
The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law

Erika de Wet*

Abstract

The article explores the validity of the Furundzija dictum in accordance with which jus cogens has to bind the state in its treaty relations and with respect to acts of the legislature, executive and judiciary. It mainly focuses on the implications of the prohibition of torture as a limitation to the national (constitutional) legislative process (an 'internal manifestation' of jus cogens), as well as to national legislation pertaining to sovereign immunity (an 'external manifestation' of jus cogens). The article also gives some indication of the role of jus cogens in determining the applicable law in conflict of law disputes and in fulfilling the double criminality requirement in extradition proceedings. In the process, it reflects the highly complicated nature between jus cogens and national law. For example, whereas the 'internal manifestation' can result in a strengthening of international norms within the national legal order, the 'external manifestation' has the potential to undermine the binding character of general international law, or even destabilize the international legal order itself. The article also exposes an emerging hierarchy of norms in international law, which is underpinned by a deepening of the international consensus pertaining to the content and hierarchical order of the international value system.

1 Introduction

In the case of the *Prosecutor v. Anto Furundzija*¹ the International Criminal Tribunal for the former Yugoslavia (ICTY) suggested *obiter dictum* that the violation of a *jus cogens*

* Associate Professor of Public International Law, University of Amsterdam, The Netherlands and *Privatdozentin* at the Faculty of Law, University of Zurich, Switzerland. The article was written in the context of the research project 'Interactions between International Law and National Law', funded by the Netherlands Organization for Scientific Research. The author would like to thank Ward Ferdinandusse, Hege Kjos, Jann Kleffner, Nikolaos Lavranos and, in particular, André Nollkaemper for their helpful comments on earlier drafts of this article.

¹ Case no. IT-95-17/1-T10, Trial Chamber, Judgment, 10 December 1998, available at <www.icty.org>.

norm, such as the prohibition against torture, had direct legal consequences for the legal character of all official domestic actions relating to the violation.²

The fact that torture is prohibited by a peremptory norm of international law has effects at the inter-State and individual levels. At the inter-State level, it serves to internationally delegitimise any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law . . . Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national body with a view to asking it to hold the national measures to be internationally unlawful; or the victim could bring a civil suit for damages in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorizing act. What is even more important is that perpetrators of torture who act upon or benefit from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. . . .

Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making powers of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad . . . It would seem that other consequences include the fact that torture may not be covered by a statute of limitations and must not be excluded from extradition under any political offence exemption.³

This broad view of the additional legal effects of peremptory norms, which could even include the abrogation of intra-state measures that obstruct the effective enforcement of a *jus cogens* norm, is a long way removed from the Vienna Convention on the Law of Treaties of 1969,⁴ which confined the application of *jus cogens* to unlawful international treaties. In accordance with the principles of treaty law, a treaty is null and void if it is concluded in conflict with a peremptory norm of general international law (i.e. *jus cogens*).⁵ State parties have to eliminate as far as possible the consequences of acts performed in reliance of provisions in conflict with the peremptory norm, and should bring their mutual relations into conformity with the peremptory norm.⁶

In the context of the prohibition against torture this would mean, for example, that any treaty that provides for the transfer of detainees from one country to another in

² See also I. D. Seiderman, *Hierarchy in International Law. The Human Rights Dimension* (2001), at 58; Dupuy, 'Normes internationales pénales et droit impératif (*jus cogens*)', in H. Ascencio (ed.), *Droit international pénal* (2000) 80.

³ *Furundzija*, *supra* note 1, at paras 155–157.

⁴ Reprinted in 8 *ILM* (1969) 679 *et seq.* [hereinafter the Vienna Convention].

⁵ Art. 53 of the Vienna Convention.

⁶ Art. 71 of the Vienna Convention; see also de Hoogh, 'The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective', 42 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1991) 190.

order to accommodate torture practices during questioning would be null and void.⁷ Where a treaty itself does not violate a *jus cogens* norm, but the execution of certain obligations under the treaty would have such effect, the state is relieved from giving effect to the obligation in question. The treaty itself would, however, not be null and void. For example, the obligations existing under an extradition treaty would fall away if it resulted in the extradition of a person to a country where he or she faced torture. The treaty itself would nonetheless remain intact.⁸

The question arises why norms which are powerful enough even to nullify treaty norms should not also directly impact national law, i.e. the intra-state actions of states and their agents. The inconsistency of an approach that limits the impact of *jus cogens* to treaty law is also reflected by the fact that the main threat to the protection of a *jus cogens* norm, such as the prohibition against torture, does not result from bilateral or multilateral treaties that facilitate its perpetration, but from acts of state organs or officials towards individuals or groups on their territory.⁹ Some authors regard this approach as an over-extension of the role and purpose of the notion of *jus cogens*. It has, for example, been argued that during the preparatory discussion of the International Law Commission (ILC) leading to the Vienna Convention, no attempts were made to extend this notion beyond the invalidation of incompatible treaties.¹⁰

However, it is doubtful whether any conclusion could be drawn from this fact, since the mandate of the drafters of the Vienna Convention was limited to issues of treaty law. It could thus not have been expected of them to deliberate on the possible role of *jus cogens* outside the treaty context. One also has to keep in mind that the development of international human rights law was still in an embryonic phase in 1969, as a result of which the potential consequences of the nature of these rights for the concept of *jus cogens* were not duly contemplated at the time the Vienna Convention was drafted. This situation changed significantly in the following years, when the impact of the International Bill of Rights and other international human rights treaties contributed to the elevation of certain fundamental rights, such as the prohibition against torture, to peremptory norms of international law.

As these rights by their very nature are directed at the protection of individuals within the territory of state parties, as opposed to regulating the relationship between

⁷ After the terrorist attacks in the United States on 11 September 2001, the United States were suspected of sending detainees suspected of involvement with the Al-Qaida network to countries in the Middle-East where they were tortured during questioning. See Ross, 'Daumenschrauben gefällig?', *Die Zeit*, 27.02.2003, at 8; cf. also Amnesty International Report, AMR 51/170/2001, available at www.amnesty.org.

⁸ E. Kornicker, *Ius Cogens und Umweltvölkerrecht* (1997), at 105.

⁹ Seiderman, *supra* note 2, at 56; Meron, 'On a Hierarchy of International Human Rights', 80 *AJIL* (1986) 14; Kornicker, *supra* note 8, at 8, 55.

¹⁰ Zimmermann, 'Sovereign Immunity and Violations of International Jus Cogens — Some Critical Remarks', 16 *Michigan Journal of International Law* (1995) 438.

states, one is forced to rethink the scope of application of the concept of *jus cogens*.¹¹ Since a violation of peremptory human rights norms could be brought about by any number of state acts, it would seem paradoxical not to extend the effects of such a violation as foreseen in the Vienna Convention to acts of state organs that have violated *jus cogens*.¹² At first sight, one could thus be tempted to agree with the dictum of the *Furundzija* decision that *jus cogens* has to bind the state both in its treaty relations and with respect to acts of the legislature, executive and judiciary.¹³

The purpose of the current article is to explore the validity of such conclusion. In doing so, it will not attempt to address all the potential implications of the broad *Furundzija* dictum, but will mainly focus on two very different manifestations of *jus cogens* in the national legal order. The first concerns *jus cogens* as a limitation to the national (constitutional) legislative process. This can also be described as an ‘internal manifestation’ of *jus cogens*, due to its predominantly intra-state impact. The second manifestation concerns *jus cogens* as a limitation to national law pertaining to sovereign immunity. As the issue of sovereign immunity by definition affects inter-state relations, this manifestation of *jus cogens* in the national legal order can be described as ‘external’.

The reasons for focusing on these particular national manifestations of *jus cogens* are threefold. First, it corresponds to a similar distinction that is emerging in state practice. Second, it gives some indication of the wide range of possibilities for applying *jus cogens* in national law as proposed by the *Furundzija* decision. This, in turn, reflects the highly complicated nature of the relationship between *jus cogens* and national law. For example, whereas the ‘internal manifestation’ can result in a strengthening of international norms within the national legal order, the ‘external manifestation’ has the potential to undermine the binding character of general international law, or even destabilize the international legal order itself. By illuminating these complexities, the author hopes to stimulate the debate pertaining to *jus cogens* on aspects which have thus far received scant attention in the literature.

Finally, it should be noted that whilst the article mainly focuses on the two national manifestations of *jus cogens* outlined here, reference is also made to other possible manifestations of *jus cogens* in the national order. These relate, in particular, to the role of *jus cogens* in determining the applicable law in conflict of law disputes, as well as in fulfilling the double criminality requirement in extradition proceedings.

¹¹ See Suy, ‘The Concept of Jus Cogens in International Public Law’, in *Conference on International Law, Lagnoisi (Greece), 3–8 April 1966, II Papers and Proceedings* (1966), at 26–29; Seiderman, *supra* note 2, at 56–57. He submitted that the resolution of the question regarding the extension of *jus cogens* to unilateral acts may turn upon whether the principles underlying *jus cogens* were confined to its explicit legal effect under the terms of the Vienna Convention, or whether a more normative approach was adopted. Cf. also Czaplinski, ‘Concepts of *jus cogens* and Obligations *erga omnes* in International Law in the Light of Recent Developments’, 23 *Polish Yearbook of International Law* (1997/1998) 88.

