
The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?

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Abstract

This article forms a contribution to the ongoing scholarly debate on the possible effect of jus cogens norms. For the purpose of the article, it is assumed that peremptory norms certainly exist in positive international law. According to the argument, even if we limit the effects of jus cogens norms to those described in the 1969 Vienna Convention, the jus cogens concept takes us farther than most commentators seem to realize. This is due partly to the power potential invested in the jus cogens concept, partly to the intricate structure typical of legal norms. In fact, as argued in this article, if we take the existence of peremptory international law to its logical consequence, it will carry too far: most actors on the international arena will consider the effects unacceptable. Using as an example the jus cogens norm most often referred to in the literature – the principle of non-use of force – it is a purpose of the present article to establish this proposition as valid. A second purpose is to attract attention to what appears to be the really crucial question for further discussion: How should the effects of jus cogens be limited? Whoever opened the Pandora's Box that once contained the jus cogens concept obviously did not fully realize the consequences that this would have for international law in general. How can this situation be remedied?

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1 Introduction

In the summer of 2006, the ILC Study Group on ‘Fragmentation of International Law’ completed its work, submitting to the Committee its final report.¹ With this report, attention is once again directed to the perplexing concept known as *jus cogens*. In a purely technical sense, the *jus cogens* concept provides a technique for solving conflicts occurring between different rules of international law.² Hence, according to the report, when a rule of *jus cogens* is shown to be in conflict with a treaty or a single treaty provision, the treaty or the single provision – if separable from the remainder of the treaty – shall be considered void.³ Secondly, when a rule of *jus cogens* is shown to be in conflict with a rule of ordinary customary international law or a resolution of an international organization, the customary rule or resolution shall be considered void.⁴ Thirdly, when a rule of *jus cogens* is shown to be in conflict with a rule of ordinary international law relative to some specific case or state of affairs, the former shall prevail.⁵

Each of these rules is applied relative to the assumption that we know what *jus cogens* is. We do not – not if we take ‘know’ to mean that we are capable of fully explaining the *jus cogens* concept. In fact there is still no generally acceptable definition.⁶ Arguably this legal void only illustrates how actors of international law perceive the phenomenon. If we search the international law literature for information on the possible normative content and effects of *jus cogens* norms, it will provide but a very diffused

¹ ‘Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission, Chaired by Martti Koskenniemi, *Report of the International Law Commission on the work of its 58th session, 1 May–9 June and 3 July–11 August 2006*. The report consists of two parts. The bulk of the report is contained in document A/CN.4/L.682. The other part, being a ‘condensed set of conclusions, guidelines or principles emerging from the studies and discussions in the Study Group’, is contained in UN Document A/CN.4/L.702. (The quotation is taken from the latter document, at 2.)

² It should be noted that when conflicts occur between different *principles*, they are solved using different techniques.

³ UN Doc. A/CN.4/L.682, at 155. According to the report, ‘[i]t is not necessary ... that this [meaning the application of Vienna Convention Arts 53 or 64] would lead to the invalidation of the whole treaty. Clauses that do not conflict with *jus cogens* and are separable from those that do, may remain valid’: *ibid.*, at 155, fn. 506. It should be noted that on this point the report is not supported by the Vienna Convention. According to Art. 44(5), ‘[i]n cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted’.

⁴ ‘Fragmentation of International Law’, UN Doc. A/CN.4/L.682, *supra* note 1, at 156.

⁵ *Ibid.*, at 149. Obviously, the difference between this third rule and the other two requires that, we distinguish between, on the one hand, the situation where a conflict occurs between two rules *relative to some specific case or state of affairs* and, on the other hand, the situation where the incompatibility of a rule with *jus cogens* is being perceived as more general. Cf. *ibid.*, at 15.

⁶ Some would argue that such a definition is indeed provided in the 1969 Vienna Convention on the Law of Treaties, Art. 53. Others would object, pointing to the fact that Art. 53 applies only relative to treaties between states, and furthermore only relative to such treaties that are concluded by states after the entry into force of the Vienna Convention ‘with regard to such States’ (Vienna Convention, Art. 4). Some would say that, even if the definition laid down in Art. 53 is considered reflective of customary international law, it still only applies relative to treaties. Others would contend that in customary international law there is indeed a general definition of the *jus cogens* concept, but this definition is partly different from the one provided in the Vienna Convention, since obviously Art. 53 was tailored to apply in the context of the law of treaties.

picture.⁷ In the most simplified of versions, it might be said that scholars belong to either one of two different camps.

