
Jus Cogens Re-examined: Value Formalism in International Law

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Enzo Cannizzaro (ed.), **The Present and Future of Jus Cogens**. Rome: Sapienza Università Editrice, 2015. Pp. 167. ISBN: 9788898533657.

Robert Kolb, **Peremptory International Law – Jus Cogens: A General Inventory**. Oxford: Hart Publishing, 2015. Pp. 148. £50. ISBN: 9781782257271.

Thomas Weatherall, **Jus Cogens: International Law and Social Contract**. Cambridge: Cambridge University Press, 2015. Pp. 509. £79.99. ISBN: 9781107081765.

Abstract

Jus cogens is receiving renewed interest both in legal practice and academia. A number of recent books approach the subject from different angles, attributable to different strands of the debate. Some approaches are predominantly technical and cannot adequately address the symbolic value of jus cogens. Others argue that considerable legal effects derive from the value dimension of jus cogens but risk skipping over technical niceties. Reading several works that represent these tendencies together points to an insurmountable tension between value orientation and formalism that is indicative of the current state of jus cogens in international law. In this review essay, I discuss a legal technique approach, a value approach relying on social contract theory and a practice-oriented approach to the study of jus cogens, represented by the three books under review. On the basis of the current state of case law and research, I also identify the most pressing challenges for our understanding of jus cogens and reflect on the relation of scholarship and the parallel work of the International Law Commission and, more generally, on the performative force of theories. I conclude that jus cogens as a manifestation of 'value formalism' in international law is an even greater conceptual conundrum than it was 20 years ago.

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1 Introduction

Recently, the issue of peremptory norms (*jus cogens*) in international law has been receiving renewed interest. Not only have publications on *jus cogens* significantly increased in reaction to a growing jurisprudence, but the International Law Commission (ILC) also placed the topic on its current programme of work in 2015.¹ During its sixty-eighth session, in the summer of 2016, the commission discussed Special Rapporteur Dire Tladi's first report, which sets out a general approach to the topic and gives a general overview of conceptual issues.² The debate in the sixth committee of the UN General Assembly in 2014 on the syllabus drafted by Tladi had already highlighted the relevance and timeliness of the subject.³ On the one hand, the contours and legal effects of *jus cogens* are still ill-defined and contentious, while, on the other hand, sufficient practice on which to base the work of the commission is now available.⁴ Accordingly, only three states, namely France, the Netherlands and the USA, had expressed doubts as to the viability and appropriateness of the ILC taking up the topic of *jus cogens*.⁵ Evidently, the books under consideration in this review essay are published at just the right moment to receive the attention they deserve.⁶

However, for two reasons, the challenge that all three books face is tremendous. First, the existing literature on the topic is vast, which makes it difficult to add something new.⁷ Second, the consistency and coherence of existing practice is doubtful. In particular, the substantial growth of jurisprudence of both international judicial institutions and, even more significantly, domestic courts on the effects of *jus cogens* makes it very difficult, if not impossible, to unite all aspects of *jus cogens* under a single theory.⁸ Yet these difficulties also provide the opportunity to earn scholarly credentials, especially since, in the words of the ILC's special rapporteur, no single theory has so far adequately explained the uniqueness of *jus cogens* in international law.⁹

¹ International Law Commission (ILC), Report on the Work of Its Sixty-Seventh Session (4 May–5 June and 6 July–7 August 2015), UN Doc. A/71/10, 14 August 2015, para. 286.

² ILC, First Report on *jus cogens* by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4.693, 8 March 2016; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 March 2012; for a summary of the discussion, see International Law Commission, Report on the Work of Its Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016), UN Doc. A/71/10 (2016), at 316ff.

³ ILC, Report on the Work of Its Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014), UN Doc. A/69/10 (2014), Annex.

⁴ *Ibid.*, Annex, paras 3, 5.

⁵ Sixth Committee, Summary Record of the 20th Meeting Held at Headquarters, New York, on Tuesday, 28 October 2014, at 10 a.m., UN Doc. A/C.6/69/SR.20, 10 November 2014, paras 13, 36, 123.

⁶ For further recent contributions to the debate, see M.D. Heijer and H. van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo vadis?* (2016).

⁷ Remarkably, Kolb presents only a select bibliography (at 130–137), while a bibliography is completely absent in Weatherall's book.

⁸ For an overview, see Kadelbach, 'Genesis, Function and Identification of *Jus Cogens* Norms', 46 *Netherlands Yearbook of International Law* (2015) 147, at 153ff; ILC, First Report on *jus cogens*, *supra* note 2, paras 46–47. For a critique that, despite this case law, there is a lack of relevant state practice, see Statement by the United States, in Sixth Committee, *supra* note 5, para. 123.

⁹ ILC, First Report on *jus cogens*, *supra* note 2, para. 59.

Obviously, an integrative theory of *jus cogens* should not be all too detached from the actual practice of states and judicial institutions and should be capable of explaining the core elements of *jus cogens*.

According to the special rapporteur, the following features are generally accepted as forming important elements of *jus cogens*: first, a norm of *jus cogens* is one from which no derogation is permitted; second, it is a norm of general international law; third, a norm of *jus cogens* is one that is accepted and recognized by the international community of states as a whole, from which no derogation is permitted; fourth, peremptory norms are universally applicable; fifth, they are superior to other norms of international law and, finally, *jus cogens* norms serve to protect fundamental values of the international community.¹⁰

In what follows, I first analyse the core arguments of the books under review. Robert Kolb and Thomas Weatherall approach the subject from different, if not opposite, perspectives. While Kolb adopts a non-ideological, technical and analytical approach, Weatherall's method is more value- and effects-oriented, synthetic and sometimes extrapolating. In a way, both books roughly represent two camps in the literature and two ways of *jus cogens*-related legal reasoning, namely the camp of strictly formal approaches, on the one hand, and that of primarily value-based approaches, on the other. The volume edited by Enzo Cannizzaro, which includes the Gaetano Morelli Lectures of 2014, also reflects this opposition of formalism and value orientation. They brought about an encounter between Christian Tomuschat and Pierre-Marie Dupuy, who acted on different sides as counsels in the proceeding between Germany and Italy before the International Court of Justice (ICJ), and, as a whole, represent an enlightened pragmatism.¹¹ I then specifically inquire what these works can contribute to scholarship on *jus cogens* and how they answer the questions that are expressed in the special rapporteur's syllabus for the study of *jus cogens*. In the concluding part, I reflect on the relation of scholarship to the parallel work of the ILC and on the performative force of theory. So far, theory is struggling to catch up with practice, and none of the recent books comprehensively captures the phenomenon of *jus cogens*, which is characterized by a specific concurrence of value and form, manifesting 'value formalism' in international law.¹²

The tension between value and form already became obvious in the Vienna Convention on the Law of Treaties (VCLT).¹³ On the one hand, Article 53 of the VCLT offers a very formal definition of *jus cogens*, which is often criticized as circular or tautological:

¹⁰ *Ibid.*, paras 61–63.

¹¹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99. Tomuschat hints to this fact in his introductory remarks, see Tomuschat, 'The Security Council and *Jus Cogens*', in E. Cannizzaro (ed.), *The Present and Future of Jus Cogens* (2015) 7, at 8.

¹² I borrow the term from Michaela Hailbronner, who uses it in a different context. Hailbronner, 'Rethinking the Rise of the German Constitutional Court: From Anti-Nazism to Value Formalism', 12 *International Journal of Constitutional Law* (2014) 626, at 646ff, with further references regarding the use of the concept.