¹² Saladin, ‘Völkerrechtliches Ius Cogens und Schweizerisches Landesrecht’, in G. Jenny (ed.), *Die Schweizerische Rechtsordnung in Ihren Internationalen Bezügen* (1988) 73.

¹³ Saladin, *supra* note 12, at 74.

2 *Jus cogens* as a Limitation to the National Legislative (Constitutional) Process – The Swiss Example

An illuminating example of state practice of this type is Switzerland, where the Federal Constitution has since 1999 explicitly bound all levels of national law to *jus cogens*.¹⁴ The *de facto* recognition of this limitation to the national legislative process was already recognized in 1996, when both chambers of the Swiss Federal Parliament invalidated a People's Initiative (*Volksinitiative*) that proposed a constitutional amendment which violated the peremptory prohibition of *refoulement*.¹⁵ The People's Initiative, which was submitted to the federal authorities in July 1992, *inter alia* proposed a constitutional clause determining that asylum seekers who entered the country illegally would be deported summarily and without the possibility of appeal.¹⁶

In its official response to the People's Initiative in 1994, the Swiss Federal Government (i.e. the Federal Council) noted the peremptory character of the prohibition of *refoulement*.¹⁷ In accordance with this prohibition, states had to refrain from deporting or extraditing persons to a country where they would face torture or inhumane or degrading treatment. This, in turn, obliged states to investigate whether the deportation or extradition of a particular individual would have such effect.¹⁸ However, in accordance with the constitutional amendment proposed by the People's Initiative, such an investigation would not be possible as illegal immigrants would be deported summarily. As a result, persons who had left their countries of origin for reasons relating to persecution would face deportation to a state where they would be subjected to torture or inhumane or degrading treatment. This would constitute a violation of the peremptory prohibition of *refoulement* and thus one of the most elementary norms of international law. As respect for the fundamental norms of international law is inherent to the *Rechtsstaat*, a violation of these norms would undermine the *Rechtsstaat* itself and cause both the country and the individuals affected irreparable harm.¹⁹

Consequently the Federal Council suggested to the Parliament (*Bundesversammlung*) to declare the People's Initiative invalid.²⁰ The Parliament followed this suggestion in a decision of 14 March 1996, as a result of which the proposal contained in the People's Initiative did not form the subject of a referendum.²¹ In 1999 the recognition of peremptory norms of international law as a material limitation to the

¹⁴ See *infra* note 23.

¹⁵ Both chambers of the Federal Parliament declared the People's Initiative invalid. See *Bundesbeschluss über die Volksinitiative 'für eine vernünftige Asylpolitik'*, 14 March 1996, BBl 1996 I 1355. The text of the People's Initiative is reprinted in the Swiss Federal Council's *Botschaft über die Volksinitiativen 'für eine vernünftige Asylpolitik und gegen die illegale Einwanderung'*, in BBl 1994 III 1489. Hereinafter referred to as *Volksinitiative*. See also Kornicker, *supra* note 8, at 19.

¹⁶ *Volksinitiative*, *supra* note 15, at 1489.

¹⁷ *Ibid.*, at 1495, 1499. Cf. also the similar opinion of the *Ständerat* in *Amtliches Bulletin* 1992 S 1015, respectively.

¹⁸ *Volksinitiative*, *supra* note 15, at 1498.

¹⁹ *Ibid.*, at 1496, 1499.

²⁰ *Ibid.*, at 1500.

²¹ *Ibid.*

legislative (constitutional) process was taken a step further in that it gained explicit constitutional recognition.²² The revised Swiss Federal Constitution of 1999 explicitly states that no People's Initiative aimed at constitutional amendment may be in conflict with the norms of *jus cogens*.²³ Any initiative that is in violation of *jus cogens* has to be invalidated by the Swiss authorities.²⁴

When formulating its aforementioned position on the People's Initiative in 1994, the Federal Council acknowledged that the notion of external material limitations to the national legislative (constitutional) process had only developed in recent years.²⁵ For example, when considering the legality of the *Rheinau* People's Initiative of 1953, the Federal Council still claimed that there was no external limitation to the constitutional process that could be regarded as superior to the will of the people and the cantons.²⁶ Such a limitation would only exist if Switzerland had formed part of a larger state that determined the framework within which the federal constitution could be amended.²⁷

In that particular instance, the People's Initiative proposed a constitutional amendment that would have resulted in the inclusion of a constitutional obligation to protect the country's natural resources. This obligation would also have been accompanied by a transitional clause that ensured its retroactive effect, thereby revoking a concession for the building of the *Rheinau* power plant in the *Rheinfall-Rheinau* area.²⁸ Even though such a revocation would have resulted in a violation of an international agreement to which Switzerland was bound, the Swiss Federal Council was not willing to regard this agreement as a material limitation to constitutional reform.²⁹ Instead, it noted that an acceptance of the People's Initiative

²² For a discussion, see Thürer 'Verfassungsrecht und Völkerrecht', in D. Thürer *et al.* (eds.), *Verfassungsrecht der Schweiz* (2001) 179, and sources quoted.

²³ 'Artikel 139 Volksinitiative auf Teilrevision der Bundesverfassung
3. Verletzt die Initiative die Einheit der Form, die Einheit der Materie oder zwingendes Völkerrecht, so erklärt die Bundesverfassung sie für ganz oder teilweise ungültig'.

'Artikel 193 Totalrevision

4. Die zwingenden Bestimmungen des Völkerrechts dürfen nicht verletzt werden.'

'Artikel 194 Teilrevision

2. Die Teilrevision muss die Einheit der Materie wahren und darf die zwingenden Bestimmungen des Völkerrechts nicht verletzen.'

²⁴ Whether such an initiative would be null and void automatically is disputed. Several international lawyers seem to agree that this is a question to be regulated by the constitutional order of the state. On the international level, the state adopting a law in violation of *jus cogens* would incur state responsibility and be under an obligation to abrogate this law. Schindler, 'Die Schweiz und das Völkerrecht', in A. Riklin *et al.* (eds), *Neues Handbuch der schweizerischen Aussenpolitik* (1992) 116; Saladin, *supra* note 12, at 73–74, 85; Meron, *supra* note 12, at 21. Cf. also J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (1974), at 68; Seiderman, *supra* note 2, at 57; concurring opinion of Judge Cançado Trindade in the *Barrios Altos* case (*Chimipuma Aguirre et al. v. Peru*), Inter-American Court of Human Rights, Judgment, 14 March 2001, para. 11, reprinted in 41 *ILM* (2002) 43 *et seq.*

²⁵ *Volksinitiative*, *supra* note 15, at 1495.

²⁶ BBl 1954 I 72.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

in a referendum would oblige the Swiss Federal Government to terminate any conflicting international agreement.³⁰

It is important to note that these statements were made in relation to international obligations that resulted from international treaties that could be legally terminated by the state parties. In formulating its 1994 position, the Federal Council explicitly distinguished such treaty obligations from *jus cogens* obligations which could not be terminated by means of a treaty procedure or any other legal act (*Rechtsakt*).³¹ When evaluating the *Rheinau* initiative of 1953, the Swiss Federal Council did not make any reference to the notion of *jus cogens* and its potential implications for national law. This is understandable, however, if one considers that the development of the concept only gained momentum after the adoption of the Vienna Convention in 1969.

Until 1994, Switzerland mainly acknowledged the overriding effect of peremptory norms in the treaty context, as is reflected by a series of extradition proceedings in the 1980s.³² The introduction of *jus cogens* as a limitation to the Swiss legislative (constitutional) process thus constituted somewhat of a novelty. The Federal Council did not, however, engage in a lengthy explanation of its motives for doing so, apart from underlining the importance of the norms at stake for the existence of the *Rechtsstaat*. The implication therefore is that the (Swiss notion of the) *Rechtsstaat* itself contained certain peremptory and unalterable norms, including the prohibition of *refoulement* and that this national origin of the most elementary norms of international law would suffice for applying the concept of *jus cogens* to national legislation.³³ Similarly, the explicit recognition of *jus cogens* as a limitation to the national legislative process in the revised Federal Constitution of 1999 did not spark any controversy within Parliament. The negotiating history of the relevant clauses reveals that their inclusion was regarded as a natural, i.e. consistent outflow of the

³⁰ *Volksinitiative*, *supra* note 15, at 1495. See also similar statements in relation to other People's Initiatives concerning the implications of obligations resulting from an international treaty, in BBl 1974 II 1133 *et seq.*; BBl 1969 II 1055, BBl 1974 I 211; BBl 1976 I 1358.

³¹ *Volksinitiative*, *supra* note 15, at 1495, 1498.

³² In the first of these decisions in 1982 (BGE 108 Ib 412), the Swiss Federal Supreme Court refused to give effect to an extradition request by Argentina, despite an existing extradition agreement between the two countries, for fear that the persons affected may be subjected to torture or inhumane or degrading treatment. Although mainly relying on Article 3 of the European Convention of Human Rights, it also described the prohibition of torture as a 'general principle of law' that had to be taken into account during extradition proceedings. By 1985 (BGE 111 Ib 142), when considering an extradition request by Tunisia, the Federal Supreme Court explicitly stated that the prohibition of torture and *refoulement* constituted elements of the *ordre public international*, which would constitute a synonym for *jus cogens*.

