of the treaty were to be assessed in the light of the derogation test, the assessment would inevitably favour the full consistency between these treaties and the principle of self-determination. By no means do the parties to the treaty undertake an obligation to violate that principle.[11] However, one can hardly say that the conduct of the parties is inspired by the wish to re-establish a situation of full conformity with *jus cogens*. They not only fail to abide by their obligation to bring the breach to an end, as they are required to do by Article 41(1) of the Articles on State Responsibility; they also tend to aggravate the misconduct by cooperating with the responsible state in relation to a situation created by the *jus cogens* breach.[12]

Certain trends in practice, though the cases have been few, might provide further guidance on the issue. The problems raised by a treaty concerning the exploitation of resources of a non self-governing territory and its compatibility with the principle of self-determination was considered, albeit indirectly, in the *East Timor* case, decided by the ICJ in 1995.[13] The facts of the case are well known, and there is no point in dwelling on them here at any length. Portugal asked the Court to decide, *inter alia*, that by concluding a treaty on the delimitation of the continental shelf off the coast of East Timor with Indonesia, the occupying power of the territory of East Timor, Australia, violated the right of Portugal as administering power of that territory and the principle of self-determination and permanent sovereignty over the natural resources of the people of East Timor.

It is worth noting that the Portuguese claim was based on the principle of self-determination, and not only on the secondary obligations deriving from its

[11] The existence of rules governing this conduct is controversial. Some authors are inclined to assume that the conclusion of treaties relating to exploitation of unlawfully occupied territory falls within the prohibition against recognizing a situation created by a breach of *jus cogens* or rendering aid or assistance in maintaining that situation, a prohibition laid down by Article 41(2) of the Articles on State Responsibility adopted by the ILC in 2001 (see, for instance, S. Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?', and T. Christakis, 'L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales', both in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Leiden–Boston: Martinus Nijhoff Publishers, 2006) at, respectively, 99 and 127, with further reference to diplomatic practice and to judicial case law). Even if this were the case, however, one can hardly contend that a breach of Article 41(2) entails, by itself, the invalidity of treaties concluded by the state responsible for a *jus cogens* breach with a third state.

[12] In its Commentary on Article 41, the ILC specified that the obligation not to recognize the serious wrongful act 'not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition' (*YILC* (2001), vol. II(2), at 114, para. 5).

[13] ICJ, *East Timor (Portugal v Australia)*, Judgment of 30 June 1995, *ICJ Reports* (1995) 90.

breach. Thus, the request of Portugal was based on the conceptual paradigm that *jus cogens* is breached not only by way of derogation, but also by a treaty which regulates a factual situation in a way that diverges from that which would have existed if *jus cogens* were duly complied with. However, Portugal refrained from asking the Court to declare the Treaty invalid; rather, it insisted on the unlawfulness of its conclusion.[14]

The Court, basing its conclusion on the precedent of the *Monetary Gold* case,[15] declined to decide the case for want of jurisdiction. Yet the Court seemed to sympathize with the idea that an actual conflict might have been deemed to exist between the principle of self-determination and a treaty regulating the exploitation of resources of a non self-governing territory. In the famous passage contained in paragraph 29 of the judgment, the Court qualified as 'irreproachable' the assertion 'that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character'. Furthermore, said the Court, the right of self-determination 'is one of the essential principles of contemporary international law'. It concluded, however, that, in spite of the *erga omnes* structure of the principle of self-determination, and arguably also of its *jus cogens* character, 'the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case'. Nothing in this passage conveys the idea that there was no conflict between the Treaty and the rule of self-determination.

A different course was taken by the European Union (EC/EU) in 2006 when it concluded a fishery partnership agreement with Morocco, whose territorial scope does not exclude the waters off the coast of the Western Sahara.[16] Morocco occupies this territory in violation of the right to self-determination of the Saharawi people.[17] In spite of the sharp objection raised by private and institutional actors, who pointed out the dubious compatibility of the agreement with international

[14] In one of the final submissions, Portugal asked the Court to 'adjudge and declare that Australia, inasmuch as in the first place it has negotiated, concluded and initiated performance of the Agreement of 11 December 1989, [...] (a) has infringed and is infringing the right of the people of East Timor to self-determination, to territorial integrity and unity and its permanent sovereignty over its natural wealth and resources, and is in breach of the obligation not to disregard but to respect that right, that integrity and that sovereignty; On the right to invoke *ius cogens* as a ground of invalidity of a treaty by an entity which is not party to that treaty, see *infra*, next page.