¹³ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

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.¹⁴

On the other hand, the integration of this formal provision into the VCLT was, as everybody was aware, of highly symbolic value.¹⁵ It was clear that the transformation of international law from an inter-state order to a value order must not betray the values of the legal form. Neither Kolb's technical approach, despite his clarification that he does not simply reject the value approach to *jus cogens* (at v), nor Weatherall's public order approach, which is based on the social contract, can nail down this fuzzy relation of value and form.

2 *Jus cogens* as a Legal Technique

Kolb's monograph is a follow-up to his study 'Théorie du *ius cogens* international', where Kolb developed his approach to *jus cogens* as a legal technique (at vii).¹⁶ As indicated by the subtitle 'A General Inventory', Kolb aims to give a full account of peremptory norms in international law and to extend *jus cogens* beyond public order norms and the confines of Articles 53 and 64 of the VCLT (at vi). Kolb's point of departure is 'a fundamental distinction' 'between peremptory and non-peremptory laws' that he perceives 'in all municipal legal orders' (at 1). This distinction between non-derogable norms and norms that 'can be contracted out of or contracted away' informs Kolb's 'legal technique theory' of international *jus cogens* (at 2). Municipal *jus cogens* is neither limited to public policy norms embodying fundamental values nor based on a hierarchy between *jus cogens* and *jus dispositivum*. It simply constitutes a legal technique that is intrinsically linked to the principle of *lex specialis*. When the *lex specialis* rule applies, a norm is dispositive; otherwise the norm is peremptory (at 3). Moreover, *jus cogens* only voids legal acts (and is irrelevant for factual acts or objective legal facts). The critical question then is to what extent these features of municipal *jus cogens* apply analogously in international law, given the peculiarities of the latter, such as its decentralized nature, the diverse functions of international *jus cogens* beyond effectuating the nullity of contrary legal acts and the pervasive role of state sovereignty. Kolb provisionally concludes that 'there remains some room' to conjecture that international *jus cogens* can work at least to some extent similarly to its municipal counterpart (at 4–7). Accordingly, Kolb conceives of international *jus cogens* as a legal technique that puts aside the *lex specialis* rule. Thus understood, international *jus cogens* is not necessarily related to public policy, and Article 53 of the VCLT is not exhaustive of all *jus cogens* phenomena in international law (at 7–9).

¹⁴ See, e.g., Tomuschat, *supra* note 11, at 17.

¹⁵ This has been underscored by many international lawyers. For one of the most recent statements to that effect, see Kadelbach, *supra* note 8, at 6.

¹⁶ R. Kolb, *Théorie du ius cogens international: Essai de relecture du concept* (2001).

According to Kolb, the ‘gist’ of *jus cogens* lies in a prohibition to contract out of certain norms of general international law. It protects the unity of general legal regimes *ratione personarum* against their splitting into a series of special laws applicable on a priority basis between some parties (at 127–128). This notion of peremptoriness as ‘the other side of the coin of the *lex specialis* principle’ (at 3) needs some clarification. First, it should be noted that there are two forms of speciality, namely speciality in regard to parties and speciality in regard to ‘subject-matter’. A rule may be general or special in regard to the number of actors whose behaviour is regulated by it or in regard to its subject matter (fact description).¹⁷ For example, a good neighbourliness treaty can provide an example for a treaty that is supposedly general in subject matter but valid only in a special relationship between a limited number (two) of states and, thus, is *lex specialis* in regard to the number of actors covered. The use of anti-personnel mines, by contrast, is a special subject within the general subject of humanitarian law. Therefore, the Convention on Anti-Personnel Landmines governs a ‘special’ aspect of the general rules of humanitarian law and is *lex specialis* in regard to subject matter.¹⁸ Peremptoriness – that is, non-derogability – essentially relates to the first form of speciality: speciality in regard to parties.

Second, it is also worth pointing out that Kolb’s theory of *jus cogens* cannot explain the effect of nullity. While the *lex specialis* rule defines the relationship between two norms and determines which norm to apply, the peremptory status of a norm entails a limitation on the law-making power. Contrary to what Kolb suggests by positing that ‘constant inapplicability ... is practically tantamount to nullity’, nullity of legal acts does not merely affect the applicability of a norm (at 68). Kolb holds the view that nullity is applicable only where a norm provides for this special effect (at 105), which, however, does not prevent him from claiming later that nullity is ‘inherent’ in the notion of *jus cogens* (at 113). In any case, to take the metaphor further, there seems to be no perfect symmetry between the two sides of the ‘coin’.

Chapter 2 revisits *jus cogens* deniers. Since the number of those questioning the notion is fast diminishing,¹⁹ the main point of this chapter probably is that we have entered something like the ‘post-ontological era’ of *jus cogens*.²⁰ Nevertheless, Kolb grapples, *inter alia*, with institutional and structural arguments against the possibility of *jus cogens*. Given that *jus cogens* is now clearly established in positive law, two objections seem to be most significant. On the one hand, some ‘pragmatists’ regard *jus cogens* as useless. On the other hand, a ‘political’ argument against *jus cogens* holds that it is dangerous for international law and is a tool for political manipulation and (Western)

¹⁷ ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group, UN Doc. A/CN.4/L.682, 13 April 2006, paras 112ff, with further references.

¹⁸ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction 1997, 2056 UNTS 211.

¹⁹ Linderfalk, ‘The Effect of *Jus Cogens* Norms: Whoever Opened Pandora’s Box, Did You Ever Think about the Consequences?’, 18 *European Journal of International Law (EJIL)* (2008) 853, at 855; ILC, First Report on *jus cogens*, *supra* note 2, para. 44.

²⁰ For international law in general, cf. T. Franck, *Fairness in International Law and Institutions* (1995), at 4.

partisan politics. Kolb aptly alleviates this critique, arguing, on one side, that while *jus cogens* certainly is employed in contexts where it is superfluous, it serves some discrete legal functions (at 24); on the other side, Kolb argues that *jus cogens* should not be used as a ‘highly effective Rambo-tool’ but presupposes ‘nuance and compromise’ (at 26). It can be added that the latter critique, in its essence, is not levelled against the concept of *jus cogens*, as such, but against international law more generally.

Chapter 3 conveys an impression of the plethora of theories on *jus cogens*. Kolb commences his survey with those authors who conceive of *jus cogens* as a modern expression of natural law. Suffice it to say that natural law conceptions, from Kolb’s point of view, suffer from various weaknesses, especially, that they cannot explain *jus cogens* as an ‘intra-positive mechanism for issues of derogation’ (at 31). While natural law theories keep to the sidelines of the debate, the theory of *jus cogens* as the ‘public order of the international community’ occupies centre stage. According to this theory, *jus cogens*, as a ‘series of constitutional norms’, gives rise to hierarchically superior norms. This is certainly incommensurate with Kolb’s non-derogation theory; in Kolb’s view, the public order theory plainly confuses the relationship *lex generalis/lex specialis* with the relationship *lex superior/lex inferior* (at 35). The hierarchy argument does not reverberate in actual judicial practice, and when it comes to details, the hierarchy argument suffers from some shortcomings that are rarely addressed.²¹ In particular, the claim that a norm is superior as such does not determine its specific function in a concrete setting (at 35–37). As distinct from this ‘public order’ theory, the ‘constitutional’ theory conceives of *jus cogens* as fundamental general principles, constituting the minimum necessary for the existence of an international legal order, both substantive and structural. They are to be found at the apex of the legal system, including most notably the precept *pacta sunt servanda*. This theory seems to have hardly any followers today,²² just like the essentially pre-VCLT theory of *jus cogens* as a specific rule for conflict of successive treaties.²³ Clearly, for Kolb, the theory of *jus cogens* as a legal technique, which defines *jus cogens* by its effect – that is, non-derogability – catches the essence of the phenomenon. It also finds support in Article 53 of the VCLT, which Kolb quite rightly defends against critics who regard it to be tautological.