³³ Cf. the decision of *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, File No. 27790, 22 May 2002, 41 *ILM* (2002), at 975–976, para. 60 and paras 75–78. In this case, which concerned the deportation of a refugee to a country where there was a risk of torture, the Canadian Supreme Court did not regard itself directly controlled by (peremptory) norms of international law. In rejecting torture as not in conformity with the principles of fundamental justice, the Court first and foremost looked at Article 7 of the Canadian Charter of Rights and Freedoms. The *jus cogens* nature of the torture prohibition merely served to reaffirm the conclusion reached on the basis of national law. On the one hand, the Canadian Supreme Court thus rejected the notion that *jus cogens* norms override national law. At the same time, however, it alluded to the existence of national peremptory norms, which find resonance in the international legal order.

precedent created by the Federal Parliament in 1996.³⁴ The Swiss Federal Council and the Parliament thus seemed to regard themselves as bound by peremptory norms of international law as a matter of course.

From the perspective of international law one could argue that this intra-state commitment to *jus cogens* would not necessarily have any added value, as it does not secure any obligations which are not already secured by customary international law. It is a well accepted principle of international law that states cannot rely on national (constitutional) law to evade obligations under international law.³⁵ States would therefore also be obliged to effect constitutional reforms within the boundaries provided for by all elements of customary international law and not only those norms that constitute *jus cogens*. In fact, one could claim that such an explicit intra-state commitment to peremptory norms of international law could have counter-productive effects, as it would imply that the legislature would not be bound to customary law that does not constitute *jus cogens*, but could follow it at its own discretion.³⁶

The Swiss practice indicates that the Swiss authorities do, in general, accept the precedence of international law obligations over national law. The Swiss Federal Supreme Court has taken the position that in the case of conflicting obligations arising from national and international law respectively, the latter enjoys precedence, unless the national legislature explicitly intended to adopt contradicting legislation.³⁷ Although this position has been the subject of criticism, legal writers acknowledge that such a violation of international law can be necessary under exceptional circumstances. This could be the case, for example, where binding decisions of international law violated core aspects of the constitutional order or fundamental human rights.³⁸ In such an instance, it may be politically impossible to execute the international obligation on the national level, even though this would not free the country from its state responsibility under international law.

Although these types of conflicts remain academic for the time being,³⁹ they do illustrate the latent tension between obligations under international (customary) law and the lack of democratic legitimacy of such obligations, especially in countries with a long history of direct democracy. Seen from this perspective, one could regard the *jus cogens* obligations in the Swiss Federal Constitution as an ‘emergency break’ aimed at

³⁴ Concerning the debates in the two houses of the Federal Parliament, see comments of Fritsch, *Amtliches Bulletin (Separatdruck: Reform der Bundesverfassung)* (1998) N 51; and Frick, *Amtliches Bulletin (Separatdruck: Reform der Bundesverfassung)* (1998) S 120.

³⁵ Arts 26 and 27 of the Vienna Convention, *supra* note 7; see also Thürer, *supra* note 25, at 188.

³⁶ See *infra* Section 4.A.

³⁷ The so-called ‘*Schubert-Praxis*’ was introduced in BGE 99 1b 39 and affirmed in BGE 111 V 201; BGE 112 II 13; BGE 116 IV 269 and BGE 117 IV 128. The *Schubert* case concerned the potential conflict of legislation regulating the acquisition of property in Switzerland by persons abroad with a Swiss-Austrian bilateral agreement. See also Thürer, *supra* note 22, at 189–190; Cottier and Hertig, ‘Das Völkerrecht in der neuen Bundesverfassung: Stellung und Auswirkung’, in U. Zimmerli (ed.), *Die neue Bundesverfassung. Konsequenzen für Praxis und Wissenschaft* (2000) 13 *et seq.*

³⁸ Thürer, *supra* note 22, at 191; cf. also Cottier and Hertig, *supra* note 37, at 17.

³⁹ In practice, most conflicts between national and international law are resolved by means of an international law-friendly interpretation.

securing respect for these obligations even in the face of popular protest. It is not intended to weaken the force of international (customary) law in the national legal order, but to ensure that the elementary elements of the international order are respected at all times — based on the premise that these norms are essential for the very existence of the democratic legal order itself.⁴⁰

3 *Jus cogens* as a Limitation to National Legislation on State Immunity

The peremptory character of the prohibition against torture has also been relied upon in national courts to override national legislation that concretizes customary norms pertaining to sovereign immunity. This particular application of *jus cogens* on the national level distinguishes itself from that in the previous section in two respects. The following passages will illustrate that the first concerns the content of the peremptory obligation itself, whereas the second relates to the scope of the impact that the national application of the torture prohibition effects. A well-known case which illustrates these differences is *Princz v. The Federal Republic of Germany*,⁴¹ which concerned a civil compensation claim for the torture that Mr. Princz suffered at the hands of the Nazi regime during the Second World War.

In the *Princz* case the District Court for the District of Columbia concluded that the United States government needed to recognize *jus cogens* violations as an implied waiver of sovereign immunity in accordance with §1605(2)(a) of the Foreign Sovereign Immunities Act (FSIA).⁴² This section provides that a foreign state will not be immune if it has waived its immunity either explicitly or by implication.⁴³ According to the District Court, Congress could not have intended to allow Germany — which did not recognize Mr. Princz's United States citizenship in 1942 — to raise immunity subsequently as a shield against liability.⁴⁴ Since international law is part of United States law, federal courts would have to interpret the FSIA consistently with

⁴⁰ It is noteworthy that Swiss writers suggest that the notion of peremptory norms should be interpreted broadly on the national level. National authorities should regard the internationally recognized *jus cogens* norms as a minimum standard to be complemented by other international norms of exceptional importance. Cf. Thürer, *supra* note 22, at 184–185; Cottier and Hertig, *supra* note 37, at 19–20.

⁴¹ 26 F 3d at 1168.

⁴² 28 U.S.C. § 1605(1)(a).

⁴³ The exceptions provided for in §1605 FSIA give the only basis on which United States federal courts will exercise jurisdiction over a foreign state. See *Argentine Republic v. Amerada Hess Shipping Corporation* 109 S Ct. 683 (1989); Bergen, 'Princz v. The Federal Republic of Germany: Why the Courts Should Find that Violating Jus Cogens Norms Constitutes an Implied Waiver of Immunity', 14 *Connecticut Journal of International Law* (1999) 176.

⁴⁴ 813 F Supp. 26 (D.D.C. 1992). The District Court further held that Mr. Princz's case involved extraordinary facts that were not before the Supreme Court when it determined *Argentine Republic v. Amerada Hess Shipping Corporation* 488 U.S. 428, 432 *et seq.* (1989), and were not contemplated by Congress when it enacted the FSIA. The plaintiff in the *Amerada Hess* case was a shipping corporation that sent an empty oil tanker in May 1982 from the Virgin Islands to Alaska. Although this was during the war between Great Britain and Argentina over the Falkland Islands, both of the warring parties were notified of the tanker's presence and purpose. Off the Argentine coast, but well in international waters,

international law. Consequently the only way in which the statutory regime of the FSIA could be reconciled with international law would be to allow *jus cogens* violations to constitute an implied waiver of sovereign immunity.⁴⁵

A comparable conclusion was drawn by the Court of First Instance of Levadia, Greece, in the so-called *Distomo* decision of 1997.⁴⁶ Several private actors submitted a compensation claim against Germany for the massacre of 218 civilians and the destruction of their property by members of the SS in June 1944.⁴⁷ The Court waived the Greek legislation regulating the sovereign immunity of Germany on the basis that a sovereign state could not reasonably expect to receive immunity for grave violations of international law that amount to a violation of *jus cogens* norms.⁴⁸ It considered it to be illogical to uphold sovereign immunity in the face of *jus cogens* violations, as these violations are theoretically illegal under the laws of every sovereign nation.⁴⁹ Sovereign immunity was not intended to enable a sovereign to escape accountability for prohibited acts such as torture, but to enable it to pursue responsibly the nation's mission without fear of adjudication. By granting immunity to a state that has violated a rule of *jus cogens*, a court is recognizing a sovereign right which, in effect, could not exist because the state is not acting as a sovereign. This, in turn, would amount to a collaboration by the court with respect to the offence in question, as it sends a clear message to perpetrators of violators of *jus cogens* norms that the international community is turning a blind eye to continued and future impunity.⁵⁰

In essence, the *Princz* and *Distomo* Courts of First Instance assumed that the stronger normative quality of the *jus cogens* prohibition of torture would extinguish all colliding non-peremptory norms.⁵¹ Consequently, a conflict between the peremptory

the tanker was attacked by Argentine aircraft and, though not destroyed, eventually had to be tanked off the coast of Brazil. While the Second Circuit found that the attack of a neutral ship in international waters without apparent justification was a clear violation of international law, the Supreme Court found Argentina to be immune from suit under the FSIA.