[15] ICJ, *Case of the Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment of 15 June 1954, *ICJ Reports* (1954) 19.

[16] Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2006] OJ L141/1.

[17] For a recent analysis of the different legal implications of Morocco's illegal presence in Western Sahara, see K. Arts and P.P. Leite (eds), *International Law and the Question of Western Sahara* (Leiden: International Platform of Jurists for East Timor, 2006).

law, the validity of the agreement was not questioned by the parties at the international level.[18] According to the bilateralist approach adopted by the Vienna Convention in Articles 65 and 66(a), only the parties to a treaty might invoke *jus cogens* as a ground for impeaching the validity of a treaty or for terminating it. One can only speculate that the EU's position was influenced by political and economic considerations related, in particular, to the interest of having new fishing fields for the EU's troubled fishing industry. The vicissitudes of the agreement are thus clear evidence of the insufficiency of a bilateralist approach where there is a need to safeguard collective or universal interests such as those enshrined in *jus cogens*.

The idea that circulated in institutional and academic circles was that the provisions of the agreement in question must be interpreted in a manner consistent with the principle of self-determination. On this view, the Treaty would apply to the zones where Morocco exercises its jurisdiction lawfully.[19] A conflict could thus be prevented through the use of a classical technique of conflict-avoidance, namely, the doctrine of consistent interpretation. Logically, however, this approach tends to confirm, and not to obviate, the existence of a potential conflict between these provisions of the agreement and *jus cogens*.

Consistent interpretation as a technique of conflict avoidance seems to have been used by the ECJ in order to settle another potential conflict between the principle of self-determination and an agreement whose scope potentially covers a non self-determined territory. In *Brita*,[20] the ECJ held that the association agreement between the EC and Israel must be interpreted as excluding from its scope goods coming from the Palestinian territories. The Court grounded this finding on international principles of interpretation according to which the association

[18] In an opinion released upon request of the Security Council, the Legal Counsel to the Security Council expressed a position cautiously in favour of the legality of contracts concluded by Morocco with foreign companies for the exploration of mineral resources in Western Sahara, if undertaken for the benefit of the people (see letter dated 29 January 2002 from the Under-Secretary-General for Legal Affairs, the Legal Counsel, addressed to the President of the Security Council, UN Doc.S/2002/161 of 12 February 2002, available at <http://www.arso.org/Olaeng.pdf>. However, in a speech to an academic conference held in Pretoria on 5 December 2005, the Legal Counsel, speaking in his private capacity, held that 'an agreement which does not make a distinction between the waters adjacent the Western Sahara and the waters adjacent to the territory of Morocco would violate international law'. See V.H. Corell, 'The Legality of Exploring and Exploiting Natural Resources in Western Sahara', contribution to the conference on *Multilateralism and International Law with Western Sahara as a Case-Study*, Pretoria, 5 December 2008, 7 *et seq.*, available at <http://www.havc.se/res/SelectedMaterial/20081205pretoriawesternsahara1.pdf>.

[19] This view was, for instance, endorsed by EU institutions in the debates leading to the approval of the Fisheries Partnership Agreement with Morocco, where it was stressed that the Agreement was to be interpreted in conformity with the principle of self-determination. See the legal opinion rendered by the Legal Office of the European Parliament on the 20 February 2006, Doc. N. SJ-0085-06, available at <http://www.europarl.europa.eu>. See also the position expressed by the Commission during the debate in the Parliament on 15 May 2006, Doc N. CRE 15/05/2006—18, available at <http://www.europarl.europa.eu>.

[20] Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg Hafen*, Judgment of 25 February 2010, not yet reported.

agreement with Israel was to be interpreted in accordance with the cooperation and trade agreement between the EC and the Palestinian Authority, which concerns precisely those goods. In spite of its persuasive force, this approach can hardly have a legal basis in the international principles on treaty interpretation, which limit the relevance of other international rules to those applicable between the parties. One fails to see how the agreement between the EC and the Palestinian authority can be taken into account in the interpretation of another unrelated agreement between the EC and Israel. The conclusion could be different if one assumed that the obligation to interpret the two treaties in accordance with each other follows from a superior principle of *jus cogens–freundliche Auslegung.*

The cases briefly referred to above illustrate one of the dilemmas left open by Articles 53 and 64. Do they apply only to normative conflicts, arising prior to an actual breach of *jus cogens,* or do they also apply to treaties which do not derogate from *jus cogens* but establish forms of cooperation with the responsible state in relation to a situation already created by a previous *jus cogens* breach?