Surprisingly, in Kolb’s fine-grained theoretical tableau, authors as diverse as Alexander Orakhelashvili and Ulf Linderfalk are squeezed into the same category, namely ‘public order’ theory, which is obviously very broad (at 45). It is probably even less expedient to simply split *jus cogens* theories into just two main schools of thought as does the ILC’s special rapporteur, who basically distinguishes natural law and positivism.²⁴ Generally, it is vital to keep in mind that the various theories do not share an

²¹ For a critical assessment, see also Kleinlein, ‘*Jus Cogens* as the ‘Highest Law’? Peremptory Norms and Legal Hierarchies’, 46 *Netherlands Yearbook of International Law* (2015) 173.

²² The latest reference is Conforti, ‘Cours général de droit international public’, 212 *Recueil des Cours* (1988-V) 129.

²³ Notably, D. Anzilotti, *Cours de droit international: Premier vol. Introduction, théories générales. Traduction française d’après la 3. éd. italienne, rev. et mise au courant par l’auteur, par Gilbert Gidel* (1929), at 96–101; Morelli, ‘Norme dispositiva di diritto internazionale’, 24 *Rivista di diritto internazionale* (1932) 388, at 483ff.

²⁴ ILC, First Report on *jus cogens*, *supra* note 2, paras 50–60.

identical objective. Some of them, especially the natural law theories, regard it as their key task to explain the binding nature of *jus cogens* (the source of peremptoriness), while other theories – in particular, the ‘public order theory’ – mainly offer guidance on which type of norms can qualify as *jus cogens*.²⁵

The ensuing chapters get to the nuts and bolts of international *jus cogens*. Chapter 4 on its legal construction opens with a significant disclaimer: *jus cogens* does not have the ‘absolute and monolithic nature and effects’ that mainstream doctrine all too easily attaches to it. Rather, *jus cogens* is ‘highly contextual, variable and multiple’ (at 45). Kolb presents a ‘typology’ of peremptory norms, which is based on his legal technique theory and comprises ‘public order’ *jus cogens*, ‘public utility’ *jus cogens* and ‘logical’ *jus cogens*. The distinguishing mark of each type is the reason it provides for declaring a norm to be non-derogable or ‘un-fragmentable’ (at 46). While public order *jus cogens* consists only of fundamental norms, public utility *jus cogens* is a more comprehensive category of norms that need to be ‘unaltered, integrated and unique’ in the public interest (at 49). Remarkably, Kolb does not consider the effect of nullity a necessary prerequisite for this type of *jus cogens*, and, hence, public utility *jus cogens* includes constitutive treaties of international organizations (including the Statute of the International Court of Justice, to which Kolb pays special attention, at 50–54) as well as so-called integral treaties (Article 41, para. 1 lit. b of the VCLT).²⁶ Finally, Kolb defends principles like *pacta sunt servanda* and good faith as part and parcel of *jus cogens*, namely of the ‘logical’ type, although this extension of the concept does not match the current usage in mainstream international law (at 56–58).

The next sub-section of chapter 4 discusses the legal acts and facts that *jus cogens* ‘extends’ to beyond international agreements. Kolb divides unilateral acts into material acts (such as the invasion of a territory) and legal acts (such as resolutions of international organizations, including decisions of the UN Security Council (UNSC), acquiescence, reservations, or waivers). Only the second category is subject to the validity/nullity test of *jus cogens*. By contrast, for Kolb, the non-availability of countermeasures (as material unilateral acts), if their exercise is contrary to *jus cogens* norms (compare Article 26 of the ILC’s Articles on State Responsibility [ASR]), is a consequence of ‘public order’ rather than of *jus cogens*.²⁷ Here, Kolb has to admit that his terminological and conceptual distinctions ‘have largely been lost in the line of mainstream thinking after the ILC, in its Articles on State Responsibility, largely intermingled these issues’ (at 64). With regard to customary international law, Kolb, like many authors, essentially draws a distinction between general customary international law (at 65ff) and regional customary international law (at 71–72). For various practical and conceptual reasons, Kolb persuasively argues that *jus cogens* does not void general customary international law. However, his argument that state practice and case law do not know of such an operation of *jus cogens* is less conclusive than it might seem

²⁵ Cf. *Ibid.*, at para. 56.

²⁶ Statute of the International Court of Justice 1945, 1 UNTS 993.

²⁷ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (ASR), UN Doc. A/56/10, November 2001, at 43, paras 46ff.

since, in many cases, courts do not even recognize a norm conflict that would trigger the nullity of general customary international law. By contrast, the conceptual objection that non-derogability (which excludes the application of the *lex specialis* rule in regard to the number of actors covered) does not explain the ‘nullity’ of general customary international law is trenchant (at least if we assume that the concept of nullity is essential for describing the effect of peremptory norms) but not applicable to regional customary international law (at 68). Therefore, Kolb argues that customary rules are legal facts in the narrow sense, and not legal acts, an argument definitely more controvertible than the first.

For the remainder of Chapter 4, Kolb discusses ‘special issues’, starting with the ‘extent of peremptoriness’ (at 73–76). As he explains, the core content of some norms can be peremptory, while their normative periphery is derogable. This question has received particular attention with respect to the prohibition of the use of force, which knows three accepted exceptions, collective self-defence, enforcement action under Chapter VII of the UN Charter and invitation by the government of a state to undertake military action on its territory. Kolb takes a nuanced stance on the peremptory core of the non-use of force rule and of provisions of international humanitarian law. Another ‘special issue’ is the relationship between both *jus cogens* and derogation clauses in human rights treaties (at 77ff) and *jus cogens* and Common Articles 6/6/6/7 of the Geneva Conventions I–IV (at 81ff).²⁸ The interrelation of these phenomena notwithstanding, Kolb rightly insists that *jus cogens* and derogation clauses are distinct categories. Kolb also touches upon ‘differentiation’ according to legal subjects – that is, whether there is a difference between the scope of *jus cogens* in inter-state relations and its scope for other subjects of law, such as the UNSC – and underscores the need to consider more closely which norms apply to different subjects and which ones are *jus cogens* for each of them (at 86).

The chapter concludes with a brief discussion of the definition of the ‘proper normative conflict’. This problem looms large since the question of what constitutes a norm conflict in international law is not undisputed. Incompatibilities can be defined in a broader and a narrower sense. Norm conflicts can be *prima facie* or genuine.²⁹ The ILC Study Group on Fragmentation refers to a normative conflict as a situation in which relevant treaties seem to point to different directions in their application by a party³⁰ or as a situation where two rules or principles suggest different ways of dealing with a problem.³¹ Broad conflicts of this kind can often be resolved through harmonious interpretation or balancing. The most adequate notion of a norm conflict in

²⁸ Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, 75 UNTS 85; Geneva Convention III relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

²⁹ A corresponding distinction refers to divergences, on the one hand, and to conflicts, on the other. See C.W. Jenks, *The Prospects of International Adjudication* (1964), at 425–426.

