



Constitutionalism in International Law: The Limits of *Jus Cogens.*

by

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Summary

This dissertation explores the place that *jus cogens* occupies in contemporary international legal thought and practice. More specifically it looks at the place that the concept occupies within the discourse surrounding constitutionalism in international law. The question is asked whether it is viable to posit a specific constitutional structure for international law and whether such structure can be legitimized by the existence of certain values that are held in common by the international community. Both structural and value-based approaches posit a place for norms of *jus cogens* as possibly being seen as constitutional norms to some extent.

Jus cogens as a now widely accepted concept in international law, continues to be the subject of much contemporary debate. The nature and function of the concept as proposed by various authors is looked at and the problematic aspects set out. Although there is a large amount of literature acknowledging the existence and importance of *jus cogens*, this has not been supported by international judicial practice. It seems that it is the practical difficulties surrounding the functioning of normative hierarchy that is the main reason for this.

Chapter 1 introduces the approaches to the constitutionalism debate that have posited a legitimate place for norms of *jus cogens*. It also provides an introduction to the concept of *jus cogens* within contemporary international law.

Chapter 2 starts out by defining certain concepts involved in the discourse surrounding constitutionalism. The strands of thought involved in the constitutionalism debate are then set out in order to provide the context for the placements of *jus cogens* posited by various authors.

Chapter 3 looks at the evolution of the concept of *jus cogens* and the limited practical effect that has been given to the concept in international judicial practice. The main consideration here is the perceived inapplicability of *jus cogens* within cases concerning jurisdictional immunity. It therefore seems that *jus cogens* is, in general, limited to application against rules directly contradicting the substance of the *jus cogens* norm.

Chapter 4 provides a critique of normative hierarchy theory, which is a main aspect dealt with in much constitutionalist thought. The chapter shows how the proposed functionality of normative hierarchy theory is unconvincing as only negative prohibitions can function as *jus cogens* under this construction. This further limits the instances where *jus cogens* can be seen as effective under constitutional thought.

Chapter 5 concludes that under a strict conception of normative hierarchy, *jus cogens* is unlikely to receive much practical legal effect. This is due to the inapplicability of *jus cogens* in procedural matters and the limited number of norms that can function as *jus cogens* under normative hierarchy.

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Chapter 1: Introduction.

[I]t can feel like a project of the utmost seriousness and urgency to interpret the world in constitutional terms.

-David Kennedy
“The Mystery of Global Governance”

The discourse surrounding the concept of ‘international constitutionalism’ has gained much momentum in recent years and the term itself has become somewhat of a buzzword in certain circles¹. The growing literature on the topic has led to a proliferation of scholarly opinions regarding the meaning of the concept and more controversially whether there is in fact an emerging constitutional order in international law.² The debate surrounding ‘constitutionalism’ involves differing perspectives concerning not only what international law is hoped to achieve under various constitutional constructions, but also what processes and structures should be put in place in order to bring about the various changes that have been envisaged.

This dissertation will analyze these differing perspectives and set out the place that *jus cogens* norms occupy under the various constructions. The place and effect envisioned for norms of *jus cogens* under these understandings will then be contrasted with the limited practical relevance that has been given to such norms by various international tribunals. Much of constitutional thought proposes a normative hierarchy. This construction may however further limit the number of norms that are capable of being seen as *jus cogens*. This aspect will be dealt with in later chapters.

Two general approaches that have been linked to the idea of ‘constitutionalism’ in international law will be set out. The diversity of opinions and views involved in the constitutionalism debate make it extremely difficult and even undesirable to formulate fixed categories for the differing constructions. The following general approaches

¹ Peters A ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden Journal of International Law* 582.

² Breau SC ‘The Constitutionalization of the International Legal Order’ (2008) 21 *Leiden Journal of International Law* 545.

therefore represent a tentative grouping of various authors' views on constitutionalism in international law and are most certainly not the only way in which such varying views may be grouped.

The first approach represents, amongst other aspects, a certain tendency to use lessons and formulae used in the construction of constitutions in domestic legal systems and attempting to transplant the salient features with necessary alterations into international law³. Such an approach usually focuses heavily on how international institutions should be structured to steer international law in a proposed direction. The focus here is generally on structural aspects that are most often offered as solutions to various problems that authors have encountered within the international legal system.⁴ Other authors, included under this general approach, have used functional considerations in an attempt to set out various concepts and understandings that can be used as the tools for identifying and evaluating international constitutional developments.⁵ This general approach therefore focuses on the processes and institutions that would make up the international legal system and may be tentatively referred to as a 'structural approach'.⁶

The structural considerations relevant to *jus cogens* relate to the proposed functionality of a normative hierarchy in international law. *Jus cogens* norms are often said to have a superior status as compared to other norms of international law. This understanding leads to the proposed functional ability of *jus cogens* norms to trump ordinary norms of international law when such norms are in irreconcilable conflict with a norm of *jus cogens*.⁷

³ Dunoff JL & Trachtman JP 'A Functional Approach to International Constitutionalization' in Dunoff JL & Trachtman JP (eds) (2009) *Ruling the World? Constitutionalism, International Law, and global Governance* Cambridge: Cambridge University Press .

⁴ Schilling T 'Constitutionalization of General International Law – An Answer to Globalization?' (2005) *Emile Noel Fellows Forum* Spring 1.

⁵ Dunoff & Trachtman (note 3) at 4.

⁶ Other expositions of 'structural approaches' can be found in Noortmann M (2005) *Enforcing International Law: From Self-Help to Self-Contained Regimes* Ashgate: Aldershot and Slaughter A (2005) *A New World Order* Princeton: Princeton University Press.

⁷ Francisco Forrest Martin 'Delineating a Hierarchical Outline of International Law Sources and Norms' (2002) *Saskatchewan Law Review* 333.

The other approach focuses on striving for the recognition of an international legal community that has the ability to direct and limit political power.⁸ Such a community gives credence to the proposed emergence of an international value system, where certain values are said to be held by the international community as a whole.⁹ Such values then give legitimacy to the existence of certain norms of international law that have come into being in order to protect such international values and therefore limit the political will of individual states by subjecting them to such community based considerations.¹⁰ This approach therefore legitimizes the existence and proposed functionality of *jus cogens*, as norms must first be accepted and recognized by the international community as being peremptory before they have the ability to limit political power internationally.¹¹ This dissertation will tentatively refer to this general approach as a ‘value-based’ approach.

Both approaches have much to add to the debate concerning constitutionalism in international law, the first focuses mainly on positing the institutions and norms that should be put in place in order to direct international law in a proposed direction, while the other rather deals with how we should reconfigure our perceptions about the functioning and making of international law itself. These approaches are not mutually exclusive and many authors use a more combined approach in any event.¹² Both approaches are relevant to any proper formulation of constitutionalism, therefore at this stage, debate which could lead to some theoretical consensus is more important than pushing constitutionalism of any one kind.

Constitutionalism implies an understanding about how international law should be developed and how it should function. This, however, inevitably implies the placement of certain institutions and norms in order for the system to function according to this

⁸ Von Bogdandy A ‘Constitutionalism in International Law: Comment on a Proposal from Germany (2006) 47 *Harvard International Law Journal* 223.

⁹ *Ibid.* See also De Wet E ‘The International Constitutional order’ (2006) 55 *International and Comparative Law Quarterly* 55.

¹⁰ Peters A (note 1) at 586-589.

¹¹ Vienna Convention on the Law of Treaties 1969, Article 53.

¹² For example see De Wet (note 9) at 55.

understanding. The functional and the ideal are therefore never truly separated from each other.

The purpose of the distinction being made between these two general approaches is that *jus cogens* norms are seen as having a hierarchical character under the structural approach, which is then seemingly legitimized under the value-based approach where the existence of such norms is based on community value considerations. The important distinction in approach is as follows. Structural views give a specific placement and function to *jus cogens* norms, while value-based views legitimize this structuring by contending it is based on community value considerations.

This dissertation therefore seeks to set out the place that *jus cogens* occupies in various theories and constructions connected with the constitutionalism debate, in order to evaluate whether the concept plays a prominent role in international constitutional thinking and more importantly whether the concept holds a viable place in the international legal order.

Jus cogens receives increased support in international law as many authors see rules of a superior nature to ordinary rules of international law as one of the functional ways of limiting a state's freedom of contract.¹³ The superior nature of *jus cogens* norms was introduced into positive law by way of Article 53 of the Vienna Convention on the Law of Treaties¹⁴ (VCLT), which reads as follows:

'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.'¹⁵

¹³ Shelton D 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 298.

¹⁴ De Wet (note 9) at 58.

¹⁵ Vienna Convention on the Law of Treaties 1969, Article 53. See also Article 64 which states; '[i]f a peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.

The term was therefore firmly placed within a positivist context of international law by the VCLT. The term *jus cogens*, which translated from Latin means ‘compelling law’, has amongst many contemporary writers therefore been described, in general, as ‘a body of peremptory norms of international law from which no derogation is permitted’.¹⁶ Due to this understanding, authors have described *jus cogens* norms as enjoying superior rank and status as compared to other norms of international law.¹⁷ The introduction of concepts such as community interests and values further meant that it became possible to theorize about *jus cogens* beyond the confines of treaty law.¹⁸ This general move away from the traditional view of international law based on the individual interests of states means increased support for a community interest orientated system which strongly advocates: Protection of human rights, protection of the environment, sustainable development and prosecution of violators of humanitarian and human rights law.¹⁹ The norms that are today generally accepted as forming part of *jus cogens* are therefore, not surprisingly, generally composed of human rights norms.²⁰

Despite the theoretical acknowledgment of *jus cogens* norms, there is less certainty about the effect that such norms are to have in practice. The International Court of Justice (ICJ) has in particular been reluctant to pronounce on the nature and effect of *jus cogens* norms and seems to prefer arguments that do not involve conflicts between norms of *jus cogens* and other international legal norms.²¹ It therefore seems as if *jus cogens* does not have the practical legal effect that has been envisioned by many commentators over the years. The practical limits of *jus cogens* application can also be seen in the various theoretical shortcomings connected with the proposed functionality of normative hierarchy theory, which does not take into account the complexities inherent in international legal

¹⁶ Dugard J (2005) *International Law: A South African Perspective* (3rd ed) Lansdown: Juta 43.

¹⁷ Cassese A (2005) *International Law* (2nd ed) Oxford:Oxford University Press 200.

¹⁸ Paulus AL ‘Jus Cogens in a Time of Hegemony and Fragmentation’ (2005) 74 *Nordic Journal of International Law* 308.

¹⁹ *Ibid* at 309.

²⁰ De Wet (note 9) 58.

²¹ See *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* 8 July 1996 (*ICJ Reports* 1996, 258) *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* ICJ Judgment of 3 February 2012 para 96.

adjudication. This dissertation will deal specifically with these limits concerning *jus cogens* application in chapters 3 and 4.

The following questions related to *jus cogens* will therefore be dealt with: What is the place and function envisioned for norms of *jus cogens* within an international legal order based on constitutionalism? If there is indeed a legitimate place for such norms in the international legal order, then the question arises whether there is practical support for the application of such norms within contemporary law and what the possible shortcomings associated with such application are?

The following chapters will deal with these and various related questions. The issues that will be dealt with in each chapter are as follows.

Chapter 2 will set out the approaches involved in the constitutionalism debate and will set out the place that *jus cogens* norms generally hold within the debate. Chapter 3 will provide a short exposition on the evolution that the concept of *jus cogens* has undergone within international law in order to provide a basis for how the concept is to be viewed in contemporary international thought. The chapter will also deal with the limited practical effect that has been given to norms of *jus cogens* in international adjudication. This will be done specifically within the context of jurisdictional immunity cases. Chapter 4 will then provide an argument concerning the shortcomings of normative hierarchy theory, which is a main structural component of much constitutional thinking. Chapter 5 will conclude by summing up the various limitations that are inherent in the application of norms of *jus cogens* under constitutionalist thought.

Chapter 2: Strands of thought in constitutionalism.

2.1 Introduction.

As indicated in Chapter 1, this dissertation differentiates between two general strands of thought concerning constitutionalism. Any survey of the works of authors that have contributed to this debate would reveal a vast number of views all with differing emphasis and approach. Therefore the opinions of some of the main authors are included here to set out some of the more prevalent views and contributions. This chapter will start off by providing a workable definition of constitutionalism in order to provide a context in which to discuss the views that have been set out. The structural approach to the topic will then be considered, followed by a discussion on the value-based approach. The place that the concept of *jus cogens* occupies under these different views will also be set out.

2.2 Defining ‘Constitutionalism’.

The terms *constitution*, *constitutionalism* and *constitutionalization* are the terms that are often related to each other within the literature surrounding the constitutionalism debate. These concepts are often used in vague or obscure terms and often in an interchangeable way.²² The following observations serve to indicate workable distinctions between the concepts, while keeping in mind that the concepts are intrinsically interrelated and cannot be properly understood in conceptual isolation.

Constitution in the legal sense may be broadly described as the ‘sum of basic legal norms which comprehensively regulate the social and political life of a polity’.²³ The concept has been similarly described as referring to ‘a coherent set of long-term principles and rules of a higher legal rank constituting the basic order of a political community, or of a

²² Dunoff JL & Trachtman JP (2009) *Ruling the World? Constitutionalism, International Law, and Global Governance* Cambridge: Cambridge University Press 234.

²³ Peters A ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden Journal of International Law* 581.

functionally limited community.’²⁴ Such rules and principles therefore become the functional aspects concerning constitutionalism and would normally become part of what is generally termed ‘constitutional law’ within a specific legal system. No single instrument in international law fulfils the function of a ‘constitution’. Therefore focus is given in this dissertation to certain norms that may be seen to fulfill this function to certain extents.