4. The Ambiguity of the Notion: Divergence and Convergence

There are still greater difficulties if one thinks of how easily divergence can turn into convergence. The latter might be viewed as a conceptually reversed situation in which a treaty creates a situation which tends to converge toward the situation required by *jus cogens,* without, however, attaining full conformity.

With this situation in mind, it has been argued that, if there are clauses in a treaty on exploitation of the resources of non self-governing territories which are aimed at ensuring that a part of the profits from exploitation go to the benefit of the non self-determined people, this would offset the balance in favour of the legality of the treaty.[21] This argument rests ultimately on the consideration that a treaty reserving substantial advantages to the holder of the right to self-determination is to be preferred over the absence of any treaty, which would leave the occupying power practically free to dispose of the territorial resources for its own benefit.

Logically, the thread separating convergence from divergence is very thin. In the course of the debate within the General Assembly of the UN on the legality of the Camp David Accords, concluded in 1978 between Egypt, Israel, and the United States, the positions of states tended to boil down to two main options. According to the majority of states, the Accords, by recognizing a limited right to

[21] This was the position held by a number of member states and certain EU institutions in regard to the Fisheries Partnership Agreement with Morocco. For a full account, see E. Milano, 'The New Fisheries Partnership Agreement between the European Communities and the Kingdom of Morocco: Fishing Too Far South ?', 22 *Anuario Español de Derecho Internacional* (2006) 413.

self-government on the part of the Palestinian people, had the effect of rendering impossible, or more difficult, the full attainment of self-determination: a typical divergence argument. The antithetical position was taken by a minority, but not insignificant group of states, who maintained that the Accords, although not realizing in full the right to self-determination, nonetheless constituted a first step in this direction: a typical convergence argument. In the end the first position prevailed and resolution 34/65 B of 29 November 1979 was adopted. This resolution rejected 'those provisions of the accords which ignore, infringe, violate or deny the inalienable rights of the Palestinian people' and concluded, in paragraph 4, that these agreements 'have no legal validity in so far as they purport to determine the future of the Palestinian people and of the Palestinian territories'.[22]

Thus, the question arises whether respect for *jus cogens* can be graduated; whether, in other words, a treaty which aims at alleviating the violation of fundamental values of the international community, without bringing about a situation of full compatibility, is nonetheless in conflict with *jus cogens* and therefore invalid.

The question raises momentous legal and political issues.[23] Politically, it is difficult to determine what is the best approach to re-establish a situation of full compliance with *jus cogens* after a breach: whether it is an approach based on intransigence, or one based on flexibility. Legally, the issue is even more complicated, as the absence of consistent practice makes it necessary to rely on mere logical deduction from premises which are far from clear. It is difficult, in particular, to determine whether individual states, acting on their own behalf, can lawfully conclude treaties, among themselves or with the responsible states, which are objectively inconsistent with *jus cogens* even though they gradually promote compliance with *jus cogens* norms, on the ground that in doing so they act in the interests of the international community as a whole, which is the ultimate holder of the rights and duties deriving from a rule of *jus cogens*.

On the basis of the current state of the law, drawing precisely the line between convergence and divergence remains highly controversial, as is the question of what are precisely the constitutive elements of each of these situations. These

[22] See the discussion held at the Plenary Meeting of the General Assembly of 29 November 1979, *GAOR, Thirty-fourth Session*, Plenary Meetings, 83rd Meeting, vol. III, at 1534. In particular, a proposal by Egypt to delete para. 4 of the resolution was rejected by a narrow majority, with many states voting against or abstaining. The majority was 56 to 51, with 30 abstentions. Interestingly enough, although not immediately relevant for the aim of the present chapter, some states also cast doubt on the competence of the General Assembly to declare the invalidity of treaties. See, in particular, various interventions to explain the vote, ibid., at 1535 *et seq.*

[23] The same reasoning should also apply to the secondary obligation not to recognize the unlawful situation created by a breach of *jus cogens*. See S. Talmon, in 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus cogens* Obligation: An Obligation without Real Substance?', *supra* note 7, at 106. In the author's view, however, this reasoning would not apply in the relations between the responsible state and third states. The responsible state is under the obligation to ensure the full respect of the violated rule, a duty owed to the international community as a whole (at 124–5).

questions would be better left to future development. What seems important, for the purposes of the present study, is only to point out that the divergence/convergence dyad can intuitively serve as a possible logical framework aimed at determining the existence of a conflict on a case-by-case analysis.