On the one hand, we have the 'affirmants'.⁸ Describing the effects of *jus cogens* norms, affirmants cite the 1969 Vienna Convention on the Law of Treaties,⁹ Article 53, which is seen as expressing a rule applicable to international law at large. Whether considered in relation to conflicts only between *jus cogens* and international treaties, or more widely, in the context of international law in general, the definition laid down in Article 53 applies: a *jus cogens* norm is one which permits of no derogation and which can be modified only by a subsequent norm having that same character. For some affirmants, *jus cogens* norms have effects going even beyond those described in Article 53.¹⁰

On the other hand, we have a steadily diminishing group of 'sceptics'.¹¹ Sceptics accept the rules enshrined in the Vienna Convention concerning the effects of *jus cogens*, emphasizing, however, that in international law consensus has not (yet) been achieved on the normative content of that concept. They argue that for this reason *jus cogens* must be treated as existing merely on paper. Hence, according to the sceptics, *jus cogens* is a term used only for rhetorical purposes. It lacks all reference in positive law.

For the purpose of this article, I will adopt the position of an affirmant. I will assume that although admittedly *jus cogens* is a term often used for rhetorical purposes – to confer *pathos* on legal arguments that otherwise would appear less convincing – the concept does exist also in positive international law. What I intend to show is that the effects of *jus cogens* norms extend very far – farther than even most affirmants might assume. This is due partly to the power potential invested in the *jus cogens* concept, partly to the intricate structure typical of legal norms. In fact, I will take the argument even further. I will venture the proposition that if we take the existence of peremptory international law to its logical consequence, then this will simply carry too far: most

⁷ See, e.g., A. Orakhelashvili, *Peremptory Norms in International Law* (2006); L. Hannikainen, *Peremptory Norms (Jus Cogens) In International Law* (1988); Allain, 'The Jus Cogens Nature of Non-Refoulement' 13 *Int'l J Refugee L* (2001) 533; Araujo, 'Anti-Personnel Mines and Peremptory International Law: Argument and Catalyst', 30 *Vanderbilt J Transnat'l L* (1997) 1; De Wet, 'The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law', 15 *EJIL* (2004), 97; MacGregor, 'State Immunity and *Jus Cogens*', 55 *ICLQ* (2006) 437; Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of *Jus Cogens*', 71 *Nordic J Inter'l L* (2002) 523; Verhoeven, 'Droit des traits, réserves et ordre public (*jus cogens*)' 13 *Js trib* (1994) 765; Kornicker, 'State Community Interests, *Jus Cogens* and Protection of the Global Environment', 11 *Georgetown Int'l Environmental L Rev* (1998) 101. See also various entries in the recently published volume edited by Tomuschat and Thouvenin: *The Fundamental Rules of the International Legal Order* (2006).

⁸ See, e.g., Hannikainen, *supra* note 7; Paulus, 'Jus Cogens in a Time of Hegemony and Fragmentation', 74 *Nordic J Int'l L* (2005) 297.

⁹ 1155 UNTS 331.

¹⁰ See, e.g., Cassese, *International Law* (2nd edn., 2005), at 205–208.

¹¹ See, e.g., Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society', 28 *Virginia J Int'l L* (1988) 585; Weisburd, 'The Emptiness of the Concept of *Jus Cogens*. As Illustrated by the War in Bosnia-Herzegovina', 17 *Michigan J Int'l L* (1995–1996) 1.

actors on the international arena will consider the effects unacceptable. It is one of the two purposes of the present article to establish this proposition as valid. I will base my analysis on the norm most often referred to in the literature as an example of the international *jus cogens*: the principle of non-use of force.¹² A second purpose of this article is to encourage debate on the policy question that quite naturally ensues: How should the effects of *jus cogens* be limited? Whoever opened the Pandora's Box that once contained the *jus cogens* concept obviously did not fully realize the consequences that this would have for international law in general. How can this situation be remedied?