Constitutionalization has been described as ‘the continuing process of the emergence, creation, and identification of constitution-like elements in the international legal order.’²⁵ This term therefore refers to the processes that are involved in the development of an international legal system based on constitutionalist thinking. It should be noted that when focus is given to legal development, the mental attitude inferred by ‘constitutionalism’ is subsumed into the concept of ‘constitutionalization’ where process is emphasized. The term ‘constitutionalization’ is therefore often used instead of ‘constitutionalism’ under structural approaches.

Constitutionalism on the other hand is a perspective term. It is associated with reconceptualizing international law by, amongst other considerations, subjecting political power to the rule of law, giving international law a certain public order function through the development of an international community, as well as advocating the application of specific constitutional norms within the international legal order.²⁶ Therefore, depending on one’s perspective, the concept can emphasize the functional application of certain rules, principles or institutions, which would indicate a predominantly systemic or *structural* perspective. On the other hand it could emphasize the existence of an international community with the ability to generate common values giving international law a public order imperative, which would be indicative of *value* or community based perspective.

²⁴ Joerges C & Petersman E (eds) (2011) *Constitutionalism, Multilevel Trade Governance and International Economic Law* Oregon: Hart Publishing 543.

²⁵ Peters (note 23) at 582.

²⁶ *Ibid* at 583.

2.3 Elemental basis of constitutionalism: Values, norms, rules and principles.

This dissertation differentiates between the concepts of value, norm, rule and principle. Norms appear in explicit legal terms as rules and principles.²⁷ Rules and principles as functional components of law exist to protect or promote underlying values of specific states or groupings of states.²⁸ There are certain rules and principles that have come into being that specifically protect values held by the international community as a whole. Such rules and principles limit the political will of individual states and subject them to community based considerations.

The concept of *jus cogens* is specifically dealt with in this dissertation. This is because the peremptory status of norms considered *jus cogens* have the purpose of limiting political power internationally and therefore protect values held by the international community as a whole. We therefore now turn to the general approaches concerning constitutionalism in order to lay a basis for the necessary inclusions concerning any view relating to constitutionalism.

2.4 Considering the ‘structural approach’: An emphasis on system.²⁹

As indicated in Chapter 1, this approach focuses on constructing a constitution or developing a constitutional law for the international legal order by positing the required norms and institutions that are seen as required for legal development.³⁰

²⁷ Brandom R (1998) *Making it explicit: reasoning, representing, and discursive commitment* Harvard: Harvard University Press 19, 62. This understanding moves away from the Kantian perspective on norms where the normative always appears in the explicit form of rule or principle. Brandom rather suggests that norms exist fundamentally in what is implicit in the practices of states and then represent functionally as rules or principles when made explicit.

²⁸ See Peterson N ‘Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation’ (2008) 23 *American University International Law Review*, where it is argued that rules and principles function in legal adjudication in order to protect underlying value considerations.

²⁹ ‘System’ here means a development or exposition of the components, being either norms or institutions, that are viewed as essential to the functioning of international law under constitutionalism.

³⁰ See Schilling T ‘Constitutionalization of General International Law –An Answer to Globalization?’ (2005) *Emile Noel Fellows Forum* Spring 1.

For some the increased demand for international legal rules is due to occurrences such as globalization, which give rise to an increased demand for constitutional norms and processes.³¹ Others argue that the proliferation of global networks has increased global interdependence amongst states. Such interdependence has placed domestic constitutions under strain and certain functions that were seen as typically domestic governmental functions (such as guarantees relating to human security, freedom and equality) are now being transferred to the international level.³²

International constitutional law has likewise been seen as a response to fragmentation of international law, where international law is seen as being made up of specialized functional regimes, each with its own treaties, principles and institutions.³³

Fragmentation presents the issue that the values and interests involved within these separate regimes are not always compatible with those of other regimes. International law viewed from a fragmented perspective has therefore also been viewed as an ‘anti-constitutional’ trend.³⁴ The risk presented by fragmentation is that specific fields are not affected by developments in other fields, which can result in inconsistent or conflicting judgments when norms from different fields come into conflict with each other.³⁵ The perceived benefit of constitutionalization here is that it can respond by providing central institutions or providing particular hierarchies amongst rules. In this way a certain order is said to be given to a system that may otherwise be perceived as chaotic or fragmented.³⁶

Constitutionalism has also been used to propose a structure where the most fundamental norms of international law represent what has been termed an international constitutional

³¹ Dunoff & Trachtman (note 22) at 5. See also Schilling (note 30) at 1.

³² Peters (note 23) at 580.

³³ Dunoff & Trachtman (note 22) at 6. See also D’Amato AD ‘A Few Steps Toward an Explanatory Theory of International Law’ (2009-2010) 7 *Santa Clara Journal of International Law* 2, where it is suggested that international legal theory has itself become fragmented.

³⁴ Peters (note 23) at 580.

³⁵ Dunoff & Trachtman (note 22) at 6.

³⁶ *Ibid* at 8.

law.³⁷ The traditional conception of state sovereignty is said to now be complemented or modified, to some degree, by other constitutionally related guiding principles such as respect for human rights, human security, global common interest and rule of law.³⁸ Supremacy (hierarchical status) of certain peremptory norms of international law are often said to encompass constitutional law, as such norms are considered to trump conflicting treaty norms or customary international law norms when such norms come into conflict with a peremptory norm. This has led to the proposition that *jus cogens* represents ‘constitutional law in the formal sense’.³⁹

Many other authors feel that constitutionalization requires broad international agreement around shared fundamental values, which may not yet exist. This consideration will be dealt with later in the chapter. Others see constitutionalization as a political effort to force a certain specialized regime in order for specific international actors to claim normative priority for a certain set of norms. Some even go so far as to characterize the proposition of constitutional norms as being a ‘hegemonic project’.⁴⁰ It is therefore not by any means generally agreed that the positing of a constitutional law within the international legal system is a viable or necessary option.

Even for those who support the constitutionalization of international law, the constitutionalism debate contains many controversial aspects at the present stage of development, with many authors proposing vastly differing structures for the international legal system.⁴¹ Some authors do not rely on a constitutional construction but rather on the re-systemization of international regimes or networks.

³⁷ Peters (note 23) at 586.

³⁸ *Ibid.*

³⁹ *Ibid* at 598.

⁴⁰ Koskenniemi M ‘Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought’ (2005) Harvard University, Keynote Speech, 5 March 2005 5.

⁴¹ Breau SC ‘The Constitutionalization of the International Legal Order’ (2008) 21 *Leiden Journal of International Law* 548.

Noortmann builds on an argument by Keohane who is of the opinion that regimes are built by states in order to promote mutually beneficial interests.⁴² He argues that international regimes can in fact promote international law.⁴³ Such authors therefore see the international legal system in a highly structural manner, with a strong connection to systems analysis theory as well as regime theory. The focus in these approaches tends to revolve around international cooperation considerations rather than limitations on state political power. They therefore depart from a strictly constitutionalist perspective, as they do not posit the existence of constitutional norms per se, although they do deal with various considerations relevant to the constitutionalism debate.

A good example of this is Slaughter's view on global governance, which centers around the assertion that the operation of global networks is a key feature of the contemporary international legal order.⁴⁴ Such networks work with the goal of institutionalizing cooperation and containing conflict in an attempt to allow states to achieve peace, prosperity, stewardship of the earth as well as minimum standards of human dignity.⁴⁵ International organizations have a large part to play in such an 'international relations' approach to international law. Certain institutions are tasked with collecting and disseminating information that is required by the participants to coordinate their work.⁴⁶ Her proposition is therefore an exposition of what may be termed a 'networks approach', which is centered predominantly around structural considerations.⁴⁷

Other authors have focused more closely on proposing constitutional norms and structures. Dunoff and Trachtman through expanding on what they term a 'functional approach' to constitutionalization, start by describing the purposes that international constitutional norms are intended to serve.⁴⁸ Three important functions set out by the

⁴² Noortmann M (2005) *Enforcing International Law: From Self-Help to Self-Contained Regimes* Ashgate: Aldershot. See also Keohane R (2005) *After Hegemony: Cooperation and Discord in World Political Economy* Princeton: Princeton University Press. For a summary of the arguments see, Breau (note 41) at 552.

⁴³ Noortmann (note 42) at 140-143.

⁴⁴ Slaughter A (2005) *A New World Order* Princeton: Princeton University Press 166.

⁴⁵ *Ibid* at 1-4.

⁴⁶ *Ibid*.

⁴⁷ Breau (note 41) at 553.

⁴⁸ Dunoff & Trachtman (note 22) at 10.

authors are: enabling the formation of international law (enabling constitutionalization), constraining the formation of international law (constraining constitutionalization), filling the gaps in domestic constitutional law that result from globalization (supplemental constitutionalization).⁴⁹ These functions are then said to be implemented through various mechanisms that have been linked to constitutionalization. Such mechanisms include: horizontal allocation of authority, vertical allocation of authority, supremacy, stability, fundamental rights, review, accountability or democracy.⁵⁰

This functional understanding of constitutionalization therefore posits specific places within the international legal system for various norms and institutions that are to fulfill constitutional functions. Of importance for this dissertation is to set out a possible function for norms of *jus cogens*. Under the above functional model, norms of *jus cogens* act primarily within constraining constitutionalization, as their peremptory nature limits the production of ordinary international law.⁵¹ Therefore *jus cogens* is seen as a specific mechanism that may be used to limit state political power on the international level.

Schilling distinguishes between the terms ‘constitutionalization of international law’ and ‘constitutionalization within international law’.⁵² The first term (which is relevant to this dissertation) in his opinion is generally discussed through one of two approaches. The one approach places emphasis on the constitutionalization of international subsystems as a move towards constitutionalization of general international law as a whole,⁵³ while the other emphasizes the development of an international constitution which may come about as a reaction to the internationalization of politics and law.⁵⁴

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* See also Klabbbers J, Peters A & Ulfstein G (2009) *The Constitutionalization of International Law* Oxford: Oxford University Press 271-341, which deals with the proposal of the international legal order as an ‘inter-state’ democracy made up of an association of democratic states.

⁵¹ Dunoff & Trachtman (note 22) at 11.

⁵² Schilling T (note 2) at 2.

⁵³ See Klabbbers , Peters & Ulfstein (note 50) at 201-219, where the term ‘sectoral constitutionalization’ is used to refer to the constitutionalization of specialized regimes or subsystems.

⁵⁴ Schilling (note 30) at 2.

The first approach observes that the constitutionalization of international law requires recognition of interests of the international community of states as well as the introduction of various mechanisms for implementation of important components.⁵⁵ The aspects which require implementation are said to include, amongst others: taking into account democratic requirements when recognizing new states, the protection of human rights, regional systems of integration, and mechanisms for the implementation of constitutional principles by the Security Council.⁵⁶

The second approach rather involves the implementation of certain traits of municipal constitutions in international law in order to safeguard national constitutional standards at the international level. The results of such constitutionalization is hoped to be seen within the reinforcement of the legal position of the individual, the reinforcement of responsible government and of checks and balances in the international legal system, a further hierarchization of international law and an increased respect for fundamental rights.⁵⁷

As can be seen from the above, the first approach places emphasis on the interests of the community of states, while the second emphasizes the protection of municipal constitutional standards.⁵⁸ Schilling is of the opinion that particularly when dealing with structural aspects of constitutionalization, a municipal constitution must be taken as the example of what a constitution is. He therefore sees international constitutionalism as a possible answer to the 'loss of protective force' of municipal constitutions as a result of globalization.⁵⁹ The question to him becomes whether constitutionalization at the international level can offer guarantees that municipal law can no longer offer. Therefore in order to be functional under such a view it must, in important ways, emulate the structures of municipal constitutions.⁶⁰ Peters similarly argues that constitutionalism as a

⁵⁵ *Ibid* at 3.

⁵⁶ *Ibid*. See Klabbers, Peters & Ulfstein (note 50) at 205, where it is proposed that an indicator or promoter of constitutionalization may be seen in 'the endorsement of constitutional rights and principles such as human rights, rule of law, democracy, and solidarity in the law of international relations'.

⁵⁷ Schilling (note 30) at 3.

⁵⁸ *Ibid* at 4. See also Klabbers, Peters, & Ulfstein (note 50) 185.

⁵⁹ Schilling (note 30) at 4.

⁶⁰ *Ibid* at 5.

legal argument strengthens efforts to compensate for such a perceived de-constitutionalization at domestic level.⁶¹

Schilling goes on to consider which rules of international law, if any, can be considered constitutional.⁶² *Jus cogens* can be seen as representing ‘consensus law’ as it comes about without state practice with emphasis placed on *opinion juris*.⁶³ The wording of the VCLT requires peremptory norms to simply be ‘accepted and recognized’ as peremptory. This in his view provides some evidence of the existence of consensus law, which may be seen as having a constitutional nature.⁶⁴

Important structural questions seem to present themselves in the above arguments. Should one see international constitutional law as a specific individual system in international law, where specific constitutional norms are developed and their enforcement is made effective purely by systematizing their relations to other systems within international law? Authors have asked the question whether systems such as human rights should in fact be seen to fulfill certain constitutional functions.⁶⁵ This understanding seems to originate from municipal constitutional law where human rights that are encompassed in domestic bills of rights are included in constitutional law.⁶⁶ Similarly, *jus cogens* norms, being seen as constitutional norms, are often posited as predominantly including human rights norms. Some have even posited the primacy of human rights law as a fundamental principle.⁶⁷ However it may be argued that forcing such a western perspective on human rights onto the international community as a whole may not be reflective of the values of the international community at this stage of development.