5. The Farthest End of the Spectrum: Occasional Collision

Situations of collision arise when the application of ordinary rules, which logically and, in most cases practically as well, are consistent with *jus cogens* rules, creates occasional interference. In these instances, the way the ordinary rules are applied can make the full achievement of the aim of *jus cogens* norms more difficult, or even deprives such norms of their effectiveness.

This situation is also theoretically interesting, as it provides an opportunity to observe in practice a conflict between customary international law and peremptory law which in theory is quite difficult to conceive of. Indeed, the classical conception of conflict of laws is patently incapable of explaining the clash with *jus cogens* arising from the application of a *superveniens* rule of general international law. Conduct leading to the formation of custom would be, from the very beginning, inconsistent with *jus cogens*, and would therefore be inappropriate for establishing new law. A conflict is practically conceivable only as a form of indirect and occasional collision between the effects created, in a particular context, by a customary law rule and by a *jus cogens* rule.

The most obvious example of collision is the relation between peremptory substantive rules and ordinary procedural rules. The two sets of rules have different contents and therefore do not impose incompatible obligations. In practice, however, procedural rules can collide with substantive rules, in particular when they prevent the system of remedies from properly functioning, or when they affect, in a variety of ways, the effectiveness of that system.

Some indication in this direction can be drawn from the interesting decision of the ICJ in the *Armed Activities in the Congo* case.[24] The Congo contended that the reservation made by Rwanda to Article IX of the Genocide Convention, which establishes the jurisdiction of the ICJ over disputes related to the interpretation and application of the Convention, was inconsistent with substantive provisions of the Convention that have a peremptory nature.[25] The Court

[24] ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, *ICJ Reports* (2006) 6.

[25] The tacit underlying premise was that the effects of the reservation were analogous to that of a treaty contracting out of the effects of Article IX of the Convention in the relations between Rwanda and the other parties to the Convention, at least those who did not object to the reservation. This premise, however, does not appear to be altogether correct, as it tends to equate the effect of a reservation, which indicates the lack of consent to assume an obligation, with the effect of a treaty which derogates from obligations established in a previous treaty.

rejected the Congo's claim using the classical scheme of conflicts by derogation. According to that scheme, in order to proclaim the invalidity of a reservation to Article IX of the Genocide Convention, it must be demonstrated that a peremptory rule requires the states to recognize the jurisdiction of the ICJ for disputes regarding the interpretation or application of the Convention. In the absence of such a rule—and, quite to the contrary, in the presence of a conspicuous practice of reservations to Article IX—the Court declined to review the validity of the reservation.[26]

However, in an earlier passage of the decision, concerning the compatibility of the reservation with the object and purpose of the Convention, the Court alluded to a subtler and more nuanced form of conflict. It found that the reservation of Rwanda did not affect the substantive obligations of the Genocide Convention, as it was simply aimed at excluding a particular method of settling a dispute under the Convention.[27] One could thus infer, on the basis of an *a contrario* reasoning, that a reservation to procedural provisions would be inconsistent with the object and purpose of the Convention if these reservations proved capable of affecting the Convention's substantive obligations.

This approach would appear to be entirely reasonable. A treaty can be composed of an inextricable pattern of substantive and procedural provisions, so that a reservation to the latter inevitably affects the normative balance on which the entire system of the treaty rests. This is probably the rationale behind the position of human rights treaties bodies, according to which reservations to the special mechanisms of compliance with a human rights treaty that authorize individuals to raise a claim are inconsistent with the treaty's object and purpose.[28]

More controversial is the determination of the fate of the reservation. Even assuming that a reservation to a treaty provision embodying a *jus cogens* rule is invalid,[29] it does not automatically follow that a reservation to a treaty provision

[26] In para. 68 the Court recalled previous occasions in which it gave full effect to reservations to Article IX, namely, *Legality of Use of Force (Yugoslavia v United States of America)*, Provisional Measures, Discontinuance, Order of 2 June 1999, *ICJ Reports* (1999), at 924; and *Legality of Use of Force (Yugoslavia v Spain)*, Provisional Measures, Discontinuance, Order of 2 June 1999, *ICJ Reports* (1999), at 772.