³⁰ ILC, *supra* note 17, para. 23.

³¹ *Ibid.*, para. 25.

a narrow sense seems to be the test suggested by Ewald Wiederin. According to this test, two rules are in conflict to the extent that conduct in conformity with one rule implies a violation of the other rule.³² Broader definitions of legal conflicts include ‘indirect’ conflicts that occur whenever a norm somehow impedes the operation of *jus cogens* – for example, in situations in which the rules of state immunity would lead to the undesired result of impunity for violations of peremptory norms by individuals, particularly war crimes, genocide, or torture.³³ It is especially in the relationship of peremptory norms and jurisdictional immunities that it has turned out to be critical how we define the relevant conflict of norms. The question is highly controversial; Kolb leaves it at that and warns that *jus cogens* should not become a device for solving any type of norm conflict (at 88).

Chapter 5 peruses the extensive debate on the sources of *jus cogens* and concludes that *jus cogens* can be embodied in any source, be it customary international law, treaties or general principles (at 96). Kolb then turns to discussing the possibility of relative *jus cogens*, such as regional, conventional or even bilateral *jus cogens* norms. It follows from a consistent application of his concept of *jus cogens* as a legal technique that all of this is possible (at 97ff). Again, this is repugnant to mainstream thought, according to which universal applicability follows from the notion of non-derogability and also from the idea, in Article 53 of the VCLT, that *jus cogens* norms are norms of general international law.³⁴ Moreover, Kolb’s theory has no principal problem in accepting what might be most challenging for natural law approaches, namely that *jus cogens* can be modified, as recognized by Article 53 (at 100–103).

Chapter 6 on the effects of *jus cogens* norms is relatively short, while Kolb is well aware that the question of effects has ‘recently’ become one of the ‘most intricate and grave problems’ of *jus cogens* (at 104). As already shown, some of the categories Kolb includes in the concept do not entail the effect of absolute nullity; public interest *jus cogens* will most often not have this radical effect (at 105). It comes as no surprise that Kolb regards the responsibility-related consequences of *jus cogens* norms (cf. Articles 40–41, 26 and 50 of the ASR) as resulting, rightly understood, from universal ‘public order’ norms rather than from *jus cogens*. He deplores once more that ‘the ILC conflated the two notions of *jus cogens* and public policy’ (at 107). For him, the correct way to put the matter is to clarify that public order norms have several legal consequences. One of these consequences is the *jus cogens* effect; another consequence is that a special regime applies under the rules of state responsibility (at 107–108).

Kolb also takes issue with the view that the secondary rules that apply if a rule of *jus cogens* is violated are themselves peremptory (at 109ff). One of the alleged merits of such an approach would be that it promotes the effectiveness of *jus cogens*.

³² Wiederin, ‘Was ist und welche Konsequenzen hat ein Normenkonflikt?’, 21 *Rechtstheorie* (1990) 311, at 318–325. For an application of this definition to international law, see Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’, 17 *EJIL* (2006) 395; D. Pulkowski, *The Law and Politics of International Regime Conflict* (2014), at 149.

³³ A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 136–139.

³⁴ Cf. ILC, First Report on *jus cogens*, *supra* note 2, para. 67.

And, yet, Kolb regards this theory of ‘consequential *jus cogens*’ (of which Alexander Orakhelashvili is the most determined representative³⁵) ‘to be the greatest legal and practical mistake ever made in the context of *jus cogens*’ (at 110). The reasons for this strong view are easily comprehensible. In particular, Kolb claims that this effect of *jus cogens* simply has no basis in either positive law or in the notion of peremptoriness. Moreover, it would lead, on the one hand, to ‘excessive rigidity’ in the application and administration of the law, while, on the other, it entails a ‘tendency to a creeping and complete subversion of the legal system’ (at 110–112). Kolb concludes that the effects of *jus cogens* are ‘far from settled and clear’ and sketches an incremental theory for the judicial development of these effects.³⁶ This amounts to the rule of thumb that the judge may take steps forward in ‘grey areas’ but may not invent entirely new obligations (at 114–115).

3 *Jus Cogens* and Social Contract

Different from Kolb’s ‘legal technique theory’, Weatherall aims to corroborate the popular public order theory of *jus cogens* with the help of social contract theory, which he presents as ‘a theoretical construct that explains governance structures as the product of the recognition of common rules, with correlative duties, to protect the most basic common interests of a community’ (at xli). Contract theory guides his examination of legal aspects of *jus cogens*, while he aims at a ‘liberal approach to international law and politics’. This ‘political vision’ seeks to reconcile the development of an individual-oriented *jus cogens* within a state-based international legal order and acknowledges that ‘values matter in international law’ (at xl, xli, xxxix). Contrasting with what one might expect from the book title and the prominence of the term ‘social contract’ throughout the book, which is based on his doctoral dissertation, Weatherall’s ambitions on that front are avowedly ‘modest’. Social contract theory serves as an ‘ordering framework’ that informs about the questions to ask of *jus cogens* in order to understand the ‘mechanics’ of international society better (at 16). Weatherall points to similarities between social contract and *jus cogens*: like the social contract for the domestic legal order, *jus cogens* reflects a genesis of certain values and interests in international law as a product of their importance to the maintenance of the international community (at 99–100). It follows that Weatherall, unlike Kolb, regards the inviolable status of a peremptory norm as a feature of the subject matter of the rule, which is intrinsic to the norm itself.

The overall structure behind the six parts and 19 chapters of the book (which the reader sometimes risks losing sight of) covers four areas: the ‘authority’ of *jus cogens*, representing common interests and values of a community (part II); the ‘sources’

³⁵ See, e.g., Orakhelashvili, ‘Jurisdictional Immunities of the State’, 106 *American Journal of International Law (AJIL)* (2012) 609, at 615–616.

³⁶ Here, Kolb is building on Focarelli, ‘Promotional *Jus Cogens*: A Critical Appraisal of *Jus Cogens*’ Legal Effects’, 77 *Nordic Journal of International Law* (2008) 429; Bianchi, ‘Human Rights and the Magic of *Jus Cogens*’, 19 *EJIL* (2008) 491.

of *jus cogens* as a legislative expression of the social need to protect these interests (part III); the ‘content’ of peremptory norms – that is, normative rights and correlative duties, delineated through this social need (part IV) and the establishment of civil society pursuant to the enforcement of these norms (part V). Part VI sums up the previous findings.

In part II on the ‘authority of *jus cogens*’, Weatherall covers the international community of states as a whole – human dignity as a general principle of law, the role of morality in the doctrine of *jus cogens* and their interrelation. The idea of the international community contains a dual meaning (Chapter 3). Technically, the international community is a community of states, and the state is the subject of duties of responsibility and accountability. The beneficiary of these substantive obligations, in turn, is the international community of mankind, as expressed in concepts like the basic considerations of humanity, the fundamental well-being of the individual and the juridical conscience of mankind (at 33). Weatherall briefly outlines the philosophy of human dignity (at 34–40) and contends in Chapter 4 that human dignity, ‘animating principle of *jus cogens*’ (at 34), informs the content of the most basic norms and laws of society as a general principle of law. To corroborate this claim, he cites, a little eclectically, a number of legal philosophers and international lawyers, ranging from John Finnis, Joseph Raz, representatives of the New Haven School and Hermann Mosler to Christopher McCrudden (at 40–41). In order to establish the link between human dignity and peremptory norms, Weatherall also collects relevant statements and judicial pronouncements. On the basis of these findings, he equates *jus cogens* with domestic constitutional law (at 66).