⁶¹ Peters (note 23) at 586. See also Klabbers, Peters & Ulfstein (note 50) at 347.

⁶² Schilling (note 52) at 8.

⁶³ *Ibid* at 10.

⁶⁴ *Ibid* at 8-10.

⁶⁵ Dunoff & Trachtman (note 22) at 233-257.

⁶⁶ *Ibid*.

⁶⁷ UN Sub-comm’n on the Promotion and Protection of Human Rights, Globalization and Its Impact on the Full Enjoyment of Human Rights, preliminary report submitted by J. Oloka-Onyando and Deepika Udagama, UN Doc. E/CN.4/Sub.2/2000/13, para. 63.

The point made here is that it is perhaps undesirable at this stage to push for one specific structural approach unless it can be related to, or guided by, the values held by the international community. Any formalized structure that is proposed must be built around and supported by a set of core values.⁶⁸ It therefore seems unwise at this stage of development to advocate, without question, any of the specific structures above.

There is also a lively debate concerning the existence of a normative hierarchy in international law.⁶⁹ Some authors argue that there are certain norms that are to be ranked higher than all other norms of international law and therefore trump norms that are placed lower in the hierarchy.⁷⁰ *Jus cogens* norms are often cited as having such a normative superiority due primarily to their peremptory nature.⁷¹ This construction may however not adequately provide for the complexities inherent in legal adjudication and application. The efficiency that the construction proposes may perhaps not give international law the legitimacy it seeks under a constitutionalist view. Aspects of normative hierarchy theory relevant to *jus cogens* will be discussed in Chapter 4.

2.5 ‘Value-based’ approach: Giving legitimacy to the system.

There are some authors who have departed from a predominantly or concretely structural approach which posits the requisite constitutional norms or institutions that are seen as necessary for legal development under constitutional thinking.

De Wet, for example, rather proposes a view of constitutionalism that argues for a constitutional order consisting of an international community and an international value

⁶⁸ Breau (note 51) at 545-561.

⁶⁹ Many authors have linked the concepts of constitutionalism and hierarchy. See for example Tomuschat C ‘International Law as a Coherent System: Unity or Fragmentation’ in Arsanjani et al (eds) (2011) *Looking to the Future: Essays on International law in Honor of W. Michael Reisman* Leiden: Martinus Nijhoff Publishers 336 and Cassese A (2005) *International Law* (2nd ed) Oxford: Oxford University Press 198-199.

⁷⁰ Martin FF ‘Delineating a Hierarchical Outline of International Law Sources and Norms’ (2002) *Saskatchewan Law Review* 333.

⁷¹ De Wet E ‘The International Constitutional order’ (2006) *International and Comparative Law Quarterly* 58.

system as well as certain rudimentary structures for the enforcement of such a system.⁷² Peters finds the basis for legitimacy of the constitutionalist argument to lie in the proposition that the international community can be considered and functions as a legal community.⁷³ As an essential feature the international community brings a certain legitimacy to international law, as a legal community is governed by rules and principles and therefore not solely by political power.⁷⁴ Various core provisions of international law encompassed in certain world order treaties, as well as in some customary law principles, are said to embody collective obligations that serve global community interests and therefore go beyond purely individual interests of states.⁷⁵ These so called ‘public interest norms’ are often seen as a main consideration, as they relate to shared global attitudes or beliefs and therefore embody universal values to some extent.⁷⁶

The focus of the value based approach within this dissertation is the question of whether one can speak of an international polity or ‘international community’. This is an important consideration as there must be some basis for the existence of shared values in international law. The existence of such values would then allow one to posit specific rules and principles that functionally protect them. An international community with shared values provides authority for the existence of constitutional norms. The focus here will thus be on considerations relevant to the positing of an international community and will not deal extensively with the structures or institutions involved.

The term ‘value’ can have many different meanings depending on the field of study in which it is used or in which context. When speaking of ‘international values’ in the legal sense, we are talking of values held by the international community that guide human and state interaction and conduct. In what he refers to as ‘human values’, Rokeach defines a value as follows:

⁷² *Ibid* at 51.

⁷³ Peters (note 23) at 586.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* at 588-589.

⁷⁶ *Ibid* at 589.

‘A *value* is an enduring belief that a specific mode of conduct or end-state of existence is personally or socially preferable to an opposite or converse mode of conduct or end-state of existence.’⁷⁷

As they are *beliefs*, we can only call certain values ‘global’ if they are actually globally shared.⁷⁸ There must be global consensus regarding their existence or the values themselves must be ‘the outcome of a genuine global conversation about values involving all the worlds’ citizens’.⁷⁹ As community values, these values should represent certain cultural ideals held in common by the international community.⁸⁰ The existence of such an international community as well as its legal significance is however still disputed.⁸¹

The concept of an international community does not at this stage have an exact agreed upon definition, although its existence seems to be supported by various international instruments as well as by case law. The VCLT refers to a peremptory norm as one ‘accepted and recognized by the international community of states’.⁸² This Article suggests that the international community has the ability to collectively accept and recognize certain norms as being of a peremptory nature. Furthermore, the Article seems to indicate that the international community is made up of sovereign states.⁸³ There may even be an argument to be made that Article 38 of the ICJ Statute, when setting out the existence of ‘general principles of international law’ as a source of law and setting out the requirement of such being ‘recognized by civilized nations’, posits an international community.⁸⁴ The wording here however indicates that such a community would only include states. The consensual aspect representing at least some sort of community interest does in any event seem to be present here.

⁷⁷ Rokeach M (1973) *The Nature of Human Values* 5.

⁷⁸ Spijkers O ‘What’s Running the World: Global Values, International Law, and the United Nations’ (2009-2010) 4 *Interdisciplinary Journal of Human Rights Law* 68.

⁷⁹ *Ibid* at 68-69.

⁸⁰ *Ibid* at 69.

⁸¹ *Ibid*.

⁸² The Vienna Convention on the Law of Treaties, Article 53.

⁸³ Ferreira G & Ferreira-Snyman A ‘The Constitutionalism of Public International Law and the Creation of an International Rule of Law: Taking Stock (2008) 33 *South African Yearbook of International Law* 149.

⁸⁴ Statute of the International Court of Justice, Article 38(1)(c).

The Vienna Declaration on Human Rights (1993)⁸⁵ declares that ‘the promotion and protection of human rights is a matter of priority for the international community’. This in the context of human rights, however seems to advocate a broader concept of international community which may include non-state actors and even individuals.⁸⁶

In the ILC Draft Articles on State Responsibility,⁸⁷ as well as the Draft Articles on the Responsibility of International Organizations,⁸⁸ reference is made to the concept of obligations owed to the international community as a whole. This seems to support the contention that actions of states as well as of international organizations are relevant to the international community.

In the ICJ advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, President Bedjaoui acknowledged the emergence of the concept of ‘international community’.⁸⁹ This is further supported by other jurisprudence of the court dealing with obligations *erga omnes*. The court has in this regard distinguished between obligations owed to the international community and those owed to individual states.⁹⁰ The court in the recent *Jurisdictional Immunities* case described a rule of *jus cogens* as ‘a rule accepted by the international community of states as a whole as one from which no derogation is permitted.’⁹¹ This further indicates the link between the international community and the existence of *jus cogens* norms.

There therefore seems to be ample authority for the existence of an international community, although the concept is still not free from detractors. Boyle and Chinkin for instance view the concept as a purely artificial construct with both its existence as well as

⁸⁵ Vienna Declaration and Programme of Action on Human Rights, UN Doc A/CONF157/23 (1993).

⁸⁶ Ferreira & Ferreira-Snyman (note 83) at 150.

⁸⁷ See Draft Articles on State Responsibility, Articles 42 & 48 (2001) Available at <http://untreaty.un.org> [Accessed on 21 May 2012].

⁸⁸ See Draft Articles on the Responsibility of International Organizations, Articles 43 & 49 (2011) Available at <http://untreaty.un.org> [Accessed on 21 May 2012].

⁸⁹ *Legality of the Threat or Use of Nuclear Weapons* 1996 ICJ Reports 270-271.

⁹⁰ See *Barcelona Traction Light and Power Company Ltd* (second phase) [1970] ICJ Rep 32 and *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion 9 July 2004 para 155.

⁹¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* ICJ Judgment of 3 February 2012 para 94.

the proposed values arising from it being contested.⁹² Despite such remarks, it is the composition of such a community rather than its existence that draws the greatest debate in contemporary writing. De Wet is of the opinion that ‘at this stage of its development, the international community is still predominantly composed of states, as they remain central to the process of international law-making’.⁹³ She also therefore includes international organizations and individuals to various degrees.⁹⁴ Individuals, for example, possess a certain degree of legal personality due to the establishment of human rights systems in international law.⁹⁵

Domingo is of the opinion that the emphasis on the nation state is an inherent defect of international law as a system, which renders it incapable of meeting the basic needs of the world that longs for a true global community of persons.⁹⁶ He would therefore perhaps place greater emphasis on the other roleplayers within a true international community. It seems that at this stage of international legal development, it would be acceptable to conclude in agreement with Ferreira and Ferreira-Snyman that, ‘whatever one’s view on the composition of the international legal community, it is a fact of international life that states and international organizations, the traditional subjects of international law, are not the only roleplayers exerting influence on international lawmaking processes.’⁹⁷

Due to such value orientated thought, authors have even referred to *jus cogens* norms as ‘value based’ norms.⁹⁸ This is due to the fact that they are seen as originating from community based considerations. Such authors contend that these norms are therefore directly based on global values.⁹⁹ De Wet argues that the international value system is concerned with norms that have a ‘strong ethical underpinning’.¹⁰⁰ Such norms, in her view, have been integrated into positive international law and gain a hierarchical standing

⁹² Boyle & Chinkin (2007) *The Making of International Law* Oxford: Oxford University Press 17.

⁹³ De Wet (note 71) at 55. See also Danilenko GM (1993) *Law-Making in the International Community* Netherlands: Martinus Nijhoff Publishers 154.

⁹⁴ De Wet (note 71) at 51.

⁹⁵ *Ibid* at 55.

⁹⁶ Domingo R ‘The Crisis of International Law’ (2009) 42 *Vanderbilt Journal of Transnational Law* 1543.

⁹⁷ Ferreira & Ferreira-Snyman (note 83) at 150.

⁹⁸ Spijkers (note 78) at 71.

⁹⁹ *Ibid*.

¹⁰⁰ De Wet (note 71) at 57.

when compared with other norms.¹⁰¹ She therefore advocates a hierarchical structure under her conception of constitutionalism, with the ethical underpinnings of certain norms providing a certain legitimacy to the structure.¹⁰² Such a hierarchy is said to be of a layered nature, including layers of *jus cogens* and obligations *erga omnes*.¹⁰³

The emergence of an international community, as an identifiable and functional concept under international law, gives credence to the proposition that protection is now afforded by such a community to certain basic values even where it may be against the will of any particular individual state.¹⁰⁴ Tomuschat goes further by proposing that these values derive from the understanding that states are merely instruments with the inherent function of serving the interests of their citizens.¹⁰⁵ The international community, in his view, therefore sees the state as a unit at the service of human beings.¹⁰⁶ The widespread acknowledgment and adoption of various human rights instruments at the international level may be seen as evidence of this shift in thinking indicated by Tomuschat, as states now have obligations that are owed directly to individuals under international law.

Of specific importance for this dissertation is that such understandings give a certain legitimacy to specific functional aspects connected to this. International community values give credence to the proposition of many of the authors discussed above that there are certain norms of international law that have come into being specifically in order to protect such values. Without at this stage advocating any of the specific structural approaches mentioned above, the literature does seem to place considerable emphasis on norms of *jus cogens* as fulfilling this function to some extent. There is therefore support

¹⁰¹ De Wet (note 71) at 57.

¹⁰² *Ibid.*

¹⁰³ *Ibid* at 59.

¹⁰⁴ Tomuschat C 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course in Public International Law' (1999) 281 *Recueil Des Cours* 10, 161.

¹⁰⁵ *Ibid* at 161. See also Lauterpacht H 'The Grotian Tradition of International Law' (1946) 23 *British Yearbook of International Law* 27, where it is stated that 'behind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings'.

¹⁰⁶ Tomuschat (note 104) at 95.

in the literature for the legitimacy of the concept of *jus cogens*. However there is less agreement concerning how the concept is to function in international law.¹⁰⁷

Should *jus cogens* be seen as representing the superiority of certain norms in international law, in which case can a hierarchy of norms therefore be posited as a workable structure? What norms should be included in *jus cogens* and how are these norms to function in practice? These and other related questions will be discussed in the following chapters.

¹⁰⁷ Shelton D 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 297.

Chapter 3: Evolution of the concept of *jus cogens* and its effect in contemporary international law.

3.1 Introduction.

The differing theories or perspectives on international law held by commentators and judges over the years have led to vastly differing opinions surrounding the nature of the concept of *jus cogens*. In contemporary law, even though the existence of *jus cogens* has received widespread international support, there is still much disagreement surrounding its nature and possible source.¹⁰⁸ Natural law thinking as well as the positivist consent based approach to international law have both impacted considerably on the theory surrounding the concept. The concept has been posited as having a basis in public policy, public order considerations, necessity and constitutional principle to name a few.¹⁰⁹ This chapter sets out the evolution that the concept has undergone and provides a possible basis for the concept in contemporary international law under constitutionalist thought. The application given to norms of *jus cogens* by international tribunals will be used to evaluate whether the effect that has been envisioned for *jus cogens* is supported by practice.