[27] *ICJ Reports* (2006), at 32, para. 67.

[28] See the General Comment No. 24 of the Human Rights Committee: *Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, especially para. 11. In their Joint Separate Opinion to the ICJ decision mentioned in the *Armed Activities in the Congo* case, Judges Higgins, Kooijmans, Elaraby, Owada, and Simma emphasized the importance of the role of the ICJ for the object and purpose of the Genocide Convention. They also recalled the case law of human rights bodies, which tends to consider that reservations to provisions which establish mechanisms aimed at securing compliance with the substantive provisions of human rights treaties are incompatible with the object and the purpose of the treaty.

[29] This is the prevailing view among legal scholars. See A. Pellet, 'Tenth Report on Reservations to Treaties', A/CN.4/558/Add.1, para. 35. It seems natural to assume that reservations aimed at contracting out of a peremptory rule enshrined in a treaty conflict with *jus cogens* and are therefore invalid. This conclusion is not altered by the consideration that the effect of reservations is limited to the plane of the law of treaties, and cannot contract out of the effect of peremptory rules

which sets up a special mechanism aimed at securing compliance with *jus cogens* is equally invalid.

This idea is acceptable only in as much as a treaty establishing special remedies for *jus cogens* expresses the belief of the international community that these remedies are necessary in order to preserve the effectiveness of *jus cogens*, and that they are necessarily connected with it. The functioning of the system of remedies thus becomes a corollary of the existence of substantive *jus cogens* obligations, whose effectiveness can be affected by a radical malfunctioning of that system. The conclusions of the ICJ in *Congo v Rwanda* might imply that Article IX of the Genocide Convention, which contains a classical compromissory clause conferring jurisdiction to the ICJ for disputes regarding the interpretation or application of the Convention, is not an indispensable tool for preserving the effectiveness of the prohibition on genocide.

Issues connected with special remedies provided for by treaties in order to secure the effectiveness of *jus cogens* have been discussed in regard to Article 66(a) of the Vienna Convention, which confers jurisdiction on the ICJ for disputes concerning the validity or the efficacy of treaties conflicting with *jus cogens*. Different views have been expressed in this regard. On the one hand, there are no indications in the Vienna Convention that the existence of an objective dispute settlement mechanism was conceived of as an indispensable part of the *jus cogens* regime.[30] It is well known that reservations to Article 66(a) have been made by a large number of states which, by so doing, evidenced their belief that the regime of *jus cogens* enshrined in Articles 53 and 64 is not legally linked to the question of whether the ICJ has jurisdiction.[31]

This conclusion might change only if one demonstrated that the development of a category of higher law designed to protect fundamental collective values of the international community includes, as a corollary, the need to have the validity of inferior law assessed through an objective system of dispute settlement. Considerations of this kind might have inspired the objections of certain states to the reservations to Article 66(a), which indicate a certain tendency of the

of general international law. As stated above, hierarchy as a conflict-settling technique expresses the collective interest not to tolerate the presence of conflicting acts within the international legal order.

[30] The inclusion of Article 66(a) was rather inspired by the attempt to discourage unilateral invocation of *jus cogens*, which would have endangered the stability of international legal relations. This consideration might have prompted the conclusion that this rule can be hardly 'considered as an element of the concept of peremptory norm'. See G. Gaja, 'Jus Cogens *Beyond the Vienna Convention*', *supra* note 1, at 285.

[31] See Multilateral treaties deposited with the Secretary-General, the Vienna Convention on the Law of Treaties, Status as at 25 June 2010, available at <http://treaties.un.org/Home.aspx?lang=en>. See J. Verhoeven, 'Jus Cogens and Reservations or "Counter-Reservations" to the Jurisdiction of the International Court of Justice', in K. Wellens (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy* (The Hague: Martinus Nijhoff, 1998) 195; H. Ruiz Fabri, 'Article 66', in O. Corten and P. Klein (eds), *Les conventions de Vienne sur les droit des traits. Commentaire article par article* (Bruxelles: Bruylant, 2006) vol. III, 2391.

objecting states to regard the jurisdiction of the ICJ as a necessary part of the legal regime of *jus cogens*.[32]

6. *Jus Cogens* and Rules on Sovereign Immunity

The controversial existence of a conflict between substantive peremptory rules and procedural rules has assumed a central role in the *jus cogens* versus sovereign immunity saga. Given the limited scope of the present chapter, there is no point in dwelling unnecessarily on all the aspects of this well-known issue, which concerns a typical case of occasional and indirect interference between customary law and *jus cogens*. The analysis will therefore focus on one particular issue, the most controversial one, concerning the possibility to lift state immunity in a civil claim for damages allegedly arising from a violation of *jus cogens*. Even this limited aspect will be explored concisely. In the following paragraphs, only some views will be considered, which epitomize diverse, maybe antithetical, views about the existence of a conflict between the two legal regimes.