⁴⁵ Cf. also the Dissenting Opinion of Judge Wald, in the Court of Appeal, *infra* note 58, at 1181 *et seq.* Judge Wald found support for the view that a state waived its sovereign immunity when violating a norm of *jus cogens* in the establishment of the Nuremberg Trials, as well as the ICTY. See Bergen, *supra* note 46, at 174–175; Horowitz, 'Regina v. Bartle and the Commissioner of Police for the Metropolis and other *ex parte Pinochet*: Universal Jurisdiction and Sovereign Immunity for Jus Cogens Violations', 23 *Fordham International Law Journal* (1999) 523; Johnson, 'A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity under the Federal Sovereign Immunities Act', 19 *Maryland Journal of International Law and Trade* (1995) 285; Lieberman, 'Expropriation, Torture, and Jus Cogens under the Foreign Sovereign Immunities Act: *Siderman De Blake v. Republic of Argentina*', 24 *Inter-American Law Review* (1993) 534.

⁴⁶ *Prefecture of Voiotia v. Federal Republic of Germany*, Case 137/1997, summarized by Bantekas, 92 *AJIL* (1998) 765 *et seq.* [hereinafter referred to as the *Distomo* case].

⁴⁷ For a discussion of the legal consequences of the *Distomo* case, *supra* note 49, see Kempen, 'Der Fall *Distomo*: griechische Reparationsforderungen gegen die Bundesrepublik Deutschland', in H.-J. Cremer *et al.* (eds), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger* (2002) 179 *et seq.*

⁴⁸ *Distomo* case, *supra* note 46, at 766. See also Horowitz, *supra* note 45, at 510.

⁴⁹ *Distomo* case, *supra* note 46, at 766; Horowitz, *supra* note 45, at 523; Lieberman, *supra* note 45, at 534.

⁵⁰ *Distomo* case, *supra* note 46, at 766; Horowitz, *supra* note 45, at 523.

⁵¹ A similar argument was forwarded in the Dissenting Opinion of Judges Rozakis and Callisch in the decision *Al-Adsani v. United Kingdom*, European Court of Human Rights, Judgment, 21 November 2001, at para. 3, available at <www.coe.int>. In this particular case, the plaintiff (unsuccessfully) initiated a claim for compensation in the United Kingdom against the Government of Kuwait, where he was

prohibition of torture and the (ordinary) customary rule of sovereign immunity would result in the prevailing of the former over the latter.⁵² The reference to the near universal illegality of torture in national jurisdictions in the *Distomo* case is misleading, as it is unlikely that the Court relied on this fact alone to disqualify the prohibition of torture from being covered by sovereign immunity. For if that had been the case, it would imply that all universally outlawed acts had to be elevated to international crimes which fell outside the scope of sovereign immunity. It is hardly likely, however, that states engaging in theft, bribery or blackmail would be denied sovereign immunity in a foreign court on the basis that these acts were criminalized in virtually all national jurisdictions. It is therefore fair to conclude that the Court in *Distomo* was motivated by the hierarchically superior nature of the prohibition of torture and the assumption that a norm of such peremptory normative quality would trump any conflicting non-peremptory norm.

In addition to accepting the overriding normative quality of the prohibition of torture, the *Princz* and *Distomo* Courts of First Instance further assumed that there indeed existed a conflict between the prohibition of torture and sovereign immunity. However, this would only be the case if the scope of the peremptory prohibition against torture included the obligation to grant torture victims the possibility to enforce their right to compensation.⁵³ It is doubtful, however, whether this is indeed the case, as such a broad interpretation of the prohibition of torture is not supported by widespread and consistent state practice.⁵⁴ This is most likely one of the main reasons why the reasoning of these two courts has so far not survived the scrutiny of higher courts.

In the *Princz* case, the majority within the Court of Appeal was of the opinion that the implied waiver to the FSIA depended on whether the foreign government indicated its amenability to suit.⁵⁵ The examples provided for in the FSIA's legislative history in connection with the notion of an implied waiver all concerned litigation in one form or another. In particular, they included agreement by the foreign state to arbitration, that a particular country's law should govern a contract, or the filing of a

allegedly tortured by the Kuwaiti intelligence services. According to the minority, the acceptance of the *jus cogens* nature of the prohibition of torture entails that a state allegedly violating it cannot invoke hierarchically lower rules to avoid the consequences of the illegality of its actions. Compare also Tams, 'Schwierigkeiten mit dem Jus Cogens', 40 *Archiv des Völkerrechts* (2002) 333 *et seq.*; Voyakis, 'Access to Court v State Immunity', *ICLQ* (2003) 318 *et seq.*; Reece-Thomas and Small, 'Human Rights and State Immunity: Is there Immunity from Civil Liability for Torture?', 1 *Netherlands International Law Review* (2003) 13 *et seq.*

⁵² Tams, *supra* note 51, at 340.

⁵³ *Ibid.*, at 339; Voyakis, *supra* note 51, at 320.

⁵⁴ Tams, *supra* note 51, at 342–343. He also notes that international human rights treaties refer to these obligations in separate articles, which implies that they constitute separate and distinct obligations. For example, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 [hereinafter the Torture Convention] provides for the prevention of torture in Article 2 and the obligation to provide legal protection in Articles 5, 7 and 14. See also the decision of the German Federal Supreme Court (*Bundesgerichtshof*) BGH III ZR 245/98 of 26 June 2003, at 8.

⁵⁵ 26 F 3d at 1174.

responsive pleading by the foreign country without raising an immunity defence.⁵⁶ Mr. Princz's failure to allege that the German government or its predecessor had indicated any consent to waive its immunity for the atrocities committed during the Nazi regime doomed his *jus cogens* claim.⁵⁷ In the *Princz* case the Court of Appeal did not explicitly deal with the question whether the scope of the preemptory prohibition against torture included an obligation to provide torture victims with the possibility to enforce a civil compensation claim. Instead, it relied on the language and history of FSIA.⁵⁸ It would nonetheless be fair to conclude that if the majority had supported such an extensive interpretation of the *jus cogens* prohibition of torture as well as its hierarchical implications, it would have come to a different conclusion.

The *Distomo* case would arguably also not provide strong evidence for the existence of a preemptory obligation to grant torture victims a legal avenue for the enforcement of compensation claims — despite the fact that the Greek Supreme Court (*Areios Pagos*) effectively confirmed the decision of the Court of First Instance.⁵⁹ The Supreme Court claimed the existence of a new rule of customary international law, in accordance with which states could not rely on sovereign immunity for those violations of international law which its organs committed while present in the territory of the *forum* state.⁶⁰ The Court thus seemed to rely on the existence of a *customary international exception* to sovereign immunity in instances where the *forum*

⁵⁶ *Princz*, *supra* note 55, at 1174. See also *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F. 3d 243 (2d Cir. 1997). The three waivers listed in the legislative history of the FSIA had a connection to litigation; Bergen, *supra* note 43, at 173, 178. Cf. also *De Negri v. The Republic of Chile*, 1992 WL 91914 at 3-5; H.R. Rep. No. 1487, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S.C.C.A.N., at 18; Lieberman, *supra* note 45, at 534; Bergen, *supra* note 43, at 173, 178; Johnson, *supra* note 45, at 267; Horowitz, *supra* note 45, at 511.

⁵⁷ *Princz*, *supra* note 55, at 1174.

⁵⁸ For a similar approach, see the unpublished decision of the English Court of Appeal, *Al-Adsani v. Government of Kuwait and Others*, judgment, 12 March 1996 in 107 ILR (1997) 542.

⁵⁹ Decision of 20 January 2001, discussed in Kempen, *supra* note 47, at 181 *et seq.*

⁶⁰ Kempen, *supra* note 47, at 184–185. As evidence of this new state practice, it referred to the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Properties, at Art. 12, reprinted in *Yearbook of the International Law Commission* (1991 II/2) 44. Other indications of the emergence of such a practice is the European Convention on State Immunity of 1972 (Basle Convention). In accordance with sec. 5, a contracting state cannot claim immunity from the jurisdiction of another contracting state in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the state of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred. The Basle Convention has, however, only been ratified by eight states. Cf. also the International Law Institute's Resolution concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, at para. 2(e), reprinted in *Annuaire de l'Institut de Droit International* (1992) 223. Limited exceptions to sovereign immunity with respect to civil claims resulting from acts committed within the *forum* state can be found in, *inter alia*, the United Kingdom State Immunity Act, 17 ILM (1978), at 1132 and the Canadian State Immunity Act, 21 ILM (1982), at 798.

state coincided with the state on whose territory the illegal behaviour occurred, rather than on the hierarchical nature and scope of the prohibition against torture.⁶¹

Furthermore, if one indeed accepted the peremptory character of the obligation to provide torture victims with a legal avenue to enforce compensation claims, a consistent application of this hierarchically superior norm would imply that it also prevailed over sovereign immunity from execution.⁶² In the normal course of events, customary international law allows for execution of decisions against those assets of a sovereign in the *forum* state which are used for commercial activity.⁶³ In the event that these assets would not suffice to cover a civil claim for damages resulting from torture, the court would have to waive the immunity of execution against non-commercial assets, as anything less would severely undermine the credibility of the *jus cogens* nature of the civil claim for compensation.⁶⁴