2 The Concept of a Legal Norm

As a basis for my analysis of the *jus cogens* concept, I will adopt two assumptions. First, I will take for granted that in the language of international law, the term *jus cogens* denotes a set of legal norms. To that extent, the point of departure chosen for the present article is identical to the one used for Article 53 of the Vienna Convention. According to the definition provided in Article 53, '[a *jus cogens* norm] 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'.¹³ Secondly, I will assume the *jus cogens* norm typically to be a norm having a regulative character. According to often-used terminology, legal norms have either a regulative or a constitutive character.¹⁴ When a norm is used to identify some behaviour or state of affairs as either prescribed, prohibited, or permitted, it is said to have a regulative character. When instead a norm is used to create an institutional fact it is said to have a constitutive character.¹⁵ For instance, a constitutive norm may be used for the purpose of establishing an international tribunal or defining some legally relevant concept. Clearly, the assumption underlying all previous writing on the topic is that *jus cogens* norms belong to the former category only.¹⁶

Given the assumptions adopted, it is evident that I cannot analyse the effects of *jus cogens* without first having established some kind of definition of what a legal norm is.

¹² See, e.g., the opinions expressed by the Governments of the US and Nicaragua, and by the International Law Commission, as reiterated by the ICJ in the Nicaragua Case. (*Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ, Judgment of 27 June 1986, [1986] ICJ Rep 14, para. 190, available at: www.icj-cij.org)

¹³ Italics added.

¹⁴ On the concept of regulative and constitutive norms generally see, e.g., A. Peczenik, *On Law and Reason* (1989), at 276–281.

¹⁵ Let us use Art. 53 of the 1969 Vienna Convention as an example! Obviously, it can be analysed as expressing two norms, the one having a regulative character – consider the first sentence of the provision – the other having a constitutive character – the second sentence.

¹⁶ Examples include the principle of non-use of force; the right of self-determination; and the prohibitions of slavery, genocide, *apartheid*, crimes against humanity, and torture. See, e.g., Cassese, *supra*, note 10, at 198–212.

Certainly, the proper definition of a legal norm is a matter of debate,¹⁷ but I will not here engage in this philosophical polemic any more than is absolutely necessary, considering the purpose at hand. Hence, I will confine myself to establishing two propositions generally practised in the analysis and systemization of international law. Arguably, participants of the international law discourse accept them as a matter of course.

- (1) A legal norm is not to be identified with the utterance or utterances by which we assume the norm to be expressed.

In international law, state practice and international written agreements (or treaties) are referred to as *means for the determination of law*.¹⁸ Obviously, this terminology originates in the assumption that state practice and international treaties express legal norms, and that, for this reason, we should use them whenever the existence and contents of such norms need to be established. It would not make sense to refer to state practice and treaties as means for the determination of law if they themselves were considered to form norms of law. Similarly, it would not make sense to say of a treaty that it is not clear or that it needs to be interpreted. If a treaty is considered unclear this is because the legal norm it is assumed to express is not borne out clearly by its text.¹⁹

- (2) In order fully to reconstruct the contents of a legal norm having a regulative character, we need to be able to state, first, the specific kind of conduct or state of affairs prescribed, prohibited, or permitted, and, secondly, each and every single condition on which the prescription, prohibition, or permission is to be dependent, including to whom it applies.

The contents of legal norms are expressed and communicated in the form of norm sentences.²⁰ In linguistics, a distinction is made between the sentence as something that can be uttered (as the product of a language-behaviour on the part of some human being or group of human beings), and the sentence as an abstract entity in the linguist's model of the language system.²¹ Otherwise, when we confronted a series of words inscribed on a piece of paper or uttered orally, we would not be able to say that the series was incomplete or that words had been put together incorrectly. Take, for instance, the following passage: '[a] treaty are applied provisionally pending its entry force'. The utterance might be said to express a sentence, but obviously, it does

¹⁷ For a brief description of the various competing definitions see, e.g., Pezcenik, *supra*, note 14, at 270–272. For further discussions on the concept of a legal norm see, e.g., Alchourrón and Bulygin, 'The Expressive Conception of Norms', in S.L. Paulson and B. Litschewski Paulson (eds), *Normativity and Norms* (1998), at 383–410; O. Weinberger, *Norm und Institution* (1988); H. Kelsen, *Allgemeine Theorie der Normen* (1979).