The first view, maintained by a small but not insignificant number of cases and scholarly works, seems to consider that a conflict arises when rules on state immunity are invoked with a view to avoiding the judicial assessment of conduct allegedly in breach of *jus cogens*. The need to apply *jus cogens* would therefore justify disregarding the rules on state immunity.[33]

This position has been expressed with exemplary clarity by Judges Rozakis Caflisch, Wildhaber, Costa, Cabral Barreto, and Vajić in their Dissenting

[32] This conclusion is not easily drawn if one considers that Article 66(a) is fashioned as a classical compromissory clause concerning disputes on the validity or the efficacy of treaties allegedly conflicting with *jus cogens*. There is undoubtedly an incoherence in shaping *jus cogens* as a body of rules protecting fundamental values of the international community, on the one hand and, on the other, in assigning only to the states parties to a treaty the power to invoke *jus cogens* as a ground for impeaching the validity of that treaty or for terminating it. Maybe in an attempt to escape this incoherence, the idea was put forward that invalidity or termination of treaties conflicting with *jus cogens* follows automatically from the existence of higher law and need not be determined through the procedure set out in Articles 65 and 66 of the Vienna Convention (see, for example, B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *Recueil des Cours* (1994-VI) 217, at 289). This incoherence seems to reflect the difficulty of reconciling the new communitarian approach inherent in the notion of *jus cogens* with the traditional bilateralistic dynamics of the international community. A system of objective remedies designed to protect collective values vis-à-vis treaties should have been fashioned differently. However, one can certainly doubt that, at the present historical stage, states are ready to accept a mechanism aimed at assessing objectively the priority of collective interests over individual interests. For consideration of this issue, see B. Simma, 'Bilateralism and Community interests in the Law of State Responsibility', in Y. Dinstein (ed.), *International Law at a Time of Perplexity. Essays in Honour of Shabtain Rosenne* (Dordrecht– Boston, London: Martinus Nijhoff, 1989) 821, at 837 *et seq.*

[33] See in particular A. Bianchi, 'Denying State Immunity to Violators of Human Rights', 46 *Austrian Journal of Public and International Law* (1994) 195–229; M. Reimann, 'A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v. Federal Republic of Germany*', 16 *Mich. J Int'l L* (1995) 403 *et seq.*

Opinion to the *Al Adsani* decision of the European Court of Human Rights. The judges took the view that, 'due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on state immunity, the procedural bar of state immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect'.[34]

The opposite view relies on the classical conception of conflict by derogation. The House of Lords, in *Mitchell and Jones*, expressed this view in the following terms: 'The *jus cogens* is the prohibition on torture. But the United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not.' A few lines later, the Court added: 'to produce a conflict with state immunity, it is therefore necessary to show that the prohibition on torture has generated an ancillary procedural rule which, by way of exception to state immunity, entitles or perhaps requires states to assume civil jurisdiction over other states in cases in which torture is alleged'.[35]

These two excerpts highlight the existence of philosophically different notions of conflict. Whereas the House of Lords relies on the classical notion of conflict by derogation, the dissenting judges in *Al Adsani* advanced a different notion, rooted in a broader conception of *jus cogens*, conceived of as overriding all inferior rules that interfere with their application. In the classical view, *jus cogens* is regarded merely as a limit to the consensual capacity of the parties to a treaty, whereas under the broader approach it is seen, rather, as the overarching system of values of the international community.[36]

[34] *Al Adsani v the United Kingdom*, Judgment of 21 November 2001, Application no. 35763/97, Joint Dissenting Opinion of Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto, and Vajić, para. 3. A somewhat similar approach, which further highlights the effect of hierarchical methods of normative conflicts, has been adopted by Italian courts. In the well-known *Ferrini* case, the Court of Cassation denied immunity to Germany in a civil suit brought by the victims of war crimes committed during World War II (*Ferrini v Germany*, decision of 11 March 2004, No. 5044, reprinted in 87 *Riv. di Diritto Internaz.* (2004) 539 *et seq.*). A consistent pattern of cases has confirmed this approach (see, for example, Court of Cassation, first criminal section, case no. 1072, 21 October 2008, not yet reported) giving rise to a dispute between Germany and Italy, referred by Germany to the ICJ (the application is available at <http://www.icj-cij.org/docket/files/143/14923.pdf>). See P. De Sena and F. De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case', 16 *EJIL* (2005) 89.