However, if national courts were to allow execution against assets necessary for the official functioning of the foreign government in the *forum* state, it could have a severe impact on the basic framework for the conduct of international relations.⁶⁵ As international cooperation — including cooperation with a view to eradicating torture — presupposes the existence of such a framework, the ultimate impact of what may initially come across as a consistent and efficient enforcement of peremptory norms of international law, may prove to be counter-productive.⁶⁶ This is most likely also the

⁶¹ But see *Germany v. Margellos*, Case No. 6/17-9-2002, Supreme Special Court, Judgment, 17 September 2002, at para. 14 (unpublished). In this decision, the facts of which were comparable to those of the *Distomo* decision, *supra* note 49, the Supreme Special Court determined that such an exception was not supported by a widespread and consistent state practice, regardless of whether the acts constituted a violation of *jus cogens* norms or not. Although this decision was handed down by the highest court in Greece, it did not have any direct consequences for the *Distomo* ruling, which was rendered at an earlier point in time. It does, however, settle the Greek legal position with respect to future cases of this nature. Cf. also *McElhinney v. Ireland*, European Court of Human Rights, Judgment, 21 November 2001, at para. 38. The Court observed that there appears to be a trend in international and comparative law towards limiting immunity in respect of personal injury caused by an act or omission within the forum state, but that it is not sufficient to constitute customary law. Cf. *Kalogeropoulou and others v. Greece and Germany*, European Court of Human Rights, Admissibility, 12 December 2002, at para. D.1.a. See also Maierhöfer, 'Der EGMR als Modernisierer des Völkerrechts? — Staatenimmunität und ius cogens auf dem Prüfstand/ Anmerkung zu den EGMR-Urteilen Fogarty, McElhinney und Al-Adsani', 29 *Europäische Grundrechte Zeitschrift* (2002) 395; Gattini, 'To what Extent are State Immunity and Non-justiciability Major Hurdles to Individuals' Claims for War Damages?', 1 *Journal of International Criminal Justice* (2003), 359 *et seq.*

⁶² Tams, *supra* note 51, at 345.

⁶³ Kempen, *supra* note 47, at 183; cf. also Johnson, *supra* note 45, at 286.

⁶⁴ Cf. the Concurring Opinion of Judge Pellonpää, in *Al-Adsani*, *supra* note 51.

⁶⁵ Concurring Opinion of Judge Pellonpää in *Al-Adsani*, *supra* note 51; see Maierhöfer, *supra* note 61, at 397, who questioned the wisdom of the seizing of embassies and other state property that is necessary for international cooperation; see also Tams, *supra* note 51, at 345–346.

⁶⁶ Cf. also the Concurring Opinion of Judge Pellonpää in *Al-Adsani*, *supra* note 51; Maierhöfer, *supra* note 61, at 396–397.

reason why the Greek Minister of Justice has not yet given the necessary permission⁶⁷ for execution of the *Distomo* decision against German assets in Greece.⁶⁸

Some authors also highlight the possibility of abuse, as states could use the ambiguous nature of *jus cogens* norms to deny sovereign immunity for reasons not relating to *jus cogens*.⁶⁹ As a result, states could be confronted with a variety of claims in foreign courts, some of which may be of a pretextual nature.⁷⁰ On the one hand, this fear could come across as exaggerated. As a rule does not become *jus cogens* until the international community as a whole recognizes it as a rule that permits no derogation,⁷¹ courts would hesitate before labelling a violation as *jus cogens* at its own discretion in order to avoid immunity and prosecute an individual that has not violated an established peremptory norm.⁷² In other words, the narrowness of the waiver of immunity and that of *jus cogens* are complementary. Since only a small number of international law norms fit the description of peremptory norms, the inclusion of peremptory norms as a basis for an (implicit) waiver of immunity would only affect a small category of acts.⁷³

The risk of political abuse would nonetheless exist in the sense that proceedings of this nature will most likely only be instituted against less powerful states. For example, it is not very likely that a permanent member of the Security Council would face civil claims in foreign courts for damages resulting from the violation of *jus cogens* norms.⁷⁴

⁶⁷ In accordance with sec. 923 of the Greek Civil Procedure Code, execution against the assets of a foreign country is dependent on an affirmative decision of the Minister of Justice. Cf. Kempen, *supra* note 47, at 182.

⁶⁸ Assets that would be affected include the German Goethe Institute, the German Archeological Institute and the German school in Athens. See Kempen, *supra* note 47, at 181, 183. For similar reasons, former President Clinton suspended the application of a further amendment to the FSIA, which would allow United States victims of state sponsored terrorism to attach and execute judgments against a foreign state's diplomatic or consular properties. The amendment is contained in §177 of the Treasury and General Government Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105–277, 122 Stat. 2681 (1998). See also the former President's Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, 34 *Weekly Comp. Pres. Doc.* 2108, 2133 (23 Oct. 1998). Cf. also the Concurring Opinion of Judge Pellonpää in *Al-Adsani*, *supra* note 51.

⁶⁹ Zimmermann, *supra* note 10, at 439.

⁷⁰ *Ibid.*, at 439; Maierhöfer, *supra* note 61, at 397–398.

⁷¹ The large majority of states implied by this requirement also includes majorities in each grouping of states. See *Yearbook of the International Law Commission* (1976, II), at 119. Seiderman, *supra* note 2, at 164; *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929 at 940 (D.C. Circ. 1988); Saladin, *supra* note 12, at 71; Meron, *supra* note 9, at 9. See also Teraya, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable rights', 12 *EJIL* (2001) 928.

⁷² Horowitz, *supra* note 45, at 524; Bergen, *supra* note 43, at 200.

⁷³ Lieberman, *supra* note 45, at 534–535.

⁷⁴ According to Zimmermann, *supra* note 10, at 439, the lifting of sovereign immunity in a court of one state may lead to retaliation in the courts of other states — some of whom do not enjoy independence from the government in place. In such situations the national courts might then be induced to render judgments against the other country purely according to the political situation prevailing between them.

This could result in the perception that *jus cogens* is merely an instrument in the hands of the powerful against the weak, which would be severely detrimental to the legitimacy and further development of the concept of *jus cogens* and international law in general. It would also constitute an attack on the equality and independence of states, which could be perceived as an attack on the international legal order itself.⁷⁵

Finally, it is worth noting that the peremptory character of the prohibition of torture in the *Princz* and *Distomo* cases is not only problematic with respect to the exact content of the obligation, but also in relation to the point in time that this prohibition as such gained *jus cogens* status. In both instances, the claims for civil compensation were based on acts of torture that were committed during the Nazi regime. As the concept of *jus cogens* only gained worldwide recognition after 1969, it is highly doubtful whether it could serve as a basis for claims resulting from acts that were committed between 1933 and 1945.⁷⁶ This conclusion remains unaffected by the fact that the fundamental norms identified by Nuremberg, such as the prohibition of genocide, enslavement and torture, are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.⁷⁷ The fact that the events at Nuremberg served as a catalyst for the subsequent development of *jus cogens* does not mean that these norms had already acquired *jus cogens* status at that time.⁷⁸

In summary, the *Princz* and *Distomo* cases (at the first instance level) are problematic with respect to their interpretation of the *content* of the peremptory prohibition against torture, the *impact* of this particular interpretation and its consequences for national law on relations with third states, as well as the *point in time* in which the prohibition as such gained *jus cogens* status. None of these problems are present, however, when the prohibition of torture is applied as a peremptory limitation to the national constitutional process as outlined above in Section 2. In that instance, the nature of the peremptory prohibition was uncontroversial, as it concerned the *refoulement* prohibition which undoubtedly includes the obligation to evaluate the consequences of deportation for the specific individual in question. This obligation was also well established by the time it was used by the Swiss authorities to

Similarly Maierhöfer, *supra* note 61, at 397. Although this fear is valid, it is possible that retaliation is not as likely to occur against a super-power. For example, it is noteworthy that Art. 1605 (7) of the FSIA, *supra* note 42, does under limited circumstances permit the lifting of immunity for personal injury that was caused by an act of torture, extra-judicial killing, aircraft sabotage and hostage-taking on behalf of a foreign state. The most important limitation is that the Executive must have declared the defendant state a 'sponsor of terrorism'. In addition, the claimant or victim had to be a US national at the time the act occurred. Despite the jurisdiction provided by this clause, there has been no case in foreign courts in which an action alleging torture, assassination or any similar abuse has been brought against any United States agency or the United States Government based on its activities abroad. See Bergen, *supra* note 43, at 199–200; Johnson, *supra* note 45, at 287.

⁷⁵ Cf. also Zimmermann, *supra* note 10, at 440.

⁷⁶ *Ibid.*, at 437.

⁷⁷ Compare *Siderman De Blake*, 965 F.2d at 715 (9th Cir. 1992); Bergen, *supra* note 43, at 182.