Weatherall propounds the moral underpinning of *jus cogens* in Chapter 5, relying expansively on the *travaux préparatoires* of the VCLT and on jurisprudence but reconfirming that moral considerations have been incorporated into international law through the doctrine of *jus cogens* (at 84). Mediating between the view that the moral dimension of human dignity itself explains the peremptory force and the view that the legal effects of *jus cogens* are simply based on state consent, Weatherall would like to reconcile natural law and positivist approaches. Ultimately, however, if I understand his approach correctly, positivism prevails since the obligatory force of morality merely provides ‘additional pull to comply’ with what is otherwise proscribed by the law (at 84–85). These considerations obviously do not explain why morality would lead to specific forms of enforcement. Therefore, Weatherall hastens to clarify that the effects of *jus cogens* are established as a matter of positive law. Morality, by contrast, is a ‘material source’ of peremptory norms and informs the content of *jus cogens* (at 93–94). Different from Kolb, Weatherall has no qualms about applying the principle of non-derogability to unilateral acts and equating non-derogation clauses in human rights treaties with non-derogability of *jus cogens* (at 88–89). For him, universality is implicit in non-derogability, while universality suggests a monist legal order with *jus cogens* as a hierarchically elevated sphere of law (at 89–92).³⁷

³⁷ Citing, affirmatively, Judgment, *Prosecutor v. Furundžija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, paras 153–155.

Chapter 6 concludes part II and presents *jus cogens* as the expression of an international social contract. Its message is that the higher interests of the community expressed in *jus cogens* are ‘extra-State’, concerning the whole of mankind, and designate the individual human being as their ultimate beneficiary. Human dignity as a general legal principle, like the natural law principles identified variously by Enlightenment contractarians, reflects shared values and interests (at 102). The reader inevitably wonders why Weatherall’s reception of contract theory ends with Kant. Weatherall could also have paid more attention to the critical question of how and on what terms the social contract can be extended from the state to the universal level. Clearly, there is a tension between the domestic and the universal social contracts. For the simple fact that the international community consists of a complex plurality of states and individuals (and a number of further legal entities, both public and private), the presentation of the social contract as the antonym of ‘state voluntarism’ falls short of a full explanation (at xl). Weatherall remains vague as to who are the parties to the social contract that he has in mind.

Chapter 7, the first chapter of part III on ‘sources’, traces the historical antecedents as ‘material sources’ of *jus cogens* and the tradition of natural law in international law scholarship. Weatherall goes back to the ancient law of the Greeks. In principle, this is to be welcomed since there is rather little recent literature on the history of *jus cogens*. Yet Weatherall mainly relies on secondary literature from the 1980s. Following Alfred Verdross, Weatherall regards Vattel’s distinction of a necessary and voluntary law of nations as a construction akin to the modern contrast between *jus cogens* and *jus dispositivum* (at 118). Indeed, the invalidity of treaties on moral grounds is a natural law concept. Other authors trace *jus cogens* in international law back to Vitoria, Grotius, or Christian Wolff.³⁸ Yet finding unequivocal authority for the notion ‘*jus cogens*’ in classical natural law treatises on international law is a rather intricate exercise.³⁹ The term marks a distinction from *jus dispositivum* – from law that is in the books but can be contracted out at will – but it is not of Roman origin. Rather, it is an invention of 19th-century Pandectism.⁴⁰

Chapter 8 covers the classic issue of the ‘formal sources’ of peremptory norms. Rather than postulating a ‘new source’ of international law, Weatherall aims at explaining *jus cogens* within the framework of the traditional sources. He suggests understanding peremptory norms as arising through some interrelation of customary international law and general principles (at 133). In support of this view, he relies largely on the wording of Article 53 of the VCLT, which claims that peremptory norms be ‘accepted and recognized by the international community’ and its similarities to

³⁸ Gómez Robledo, ‘Le *ius cogens* international. sa genèse, sa nature, ses fonctions’, 172 *Recueil des Cours* (1981-III) 9, at 23 (Vitoria); Schweitzer, ‘Ius cogens im Völkerrecht’, 15 *Archiv des Völkerrechts* (1971–1972) 197, at 198ff (Grotius); Thomann, ‘Introduction’, in M. Thomann (ed.), *Christian Wolff Gesammelte Werke, Abteilung III* (1972), vol. 25, part V, at 32, 41 (Christian Wolff); Verdross, ‘Jus Dispositivum and Jus Cogens in International Law’, 60 *AJIL* (1966) 55, at 56 (Vattel).

³⁹ Kadelbach, *supra* note 8, at 150.

⁴⁰ M. Kaser, *Das Römische Privatrecht, Erster Abschnitt: Das altrömische, das vorklassische und klassische Recht* (2nd edn, 1971), at 198.

Article 38 para. 1 lit. b and c of the ICJ Statute. Weatherall highlights the ‘and’ and argues that peremptory norms are norms of customary international law ‘influenced by general principles of international law, namely human dignity’ (at 203). Weatherall adheres to a two-element approach to the identification of this particular form of customary *jus cogens*, relying both on state practice and, more importantly, *opinio juris*. In the context of *jus cogens*, the social need of the international community expressed by *opinio juris sive necessitatis* is informed by the general legal principle of human dignity (at 139). If one takes into account that Weatherall refers to general multilateral treaties, practice in international organizations and domestic legislation and judgments as state practice, it turns out that his method of identification aims at a sort of ‘custom lite’⁴¹ and, despite its innovativeness and sophistication, is ultimately rather mainstream. Weatherall vaguely claims that the legal effects of peremptory norms that preclude persistent objection (universality and non-derogation) result from the material source of *jus cogens* and are ‘severable’ from the evidentiary function of the formal source of peremptory norms (at 155). In a turn to pragmatism, Weatherall eventually acknowledges that courts and tribunals are instrumental to the recognition of peremptory norms as a ‘kind of international common law’ (at 162). This leads him to conclude the chapter with an impressive compilation of judicial pronouncements, international and domestic, on the existence of particular peremptory norms and their legal effects (at 162–174).

Concluding part III on sources, Chapter 9 confirms that Weatherall aims at a reconciliation of normativity and positivism and conveys that he is not interested in the contractarian element in contractarian thought. He rather builds on philosophies of social contract (Rousseau, Kant), in which the general will is the legislative principle (at 175). This contractarianism accounts for the emergence of norms necessary for the maintenance of society through the shared values and higher interests of community, rather than the direct consent of its individual members to such rules (at 182). Thus understood, social contract theory simply provides a perspective for the way the legislative mechanism of *opinio juris sive necessitatis* incorporates the higher interest of the international community into peremptory norms (at 175).