3.2 Evolution of the concept.

3.2.1 A link to natural law.

The concept of *jus cogens* seems to draw some relation to seventeenth and eighteenth century natural law thought. Jurists such as Samuel Rachel (1628-1691), Christian Wolff (1679-1754) and Georg Friedrich de Martens (1756-1821) posited that the legal order could be divided into three spheres; *jus civile*, *jus gentium* and *jus naturae*.¹¹⁰ *Jus civile*

¹⁰⁸ Shelton D 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 299.

¹⁰⁹ *Ibid* at 291-292.

¹¹⁰ Cassese A (2005) *International Law* (2nd ed) Oxford:Oxford University Press 200.

was the internal law of a state, *jus gentium* was the law applicable to relations between states, represented mostly in treaties and *jus naturae* was natural law that regulated the life of mankind.¹¹¹ The importance of this for this dissertation is that it was proposed that *jus naturae* would prevail over treaties when such treaties were contrary to the tenants of natural law.¹¹² Within international law specifically, this line of thinking led other authors to hold the belief that positive law is in fact inferior to international morality or natural law percepts.¹¹³ Natural law was said to be derived from reason and humanity, therefore it did not set out specific norms that could have been viewed as more ‘important’ than other norms. It cannot therefore be said that at this stage a hierarchical structure to international law was posited. This understanding however, could have influenced the emergence of hierarchical thought to some degree.

The concept of *jus cogens* has also been related to Judge Schücking’s dissenting opinion in the 1934 *Chinn* case, where he argued that the court should not enforce agreements that are contrary to international public policy.¹¹⁴ At this stage, positivists continuously proclaimed freedom of contract as being the foundation of the international legal system while the natural law thinkers held the view that states can never be absolutely free in establishing contractual relations with other states. They particularly believed that states were obliged to follow certain fundamental principles upon which the relations between states as members of the international community were based.¹¹⁵ Natural law therefore seemed to find its application in the international legal system in the form of fundamental principles.

Verdross wrote on *jus cogens* in 1937, where he posited that freedom to conclude treaties could be limited by rules of international law that have the character of *jus cogens*.¹¹⁶ He however went further by positing another category of *jus cogens* that consists of general

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Nys E ‘The Codification of International Law’ (1911) 5 *American Journal of International Law* 874.

¹¹⁴ *Oscar Chinn*, 1934 PCIJ (ser. A/B) No.63, at 149-150 (Schücking ,J. dissenting).

¹¹⁵ Danilenko GM ‘International *Jus Cogens*: Issues of Law-Making’ (1991) 2 *European Journal of International Law* 44.

¹¹⁶ Verdross A ‘Forbidden Treaties in International Law’ (1937) 31 *American Journal of International Law* 571.

principles of morality or public policy that are held in common by civilized states.¹¹⁷ By positing a rule and principle based character to *jus cogens*, this understanding seems to have been an attempt to formalize the concept in some way. This understanding therefore seems to suggest that norms of *jus cogens* can include rules and general principles of morality, as he speaks of ‘groups’ of *jus cogens* here.¹¹⁸ The ability to invalidate treaties due to the peremptory character of specific norms seems to also suggest the emergence of hierarchical thought in international law.¹¹⁹

Natural law considerations seem to have found their way into other aspects of international law, although with less direct effect. Article 38 of the Statute of the ICJ includes both rules expressly recognized by states as well as general principles of law recognized by civilized nations as sources of international law.¹²⁰ Generally, when treaty and custom do not provide answers to a specific case then the court may resort to such general principles from municipal law to fill the gaps in the law.¹²¹ The link between general principles and natural law was made by Justice Tanaka in the *Southwest Africa Cases*, where he held that:

‘[T]he “general principles of law” conceived as a source of law are in many ways indistinguishable from the law of nature as often applied in the past in that sphere. There is no occasion, for that reason, with suspicion or embarrassment. The part of the law of nature in legal history—including the history of international law—is more enduring and more beneficent than that of positivism, which either identifies the law with, or considers it the result of, the mere will of the state and its agencies’¹²²

This view describes general principles as giving applicability to natural law understandings within international law and possibly providing a sort of counterbalance

¹¹⁷ Verdross (note 116) at 572.

¹¹⁸ *Ibid.*

¹¹⁹ See Ford CA ‘Adjudicating *Jus Cogens*’ (1994-1995) 13 *Wisconsin International Law Journal* 149, where he writes, ‘the *jus cogens* formulation is a modern, secular reincarnation of natural law theories, embodying the idea of a higher moral order against which ordinary actions and legal rules must be judged’.

¹²⁰ Statute of the International Court of Justice, Article 38(1)(a)&38(1)(c).

¹²¹ De Wet E (2004) *The Chapter VII Powers of the United Nations Security Council* Hart Publishing: Oxford 80.

¹²² *Southwest Africa case* (Ethiopia v. South Africa, Liberia v. South Africa) (Second Phase), ICJ Rep. 6, 298 (1966).

to strict legal positivism.¹²³ He also seems to suggest that general principles may perhaps serve a public order function by tempering mere ‘will of the state’ considerations.

The drafting history of Article 38(1)(c) indicates that the requirement that general principles be ‘recognized by civilized nations’ was included in order to provide a rational basis for discourse concerning the source.¹²⁴ This indicates that general principles are not derived from natural law maxims, but are rather established by the implicit consensus of the international community.¹²⁵ Various authors have therefore posited that mere existence of *opinio juris* is sufficient for the establishment of such principles.¹²⁶ Natural law thinking therefore seems to have been included to some degree in positive international law through the inclusion of general principles as a source of international law.

The existence of general principles as a source of international law indicates that treaty and custom are not the only considerations to be taken into account when sourcing norms of international law.¹²⁷ The fact that they are termed ‘principles’ shows that they do not authorize the ICJ to proceed on the basis of non-legal considerations, as they are formal sources of international law. This is further reinforced by Article 38(2) of the ICJ Statute which provides authorization for the court to decide a case *ex aequo et bono* if the parties to the case agree. General principles should not therefore be reduced to this understanding.¹²⁸ General principles have much to add to international law, as the considerations relevant to legal adjudication go beyond simple reference to treaty and custom.¹²⁹ General principles could not however give direct effect to public order considerations as they could not generally be relied on in practice as a basis for jurisdiction where treaty or customary law had direct application to a specific case.

¹²³ Peterson N ‘Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation’ (2008) 23 *American University International Law Review* 292.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* see also Simma B & Alston P ‘The Sources of Human Rights law: Custom, *Jus Cogens* and General Principles’ 12 *Australian Year Book of International Law* 104.

¹²⁷ Hall S ‘The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism’ (2001) 12 *European Journal of International Law* 292.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

Jus cogens norms are generally norms of general international law found in treaty or custom which have been elevated to *jus cogens* status due to the implicit consensus of the international community that such norms should be peremptory.¹³⁰ The existence of *jus cogens* norms and general principles as functional aspects of international law indicates that a strictly consent based approach to international law cannot account for the true functioning of the international legal order.¹³¹ This is particularly true when viewed from a constitutionalism perspective which gives emphasis to community based considerations.

The atrocities of World War II reaffirmed the need for a reassertion of fundamental higher norms in international law and to provide them with direct practical legal effect.¹³² The blatant disregard of community based considerations in favour of individual state centered ideologies led to a perceived necessity to give more direct effect to public order norms.¹³³ It was the opinion of Judge Moreno-Quintana in the *Guardianship of Infants* case that within the international public order certain fundamental rights of states have a peremptory character and universal scope.¹³⁴ The claim that superior norms have the ability to override treaty and custom led to increased discussion surrounding the existence and effect of *jus cogens* norms.¹³⁵

In the 1960's there came the suggestion from certain countries, especially socialist and developing countries, that certain norms of international law should be given a higher

¹³⁰ *Jus cogens* norms do not derive their status from conventional sources of treaty or custom, but are rather based on the collective conscience of the international community. Due to this, no explicit individual state consent can justify behaviour contrary to a *jus cogens* norm. See Ford (note 119) at 152. The superior status of *jus cogens* norms has been described as deriving from the 'substance of the rule and its intrinsic value'. Remarks of Mustafa Kamil Yasseen (Iraq) in *Summary Records of the 17th Session, 828th Meeting* (1966) 1 *Year Book of the International Law Commission* 38, para 29, U.N. Doc A/CN. 4/156.

¹³¹ Traditional consent based theories cannot apply to peremptory norms as states' freedom to contract out of international rules does not apply to peremptory norms. See Ford (note 119) at 146-147.

¹³² Shelton D (note 108) at 297. It is primarily after World War II that scholars became insistent on the existence of *jus cogens*. See Ford (note 119) at 154.

¹³³ Shelton (note 108) at 297. *Jus cogens* norms embody the idea that states are not free to do whatever they wish. See also Ford (note 119) at 149.

¹³⁴ *Guardianship of Infants* case, ICJ Reports (1958) 106-107 (Separate Opinion of Judge Moreno-Quintana).

¹³⁵ This ability gave *jus cogens* tremendous potential importance, but it still had to be translated into international practice. See Ford (note 119) at 145.

status than ordinary norms set out in treaty and custom.¹³⁶ The norms generally included in such a category were: self determination of peoples, prohibitions on aggression, genocide, slavery and racial discrimination.¹³⁷

Particularly for the developing countries, *jus cogens* became one of the ways of fighting the colonial powers as it provided an opportunity to condemn imperialism, slavery and forced labour and other related practices that violated the principles of equality for all human beings and the sovereign equality of states.¹³⁸ For the socialist countries, *jus cogens* meant the recognition of principles that proclaimed the peaceful coexistence of states, particularly between countries having vastly differing political structures.¹³⁹

Many western countries did not initially support the concept of *jus cogens*. Countries such as France and Switzerland expressed serious doubts, while other such as Greece, Israel, Spain and Canada became aware of the need for such a concept, either because of strong humanitarian traditions or under the influence of national jurists.¹⁴⁰ Eventually there developed more general acceptance of the notion on the proviso that in the case of a dispute arising, an impartial body such as the International Court of Justice could be called upon to decide the issue.¹⁴¹

3.2.2 Inclusion in the VCLT.

The concept of *jus cogens* was then in 1969 placed firmly in positive international law by inclusion of the concept in Article 53 of the VCLT. The Article sets out criteria which render a treaty void due to it conflicting with a peremptory norm. Firstly, there must be a peremptory norm of international law. Secondly, such norm must be accepted and

¹³⁶ Cassese (note 110) at 199. See also Summary Records of the 15th Session (1963) 1 *Y.B. Int'l L. Comm'n*.

¹³⁷ Cassese A (2005) *International Law* (2nd ed) Oxford: Oxford University Press 199.

¹³⁸ UN Conference on the Law of Treaties, First Session (1968), *Official Records*, at 300.

¹³⁹ Cassese (note 110) at 200.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

recognized by the international community. Thirdly, no derogation from such a norm is permitted. Fourthly, such norm can only be modified by a norm of the same character.¹⁴²

The Vienna Convention therefore did not set out criteria for how to identify a peremptory norm, except to indicate that it must be accepted and recognized as peremptory. This seems to imply that norms of customary international law are then elevated to peremptory status when the international community of states agrees that such norms are to be considered peremptory.¹⁴³ Therefore for a specific norm to form part of *jus cogens* for the purposes of the VCLT, there must be the implicit consensus of the international community that the norm is peremptory.¹⁴⁴ Furthermore the inclusion in the VCLT was mostly seen as representing a voluntarist approach to *jus cogens* as only states bound by the treaty would be subject to its provisions.¹⁴⁵ This consideration has led some authors to understanding *jus cogens* as only having a place in the law of treaties and having no application outside of treaty law.¹⁴⁶ This is however not generally accepted in theory and practice as most instances involving the application of norms of *jus cogens* are evident outside of treaty law. The concept of peremptory norms has also been included in other international instruments. Therefore *jus cogens* cannot be confined to treaty law under contemporary international legal thinking.¹⁴⁷

As the VCLT sets out that norms of *jus cogens* have a peremptory nature and may not be derogated from by treaty, many authors viewed such norms as having a rank and status

¹⁴² See Vienna Convention on the Law of Treaties, Article 53. This also means that widespread practice of states that is contrary to a norm of *jus cogens* does not mean that states are not bound by the norm. See Ford (note 119) 145.

¹⁴³ There need not be state practice concerning the *jus cogens* nature of a specific norm. A norm of *jus cogens* therefore remains binding even if there is widespread contrary practice. *Jus cogens* is therefore distinguishable from ordinary customary international law which by definition requires both state practice and *opinio juris*. See Ford (note 119) at 152.

¹⁴⁴ For drafters of the VCLT 'it was more society and less the law itself which defined the content of *jus cogens*'. See Remarks of Shabtai Rosenne (Israel), in Summary Records of the 15th Session, 685th Meeting (1963) 1 *Y.B. Int'l L. Comm'n* 73, para 4, U.N. Doc. A/CN. 4/156.

¹⁴⁵ Shelton (note 108) at 299.

¹⁴⁶ Suy E, Remarks in, Cassese A & Weiler JHH (1988) *Change and Stability in International Law-making* New York: de Gruyter 97.

¹⁴⁷ Draft Articles on State Responsibility (2001) Article 40 Available at <http://untreaty.un.org> [Accessed on 21 May 2012]. Draft Articles on the Responsibility of International Organizations (2011) Article 26. Available at <http://untreaty.un.org> [Accessed on 21 May 2012].

superior to that of all other norms of international law.¹⁴⁸ It is this understanding that led many authors to posit an emerging hierarchy of norms in international law. This notion has gained momentum in contemporary international legal theory and is particularly prominent within the constitutionalism debate.