⁷⁸ As was apparently concluded by Judge Wald, *supra* note 55, at 1181–1182; Bergen, *supra* note 43, at 182. See the *Distomo* case, *supra* note 46, at 766. The Court regarded Art. 46 of the Regulations annexed to the Fourth Hague Convention of 1907 as constituting part of *jus cogens*. In accordance with this article, occupying forces must respect the rights to family, honour, life, property and religious convictions.

invalidate the People's Initiative in question. Finally, the impact of the national application of the peremptory prohibition against torture was predominantly internal. Whilst strengthening the national consciousness of the importance of international norms for the protection of the national legal order, it did not have any disruptive impact on relations with third states.

4 The Emerging Recognition of a Hierarchy of Norms in International Law

From the above analysis one can conclude that the recognition of a hierarchy of norms in international law is increasingly developing outside the scope of treaty law, with direct consequences for the interaction between national and international law. The Swiss Constitution thus far remains a unique example of the explicit constitutional recognition of the overriding normative power of *jus cogens* over national law. However, there is increasing evidence that courts in other national jurisdictions are also willing to accept the overriding character of *jus cogens* norms within the national legal system — if and to the extent that the content of the *jus cogens* norm in question is beyond doubt. For example, in the *Princz* decision, the reluctance of the Court of Appeal to grant overriding effect to the prohibition of torture over national legislation on sovereign immunity did not seem to result from a rejection of the hierarchically superior quality of the prohibition of torture as such. Instead, it was related to the limited *scope* of the peremptory prohibition, which would (not yet) include an obligation to grant torture victims the right to claim compensation.

An acceptance of the overriding normative power of *jus cogens* over national law was also hinted at in the *Bouterse* decision, in which the Dutch courts were confronted with the request to prosecute the former military leader of Surinam, Desi Bouterse, for allegedly ordering 15 extra-judicial executions that took place in Surinam in December 1982.⁷⁹ One of the questions which arose in the case was whether the prohibition of the application of the statute of limitations to the crime of torture had acquired *jus cogens* character. Although the Dutch Supreme Court (*Hoge Raad*) did not elaborate on the issue, the Attorney-General opined⁸⁰ that state practice did not support such a conclusion.⁸¹ He did, however, also submit that states could not ignore

⁷⁹ Court of Appeal of Amsterdam, 20 November 2000, ELRO No. AA8395 [hereinafter the *Bouterse* case] (Court of Appeal). The proceedings were instituted by relatives of some of the victims who resided in the Netherlands. Although some of the victims had Dutch nationality, Mr. Bouterse himself did not. The Dutch Torture Convention Implementation Act, which implemented the Torture Convention, entered into force on 20 January 1989.

⁸⁰ Although the Supreme Court is not bound by the Expert Opinion of the Attorney-General, it can be indicative of the reasoning of the Court, in particular in situations where the Court itself is very brief in its reasoning.

⁸¹ Expert Opinion annexed to *Bouterse* decision (Supreme Court), *supra* note 79, para. 107. A survey of the statute of limitations of several European countries revealed that they prohibited its application to the crime of torture where it constituted a war crime and, in some (but not all) countries, a crime against humanity. State practice would thus not support the conclusion that the prohibition against the application of the statute of limitations to the crime of torture constituted customary international law.

the hierarchy of norms developing within international law and that *jus cogens* norms would override conflicting national law.⁸² The Attorney-General's position therefore implies that if the prohibition of the application of the statute of limitations to the crime of torture had acquired *jus cogens* status, it would have automatically trumped any conflicting Dutch legislation, due to its special normative quality.⁸³

Although the present article is limited to an examination of the implications of the peremptory prohibition of torture for national law, it is noteworthy that this emerging acceptance of the overriding normative power of *jus cogens* norms can also be witnessed with respect to other peremptory norms. One example is the *Unocal* case, which was initiated under the United States Alien Tort Claims Act (ATCA)⁸⁴ and involved, *inter alia*, allegations of forced labour.⁸⁵ Villagers from the Tenasserim region in Myanmar accused *Unocal* of directly or indirectly subjecting them to forced labour at the hands of the Myanmar military, who provided security services for a gas pipeline that *Unocal* constructed throughout the region.⁸⁶ One of the questions which arose concerned the law to be applied to the cause of action, as it was possible under the ATCA to apply international law, the law of the state where the underlying events occurred, or the law of the *forum* state, respectively.

The Court of Appeal for the Ninth Circuit determined that in the light of the *jus cogens* nature of the alleged violations,⁸⁷ it would be preferable to apply international

let alone a norm of *jus cogens*. The Attorney-General thus rejected the conclusion of the Court of Appeal, *supra* note 79, at para. 5.2, that accepted that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968 was declaratory of customary international law, although it had only been ratified by 43 states.

⁸² Expert Opinion annexed to the *Bouterse* decision (Supreme Court), *supra* note 79, at paras 91 and 94. This would be a deviation from the normal practice in Dutch law, following from Art. 94 of the Constitution, according to which a national statute would not become non-applicable where it violated customary law, whereas national statutes may not be applied where they are in contradiction with a treaty norm.

⁸³ Such a finding presupposes that the obligation to prosecute perpetrators of torture had acquired *jus cogens* status. For only then would the automatic trumping of national legislation preventing prosecution be explicable. Such a broad interpretation of the prohibition of torture is, however, not supported by state practice and would have unforeseeable consequences. It would, *inter alia*, imply that courts have to waive the immunity of acting Heads of State who are allegedly involved in torture practices. Anything less would be inconsistent, as it would allow cruel dictators who remain in office until the end of their days to avoid prosecution, which would be severely detrimental to the credibility of the *jus cogens* obligation to prosecute the perpetrators of torture. The possibility of prosecuting acting Heads of State, Foreign Ministers (and possibly even other members of the cabinet) was, however, just recently condemned by the International Court of Justice (ICJ), in light of the destabilizing effect that this would have on international relations. *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium)*, Judgment, 14 February 2002, at para. 51 *et seq.*, available at <www.icj-cij.org>. For a discussion, see *inter alia*, Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case', 13 *EJIL* (2002) 855 *et seq.*; Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case', 13 *EJIL* (2002), at 877 *et seq.* See also Tams, *supra* note 51, at 349.

⁸⁴ 28 U.S.C. § 1350.

⁸⁵ *John Doe I v. Unocal Corporation*, 2002 U.S. App. (9th Cir. 2002) Lexis 19263.

⁸⁶ *Ibid.*

⁸⁷ The Court accepted the *jus cogens* status of the prohibition of forced labour, which it described as a modern variant of slavery. See *Unocal* case, *supra* note 86, at paras 2 and 4 (Analysis).

law rather than the law of any particular state.⁸⁸ It regarded the law of any particular state to be, by definition, either identical to the *jus cogens* norms of international law, or invalid. Moreover, if the court were to focus on domestic tort law to provide the cause of action, it would mute the grave international law aspect of the tort, reducing it to no more (or less) than a 'garden-variety municipal tort'.⁸⁹ In essence therefore the Court of Appeal relied on the superior normative character of the *jus cogens* norm at stake (i.e. prohibition of slave labour), in deciding that international law should trump national law as the applicable law. As was the case with the Attorney-General in the *Bouterse* decision, the Court took the overriding power of the *jus cogens* norms for granted, without engaging in any explanation of its motives for doing so. In addition, the Court assumed an identical overlap between peremptory norms of international law with national law, which is similar to the Swiss Federal Council's conclusion that peremptory norms of international law would be inherent to the existence of the *Rechtsstaat*.

A Implications for Ordinary Customary Law

The question that now has to be answered is whether it is necessary or even wise for courts and lawyers to rely on the hierarchically superior nature of *jus cogens* norms in order to override national law, instead of the ordinary *customary law* nature of such an obligation. After all, from the perspective of international law, states are no less bound to ordinary norms of custom than they are to the norms of *jus cogens*.⁹⁰ In addition, the threshold for recognizing a right or obligation as constituting customary law is lower than that of *jus cogens* and the conceptual difficulties of applying *jus cogens* outside the treaty context does not apply to ordinary customary international law. Focusing on the customary nature of the rights and obligations in question rather than their *jus cogens* character could therefore be equally (if not more) effective.

This is illustrated by the Greek Supreme Court's reliance on ordinary customary law rather than *jus cogens* to waive national legislation on sovereign immunity in the *Distomo* case. Although the Greek Supreme Special Court subsequently rejected the existence of such a customary exception to sovereign immunity in the *Margellos* decision,⁹¹ the *Distomo* case nonetheless illustrates that the trumping of national law can, in principle, be facilitated by a novel interpretation and application of the customary rules on immunity themselves. It would therefore not be necessary to resort to the hierarchically superior quality of the peremptory prohibition of torture for this purpose.

Another example that illustrates this point concerns the requirement of double criminality in extradition proceedings, which mainly serves to ensure reciprocity and to prevent the requested state from assisting in extradition proceedings that would

⁸⁸ See *Unocal* case, *supra* note 86, at para. 5 (Analysis).

⁸⁹ See *Ibid.*

⁹⁰ Cf. *supra* note 36.