[35] House of Lords, *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, Judgment of 14 June 2006, paras 44 and 45. An analogous position is maintained by, among others, H. Fox, *The Law of State Immunity* (Oxford: Oxford University Press, 2002) 525; A. Zimmermann, 'Sovereign Immunity and Violations of International *Jus Cogens*—Some Critical Remarks', 16 *Mich. J Int'l L* (1995) 438; C. Tomuschat, 'L'immunité des Etats en cas de violations graves des droits de l'homme', 109 *RGDIP* (2005) 51.

[36] For a critique of a purely normative approach and attempts to solve the conflict through a functional analysis of the relevant international norms, see J. Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague–Boston–London: Martinus Nijhoff, 1997); L.M. Caplan, 'State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory', 97 *AJIL* (2003) 741. Considerable emphasis on the hierarchical effect of superior law as a conflict-settling technique is put by A. Orakhelashvili, *Peremptory Norms in International Law*, *supra* note 6,

It is not easy to say which of these perspectives corresponds to the current state of the law. In terms of intuitive logic, the existence of a conflict should be denied. Rules on immunity do not require conduct inconsistent with *jus cogens*. Nor, conversely, does *jus cogens* require states to exercise their jurisdiction over the conduct of foreign states, either in general or in particular circumstances. Uncontroversially, no logical conflict between the two sets of rules can be deemed to exist.[37]

In most cases, *jus cogens* and immunity rules do not collide. Substantive *jus cogens*, not unlike other substantive international rules, must be carried out and enforced in the context of the system of remedies of international law, including mechanisms and procedures which determine the conditions under which primary rules must be applied. In principle, this should inevitably lead to the conclusion that the two sets of rules are simultaneously applicable: *jus cogens* as a standard for assessing the legality of conduct of states, and immunity as a standard for determining the conditions under which a state can be sued in the courts of another state.

However, a collision in the application of these two normative systems can indeed occur when the mechanisms and procedures for the implementation of primary rules create conditions so restrictive that they deprive *jus cogens* norms of their effectiveness.

A possible way out of the dilemma might begin from the notion that a conflict between *jus cogens* and immunity can arise only if it is proven that the grant of immunity entails the nullification of legal protection for the values and interests underlying a *jus cogens* rule. The existence of a conflict would thus be dependent upon a careful balancing of interests to be conducted on a case-by-case basis, with a view to determining whether the full satisfaction of the interests protected by one of the two competing sets of rules completely subdues the interests protected by the other. Needless to say, the balancing test in this case is not a conflict-settling technique but rather a logical operation designed to determine whether there is actually a conflict. If there is such a conflict, it must be resolved by applying the usual *jus cogens*-based hierarchical method of conflict-settling. Determining exactly the standard which should be applied in order to reach such a conclusion falls well beyond the scope of this chapter.

at 341; ibid., 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong', 18 *EJIL* (2008) 955–70.

[37] This conclusion is endorsed by prevailing scholarly views. See, in particular, P. d'Argent, *Les réparations de guerre en droit international public* (Bruxelles: Bruylant, 2002) 801; T. Giegerich, 'Do Damages Claims Arising from *Jus Cogens* Violations Override State Immunity from Jurisdiction of Foreign Courts?', in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Leiden–Boston: Martinus Nijhoff, 2006) 203; B. Stern, 'Vers une limitation de l'"irresponsabilité souveraine" des Etats et chefs d'Etat en cas de crime de droit international?', in M. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international. Liber Amicorum Lucius Caflisch* (Leiden: Martinus Nijhoff, 2006) 511.

7. Concluding Remarks

The analysis undertaken in previous paragraphs prompts two observations.