3.2.3 The concept after the VCLT.

The concept of *jus cogens* itself cannot be seen as consent based in the traditional sense, as the VCLT only made the concept effective for treaty law and not international law in general.¹⁴⁹ The inclusion of *jus cogens* in treaty law did not give rise to much practical application as there are no instances of a treaty being declared void on account of being contrary to a *jus cogens* norm.¹⁵⁰ The concept was however considered relevant to other aspects of international law, as it was observed that threats to *jus cogens* norms, in most instances, do not stem from treaty obligations, but from acts of states towards individuals or groups on their own territory.¹⁵¹ Most norms of *jus cogens* do not in any event protect interests of states, but rather protect predominantly human or collective interests.¹⁵² The introduction into international legal thought of the concepts of ‘community interests’ and ‘community values’ means that theorizing about the application of *jus cogens* is no longer to be confined to treaty law.¹⁵³

Norm conflicts involving *jus cogens* norms are therefore seen more often between norms of *jus cogens* and norms of customary international law. For example, the obligation under customary international law to provide immunity to foreign states and officials is often seen to conflict with norms of *jus cogens*. In fact, the issue of jurisdictional

¹⁴⁸ Cassese (note 110) at 199.

¹⁴⁹ *Jus cogens* norms cannot be seen as being purely derived from treaty as they bind all states, regardless of whether such states are signatory or non-signatory to a particular treaty. Ford (note 119) at 152.

¹⁵⁰ Orakhelashvili A (2006) *Peremptory Norms of International Law* New York: Oxford University Press 41. Although there are instances where *jus cogens* could have been applied, the ICJ has chosen not to resolve the conflicts in this way.

¹⁵¹ Meron T ‘On a Hierarchy of International Human Rights’ (1986) 80 *American Journal of International Law* 14. The two most cited examples of *jus cogens*, being the prohibitions on slavery and genocide, clearly protect predominantly human rather than state interests.

¹⁵² Paulus AL ‘Jus Cogens in a Time of Hegemony and Fragmentation’ (2005) 74 *Nordic Journal of International Law* 305.

¹⁵³ *Ibid* at 297.

immunity forms the bulk of the case law dealing with *jus cogens* and will be dealt with in what follows.

3.3 The limited effect given to *jus cogens* in practice.

It was only in 2006 that the ICJ first endorsed the concept of *jus cogens*. The court was of the opinion that the prohibition on genocide assuredly had a *jus cogens* character.¹⁵⁴ It did not however attempt to clarify the legal status of *jus cogens* norms or specifically set out any criteria for identifying peremptory norms.¹⁵⁵

The ICJ had prior to this chosen not to apply the concept at all. In its Advisory Opinion on the *Legality of the Threat of Nuclear Weapons*, the court had the opportunity to pronounce on the *jus cogens* nature of either a state's right to survival or protection of human beings from nuclear fallout, but chose not to conduct the balancing of these norms in this way.¹⁵⁶ The court also seemed to choose not to use the term *jus cogens* when referring to peremptory norms. The court in this case preferred to use the words 'intransgressible principles of international customary law'. The court has therefore seemed rather reluctant to pronounce on the nature and effect of *jus cogens*.

Other courts have referred more directly to the concept of *jus cogens*. A readily cited example is the judgment of the International Criminal Tribunal for the Former Yugoslavia, in *Prosecutor v Furundzija*. The court in this case unequivocally proclaimed that the prohibition on torture is a peremptory norm of *jus cogens*.¹⁵⁷ The European Court of Human Rights in *Al-Adsani* also chose to refer to the prohibition on torture as having evolved into a peremptory norm of *jus cogens* that enjoys a higher rank in the

¹⁵⁴ *Armed Activities on the Territory of the Congo*, Jurisdiction of the Court and Admissibility of the Application (Dem. Rep. Congo v. Rwanda) (Judgment of 3 Feb 2006) at 31-32.

¹⁵⁵ Criddle EJ & Fox-Decent E 'A Fiduciary Theory of *Jus Cogens*' (2009) 34 *Yale Journal of International Law* 346.

¹⁵⁶ *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* 8 July 1996 (*ICJ Reports* 1996, 258). See also Paulus (note 152) at 307.

¹⁵⁷ *Prosecutor v. Furundzija* (1998) International Criminal Tribunal of the Former Yugoslavia no. IT-95-17/1-T, 38.

international hierarchy than treaty or custom.¹⁵⁸ Although we may be able to conclude with relative certainty that the prohibition on torture is a norm of *jus cogens*, there is growing controversy about whether *jus cogens* norms, such as the prohibition on torture, are capable of having practical effect in cases concerning jurisdictional immunity.

Jus cogens considerations have given rise to a considerable amount of case law concerning perceived conflicts between norms of *jus cogens* and the provision of jurisdictional immunity. The questions that courts have had to answer in this regard are as follows: If a *jus cogens* norm is said to invalidate or render ineffective ordinary norms of international law that are in conflict with it, is this effect solely with regard to rules directly contradicting the substantive law contained in the *jus cogens* norm? Or does the *jus cogens* norm also have this effect concerning rules of jurisdiction and procedure which find operation in favour of the violator of the *jus cogens* norm?¹⁵⁹

These considerations are particularly relevant to perceived conflicts between *jus cogens* norms and claims of jurisdictional immunity, because arguably there is no substantive content to a procedural plea of state immunity.¹⁶⁰ If however *jus cogens* has no effect on jurisdictional or procedural issues then its application becomes considerably limited within international law.

Proponents of the existence of a strict normative hierarchy in international law have however held the opinion that state immunity does not form part of *jus cogens* and therefore when there has been a violation of a *jus cogens* norm, such immunity cannot be raised. The argument here is that practical ‘effect’ must be given to the *jus cogens* norm as it is the superior norm in such instances.¹⁶¹ Case law of domestic and international tribunals is however not predominantly in support of such a view.

¹⁵⁸ *Al-Adsani v. United Kingdom* 21 October 2001, European Court of Human Rights, no. 35763/97 (*Reports of Judgments and Decisions 2001-XI*, 101).

¹⁵⁹ Fox H (2002) *The Law of State Immunity* Oxford: Oxford University Press 524-525.

¹⁶⁰ *Ibid* at 525.

¹⁶¹ Caplan LM ‘State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory’ (2003) 97 *American Journal of International Law* 741.

In the Italian decisions of *Ferrini* and *Lozano* the courts were of the opinion that *jus cogens* norms required more effective enforcement.¹⁶² This argument was based on the ‘effectiveness principle’ which was used by the courts as a basis for the denial of immunity in these cases.¹⁶³ The perceived necessity for widening the scope of *jus cogens* application does not however represent the general position regarding immunity cases.

In the *Al-Adsani* case, although the ECtHR recognized the peremptory character of the prohibition on torture, it rejected the view that violation of this norm compels the denial of immunity in civil actions.¹⁶⁴ This approach is supported by the recent ICJ decision in the *Jurisdictional Immunities* case. The court concluded that there is no conflict between a rule of *jus cogens* and the customary law rule requiring one state to accord immunity to another.¹⁶⁵ Its reasoning was that the two sets of rules address different matters. State immunity is procedural in nature and the rule concerns whether or not the courts of one state can exercise jurisdiction in respect of another state. Such procedural aspects do not therefore bear on the question whether the conduct in respect of which the particular proceedings was brought, was lawful or not.¹⁶⁶ In support of this conclusion the court referred to decisions of various domestic courts as well as the decision in *Al-Adsani*.¹⁶⁷ It therefore seems that this approach represents the general position regarding the application of *jus cogens* norms.

There have been other approaches that have renounced the strict application of normative hierarchy on purely practical grounds. In concurring with the majority decision in *Al-Adsani*, Judges Matti Pellonpää and Nicolas Bratza reasoned against the application of a normative hierarchy by extending the logic of its application to other areas of

¹⁶² *Ferrini v. Germany*, No 5044/04, 87 (2004) *Rivista di diritto internazionale* 539, ILDC 19 (IT 2004), 128 ILR 659 (11 March 2004). *Lozano v Italy*, Appeal Judgment Case No 31171/2008, ILDC 1085 (IT 2008). This understanding can also be seen in the minority decision in *Al-Adsani v. United Kingdom* 21 October 2001, European Court of Human Rights, no. 35763/97.

¹⁶³ See Cassese (note 110) 12-13, for a discussion on the principle of effectiveness in general.

¹⁶⁴ *Al-Adsani v. United Kingdom* 21 October 2001, European Court of Human Rights, no. 35763/97 para 61.

¹⁶⁵ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* ICJ Judgment of 3 February 2012 para 93.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid* at para 96.

international law. They reasoned that if one was to accept the application of *jus cogens* in immunities cases, then one would have to similarly accept its application as to execution of judgments against foreign state defendants.¹⁶⁸ This is because, like state immunity, laws regarding execution are also not *jus cogens*. Accepting normative hierarchy theory could then lead to execution against a large range of state property (for example real estate) which they argue would threaten international cooperation between states.¹⁶⁹

As convincing as these arguments may be, they do have the result that states can now hide behind the rules of state immunity for serious human rights infringements, by avoiding proceedings in foreign jurisdictions. This inevitably renders *jus cogens* ineffective in a wide range of instances.

The tendency of courts to avoid recognizing conflicts between norms of *jus cogens* and other norms of international law means that there has been very little confirmation of the practical relevance that has been envisioned for normative hierarchy theory. Courts seem to generally prefer arguments involving interpretations that do not result in direct normative conflicts. This has led to very limited practical effect being given to norms of *jus cogens*.

3.4 Implications for constitutional thought.

Within the constitutionalism debate, the value-based understanding gives legitimacy to the existence of norms of *jus cogens* that limit state political power, as long as those norms are accepted and recognized as having such a nature by the international community as a whole. The implicit consensus of the international community that certain norms should be part of *jus cogens* legitimizes the functional application of such norms by the courts. The problem is that the courts have failed to give effect to such norms or expound on their nature. The structural side to this is that a vertical dimension

¹⁶⁸ *Al-Adsani v. United Kingdom* 21 October 2001, European Court of Human Rights, no. 35763/97 Concurring Opinion of Judges Pellonpaa and Bratza. See also Caplan (note 161) at 742.

¹⁶⁹ *Al-Adsani v. United Kingdom* 21 October 2001, European Court of Human Rights, no. 35763/97 Concurring Opinion of Judges Pellonpaa and Bratza.

has been posited for international law, where norms of *jus cogens* are given a status superior to that of other norms. This hierarchical standing is inherent in much constitutional thought, although the courts have not as yet clarified how such understandings are to be translated into actual judicial practice. It does however seem that courts are reluctant to give effect to *jus cogens* norms in cases concerning jurisdictional immunity. The practical effect that is given to *jus cogens* is therefore limited to application against rules directly contradicting the substance of the *jus cogens* norm. In what follows, some additional problems associated with hierarchical thought are set out and their implications discussed.

Chapter 4: A critique of normative hierarchy theory.

4.1 Introduction.

This chapter will deal with perhaps the most important and problematic aspect relating to *jus cogens* within the constitutionalism debate. As discussed in previous chapters, there are many authors who believe that the existence of *jus cogens* now evidences a normative hierarchy in international law. This chapter will discuss some shortcomings of what may be termed ‘normative hierarchy theory’, specifically within the context of conflict of norm scenarios. It will further show how the theory may lead to a limiting of the number of norms that have the ability to function as norms of *jus cogens*.

4.2 *Jus cogens* norms as rules or principles?

4.2.1 The relation between international legal elements.

As indicated in Chapter 2, this dissertation posits an elemental understanding of international law where the concepts of ‘values’, ‘norms’, ‘rules’ and ‘principles’ are differentiated and placed in relation.

‘Norms’ in the broad sense come about through the political interactions and relations of states. Thus norms are said to be implicit in the actions of states.¹⁷⁰ In this broad sense, they encompass more than the strictly formalized legal norms represented by rules and principles. This understanding allows for the placement of so-called ‘soft law’ norms, which although not directly legally binding, do have relevance in international law.¹⁷¹

¹⁷⁰ Brandom R (1998) *Making it explicit: reasoning, representing, and discursive commitment* Harvard: Harvard University Press 19, 62. See also Voyiakis E ‘Customary International Law and the Place of Normative Considerations’ (2010) 55 *The American Journal of Jurisprudence* 166, where the additive model is discussed. This model sets out that the content of customary international law is based in the facts about the behavior and attitudes of the international agents.

¹⁷¹ The distinction between norms being implicit in practice and explicit in the form of rules and principles, gives applicability to so called ‘soft law’ considerations. International conferences and non-binding

‘Values’, as representative of the ethical component of law, guide the normative behaviour of states or groups of states. As the subtle guidance aspect, values should not be formalized or placed in systemic relation to each other. The position taken by some authors that values can be placed in hierarchy and then functionally reflect a hierarchy of norms is not supported by this view.¹⁷² Values may however reflect the necessity for specific functional hierarchies.

‘Rules’ and ‘principles’ become the functional components of the international legal system, where norms that are developed present in functional legal terms as either rules or principles.¹⁷³ Therefore they may be termed norms of international *law*. They therefore represent the norm in explicit terms.¹⁷⁴ The source of such functional aspects is in treaty, custom or general principles of international law.¹⁷⁵ As norms of international law, their relation to one another can be systematized and expressed as having certain functional characteristics. Therefore a systemic hierarchical construction can be posited for rules and principles. The effectiveness of such a construction is therefore to be judged according to its functionality. Strictly formal hierarchies, however, always have the inherent defect of being static and inflexible to various degrees.¹⁷⁶ Attempting to hierarchy components that have inherently flexible and uncertain applications therefore detracts from the efficiency that gives a particular hierarchy its functional purpose.