¹⁸ In this context, the terms treaty and practice should be understood in their respective material senses. Treaty should be understood in the sense of the textual (and possibly also non-textual) representations expressing the contents of an agreement. State practice should be understood in the sense of repeated action or non-action attributable to states.

¹⁹ Cf. Art. 33(4) of the 1969 Vienna Convention: '[W]hen a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove'.

²⁰ See, e.g., K. Larenz, *Methodenlehre der Rechtswissenschaft* (6th ed., 1991), at 250.

²¹ See, e.g., J. Lyons, *Linguistics* (1977), at 28–29.

so incorrectly. (Of course, any reader familiar with the law of treaties can identify the intended message, properly stated, as being the following: a treaty is applied provisionally pending its entry into force.²²)

Similarly, in the science of law we have to distinguish between *norm sentence* in a material sense – corresponding to a string of words inscribed on a piece of paper or uttered orally – and *norm sentence* as a complete unit in a legal system. When a legal norm is communicated, communication is effected through the expression of a norm sentence in this latter sense.²³ The legal norm is an ideal construction. For the same reason that a person can be said to have expressed a sentence incorrectly, we may say about the text of a treaty provision that even though it may give an indication of the existence and contents of a legal norm, it does not give the norm full expression. An obvious example would be Article 109(4) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS): '[o]n the high seas, a State having jurisdiction in accordance with paragraph 3 may, in conformity with article 110, arrest any person or ship engaged in unauthorized broadcasting and seize the broadcasting apparatus'.²⁴ Clearly, in order to state the content of the relevant norm, we need to know more. At least we need to know what is provided in Article 109(3) and Article 110; and of course, we need to know to whom the right applies: Which are the parties to the Convention?

The example just given makes evident what all lawyers know but sometimes need to be reminded of: in order to reconstruct the full contents of a legal norm, we are often forced to take into account several sentences uttered in different contexts, like, for instance, the text of several articles in a treaty. Certainly, based on the text of Article 109(3) of UNCLOS, we can say that in its relations with other parties, a state party to the Convention shall be permitted to arrest on the high seas any person or ship engaged in unauthorized broadcasting and to seize the broadcasting apparatus. However, in and of itself the text of Article 109(3) does not make up the whole picture. The permission laid down in Article 109(3) is not absolute. The relevant legal norm is applied relative to conditions stated in other provisions of the Convention, primarily Article 109(3) and Article 110 (as is already apparent from the text of Article 109(4)), but also Article 86 and Article 109(2) (which define what is to be understood by 'the high seas' and by 'unauthorized broadcasting', respectively).

Of course, the reconstruction of legal norms may be even more complicated than this. Sometimes we have to go outside the immediate temporal context formed by a single treaty, to combine sentences expressed at different points in time. Take, for instance, Article 1 of Additional Protocol 6 to the European Convention on the Protection of Human Rights and Fundamental Freedoms: '[t]he death penalty shall be abolished. No-one shall be condemned to such penalty or executed.'²⁵ Using the expression

²² Cf. Art. 25 of the 1969 Vienna Convention on the Law of Treaties.

²³ See, e.g., Larenz, *supra* note 20, at 250.

²⁴ 1833 UNTS 3.

²⁵ See Prot. No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (ETS, No. 114), and European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS, No. 5), respectively.

'No-one', Article 1 refers to the contents of Article 1 of the European Convention.²⁶ The meaning of Article 1 of Additional Protocol 6 is *supervenient* on Article 1 of the European Convention, to borrow a term used in legal philosophy.²⁷ 'No-one' simply means *everyone within the jurisdiction of a High Contracting Party*. Obviously, in order to reconstruct the contents of the relevant legal norm we have to take into account the text of Protocol 6 as well as that of the Convention.

Another telling example is provided by UNCLOS, Article 219: '[s]ubject to section 7, States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their offshore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall as far as practicable, take administrative measures to prevent the vessel from sailing.'²⁸ It is the generally accepted reading that by 'international rules and standards', among other things Article 219 refers to resolutions adopted by the Assembly of the International Maritime Organization and to customary international law.²⁹ Hence, in this case a full reconstruction of the relevant legal norm seems to require that we consider sentences not only expressed at different times – as in the previous example – but also by different utterers. Stated differently, parties to the Law of the Sea Convention create only parts of the relevant legal norm; other parts are created by other bodies and by other constellations of states.