First, the notion of higher law seems to be more useful in the phase subsequent to a *jus cogens* breach than in the phase prior to its violation. Practice reveals a thick net of cases in which *jus cogens* has been invoked with a view to opposing the application of treaties, or other international law rules, which govern the situation emerging as a consequence of a *jus cogens* breach.

Secondly, in order to deal with these cases, the adoption of a broad notion of conflict under Articles 53 and 64 seems, in principle, appropriate. This notion encompasses not only the classical conflicts by derogation but also other sophisticated types of conflicts characterized by various forms of interferences between higher law and inferior law. Yet, at the present stage of development of international law, the precise scope of this notion and, in particular, the conditions under which potential interference turns into an actual conflict, are doomed to remain controversial.

These two remarks seem, however, to demonstrate the shortcomings of the traditional conceptual framework based on the strict separation between the legal regimes of *jus cogens* under, respectively, the law of treaties and the law on state responsibility. This artificial state of things, which is probably due to historical contingencies surrounding the codification of these two branches of international law, can be remedied, to an extent, by a broader notion of conflict under Articles 53 and 64. This notion would apply not only to treaties by which the parties contract out of the application of *jus cogens* but also to treaties, or other ordinary rules, which make it more difficult, once a breach has occurred, to re-establish full compliance with *jus cogens* or to meet the secondary obligations entailed by the breach.

This solution also accords better with the need to preserve the *effet utile* of Articles 53 and 64. As stated above, the conclusion of treaties by which the parties undertake the commitment to violate *jus cogens* is a very rare occurrence. If this were the only normative effect of *jus cogens*, its proclamation in the Vienna Convention would be little more than symbolic. It is in the context of situations created by *jus cogens* breaches that the normative sanctions provided for by the Vienna Convention can fully attain their objective. It would be logically absurd if *jus cogens* had the effect of invalidating treaties which impose merely the obligation to derogate from *jus cogens*, even if this obligation is not put into effect, but did not invalidate treaties or other law rules which give full effect to, and bestow legal stability on, an actual violation of *jus cogens* norms.

This idea is also sensible from a theoretical perspective. In the course of its history, international law has developed an ample and variegated set of conflict-settling methods and techniques. However, until the entry into force of the Vienna Convention, recourse to hierarchical methods of conflict-settling was

quite extraneous to the international legal dynamics, mainly inspired by the logic of bilateralism. The theoretical novelty introduced by Articles 53 and 64 is the conceptualization of the typical effect of a hierarchical mechanism of conflict-settling, invalidating inferior law in the presence of a collective interest in expunging from the legal order any obligation inconsistent with its fundamental principles.[38]

From a more general perspective, the notion of conflict under Articles 53 and 64 can contribute to grasping the implication of this theoretical novelty. Rudimentary notions of conflict, conceived of as the impossibility of complying simultaneously with two obligations, are fully appropriate in a bilateralist conception. However, they do not appear adequate in the collective interest perspective which inspires the legal regime of *jus cogens*, and its very *raison d'être*. A different notion of conflict is taking shape in the somewhat 'primordial brew' of the practice subsequent to the Vienna Convention. Arguably, this notion, whose precise contours are still uncertain, is more appropriate to the hierarchical model of the relationship between ordinary law and higher law presupposed by Articles 53 and 64. If *jus cogens* is to be conceived as a category of rules expressing collective fundamental values, a broader notion of conflict ought to be adopted, more consistent with the role and function normally discharged by higher law in a constitutional community.

[38] Hierarchical techniques of conflict-settling are based on the recognition that certain values or interests enjoy overall 'supremacy' over others; supremacy is formalized in a superior rank of the norms which protect superior values and interests. Consequently, higher rules take priority over inferior rules in all situations. Here lies the difference with other techniques, which tend to recognize limited priority to certain values over other competing values and interests, conditional, however, on the search for an appropriate balance among them. The basic distinction is that in these techniques, typically referred to as interest-balancing or value-balancing, priority to prevailing values is not formalized in a higher normative rank but depends, rather, on the particular context in which the balancing must be carried out and on the case-by-case search for the appropriate balance among the diverse competing interests. Hierarchy as a conflict-settling technique thus emphasizes the existence of an emerging sphere of fundamental collective interests in the international legal order, which take priority over interests of individual states. However, the conditions under which the diverse legal interests are prioritized, and the instrument granting full effect to this scale of priority, are still to be determined. This explains the enduring uncertainties in practice and in legal scholarship, which still linger about *jus cogens* and related notions.