The difference between rules and principles is then most effectively explained by describing the different functions that rules and principles encompass in legal practice.

agreements can still represent normative behaviour which can be used to inform the interpretations of binding agreements or be the precursor to the formulation of binding rules and principles.

¹⁷²See Kadelbach S & Kleinlein T ‘International Law –a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles’ (2007) 50 *German Yearbook of International Law* 29. Where it is suggested that ‘[i]n an ideally constitutionalised world, the hierarchy of values would be reflected in a strictly hierarchical order of rules and values.’

¹⁷³ This is supported in international law by Article 38 of the Statute of the ICJ, where the primary sources of law are conventions expressing rules, international custom accepted as law and general principles of law recognized by civilized nations.

¹⁷⁴ Brandom (note 170) at 62.

¹⁷⁵ Statute of the International Court of Justice, Article 38.

¹⁷⁶ Kadelbach & Kleinlein (note 172) at 30.

The distinction set out in this dissertation is based on the functionality of the concepts as experienced in conflict of norm scenarios.

Jus cogens gives effect to the functional consideration that certain norms that form part of *jus cogens* cannot be derogated from when becoming applicable to actions of states. This understanding is however problematic as it seems, in general, that it is ordinary norms of international law, originating in either treaty or custom, that are elevated to this status. The question now becomes, what norms are capable of being included as *jus cogens*?¹⁷⁷ Commentators have included the following as norms of *jus cogens*: The prohibitions on slavery, genocide and torture,¹⁷⁸ the right to life,¹⁷⁹ fundamental principles of environmental law,¹⁸⁰ basic rules of humanitarian law,¹⁸¹ the right to development,¹⁸² the prohibition on the use of force¹⁸³ and the principle of protection of human rights,¹⁸⁴ to name a few.

The problem with these inclusions is that not all of these norms function in the same or similar manner.¹⁸⁵ Some norms function more as principles, while others function as

¹⁷⁷ The content of *jus cogens* has been a contentious issue. See Brownlie I (1990) *Principles of Public International Law* Oxford: Oxford University Press 513, where it is stated that ‘more authority exists for the category of *jus cogens* than exists for its particular content’.

¹⁷⁸ International Law Commission Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.682, 13 April 2006 para 374. See also de Wet E ‘The Prohibition of Torture as an International norm of *Jus Cogens* and its Implications for National and International Customary Law’ (2004) 15 *European Journal of International Law* 97.

¹⁷⁹ *Victims of the Tugboat “13 de Marzo” v. Cuba*, Case 11.436, Inter-American Commission on Human Rights, Report No. 47/96, OEA/Ser.L/V/II.95, doc 7rev para 79 (1996).

¹⁸⁰ Orakhelashvili A (2006) *Peremptory Norms of International Law* New York: Oxford University Press 65.

¹⁸¹ International Law Commission Report of the Study Group on Fragmentation of International Law (note 178) para 374.

¹⁸² Upadhye S (2000) *The International Watercourse: An Exploitable Resource for the Developing Nation Under International Law* New York: Yeshiva University 8.

¹⁸³ Comments of Sir Humphrey Waldock, Summary Records of the 15th Session, 682nd Meeting (1963) 1 *Y.B. Int’l L. Comm’n* 55, para 2, U.N.Doc. A/CN.4/156. See also Orakhelashvili A (2006) *Peremptory Norms of International Law* New York: Oxford University Press 50.

¹⁸⁴ Judge Tanaka’s Dissenting Opinion in the *South West Africa case* (Ethiopia v. South Africa: Liberia v. South Africa), Second phase, Judgment [1966] ICJ Rep 298.

¹⁸⁵ See Shelton D ‘Normative Hierarchy in International Law’ (2006) 100 *American Journal of International Law* 292, where it is suggested that even though we can recognize fundamental norms deriving from an international public order, the extensive assertions of such norms, without providing evidence of such superior status, poses risks for the international legal order and the credibility of such authors.

rules. It is also evident that various rules that have been included are subject to limitation or exception. Such rules are therefore not formulated or applied in absolute terms.

This presents the question of whether *jus cogens* can include absolute rules, general rules and principles. The problem here is that principles cannot trump or have greater relative strength or importance when compared to other principles or even rules. There are also issues with seeing general rules as peremptory, as these rules are necessarily subject to exceptions. These aspects expose various conceptual shortcomings for normative hierarchy theory in particular and will be expounded on in what follows.

Much of the literature dealing with *jus cogens* focuses on whether specific norms have been recognized as peremptory by the international community. There is however another important consideration that is dealt with less frequently. This relates to whether specific norms have the ability to function as norms of *jus cogens* under normative hierarchy theory. It is this question which is dealt with in what follows.

4.2.2 A functional distinction between rules and principles.

The following functional distinction between rules and principles will provide the basis for the argument.

The distinction between rules and principles can be observed within the generally accepted list of sources of international law which are set out in Article 38 of the ICJ Statute. Article 38(1)(a) refers to ‘international conventions, whether general or particular, establishing *rules* expressly recognized by the contesting states.’¹⁸⁶ Article 38(1)(c) refers to ‘general *principles* of law recognized by civilized nations’.¹⁸⁷ Although it is not the intention here to submit that all principles in international law are ‘general principles of international law’, the distinction does seem to indicate that international

¹⁸⁶ Statute of the International Court of Justice, Article 38(1)(a) Emphasis added.

¹⁸⁷ Statute of the International Court of Justice, Article 38(1)(c) Emphasis added.

law does recognize a difference between rules and principles.¹⁸⁸ It seems that in much contemporary international usage, principles are seen as more general provisions, while concrete provisions are generally referred to as rules.¹⁸⁹ It is submitted however that principles should not be conflated to mere general rules. It is not merely a distinction based on degree, where the more general a rule is, the more ‘principle-like’ it becomes.¹⁹⁰ The concepts of principle and rule have different functions in so called norm conflict scenarios and therefore their legal effects are distinguishable.

International law seems to hold some relation to Dworkin’s understanding of modern legal systems, which he believes cannot be conceived of as only including a pure system of rules.¹⁹¹ Legal systems also include principles that cannot be identified by purely formal means.¹⁹² The distinction between rules and principles can briefly be described in the following manner: Rules either apply directly to a given set of facts or they do not apply at all. Principles on the other hand compel a move in a certain direction without directly requiring a certain decision to be taken.¹⁹³ If we apply this understanding to norm conflict scenarios the following becomes relevant.

When two rules are in conflict, such conflict can often be solved by specific rules dealing with such conflicts such as a *lex specialis* or a *lex posterior* rule. The rule that is more specific to the facts at hand will therefore prevail.¹⁹⁴ Rules are therefore directly related to conduct and are often said to protect values in a more direct manner.¹⁹⁵ This is why it

¹⁸⁸ There has even been an argument by Simma and Alston that general principles should be revived in the context of human rights specifically. See Simma B & Alston P ‘The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles’ (1991) 12 *Australian Yearbook of International Law* 82-108. See also Klabbers J, Peters A & Ulfstein G (2009) *The Constitutionalization of International Law* Oxford: Oxford University Press 99-100.

¹⁸⁹ Peterson N ‘Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation’ (2008) 23 *American University International Law Review* 287.

¹⁹⁰ Alexy R (2002) *A Theory of Constitutional Rights* Julian Rivers trans 47.

¹⁹¹ Dworkin R (1977) *Taking Rights Seriously* London: Gerald Duckworth 83.

¹⁹² *Ibid* at 43-45.

¹⁹³ Alexy (note 190) 47-48.

¹⁹⁴ Peterson (note 189) at 287. See also Sassoli M ‘The Role of Human Rights and International Humanitarian law in New Types of Armed Conflicts’ in Ben-Naftali O (ed) (2011) *International Humanitarian Law and International Human Rights Law* Oxford: Oxford University Press 71, where this is explained as follows: ‘It is the norm with the more precise or narrower material and/or personal scope of application that prevails.’

¹⁹⁵ *Ibid* at 288.

is possible to act either for or against a rule in concrete cases. This also explains how the hierarchy between the two rules is always static. The more specific rule will trump the other rule in normative conflicts. For instance, in cases of armed conflict, humanitarian law and human rights law may both be seen to apply.¹⁹⁶ There may therefore be a perceived conflict between a rule of humanitarian law and a rule of human rights law in such circumstances. The rule that is closer to the particular subject matter and takes better account of the particular context will prevail in such cases.¹⁹⁷

The other way to solve the problem of normative conflict between two rules is, when applicable, to read in an appropriate exception to one of the rules.¹⁹⁸ Rules that are not subject to exception or limitation may be termed ‘absolute rules’, while those that admit or are open to exception are referred to as ‘general rules’.¹⁹⁹ The prohibition on torture may be seen as an absolute rule as its contravention is never lawful. The prohibition on the use of force is however a general rule as it is not always unlawful for a state to use force against another state.²⁰⁰

This relatively absolute nature of rules can be contrasted with the more dynamic nature of principles. When two principles find application to the same set of facts, the supposed conflict between such principles is not determined by specific conflict rules, but by ‘balancing of goods’ considerations.²⁰¹ Dworkin describes the resolution of such conflicts as accounting for the relative ‘weight’ of each principle.²⁰² This however can never be an

¹⁹⁶ UN Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (26 May 2004), at 11.

¹⁹⁷ Sassoli M & Olson L ‘The Relationship Between International Humanitarian and Human Rights Law: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts’ (2008) 90 *International Review of the Red Cross* 603.

¹⁹⁸ Alexy (note 190) at 49.

¹⁹⁹ Kritsiotis D ‘When States Use Armed Force’ in Reus-Smit C (ed) (2004) *The Politics of International Law* Cambridge: Cambridge University Press 45-49.

²⁰⁰ See pages 44-47 of this dissertation for further explanation.

²⁰¹ Peterson (note 189) at 288.

²⁰² Dworkin (note 191) at 26. See also Alexy (note 190), where he describes principles as optimization requirements that require that something be realized, to the extent possible, given the factual and legal possibilities.

exact or formally calculable measurement and therefore the weight given to each principle is often controversial.²⁰³

This balancing consideration may lead to a conclusion that one of the principles is more compelling in the specific situation, while the other principle may have proved more compelling under different circumstances. Neither principle can be said to have absolute precedence over the other. Principles have equal status in the abstract but one may have greater weight in the concrete case.²⁰⁴ The solution in the concrete case is thus achieved by giving a conditional precedence to one of the principles.²⁰⁵ Principles involve balancing of goods considerations in conflict situations and therefore compel one to protect certain value considerations.

The outcome of this reasoning is that principles cannot be placed in hierarchy. No one principle can be said to be generally more or less important than any other principle. The weight given to a specific principle is always dependent on the facts of the specific case. This general distinction has various implications for the norms that have the ability to function as *jus cogens* under normative hierarchy theory. These implications will be discussed in what follows.

4.3 Implications of the distinction for norms that can function as *jus cogens* under normative hierarchy theory.

As was set out in the previous chapters, there is a tendency within the constitutionalism debate to posit a normative hierarchy for international law. What is termed ‘normative hierarchy theory’ for the purposes of this dissertation means a strict application of the hierarchical construction. The functional value of this construction is as follows: If there is an irreconcilable conflict between an ordinary norm of international law and a *jus cogens* norm, the *jus cogens* norm will trump the other norm. It is specifically norms that

²⁰³ Dworkin (note 191) at 26.

²⁰⁴ Alexy (note 190) at 51.

²⁰⁵ *Ibid* at 52. See example on page 44 of this dissertation.

are said to have been recognized and accepted as peremptory by the international community that are given this functional ability. Under normative hierarchy theory, *jus cogens* encompasses more than the simple assertion that all states are bound by these norms. It gives *jus cogens* norms a superior status as compared to ordinary international norms.

It is therefore recognized that there may be conceptions of normative hierarchy that allow greater room for other interpretations. Dealing with hierarchy in the strict sense, however, allows for a clearer exposition of possible theoretical shortfalls.

In international legal adjudication, conflicts between norms are solved through the application of various rules of interpretation or by the appreciation of certain principles that weigh in favour of a certain outcome over another. It is therefore very seldom that competing norms should be perceived as being in irreconcilable conflict. This may account primarily for the lack of judicial practice involving *jus cogens*. Referring to *jus cogens* to solve conflicts is in most cases, therefore, unnecessary. For the purposes of further discussion it will be accepted that there can be instances of irreconcilable conflict as proposed by normative hierarchy theory.

In what follows it will be shown that the functionality proposed for norms of *jus cogens* becomes, in many cases, rather unconvincing when one distinguishes between absolute rules, general rules and principles.

4.3.1 Principles as *jus cogens* norms?

In Chapter 3 it was observed that *jus cogens*, in its early stages of development, seemed to hold strong relation to general principles of morality.²⁰⁶ Such principles were seen as having the ability to invalidate agreements between states that were contrary to them. However, the perceived necessity of giving *jus cogens* norms direct legal effect led to the

²⁰⁶ See for example Verdross A 'Forbidden Treaties in International Law' (1937) 31 *American Journal of International Law* 572.

proposition that *jus cogens* encompasses specific identifiable peremptory norms that cannot be derogated from. This attempt to provide certainty to the functionality of *jus cogens* norms then led to the proposition that such norms must, by necessity, trump other norms in the event of irreconcilable normative conflict. It is precisely this drive for functional certainty that renders principles in particular as being incapable of *jus cogens* status.