Part IV on ‘peremptory norms and the individual’ presents a survey of the material content of *jus cogens* and scrutinizes the effects of peremptory norms in the field of individual responsibility. Chapter 10 features the developments of international human rights and international crimes as legal antecedents to contemporary peremptory norms and interrelated legal developments (at 185). Chapter 11 is committed to the evolution of *jus cogens* as a kind of international common law (at 204), an idea that Weatherall developed in Chapter 8. Accordingly, judgments of domestic and international courts play a key role in Weatherall’s method to identify *jus cogens* norms. He establishes the *jus cogens* status of the prohibitions of piracy, slavery, war crimes, crimes against humanity, aggression, genocide, torture, apartheid and terrorism. By contrast, Weatherall refuses to recognize the peremptory character of the right to

⁴¹ J. Klabbers, *International Law* (2013), at 35.

self-determination, the common heritage of mankind and the right to life. Since the link of two of these norms to the individual human being is only indirect, these findings perhaps only confirm the inevitable: the identification of *jus cogens* depends on its theoretical foundations.⁴² However, it should be noted that the ILC listed the right to self-determination among those peremptory norms that are ‘clearly accepted and recognized’⁴³ and among the most frequently cited examples of *jus cogens* norms.⁴⁴

In Chapter 12, Weatherall turns to individual responsibility, both criminal and civil, and scrutinizes individuals’ immunities *ratione personae* and *ratione materiae*, as recognized by international and domestic case law and amnesties. For Weatherall, it is simply ‘the corollary’ of peremptory norms as the rights of the individual to formulate each peremptory norm also as a duty, the violation of which constitutes an international crime imputing individual responsibility (at 267). This deductive reasoning stands in contrast to actual piecemeal developments in international jurisprudence. Yet Chapter 13 defends a homocentric approach to the study of *jus cogens* as ‘not only appropriate, but also necessary’ to understand the concept both substantively and functionally (at 340).

Part V on ‘peremptory norms and the state’ is divided into four chapters. Chapter 14 analyses obligations *erga omnes* arising out of peremptory norms as an enforcement mechanism comprising ‘prevention’, ‘protection’ (by use of force) and ‘punishment’. Obligations *erga omnes* give legal effect to the importance of the interests of the international community protected by peremptory norms (at 352). Weatherall builds on a tendency expressed in practice according to which the performance of obligations *erga omnes* constitutes positive duties to prevent and punish violations of peremptory norms (at 354). While such duties are primarily specific obligations *erga omnes partes* to prevent and punish, which are found variously in international treaties like the Convention against Torture, Weatherall regards them as not being limited to these conventions (at 354).⁴⁵ As Weatherall phrases it, if a norm is recognized as being as universal and non-derogable as *jus cogens*, it follows that obligations arising from that norm, which are necessary to its fulfilment, must similarly be universal as obligations *erga omnes* (at 355). Weatherall here seems to forego the distinction between universal norms and obligations *erga omnes*.

He analyses relevant case law of the ICJ, as well as Article 41 of the ASR on the legal consequences arising for third states from serious breaches of obligations *erga omnes*. While responses to breaches of obligations arising from peremptory norms are ‘context-dependent’, Weatherall appropriately highlights that there are ‘discrete examples of collective action, undertaken by states in response to serious breaches of obligations

⁴² Cf. ILC, First Report on *jus cogens*, *supra* note 2, para. 42.

⁴³ ASR, *supra* note 27, at 85.

⁴⁴ ILC, Conclusions of the Work of the Study Group on the Fragmentation of International Law Difficulties arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.702, 18 July 2006, para. 33.

⁴⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, Art. 9.

erga omnes' (at 361–362). The next sub-section of the chapter turns to the issue of humanitarian intervention, presenting 'conservative', 'interventionist' and 'hybrid' positions (at 363–371). The remainder of the chapter discusses the punishment of violations of peremptory norms and the question of universal jurisdiction. Weatherall holds that universal jurisdiction extends to all states the legal capacity to prosecute such violations pursuant to a duty *aut dedere aut judicare* (at 376–377). He also stresses the link between the obligation to extradite or prosecute and the performance of obligations *erga omnes* (at 379). Also building on developments in international criminal law, Weatherall concludes, a bit inconclusively, albeit understandably so, that the performance of obligations *erga omnes* 'may be seen' to impose a positive duty upon each state to extradite or prosecute violators of peremptory norms and prescribe a general legal interest in the performance of such obligations (at 383).

Chapter 15 assesses state responsibility under *jus cogens*. It analyses how a state is internationally responsible for breaches of obligations *erga omnes* and the attribution of the conduct of an individual attributable to the state in order to establish international responsibility for violations of peremptory norms. The next section on 'dual responsibility' traces the distinction of individual and state responsibility.⁴⁶ The third section refers to questions of standing before the ICJ.⁴⁷ Once more, Weatherall draws far-reaching conclusions on obligations *erga omnes* (at 400, 401). The rest of the chapter is dedicated to jurisdictional immunity of the state and revisits the established case law.

4 *Jus Cogens* and the Practice of the Present and the Future

In their practice-oriented approach, which is, however committed to the philosophical foundations of *jus cogens*, Tomuschat's and Dupuy's Morelli Lectures address two issues that are of particular practical relevance and have stirred up some debate, namely the significance of *jus cogens* for the UNSC and the fate of *jus cogens* in the ICJ, especially in the *Jurisdictional Immunities* case.⁴⁸

A *Jus Cogens* and the UNSC

Tomuschat's lecture has two parts. First, he sets forth his concept of *jus cogens*; second, he adds 'a few words' about the UNSC. The first part traces the emergence of *jus cogens* in modern international law (at 10–18) before turning to its 'gist' – essentially, the rules of *jus cogens* deprive states of their legal capacity of producing valid rules of

⁴⁶ Of particular relevance, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order, 8 April 1993, ICJ Reports (1993) 3; Preliminary Objections, Judgment, 11 July 1996, ICJ Reports (1996) 595; Judgment, 26 February 2007, ICJ Reports (2007) 43.

⁴⁷ See, especially, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Reports (2012) 422.

⁴⁸ *Jurisdictional Immunities of the State*, *supra* note 11.

international law by concluding treaties. No less importantly, the rules of *jus cogens* have ‘philosophical dimensions’ because they ‘dethrone’ states as the ultimate masters of the world’s legal order (at 20). However, the practical consequences of a breach of a *jus cogens* rule and, more generally, the impact of *jus cogens* on the international legal order is ‘modest’ (at 21). *Jus cogens* encapsulates the core values of the international legal order, and, ‘by necessity’, its norms assume the quality of an international public order⁴⁹ and have ‘a higher status’ (at 22). Tomuschat encourages ‘creative legal thinking’ to find ‘well-balanced remedies’ for violations of peremptory norms while, at the same time, pronouncing a warning not to succumb to temptations created by the strong moral overtones of *jus cogens* (at 23). While academic discourse these days stands permanently in danger of invoking *jus cogens* in an overzealous manner, *jus cogens* should be reserved as an instrument to address borderline situations where law and morals join to repulse (at 32–33). Regarding the consequences of a breach of rules of *jus cogens*, Tomuschat commends the ILC for a ‘great deal of care’ (at 35).

For Tomuschat, peremptory norms and obligations *erga omnes* are only different tools employed to fight deeply immoral acts, which, at the same time, are incompatible with any notion of civilized international legal order (at 24). *Jus cogens* can also be relied on for the review of acts of international organizations (at 25). An important function of *jus cogens* is securing the unity of international law (at 25). Tomuschat sticks to the prevailing view that *jus cogens* protects the international *ordre public*. Since *jus cogens* has become a general standard for lawful conduct within the international community, as demonstrated by the ILC’s ASR, there is no need to distinguish between *jus cogens* and international *ordre public* (at 27).⁵⁰ Tomuschat expresses his disappointment with Article 53 of the VCLT and its purely formal approach to the identification of *jus cogens*. For Tomuschat, the identification of peremptory norms is comparable to identifying customary international law but ‘stricter’ in terms of the necessary extent of support, while state practice is not a constitutive element (at 28). Non-derogability is the specific distinctive criterion for *jus cogens* but not so much a constitutive element rather than an effect (at 29). Tomuschat underscores that there is no need to ‘stick slavishly’ to the list of legal sources in Article 38 of the ICJ Statute and that, eventually, no authoritative determination can be made about the essence of *jus cogens* (at 30, 31).