3 The Prohibition on the Use of Force and the Right of Self-defence

As indicated earlier, *jus cogens* confuses the international law discourse mainly because actors of international law have not been able to reach a consensus on the proper definition of the term. This is not to say that *jus cogens* cannot possibly be exemplified. It can, and the international law literature proves the point by its ample suggestions for possible *jus cogens* candidates. As it appears, the least controversial example of all is *the principle of non-use of force*.³⁰ For the purpose of the present article, I will accept this example. I will assume the principle of non-use of force indeed to be a norm having a *jus cogens* character.

On the basis of the assumption just adopted, I will now conduct an experiment. I will attempt to reconstruct in verbal form the contents of the relevant *jus cogens* norm.

²⁶ Cf. Prot. 6, Art. 6: 'As between the States Parties the provisions of Articles 1 and 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.' Art. 1 of the European Convention reads as follows: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'

²⁷ See, e.g., R.M. Hare, *Essays in Ethical Theory* (1993), at 66–81.

²⁸ Note that this is an excerpt: a second sentence of the provision has been excluded.

²⁹ See, e.g., G. Kasoulides, *Port State Control and Jurisdiction* (1993), at 35–41.

³⁰ This is the term used by the International Court of Justice in the *Nicaragua Case*, *supra* note 12, at para.188.

Of great help for the completion of this task is the provision laid down in Article 2(4) of the UN Charter. Certainly, like all *jus cogens* norms, the principle of non-use of force is a norm that belongs to the realm of customary international law.³¹ To be more specific, it is a norm universally applicable.³² However, according to what is generally taken for granted, the principle of non-use of force expressed in UN Charter Article 2(4) corresponds (at least in essentials) to that contained in customary international law,³³ and that is the reason I will use the provision as my point of departure.

Hence, as a tentative statement of the relevant *jus cogens* norm, I will begin with the following sentence:

If, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or inconsistent with the purposes of the United Nations, then this shall be considered a violation of the international *jus cogens*.

Obviously, this description is not adequate. The prohibition on the use of force – as expressed in Article 2(4) of the UN Charter – is not absolute. It is applied relative to certain conditions, one among which is that force cannot be justified by invoking the right of self-defence laid down in Article 51 of the UN Charter. This provision, too, is considered to be a reflection of customary international law.³⁴ In the authenticated English version of the Charter, Article 51 reads as follows:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.³⁵

In other words, the relevant *jus cogens* norm cannot possibly be identical with the principle of non-use of force as such. If it were, this would imply that whenever a state exercises a right of self-defence, it would in fact be unlawfully derogating from a norm of *jus cogens*. A correct description of the norm would have to account for the fact that the principle of non-use of force does have exceptions. Hence, compared to the tentative statement above, a better way of representing the relevant *jus cogens* norm would be along the following lines:

If, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or inconsistent with the purposes of the United Nations, and this action is not prompted by an armed attack, then this shall be considered a violation of the international *jus cogens*.

This suggestion that the right of self-defence is part of a *jus cogens* norm might not come out as natural to everyone. In any event, the suggestion does not go very well

³¹ *Ibid.*

³² Occasionally, the claim has been made that, apart from the universally applicable *jus cogens*, there may also be something like a *jus cogens* of regional (or even bilateral) applicability: see, e.g., E. Suy, *The Concept of Jus Cogens in Public International Law, Papers and Proceedings*, Report of a Conference organized by the Carnegie Endowment for International Peace, at Lagonissi, 3–8 Apr. 1966 (1967), at 106; Boutros-Ghali, in *ibid.*, at 107. Whether, analytically, such a thing as a regional or bilateral *jus cogens* is at all possible is a question which has to be dealt with elsewhere.

³³ See, e.g., *Nicaragua Case*, *supra* note 12, at para. 188.

³⁴ See, e.g., *ibid.*, at para. 193.

³⁵ Note that this is an excerpt: a second sentence of the provision has been excluded.

with ideas often expressed in the international literature, and apparently quite commonly represented among actors of international law in general. Two such ideas should be noticed in particular.