⁹¹ See *supra* note 61.

violate the national *ordre public*.⁹² Some authors have argued that neither of these reasons would apply in situations where a *jus cogens* norm such as the prohibition of torture has been violated.⁹³ The implication thus is that the hierarchically superior nature of the peremptory norm would automatically fulfil the requirements of reciprocity and consistency with the national *ordre public*. The question remains, however, whether the reliance on such a hierarchical argument would be more effective than reliance on ordinary customary law.

For example, in the *Pinochet* decision⁹⁴ the Spanish extradition request for the former Chilean President Pinochet from England to Spain *inter alia* turned on the question of double criminality. Under English law the existence of double criminality is intertwined with questions relating to jurisdiction, which forms a prerequisite for criminality.⁹⁵ The Court first had to determine whether the act for which extradition had been requested, i.e. alleged involvement in widespread and systematic torture, was a crime according to English law at the time it was committed.⁹⁶ In this context the English Extradition Act of 1989 draws a distinction between territorial and extra-territorial offences. Where the act had been committed on the territory of the requesting state, it also had to have been a crime under English law at the time of commitment if it had been committed *in* England.⁹⁷ If, however, the act had been committed outside the territory of the requesting state, it must have been a crime according to English law at the time of commitment if it had been committed *outside* England.⁹⁸

For the Spanish extradition request it thus was of decisive importance that the acts of torture of which Mr. Pinochet was accused had occurred outside Spanish territory. Since torture as an extra-territorial offence had only been criminalized in England with the adoption of the (non-retroactive) Criminal Justice Act of 1988, the condition of double criminality was not fulfilled under statutory law, since most of the alleged incidents of torture had occurred before this act had entered into force.⁹⁹ However, according to the Separate Opinion of Lord Millett, the statutory criminalization of these acts was complemented by the common law of which customary international law formed an integral part.¹⁰⁰ Therefore, if the latter determined that a particular act constituted an international crime over which all states had jurisdiction, the English court would have the competence to try extra-territorial offences.¹⁰¹

⁹² Swart, 'Pinochet, volkenrechtelijk gewoonterecht en (dubbele) strafbaarheid', in G. J. M. Corstens and M. S. Grenhuijsen (eds), *Rede en Recht. Opstellen ter gelegenheid van het afscheid van Prof. mr. N. Keijzer van de Katholieke Universiteit Brabant* (2000) 200.

⁹³ Swart, *supra* note 92, at 200.

⁹⁴ *Regina v. Barte and the Commissioner of Police for the Metropolis and other Ex Parte Pinochet* (No. 3), 38 ILM (1999), at 581 [hereinafter *Pinochet* No. 3].

⁹⁵ Swart, *supra* note 92, at 196.

⁹⁶ Extradition Act of 1989, at sec. 2(1)(a).

⁹⁷ Extradition Act of 1989, at sec. 21(b) and sec. 2; see also Swart, *supra* note 92, at 194.

⁹⁸ Swart, *supra* note 92, at 195.

⁹⁹ This act entered into force on 29 September 1989 and implemented the Torture Convention.

¹⁰⁰ Lord Millett, *Pinochet* No. 3, *supra* note 94, at 177.

¹⁰¹ *Ibid.*, at 177; Swart, *supra* note 92, at 195.

Lord Millett further submitted that already by 1973, widespread and systematic acts of torture constituted an international crime to which universal jurisdiction was attached under customary international law. As a result, he concluded that the English courts had the jurisdiction to try such incidents even where they had been committed outside the United Kingdom.¹⁰² This, in turn, implied that none of the requests for extradition in the *Pinochet* case could be denied on the basis that the condition of double criminality was not fulfilled.¹⁰³

Lord Millett's line of argument did not win over the majority of the House of Lords. Instead of accepting that acts of widespread and systematic torture constituted an extra-territorial offence under customary law, they regarded the (non-retroactive) Criminal Justice Act of 1988 as determinative for the extra-territorial status of torture offences. As a result, Mr. Pinochet could only be extradited for acts of torture committed outside the United Kingdom or Spain if they had been committed after 29 September 1988.¹⁰⁴ The House of Lords' reluctance to rely on customary international law for the purpose of establishing double criminality seemed to have been related to differences of opinion regarding the *point in time* at which widespread and systematic torture outside the context of armed conflict was recognized as a crime against humanity. Whilst Lord Millett claimed that this was already the case by 1973, Lord Goff submitted that widespread and systematic torture against a civilian population had only become an international crime after 1989.¹⁰⁵ It therefore remained disputed whether these acts already constituted an international crime under customary law during the reign of Mr. Pinochet.

In the *Bouterse* case, similar uncertainties most likely contributed to the Dutch Supreme Court's (*Hoge Raad*) refusal to rely on customary international law in order to fulfil the double criminality requirement. The Court of Appeal (which acted as Court of First Instance) initially determined that the murders in question constituted acts of torture under customary international law. More specifically, it determined that already by 1982 torture constituted a crime under customary international law, and that by that time crimes against humanity could also be committed outside the context of armed conflict.¹⁰⁶ As far as the question of retroactive application of the Torture Convention Implementation Act was concerned, the Court of Appeal concluded that the Torture Convention was of a declaratory nature, in that it merely

¹⁰² Lord Millett, *Pinochet No. 3*, *supra* note 94, at 177–178. He stressed, however, that isolated incidents of *jus cogens* violations would not attract universal jurisdiction under customary law, but only those that were on such a scale that they can justly be regarded as an attack on the international legal order. Cf. also *A-G Israel v. Eichmann*, reprinted in 36 *ILR* (1961), at 5 *et seq.*; Swart, *supra* note 92, at 195.

¹⁰³ Compare also Swart, *supra* note 92, at 200.

¹⁰⁴ F. sec. 134 of the Criminal Justice Act of 1988; *Pinochet III*, *supra* note 94, at 619; Horowitz, *supra* note 45, at 519.

¹⁰⁵ Lord Goff, *Pinochet No. 3*, *supra* note 94, at 120. In addition, the majority of the House of Lords was neither convinced that customary international law recognized universal jurisdiction with respect to crimes that involved the violation of *jus cogens* norms, nor that it regarded such crimes as falling outside the immunity to which former Heads of State are entitled to in foreign courts. Cf. Lord Phillips, *ibid.*, at 189; and Lord Hope, *ibid.*, at 147.

¹⁰⁶ *Bouterse* case (Court of Appeal), *supra* note 79, at paras 5.1.–5.2.

confirmed what already existed under customary international law as regards the prohibition, punishment and definition of torture as a crime against humanity. Therefore the Torture Convention Implementation Act could be applied retrospectively to cover conduct such as assault and murder that was illegal under Dutch law before 1989, but did not constitute the criminal offence of torture.¹⁰⁷

The Court of Appeal came to this decision despite the fact that the expert advice on which it relied conceded that there was some doubt whether widespread torture in a time of peace was punishable under international law by 1982.¹⁰⁸ On the one hand, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948¹⁰⁹ and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973¹¹⁰ stress that these species of crime against humanity are not conditional on a state of war or armed conflict. Similarly, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968 envisages that crimes against humanity may be committed in a time of peace.¹¹¹ At the same time, however, there seems to be no recorded case of a prosecution for a crime against humanity committed in times of peace before 1982 — either before an international tribunal or a national court.¹¹²

When the case came before the Supreme Court, it rejected the decision of the Court of Appeal by curtly determining that even if torture were a crime according to customary international law, it would not be able to neutralize the principle of legality contained in Article 16 of the Dutch Constitution and Article 1 of the Dutch Criminal Code.¹¹³ Thus, despite the country's monist legal tradition, the Dutch Supreme Court was not willing to accept that customary international law could serve as an independent basis for criminal prosecution in the Netherlands. Instead, the application of such norms remains dependent on implementing legislation.

This hesitant approach to customary law in the context of criminal law is based on the assumption that customary international law is too imprecise and unknown for direct application in criminal proceedings and that this imprecision could result in a

¹⁰⁷ *Ibid.*, at para. 6.3. This should be regarded as retrospective rather than retroactive application, as it is not intended to create new criminal offences. Whereas a retroactive penal statute criminalizes an act which was innocent when it was committed, a retrospective statute changes the future effect of a criminal act done prior to proclamation. It therefore does not change the status of the act itself, but amends the consequences thereof after proclamation. Cf. *Opinion Re Bouterse*, i.e. the Expert Opinion of C. J. R. Dugard, submitted to the Court of Appeal, ELRO no. AA8427, at para. 8.4.5 [hereinafter the Dugard opinion].

¹⁰⁸ Dugard opinion, *supra* note 107, at para. 5.3.1.

¹⁰⁹ Art. 1.

¹¹⁰ Cf. Arts II and III.

¹¹¹ Art. I(b).

¹¹² Dugard opinion, *supra* note 107, at para. 4.2.3.