Employing different beneficiaries as a distinguishing criterion, Tomuschat detects three classes of *jus cogens* (which, on Weatherall’s account, would all fall in the same category since the ultimate beneficiary is the individual): peremptory norms protecting the individual human being, peremptory norms protecting states and the right to self-determination, which may shield a people against interference, in particular, by the UNSC (at 35). Tomuschat argues that the UNSC, as an institution of the United Nations, is bound, like all other subjects of international law, by the general rules of international law, including *jus cogens* (at 54). *Jus cogens* rules demand unreserved

⁴⁹ Following Orakhelashvili, *supra* note 33, at 28–31.

⁵⁰ Following Orakhelashvili once more. *Ibid.*, at 33.

respect and obedience, and they also have an absolute character for the UNSC (at 55). In the context of the lawfulness of the UN sanctions regime, however, Tomuschat advises caution, since the UNSC is ‘not a wild beast that must be tamed by the insights of wise men from the legal profession’ (at 58). Otherwise, Tomuschat agrees with most commentators that it is an excessive extension of the concept of *jus cogens* to argue that the denial of judicial procedure constitutes a breach of a *jus cogens* norm (at 69).⁵¹

Positive duties of the UNSC under *jus cogens* – such as a duty to provide for enforcement action in the case of the four core crimes – relate to very complex considerations and evaluations and should therefore be characterized as the outcome of a political process rather than of a process under the auspices of law. Here, the law must grant enough room to politics (at 76). The topic of the UNSC’s role in peace settlements prompts the most difficult questions of considerable practical significance (at 76ff), in particular, whether the UNSC would act *ultra vires* when replacing with a resolution under Chapter VII an agreement between the directly interested parties and, interrelated, whether the UNSC must respect rules of *jus cogens* when dictating a settlement to the parties. Tomuschat opines that certain reservations and objections voiced in the past have been overtaken by the UNSC’s enlarged field of action that has been widely supported. Therefore, the UNSC could not be deemed to be prevented from determining the conditions of peace after an armed conflict (at 82). On the occasion of discussing the issue of population transfers and ethnic cleansing (at 82ff), Tomuschat highlights that the ICJ confirmed that secondary rules on breaches of *jus cogens* do not qualify as rules of *jus cogens*.⁵² In his view, Orakhelashvili’s monograph, ‘otherwise thoughtful and imaginative’, ‘errs fundamentally’ on this question (at 85).⁵³ Tomuschat finally concludes that binding the UNSC to peremptory norms has a high ‘symbolic’ value. Yet he cautions that the moralization of international law through the introduction of *jus cogens* into its architecture is not an omnipotent recipe for guaranteeing peace and security within the international community (at 88).

B The Fate of Jus Cogens in the ICJ

In marked contrast to Kolb, for Dupuy, the most important effects of *jus cogens* concern the law of state responsibility (at 101). In his lecture, Dupuy walks through the case law of the ICJ and observes two periods characterized by contradictory developments. In the first period, the court recognized that there were norms of positive international law that states could not derogate from but that they avoided the term ‘*jus cogens*’. Substance and designation have been incrementally converging – ‘la chose *avant le mot*’, ‘la chose ... et même presque le mot’ (at 104ff). In the second period, beginning in 2006, the court uses the term but does not utilize it to draw adequate conclusions from it (at 103). This means, for Dupuy, that qualification and application of

⁵¹ Most recently, ECtHR (Grand Chamber), *Al-Dulimi and Montana Management Inc. v. Switzerland*, Appl. no. 5809/08, Judgment of 21 June 2016, para. 136. This was, however, controversial, see Concurring Opinion of Judge Pinto De Albuquerque, joined by Judges Hajiyev, Pejchal and Dedov (paras 33–36).

⁵² *Jurisdictional Immunities of the State*, *supra* note 11.

⁵³ Orakhelashvili, *supra* note 35.

jus cogens are ‘dissociated’ (at 110), and he heavily criticizes the ICJ’s judgment in the *Jurisdictional Immunities* case.⁵⁴ Here, the court denies the existence of a norm conflict between the (substantive) *jus cogens* rules of the law of armed conflict, which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour and the (procedural) rules on state immunity (at 116ff).

He refers to the Institut de droit international’s (Naples session) Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes.⁵⁵ However, this resolution is also cautious eventually in its approach. Its preambular paragraphs 3 and 4 solely refer to the ‘underlying’ conflict between immunity from jurisdiction of states and their agents and claims arising from international crimes in order to express the desire of ‘making progress towards a resolution of that conflict’. Article 2, paragraph 2, clause 2, is also drafted in a conservative manner. Immunities ‘should not’ constitute an obstacle to the appropriate reparation to which victims of crimes addressed by this resolution are entitled.⁵⁶ For Dupuy, there is obviously not only a ‘latent’, but also a real, conflict between immunity and *jus cogens*. He reproaches the court for ‘misconceiving’ the essence of the distinction between primary rules (of conduct) and secondary rules (of state responsibility) by establishing an integral autonomy of procedural rules, which deprives the very distinction of any utility (at 119). For Dupuy, this radical separation of primary and secondary rules to the effect that the secondary rules can no longer ensure that the primary rules are applied is nothing but ‘*une absurdité théorique*’ (at 121). Dupuy concludes that the court obviously is in trouble where *jus cogens* conflicts with fundamental rights of states, while it has finally got used to the concept as long as this conflict is absent and *jus cogens* is expressive of state values. This adequately reflects the notion that peremptory norms protect both state interests and human or collective interests,⁵⁷ while Weatherall’s ‘individual-oriented’ *jus cogens* risks losing sight of this multidimensionality of *jus cogens* for conceptual reasons.

In addition to Tomuschat’s and Dupuy’s lectures, the volume on ‘The Present and Future of *Jus Cogens*’ includes two smaller chapters, by the editor, Enzo Cannizzaro and Beatrice Bonafè. Cannizzaro explores the special consequences of a serious breach of obligations arising out of peremptory rules of international law and contributes an interesting observation. He explains that the obligations laid down in Article 41 of the ASR – that is, obligations to cooperate and the obligation not to recognize the situation created by the breach – are obligations *erga omnes* (at 137–139). Referring to the *Jurisdictional Immunities* case, he argues that *jus cogens* might well be useful at the

⁵⁴ *Jurisdictional Immunities of the State*, *supra* note 11.

⁵⁵ Institut de droit international, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes (2009).

⁵⁶ For a summary of the debate concerning this formulation, see Salmon, ‘La résolution de Naples de l’Institut de droit international sur les immunités de juridiction de l’Etat et de ses agents en cas de crimes internationaux (10 septembre 2009)’, 42 *Revue belge de droit international* (2009) 316, at 325–326.

⁵⁷ See the related comment by the ILC’s special rapporteur. ILC, First Report on *jus cogens*, *supra* note 2, para. 58.

secondary level of the consequences that flow from the serious breach of peremptory primary rules (at 140).⁵⁸ However, the demonstration that the obligations laid down by Article 41(1) and Article 41(2) have already acquired the status of peremptory law has not been convincingly offered (at 142). It is noteworthy that Cannizzaro relies on structural reasoning in order to identify the quality of an obligation as *erga omnes*,⁵⁹ while his approach is different regarding *jus cogens*. Closely related to Dupuy's lecture, Bonafè's instructive chapter thoroughly analyses the jurisdiction of the ICJ in cases of a violation of obligations towards the international community as a whole, a topic that is, however, only indirectly related to the topic of this review essay.