The distinction between rules and principles above indicates how principles do not conflict with other principles and neither do they conflict with specific rules. Principles rather compel one to consider certain rules or give a basis for a decision where no specific rules exist that govern a specific situation. In sum, if a principle is said to be included in *jus cogens* then it will not, in any event, have the ability to trump a rule that it is supposedly in conflict with. The following example, tentatively illustrates how principles function in practice.

Many humanitarian interventions inherently hinge on the competition between two principles. The ‘preservation of peace’²⁰⁷ and the ‘protection of human rights’ are the two principles often seen to be in conflict here. The ‘balancing of interests’ consideration becomes evident here as neither of the two principles always prevails over the other. The outcome is always dependent on the effects of the intervention, the gravity of human rights violations and the risks that may be posed to international peace and security.²⁰⁸ This understanding is however not accepted by all authors. There are indeed many who are of the opinion that we should not accept military intervention for humanitarian reasons, as the rule in Article 2(4) of the UN Charter directly deals with this situation.²⁰⁹ Under this view, when there seems to be a conflict between a rule and principle, the rule will prevail as it is the more specific norm. This is however an extremely positivistic approach to the issue. Rules do not prevail over principles, this terminology is

²⁰⁷ See Declaration on Principles of International Law Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, where the principle is stated as, ‘[t]he principle that states shall settle their international disputes by peaceful means...’.

²⁰⁸ Peterson (note 189) at 289.

²⁰⁹ Article 2(4) of the UN Charter states that, ‘all members shall refrain in their international relations from the threat or use of force’. See also Peterson (note 189) at 290.

misleading. A principle is either applicable in giving content or meaning to a specific rule or it is not. The nature of principle is not to direct but to compel. This may be the proper function of principle, as without principles the meaning of rules would become ever more abstracted. Such abstraction may lead to a proliferation of rules in many areas of international law and legal adjudication would lose its ability to adapt to changing circumstances. In keeping with the above example, the principles of preservation of peace and protection of human rights are weighed against each other in controversial cases concerning humanitarian intervention. Therefore, an outcome to a controversial case can be reached due to the weighing up of principles and does not necessarily require the making of a new specific rule that can govern the situation absolutely.

Principles provide guidance in interpreting what rules are to mean in different situations and lead to more comprehensive and thoughtful judgments. In international constitutionalist thinking it is difficult to see how the system can function without the appreciation of the place of principle. In fact, a preoccupation with rule-making will lead to greater fragmentation amongst international legal regimes. The importance of principles for international law should therefore not be downplayed.

Systematic hierarchies propose certainty in the abstract. In other words, norms in a hierarchically superior relation to other norms must be more important than those norms in the abstract. What this implies for *jus cogens* is as follows: Principles are equal in the abstract and may only be given greater weight than any other principle in the concrete case. They can therefore never be seen as having hierarchical superiority. Principles do not in any event have the ability to trump either rules or principles that they are seemingly in conflict with. It is therefore extremely problematic, when looking at functional considerations, to consider principles as forming part of *jus cogens* under normative hierarchy theory.

4.3.2 General rules as *jus cogens* norms? The example of the prohibition on the use of force.

The prohibition on the use of force is an example of what may be termed a ‘general rule’. The norm cannot therefore be seen as an ‘absolute rule’, as it is subject to exceptions.²¹⁰ The question is whether the prohibition is capable of being a *jus cogens* norm. The position taken in this dissertation is that the inherent flexibility and uncertainty involved in the application of the norm seems to make it incompatible with the functionality of *jus cogens* norms proposed under normative hierarchy theory.²¹¹

The prohibition on the use of force is set out in Article 2(4) of the UN Charter. It states that: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations.’²¹² Many authors have taken the position that Article 2(4) represents a norm of *jus cogens*.²¹³ This position seems to stem from the fact that the Article is seen as the principle source of the rule.²¹⁴ It is however problematic to view the norm, in this specifically defined sense, as *jus cogens*.

Article 2(4) prohibits the use of force as well as the threat of use of force. If one is to take the position that Article 2(4) is itself peremptory then the prohibition on the threat of force must also be considered peremptory.²¹⁵ The problem with this is that the use of force is more concerning to states than the threat of force.²¹⁶ State practice indicates that such threats of force occur frequently without censure or even comment from the international community.²¹⁷ The practical effect of this is that there has been very little customary international legal development of the understanding of the threat of use of

²¹⁰ Kritsiotis (note 199) at 45-49.

²¹¹ Green JA ‘Questioning the Peremptory Status of the Prohibition of the Use of Force’ (2011) 32 *Michigan Journal of International Law* 225.

²¹² United Nations Charter, Article 2(4).

²¹³ See for example Schachter O ‘In Defense of International Rules on the Use of Force’ (1986) 53 *University of Chicago Law Review* 129.

²¹⁴ See for example Dinstein Y (2005) *War, Aggression and Self-Defence* Cambridge: Cambridge University Press 85.

²¹⁵ Green (note 211) at 226.

²¹⁶ See McCoubrey H & White N D (1992) *International Law and Armed Conflict* Michigan: Dartmouth 56, where it is stated that ‘[t]he world community is generally, and quite rightly, more concerned with the use of armed force...’.

²¹⁷ Green (note 211) at 226. There have however been specific instances where states have claimed that threats made against them have violated Article 2(4).

force.²¹⁸ The threat of force is not at this stage seen as peremptory. It would therefore be difficult to conclude that the prohibition as encompassed in Article 2(4) is a norm of *jus cogens*. In other words, Article 2(4) itself is not recognized and accepted by the international community as a norm from which no derogation is permitted.²¹⁹

Article 2(4) standing alone does not however account for the true functioning of the prohibition, as the prohibition is not absolute. The prohibition must therefore be seen within the context of the wider UN system as a whole.²²⁰ One should therefore view the prohibition as a general rule which is subject to exceptions. However, admitting exceptions to a norm within its application means further difficulties for seeing the norm as *jus cogens*.

Article 51 of the UN Charter permits states to use force in self-defence.²²¹ Article 42 allows the Security Council to authorize the use of force if it feels it is necessary, having identified a threat of the peace, breach of the peace or an act of aggression under Article 39.²²² These exceptions therefore imply that the unlawfulness of the use of force is precluded in the case of self-defence or collective security. Dealing with the prohibition in this sense necessarily means that there are instances where a state may legitimately use force. Therefore the prohibition on the use of force as a general rule cannot be seen as a norm from which no derogation is explicitly and uncontroversially permitted. The prohibition can therefore not be seen as having the ability to function as a norm of *jus cogens* under normative hierarchy theory. The norm cannot generally be seen as being of higher rank compared to other norms, as its contravention is not always unlawful.

The above reasoning may be extended to other norms that, within their application, are subject to exception or limitation. The right to life, for instance, is often cited as being an

²¹⁸ Green (note 211) at 227.

²¹⁹ See Mark Weisburd A (1997) *Use of Force: The Practice of States Since World War II* Pennsylvania: Pennsylvania State University Press 22, where it is pointed out that, '[i]f states violate the norm, and other states seem to be able to live with the violations, it is hard to see how the norm could be characterized as vital'.

²²⁰ Green (note 211) at 229.

²²¹ United Nations Charter, Article 51.

²²² United Nations Charter, Article 42.

example of a *jus cogens* norm.²²³ There are however instances where a person can lawfully deprive another of their life, for example, in self-defence. As the right is subject to limitation, it is difficult to conclude that it is a norm from which no derogation is permitted. Under this argument, the only way that aspects of the right to life can be a contender for *jus cogens* status is to rephrase it in terms of an absolute rule. One could rephrase the norm as ‘the prohibition on extrajudicial or arbitrary executions’. The problem with this norm is that it does not encompass the full scope of the right to life and the prohibition does not itself have sufficient state consensus to render it peremptory.

Another related problem applies to many human rights norms. The application of human rights, such as the right to life and the right to human dignity, often encompass positive obligations on states.²²⁴ Such underlying human rights norms cannot therefore be defined narrowly.²²⁵ The peremptory aspects of human rights norms must however be defined in sufficiently narrow terms as not to be subject to exception or limitation. As the peremptory aspects must be defined narrowly and cannot allow for derogation, they can therefore only entail negative obligations on states.²²⁶ This severely limits the human rights norms that can be seen as *jus cogens*. In sum, it is problematic to view norms that are subject to limitation or encompass positive obligations as norms of *jus cogens* under normative hierarchy theory.

4.3.3 Whole areas of international law as *jus cogens*?

There are some authors who have concluded that the *jus ad bellum* as a whole can be considered peremptory.²²⁷ This implies that it is not just the prohibition on the use of force that is peremptory but the totality of the rules relating to the use of force. As the

²²³ See for example *Victims of the Tugboat “13 de Marzo” v. Cuba*, Case 11.436, Inter-American Commission on Human Rights, Report No. 47/96, OEA/Ser.L/V/II.95, doc 7rev para 79 (1996).

²²⁴ See *Calvelli and Ciglio v. Italy* ECtHR Judgment of 17 January 2002, para 49, where the right to life was interpreted to encompass an obligation on states to adopt appropriate measures compelling hospitals to ensure the protection of people’s lives.

²²⁵ Vidmar J ‘Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?’ in De Wet E & Vidmar J (eds) (2012) *Hierarchy in International Law: The Place of Human Rights* Oxford: Oxford University Press 66.

²²⁶ *Ibid.*

²²⁷ Orakhelashvili (note 180) at 51.

peremptory aspect now includes the prohibition and its exceptions, one has to take into account the relations between a number of rules.²²⁸ It would be problematic here to suggest that there is a single norm that could be set out to encapsulate the entire functioning of *jus ad bellum*. Therefore the suggestion would be that *jus ad bellum* is a collection of norms, forming a ‘*jus cogens* network’, which would operate together to trump other areas of law.²²⁹

There is however a functional problem with this view. Many of the large number of rules have differing functions. The rules seen individually encompass varying degrees of obligation and many of the specific rules are not seen as rules from which no derogation is permitted. An example of a rule that is not considered peremptory is the reporting requirement in Article 51 of the UN Charter.²³⁰ The Article requires states to report actions that are taken in self-defence to the Security Council. The requirement is however not essentially mandatory, as a failure to report does not impact on the unlawfulness of the self-defence action.²³¹ The failure to report may indicate a possible unlawful use of force, but certainly does not confirm such unlawfulness.²³² The rule is assuredly not one from which no derogation is permitted and it therefore is not to be considered *jus cogens*.²³³ The totality of the rules of *jus ad bellum* cannot therefore be seen as *jus cogens*.

The same critique can be applied to other whole areas of law that have been posited as *jus cogens*. Some authors have suggested that the whole of human rights law can be

²²⁸ Green (note 211) at 230.

²²⁹ *Ibid* at 231. See also Kahgan C ‘*Jus cogens* and the Inherent Right to Self-Defence’ (1997) 3 *ILSA Journal of International and Comparative Law* 794, which alludes to ‘a regime concerning the use of armed force in interstate relations from which states are free to derogate’.

²³⁰ United Nations Charter, Article 51.

²³¹ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. V.U.S.) Judgment on the Merits, June 27 1986 I.C.J 14, 200, where it is noted that the reporting requirement is not a condition for the lawfulness of a customary law claim of self-defence. See also Green (note 211) 231.

²³² Green (note 211) at 232.

²³³ See Christenson GA ‘The World Court and *Jus Cogens*’ (1987) 81 *American Journal of International Law* 99, where it is stated that, ‘the requirement to report immediately to the Security Council any use of force in self-defense is not part of the customary norm of *jus cogens*’.

considered *jus cogens*.²³⁴ However, while human rights treaties may contain elements that are considered peremptory, this does not lead to all human rights being *jus cogens*.²³⁵

From the above discussion one can conclude that within a strict conception of normative hierarchy theory, only absolute prohibitions, such as the prohibitions on genocide, slavery and torture, are capable of being norms of *jus cogens*.²³⁶ Other international legal norms, that would require more flexible applications, do not have the ability, in general, to trump other norms that may be perceived to be in conflict with them.²³⁷ This severely limits the number of norms that have the ability to be *jus cogens* under most constitutionalist thought. These limits, when combined with the limits discussed in the previous chapter concerning the inapplicability of *jus cogens* norms in jurisdictional immunity cases, means that *jus cogens*, in general, is unlikely to be given extensive legal effect in international legal adjudication.

²³⁴ Parker K & Neylon B 'Jus Cogens: Compelling the Law of Human Rights' (1989) 12 *Hastings International and Comparative Law Review* 463.

²³⁵ D'Amato AD 'It's a Bird, It's a Plane, It's *Jus Cogens*' (1991) *Connecticut Journal of International Law* 1.

²³⁶ See Verdross (note 206) 571-572, where it is similarly stated that 'it is the quintessence of norms of this character that they prescribe a certain, positive or negative behaviour unconditionally'. See also Ford CA 'Adjudicating *Jus Cogens*' (1994-1995) 13 *Wisconsin International Law Journal* 164, where it is stated that slavery and genocide are uncontested as norms of *jus cogens*.

²³⁷ See Vidmar (note 225) at 67, '[i]t is significant that in the relevant literature a peremptory character is commonly ascribed to the 'prohibition of torture', 'prohibition of genocide', prohibition of slavery', and 'prohibition of racial discrimination', rather than to underlying human rights which lead to these prohibitions.'

Chapter 5: Conclusion.

The debate surrounding constitutionalism in international law has led to increased interest in the functioning and purpose of *jus cogens*. Primarily, it is the proposed superior status of norms of *jus cogens* that has led to the proposition that these norms may encompass international constitutional law to some extent.