¹¹³ *In Re Bouterse*, 18 September 2001, LjN No. AB1471, Case No. 00749/01 CW 2323, at paras 4.4–4.6 and 6.4. See also Ferdinandusse *et al.*, 'Origineel of reproductie? Internationale strafbaarstellingen in de nederlandse rechtsorde', 38 *Nederlands Juristenblad* (2002) 341 *et seq.*; van Elst, 'Universele Rechtsmacht over Foltering: Bouterse en de Decembermoorden', 27 *Nederlands Juristen Comité voor de Mensenrechten Bulletin* (2002) 208 *et seq.*; Zegveld, 'The Bouterse Case', 32 *Netherlands Yearbook of International Law* (2001) 97 *et seq.*

violation of the principles of legality and non-retroactivity.¹¹⁴ The accuracy of this assumption would, however, depend on the circumstances of the case. For example, the *Pinochet* and *Bouterse* decisions both accepted that by 1989 customary international law had recognized widespread and systematic torture during peace time as a crime against humanity. It should therefore be possible to rely on customary law for the purpose of establishing double criminality in the national legal order, where it concerns widespread and systematic acts of torture that occurred after 1989.¹¹⁵

Moreover, it is also unlikely that the difficulties resulting from the imprecision of the contents of customary law could be overcome by relying on the hierarchically superior nature of the prohibition of torture. First, the analysis in Sections 3 and 4 has already illustrated that the exact scope of this preemptory prohibition is controversial. Whereas it is beyond doubt that it includes the prohibition of the act of torture itself as well as that of *refoulement*, it is highly disputed whether it would also include the obligation to prosecute the perpetrators of torture or grant torture victims the right to claim compensation. The lack of clarity of the content of the norm is thus not solved by merely replacing the label of customary law for that of *jus cogens*. Second, there is the question of *when* the prohibition of torture as such acquired preemptory status. For even in instances where the scope of the preemptory prohibition is not disputed, there may be significant differences of opinion as to when the prohibition was generally recognized as a norm of *jus cogens*. As a result, courts that choose to rely on the *jus cogens* nature of a particular norm in order to establish double criminality may face the same difficulties concerning the principles of legality and retroactivity as courts that rely on customary law for that purpose.

Finally, by bypassing ordinary customary law in instances where it is clear enough to be directly applicable in the national legal order in favour of the *jus cogens* argument, one gives the impression that customary law has no added value in itself.¹¹⁶ This, in turn, could severely undermine the binding force of international law in general. This criticism touches on one of the major controversies in relation to the recognition of a hierarchy of norms in international law. It has thus far mainly drawn

¹¹⁴ Ferdinandusse *et al.*, *supra* note 119, at 343.

¹¹⁵ See *ibid.*, at 348–349. The authors note that an additional criticism against the direct applicability of international customary and treaty law in domestic criminal law is to be found in the requirement that the punishment itself has to be clear at the time of the commitment of the criminal act. Due to the differences in the legal systems within states, treaties usually merely demand that the punishment has to be commensurate with the character and the gravity of the crime. Customary law would provide even less clarity in this regard. In their opinion, however, the condition of the *nulla poena sine crimen* principle would be fulfilled if and to the extent that the international norm provides a clear legal framework that gives an indication of the maximum punishment with respect to the crime in question. In the case of crimes against humanity, for example, international law will impose the heaviest available punishment. This could provide the national judge and the accused with a clear framework in the form of the heaviest sentence available under national law.

¹¹⁶ Cf. also the concurring argument of Judge Reinhard in the *Unocal* case, *supra* note 86. He criticized the majority's reliance on the *jus cogens* nature of the prohibition of forced labour for establishing Unocal's liability in the case at hand: 'Because the underlying conduct alleged constitutes a violation of customary international law, the violation was allegedly committed by a governmental entity and Unocal's liability,

attention in the context of human rights law, where it has been argued that such a hierarchy would contradict the prevailing notion of the interdependence and indivisibility of human rights, according to which the realization of each human right requires the realization of all other human rights.¹¹⁷ This view is underpinned by the fear that a recognition of superior norms will engender back-sliding on commitments already assumed and a devaluation of norms that fail to achieve the elevated ranking.¹¹⁸

The rationale of this argument would apply not only in the human rights context, but also to international law in general. Admittedly, it might be overly pessimistic to assume that such an undesirable outcome would necessarily follow from the recognition of a hierarchy of norms in international law. To the extent that the full realization of peremptory norms would also depend on the realization of non-peremptory norms of international law, the recognition of a hierarchy of norms could actually serve as a catalyst for a better realization of international law in general. Furthermore, one has to keep in mind that states will invariably adopt priorities among their international obligations, regardless of any academic rhetoric about the downsides of the acknowledgement of a hierarchy of norms.¹¹⁹ It would therefore be preferable that the decisions of states were governed by hierarchical guidelines developed within international law, rather than by those developed in accordance with short-term national political advantage.¹²⁰ At the same time, however, the risk of the erosion of the normative force of general international law as a result of the recognition of such a hierarchy remains concrete and should be duly considered by those who rely on the *jus cogens* character of a particular norm in order to effect its enforcement.

5 Conclusion

From the above analysis one can conclude that there is some evidence of an emerging hierarchy in international law, which is underpinned by a deepening of the international consensus pertaining to the content and hierarchical order of the international value system. Generally speaking, the existing consensus relating to value-laden international norms such as human rights and humanitarian law remains shallow.¹²¹ It is limited to a formal recognition of certain substantive and

if any, is derivative of that government entity's [liability], *jus cogens* is irrelevant to any issue before us. Assuming the allegations to be true, the fact that the underlying conduct violated customary international law is sufficient to support liability not only on the part of the governmental actor, but also on the part of a third part whose liability is derivative thereof.'

¹¹⁷ See, for example, the preambles to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, Art. 6 of the Declaration on the Right to Development of 1986 and para. 5 of the Vienna Declaration and Programme of Action of 1993, adopted at the Second World Conference on Human Rights. See also Teraya, *supra* note 71, at 889–916.

¹¹⁸ Seiderman, *supra* note 2, at 285.

¹¹⁹ *Ibid.*, at 286.

¹²⁰ *Ibid.*

¹²¹ Cf. Paulus, 'International Law after Post Modernism: Towards Renewal or Decline of International Law?', 14 *Leiden Journal of International Law* (2001) 752.

procedural rules, which does not necessarily include a consensus regarding their content, or their hierarchical position in the national legal order. With respect to *jus cogens* norms, however, there is evidence of a deepening of the consensus in this regard. This is reflected, in particular, by references to the identical overlap between peremptory norms of international law and elementary norms of national law. That this deepened consensus nonetheless remains fragile is reflected by the fact that the consensus about the normative superior quality of the prohibition of torture does not yet encompass the consequences to be attributed to *jus cogens* norms within the national legal order. Stated differently, the consensus has not yet progressed to a level where it would include an optimization of the efficient enforcement of *jus cogens* norms, such as a peremptory obligation to grant the victims of torture a legal avenue for claiming compensation.

Whether it is wise to strive for such a consensus would depend on the impact that it might have on international relations and international law in general. The practice of the Swiss Federal Council has illustrated that the application of *jus cogens* norms as a limitation to the national legislative constitutional process can secure a minimum respect for international law, despite strong popular protest. At the same time, the effect of the overriding character of the *jus cogens* norms was of a predominantly intra-state nature and the risk of a destabilizing effect on relations with other states was minimal. In these circumstances, the national application of *jus cogens* norms would have significant added value. It is questionable, however, whether a similar conclusion could be drawn in instances where the trumping of national legislation by a *jus cogens* norm would have a predominantly inter-state effect. As illustrated above, it is possible that the destabilization resulting from the trumping of sovereign immunity by the peremptory prohibition of torture may outweigh the benefits to be gained from optimizing the *effet util* of the *jus cogens* norm.

Moreover, even in situations where the risk of destabilizing international relations were relatively small, it may be unwise to apply the superior normative force of *jus cogens* within the national legal order, as this could undermine the role of ordinary customary law. The above analysis has illustrated that the objectives desired by those resorting to the ‘hierarchical argument’ can, in principle, also be achieved by the application of ordinary customary law in the national legal order. It is true that in the context of criminal prosecutions courts may be reluctant to rely on what they perceive to be the vague content and scope of the customary norm, fearing that it might violate the principle of non-retroactivity. However, it is unlikely that a reliance on the sheer normative force of the prohibition against torture would pose a viable solution to this problem. One would still be confronted with doubts regarding the exact scope of the peremptory norm in question, as well as the point in time at which the norm as such gained *jus cogens* status. By bypassing clear and precise customary law in favour of the ‘hierarchical argument’, one could also create the belief that states have a mere discretion to respect custom, as opposed to being obliged to do so. It could also encourage an artificial and over-extended interpretation of *jus cogens*, whose threshold for recognition is considerably higher than that of ordinary custom.

In essence, therefore, the deepening of the consensus pertaining to the consequences to be attributed to *jus cogens* norms in the national legal order could only proceed in a differentiated manner. The question if and to what extent national law should be trumped by a peremptory norm of international law would depend on a careful weighing of all the interests affected. Central to this process would be the balancing of the efficient enforcement of the most fundamental norms of the international legal order with the ambiguous consequences of such enforcement for customary law and international relations. It is a challenge which national and international courts will increasingly be confronted with in the years to come, as the role of *jus cogens* is bound to become more prominent in an increasingly institutionalized international order, accompanied by an increasing interaction between different sets of rules in the international and national legal orders.