5 Concluding Observations: The Performative Force of Theory

The synchrony between the publications under review and the ILC's project on *jus cogens* beg the question how the ILC's mission regarding the 'progressive development of international law and its codification' (Article 13, para. (1)(a), of the UN Charter) relates to the role of scholarship. The later special rapporteur's syllabus defined the challenge by identifying four main issues for consideration by the commission, namely: (i) the nature of *jus cogens*; (ii) the requirements for the identification of *jus cogens*; (iii) an illustrative list of norms and (iv) the consequences or effects of *jus cogens*.⁶⁰ With regard to the nature of *jus cogens*, Kolb and Weatherall take up quite different stances. While Kolb stresses the contextuality and variability of *jus cogens*, Weatherall presents a coherent theory of his own – and risks being too coherent. Despite the openness of his approach, however, Kolb's object of study differs from the ILC's. In Kolb's words, the ILC would only be interested in 'public order' *jus cogens*.

The issue of the requirements for the identification of *jus cogens* is by far more controversial.⁶¹ In their reactions to the inclusion of the topic of *jus cogens* on the agenda of the ILC, many states have taken the view that the greatest contribution that the commission could make to the understanding of *jus cogens* is in the area of the requirements for the elevation of a norm to the status of *jus cogens*.⁶² Obviously, Kolb, whose legal technique theory works independently from the substantive norm content, does not offer a list or criteria for identification, while Weatherall is cautious in terms of identifying *jus cogens* norms and generous when it comes to the effects of *jus cogens* in case of violations. Eventually, his suggestion to rely predominantly on

⁵⁸ *Jurisdictional Immunities of the State*, *supra* note 11.

⁵⁹ For the inadequacy of a purely structural reasoning, however, see C.J. Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), at 128ff.

⁶⁰ ILC, *supra* note 3, annex, para. 13.

⁶¹ See Saul, 'Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges', 5 *Asian Journal of International Law* (2014) 1, for the proposition that scholars have focused on justificatory theory at the expense of methodological considerations and that this has limited the scope for the development of a useful discourse with international judicial bodies on matters of *jus cogens* identification.

⁶² ILC, First Report on *jus cogens*, *supra* note 2, para. 8.

judicial pronouncements is unsatisfactory for the very fact that it is exactly one of the ILC's aims to guide judges, especially judges in domestic courts, in understanding the concept of *jus cogens*.⁶³

As far as the effects of *jus cogens* violations are concerned, Kolb's and Weatherall's evaluations of more recent developments like the ILC's ASR and the debate on *jus cogens* violations and immunities, differ significantly, and this is obviously due to their respective theories. Kolb bemoans that the *jus cogens* concept has spread 'Big Bang-like' beyond the law of treaties (at v). He tends to play down these further effects of *jus cogens* – they do not fit very well into his legal technique theory – as 'only very recent' developments, and he adds that most of them 'are not recognized under international law as it stands today' (at 6). Weatherall, by contrast, wholeheartedly acknowledges that '[s]ince its codification in the law of treaties, the concept of *jus cogens* has evolved dramatically' (at 7). Kolb cannot be praised enough for the rigour and sharpness of his analysis of the *jus cogens* phenomenon and for his thorough 'mapping' of the existing literature. However, he risks losing sight of what Tomuschat refers to as the 'philosophical dimensions' of *jus cogens*. In relation to the present debate on *jus cogens*, including the ILC's approach to the subject, his legal technique theory risks being idiosyncratic.

This discrepancy between Kolb's approach and the broader debate raises the general question of what we expect from a theory of *jus cogens*. Obviously, the work of the ILC, both on the law of treaties leading to the VCLT of 1966 and on the law of state responsibility with respect to the ASR of 2001, wielded considerable influence on the development of *jus cogens*. Supposedly, the ILC has transformed the debate and, by extending the effects of *jus cogens* to the law of state responsibility, contributed to the conceptual conundrum of *jus cogens* as a manifestation of 'value formalism' in international law. A theory, like Kolb's, that has nothing to say about this is not without blemish. On a related, but different, note, Weatherall's somehow complacent social contract theory of 'individual-oriented' *jus cogens* raises the very same question of how his theory relates to the broader debate and actual practice.

However, these considerations are preliminary only. Ultimately, the strength of a theory will be demonstrated by its performative force. Theories cannot only have empirical effects by becoming a reason for action. Rather, theories and concepts can also become a constitutive part of the world that they analyse and describe.⁶⁴ In this sense of performative force, theories or models 'contribute toward enacting the realities they describe'.⁶⁵ A model or theory posits a world in order to gain purchase from

⁶³ *Ibid.*, para. 10.

⁶⁴ Cf. Bhuta, 'State Theory, State Order, State System: *Jus Gentium* and the Constitution of Public Power', in S. Kadelbach, T. Kleinlein and D. Roth-Isigkeit (eds), *System, Order and International Law: The Early History of International Legal Thought* (forthcoming 2017).

⁶⁵ For an extension of Austin's concept of performativity (Austin, *How to Do Things with Words* (2nd edn. 1975), at 14–15) see Callon, 'What Does It Mean to Say That Economics Is Performative?', in D.A. MacKenzie, F. Muniesa and L. Siu (eds), *Do Economists Make Markets? On the Performativity of Economics* (2007) 315; Mackenzie, 'Is Economics Performative? Option Theory and the Construction of Derivatives Markets', 28 *Journal of the History of Economic Thought* (2006) 29.

a reality that (at least in the first instance) confronts it. Exceeding mere description, it brings new properties into being by composing elements and stabilizing compositions and relations between composites.⁶⁶ If the composition is successful and becomes assimilated into thought, it has transformed reality.

Remarkably, regarding *jus cogens*, the ILC – which in its work not only is, as a collective body, under specific constraints and committed to actual state practice but also enjoys a special authority – seems to have exerted considerable performative force on the concept of *jus cogens*. Therefore, neither of the recent books comprehensively captures the phenomenon of *jus cogens*. Rather, only when they are read together do they convey a complete picture of the complex value formalism represented by *jus cogens*, which is characterized by a specific concurrence of value and form and fraught with tensions between the effective realization of core values of international law and formalism as a paradigm value as such. For the time being, beyond the invocations of striking the right balance between creativity and caution, this tension between value and form has not yet been adequately processed either in practice or theory. Will it ever be?

Individual Contributions to Enzo Cannizzaro (ed.), *The Present and Future of Jus Cogens*

Enzo Cannizzaro, Preface;

Giorgio Gaja, Introduction;

Christian Tomuschat, The Security Council and *Jus Cogens*;

Pierre-Marie Dupuy, Le *jus cogens*, les mots et les choses: Où en est le droit impératif devant la CIJ près d'un demi-siècle après sa proclamation?;

Enzo Cannizzaro, On the Special Consequences of a Serious Breach of Obligations Arising Out of Peremptory Rules of International Law;

Beatrice I. Bonafè, La violation d'obligations envers la communauté internationale dans son ensemble et la compétence juridictionnelle de la Cour internationale de Justice.

⁶⁶ Didier, 'Do Statistics Perform the Economy?', in MacKenzie, Muniesa and Siu, *supra* note 65, 305.