The large amount of literature acknowledging the existence and importance of *jus cogens* has not been substantially supported in international judicial practice. The practical difficulties with the proposition of a normative hierarchy seems to be at the root of this disconnect. The proposition of peremptory norms that cannot be derogated from seems to have been taken by the courts to only encompass norms of fixed content. This has two important implications for the functioning of *jus cogens* norms in judicial practice.

Firstly, *jus cogens* only becomes applicable in judicial practice if states have contravened the substance of a *jus cogens* norm. Therefore, *jus cogens* does not seem to be applicable to procedural or jurisdictional issues. This severely limits the instances in which *jus cogens* is seen as being applicable.

Secondly, norms that are capable of having the effect of trumping other norms when in irreconcilable conflict are limited to those which are not subject to derogation in the absolute sense. Therefore, it is only norms such as the prohibitions on genocide, slavery and torture, which can never be lawfully contravened, that are capable of functioning as *jus cogens* under normative hierarchy theory.

There are of course understandings of *jus cogens* that do not see these norms as functioning in the direct hierarchical manner as proposed under normative hierarchy theory.²³⁸ Therefore there are conceptions of *jus cogens* that are not subject to the

²³⁸ Separate Opinion of Judge *ad hoc* Dugard in *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda) Jurisdiction and Admissibility (International Court of Justice 3 Feb 2006) at para 6-10, where the limited consequences of normative hierarchy are particularly addressed. Dugard indicated that *jus cogens* should not be used to overthrow accepted doctrines of international law. He also indicates that

criticisms of normative hierarchy. However within the constitutionalism debate there is a general trend that advocates for a direct legal effect to be given to *jus cogens*. It seems, however, that it is this perceived necessity for making *jus cogens* effective in this way that has led to its limited application. Static hierarchies, although providing an extremely clear method for solving conflict of norm issues, do not take into account the complexities involved in legal adjudication or application. Therefore normative hierarchy theory does not represent the true functioning of international law within conflict of norm scenarios. This is, in particular, reflected in the limited international case law concerning *jus cogens*.

The question now becomes whether there are understandings of *jus cogens* that may lead to a more effective application of such norms. Although this question is beyond the scope of this dissertation, it will continue to be an important consideration for future constitutional thought, as *jus cogens* remains an important concept for expressing how individual state power can be legitimately limited under international law.

jus cogens can also be used to guide judges to choose a certain principle or policy, ‘to arrive at a coherent conclusion that most effectively furthers the integrity of the international legal order.’

Bibliography

Books

- Alexy R (2002) *A Theory of Constitutional Rights* Oxford: Oxford University Press.
- Arsanjani et al (eds) (2011) *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* Leiden: Martinus Nijhoff Publishers.
- Ben-Naftali O (ed) (2011) *International Humanitarian Law and International Human Rights Law* Oxford: Oxford University Press.
- Boyle & Chinkin (2007) *The Making of International Law* Oxford: Oxford University Press.
- Brandom R (1998) *Making It Explicit: Reasoning, Representing, and Discursive Commitment* Harvard: Harvard University Press.
- Brownlie I (1990) *Principles of Public International Law* New York: Clarendon Press.
- Cassese A (2005) *International Law* (2nd ed) Oxford: Oxford University Press.
- Danilenko GM (1993) *Law-Making in the International Community* Netherlands: Martinus Nijhoff Publishers.
- De Wet E (2004) *The Chapter VII Powers of the United Nations Security Council* Hart Publishing: Oxford.
- De Wet E & Vidmar J (eds) (2012) *Hierarchy in International Law: The Place of Human Rights* Oxford: Oxford University Press.
- Dinstein Y (2005) *War, Aggression and Self-Defence* Cambridge: Cambridge University Press.
- Dugard J (2005) *International Law: A South African Perspective* (3rd ed) Lansdown: Juta.
- Dunoff JL & Trachtman JP (eds) (2009) *Ruling the World? Constitutionalism, International Law, and global Governance* Cambridge: Cambridge University Press.
- Dworkin R (1977) *Taking Rights Seriously* London: Gerald Duckworth.
- Fox H (2002) *The Law of State Immunity* Oxford: Oxford University Press.
- Joerges C & Petersman E (eds) (2011) *Constitutionalism, Multilevel Trade Governance and International Economic Law* Oregon: Hart Publishing.

Joerges C, Sand IJ & Teubner G (eds) (2004) *Transnational Governance and Constitutionalism* Oregon: Hart Publishing.

Klabbers J, Peters A & Ulfstein G (2009) *The Constitutionalization of International Law* Oxford: Oxford University Press.

Koehane R (2005) *After Hegemony: Cooperation and Discord in World Political Economy* Princeton: Princeton University Press.

Mark Weisburd A (1997) *Use of Force: The Practice of States Since World War II* Pennsylvania: Pennsylvania State University Press.

McCoubrey H & White N D (1992) *International Law and Armed Conflict* Michigan: Dartmouth.

Noortmann M (2005) *Enforcing International Law: From Self-Help to Self-Contained Regimes* Ashgate: Aldershot.

Orakhelashvili A (2006) *Peremptory Norms of International Law* New York: Oxford University Press.

Reus-Smit C (ed) (2004) *The Politics of International Law* Cambridge: Cambridge University Press.

Rokeach M (1973) *The Nature of Human Values* Michigan: Free Press.

Slaughter A (2005) *A New World Order* Princeton: Princeton University Press.

Suy E , Remarks in, Cassese A & Weiler JHH (1988) *Change and Stability in International Law-making* New York: de Gruyter 97.

Tomuschat C & Touvenin J (eds) (2006) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* Leiden: Martinus Nijhoff Publishers.

Upadhye S (2000) *The International Watercourse: An Exploitable Resource for the Developing Nation Under International Law* New York: Yeshiva University.

Journal Articles

Akehurst M 'The Hierarchy of the Sources of International Law' (1975) 47 *British Year Book of International Law* 283.

Breau SC 'The Constitutionalization of the International Legal Order' (2008) 21 *Leiden Journal of International Law* 545.

Caplan LM 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory' (2003) 97 *American Journal of International Law* 741.

Christenson GA 'The World Court and *Jus Cogens*' (1987) 81 *American Journal of International Law* 93.

Criddle EJ & Fox-Decent E 'A Fiduciary Theory of *Jus Cogens*' (2009) 34 *Yale Journal of International Law* 346.

D'Amato AD 'A Few Steps Toward an Explanatory Theory of International Law' (2009-2010) 7 *Santa Clara Journal of International Law* 2.

D'Amato AD 'It's a Bird, It's a Plane, It's *Jus Cogens*' (1991) *Connecticut Journal of International Law* 1.

Danilenko GM 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 *European Journal of International Law* 44.

De Wet E 'The International Constitutional order' (2006) 55 *International and Comparative Law Quarterly* 51.

De Wet E 'The Prohibition of Torture as an International norm of *Jus Cogens* and its Implications for National and International Customary Law' (2004) 15 *European Journal of International Law* 97.

Domingo R 'The Crisis of International Law' (2009) 42 *Vanderbilt Journal of Transnational Law* 1543.

Ferreira G & Ferreira-Snyman A 'The Constitutionalism of Public International Law and the Creation of an International Rule of Law: Taking Stock' (2008) 33 *South African Yearbook of International Law* 150.

Ford CA 'Adjudicating *Jus Cogens*' (1994-1995) 13 *Wisconsin International Law Journal* 149.

Green JA 'Questioning the Peremptory Status of the Prohibition of the Use of Force' (2011) 32 *Michigan Journal of International Law* 215.

Hall S 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 *European Journal of International Law* 292.

Kadelbach S & Kleinlein T 'International Law –a Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles' (2007) 50 *German Yearbook of International Law*.

Kahgan C ‘*Jus cogens* and the Inherent Right to Self-Defence’ (1997) 3 *ILSA Journal of International and Comparative Law* 764.

Koskenniemi M ‘Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought’ (2005) Harvard University, Keynote Speech, 5 March 2005 5.

Lauterpacht H ‘The Grotian Tradition of International Law’ (1946) 23 *British Yearbook of International Law*.

Lauterpacht H, *First Report on the Law of Treaties*, March 24, 1953, in ‘Documents of the 5th Session’ (1953) 2 *Year Book of the International Law Commission* 90 155-56 U.N.Doc. A/CN. 4/63.

Martin FF ‘Delineating a Hierarchical Outline of International Law Sources and Norms’ (2002) 55 *Saskatchewan Law Review* 333.

Meron T ‘On a Hierarchy of International Human Rights’(1986) 80 *American Journal International Law* 14.

Nys E ‘The Codification of International Law’ (1911) 5 *American Journal of International Law* 874.

Parker K & Neylon B ‘*Jus Cogens*: Compelling the Law of Human Rights’ (1989) 12 *Hastings International and Comparative Law Review* 411.

Paulus AL ‘*Jus Cogens* in a Time of Hegemony and Fragmentation’ (2005) 74 *Nordic Journal of International Law* 297.

Peters A ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden Journal of International Law* 579-610.

Peterson N ‘Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation’ (2008) 23 *American University International Law Review* 292.

Sassoli M & Olson L ‘The Relationship Between International Humanitarian and Human Rights Law: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts (2008) 90 *International Review of the Red Cross*.

Schachter O ‘In Defense of International Rules on the Use of Force’ (1986) 53 *University of Chicago Law Review* 113.

Schilling T ‘Constitutionalization of General International Law – An Answer to Globalization?’, (2005) *Emile Noel Fellows Forum* 1.

Shelton D 'Normative Hierarchy in International Law' (2006) 100 *American Journal of International Law* 291.

Simma B & Alston P 'The Sources of Human Rights law: Custom, *Jus Cogens* and General Principles' 12 *Australian Year Book International Law* 104.

Spijkers O 'What's Running the World: Global Values, International Law, and the United Nations' (2009-2010) 4 *Interdisciplinary Journal of Human Rights Law* 68.

Tomuschat C 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course in Public International Law'(1999) 281 *Recueil Des Cours* 161.

Verdross A 'Forbidden Treaties in International Law' (1937) 31 *American Journal of International Law* 571.

Von Bogdandy A 'Constitutionalism in International Law: Comment on a Proposal from Germany' (2006) 47 *Harvard International Law Journal* 223-242.

Voyiakis E 'Customary International Law and the Place of Normative Considerations' (2010) 55 *The American Journal of Jurisprudence* 166.

Other

Charter of the United Nations.

Draft Articles on State Responsibility (2001).

Draft Articles on the Responsibility of International Organizations (2011).

International Law Commission Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN. 4/L.682, 13 April 2006.

International Law Commission, *Report of the International Law Commission on the Work of its Fifty-Seventh Session*, U.N GAOR, 60th Sess., Supp. (No. 10) at ch. XI, U.N. Doc.A/60/10 (2005).

Remarks of Mustafa Kamil Yasseen (Iraq) in *Summary Records of the 17th Session*, 828th Meeting (1966) 1 *Y.B. Int'l L. Comm'n* 38, para 29, U.N. Doc A/CN. 4/156.

Remarks of Shabtai Rosenne (Israel), in *Summary Records of the 15th Session*, 685th Meeting (1963) 1 *Y.B. Int'l L. Comm'n* 73, para 4, U.N. Doc. A/CN. 4/156.

Statute of the International Court of Justice.

The Vienna Convention on the Law of Treaties.

UN Conference on the Law of Treaties, First Session (1968), *Official Records*, at 300.

UN Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (26 May 2004), at 11.

UN Sub-comm'n on the Promotion and Protection of Human Rights, Globalization and Its Impact on the Full Enjoyment of Human Rights, preliminary report submitted by J. Oloka-Onyando and Deepika Udagama, UN Doc. E/CN.4/Sub.2/2000/13, para. 63.

Vienna Declaration and Programme of Action on Human Rights, UN Doc A/CONF157/23 (1993).

List of Cases

Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 8 July 1996 (ICJ Reports 1996, 258).

Al-Adsani v. United Kingdom 21 October 2001, European Court of Human Rights, no. 35763/97 (*Reports of Judgments and Decisions 2001-XI*, 101).

Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda) Jurisdiction and Admissibility (Int'l Ct. Justice Feb. 3, 2006).

Barcelona Traction Light and Power Company Ltd (second phase) [1970] ICJ Rep 32.

Calvelli and Ciglio v. Italy ECtHR Judgment of 17 January 2002.

Ferrini v. Germany, No 5044/04, 87 (2004) *Rivista di diritto internazionale* 539, ILDC 19 (IT 2004), 128 ILR 659 (11 March 2004).

Guardianship of Infants Case, ICJ Reports (1958) 106-107 (Separate Opinion of Judge Morena-Quintana).

Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) ICJ Judgment of 3 February 2012 para 94.

Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion 9 July 2004 para 155.

Lozano v Italy, Appeal Judgment Case No 31171/2008, ILDC 1085 (IT 2008).

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) Judgment on the Merits, June 27 1986 I.C.J.

Oscar Chinn, 1934 PCIJ (ser. A/B) No.63, at 149-150 (Schücking, J. dissenting).

Prosecutor v. Furundzija (1998) International Criminal Tribunal of the Former Yugoslavia no. IT-95-17/1-T, 38.

South West Africa case (Ethiopia v. South Africa; Liberia v. South Africa), Second phase, Judgment [1966] ICJ Rep 298.

S.S. Lotus (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 18 (Sept 7).

Victims of the Tugboat "13 de Marzo" v. Cuba, Case 11.436, Inter-American Commission on Human Rights, Report No. 47/96, OEA/Ser.L/V/II.95, doc 7rev para 79 (1996).