First, we have the idea that in modern international law there are actually two rights of self-defence, one of which – the right contained in customary law – is only partly identical with the other – the right laid down in Article 51 of the UN Charter. For example, it is a fact that while many commentators accept that, according to Article 51, force may not be used by a state for anticipatory purposes, they still claim the existence of a right of anticipatory or pre-emptive self-defence in customary international law.³⁶ Consequently, if we set ourselves the task of inquiring whether, according to international law, force may be used by a state for anticipatory purposes (to prevent an attack which is allegedly imminent), the answer will be different depending on the specific norm assumed for the inquiry. In other words, the right expressed in Article 51 is in conflict with the one contained in customary international law. According to the rule expressed in Article 64 of the 1969 Vienna Convention, read in conjunction with Article 44, when a rule of *jus cogens* is shown to be in conflict with a single treaty provision, the provision – given that it is separable from the remainder of the treaty – shall be considered void. Obviously, if a person considers the principle of non-use of force to be a norm having the character of *jus cogens*, advocating at the same time the idea that customary international law (but not the Charter of the UN) allows for the exercise by a state of a right of anticipatory or pre-emptive self-defence, then he or she would also have to accept the logical consequence that, for many years, Article 51 of the UN Charter has been a nullity.³⁷

Secondly, we have the idea that in consequence of the behaviour and non-behaviour of states in the period immediately following upon the terrorist attacks performed in and against the United States of America on 11 September 2001, customary

³⁶ See, e.g., Brunée and Toope, 'Slouching Towards New "Just" Wars: International Law and the Use of Force After September 11th', 51 *Netherlands Int'lLRev* (2004) at 373; Wolfrum, 'The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is there a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?', 7 *Max Planck Yearbk UN L* (2003) 28–29; A.C. Arendt and R.J. Beck, *International Law and the Use of Force* (2003), at 71–79; D.W. Bowett, *Self Defence in International Law* (1958), at 192. See also the dissenting opinion of Judge Schwebel, in the *Nicaragua Case*, *supra* note 12, at 347–348.

³⁷ It should be noted that according to Art. 44 of the 1969 Vienna Convention, when a treaty comes within the scope of application of Art. 64 it is treated differently from a treaty falling under Art. 53. In the former case, when a rule of *jus cogens* is shown to be in conflict with a single treaty provision, the provision may be separated from the remainder of the treaty, meaning that only the single provision will be void, but not the remainder of the treaty. In the latter case, no separation is permitted: see Art. 44(5). I have assumed about the principle of non-use of force that it did not have a *jus cogens* character in 1945 when the Charter of the UN was concluded, but that it acquired this status at a later date. If we were to assume about the principle of non-use of force that indeed it had the character of *jus cogens* already in 1945 – every other condition remaining the same – then of course the conclusion would have to be that the entire Charter was always a nullity.

international law underwent substantial change.³⁸ Before the events of 11 September – so goes the argument – a right of self-defence could be exercised only on the occasion of an armed attack carried into effect *by one state as against another*. On 7 October 2001, when officially military operations were initiated by British and American troops on the territory of Afghanistan,³⁹ customary international law allowed for a right of self-defence to be exercised also upon a large-scale attack performed *by a non-state agent*. Hence, in the final analysis – and still according to the argument – the legality of the British–American military operations turns on the assumption that at some point during the period of 11 September–7 October the contents of customary international law developed. Obviously, whoever adopts such an assumption has some serious problems to confront.

In order for a norm of customary international law to be described as peremptory, it has to be regarded as peremptory by the international community of states as a whole. This is evident from the definition provided in Article 53 of the 1969 Vienna Convention on the Law of Treaties: '[a *jus cogens* norm] 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'.⁴⁰ Stated somewhat differently, a norm of *jus cogens* may be said to presuppose the existence of two kinds of *opinio juris*.⁴¹ This requirement for a double *opinio juris* is of great relevance for the discussion on the possible legality of the British–American military activities in Afghanistan.

Let us say that we are advocating the proposition that from 11 September to 7 October 2001, the right of self-defence contained in customary international law partly changed. Obviously, it would not be enough if we could show that in this very period states changed their opinion with regard to the contents of the right of self-defence. We would also have to show that states changed their opinion with regard to the contents of peremptory international law. Considering the circumstances, this second requirement can hardly be met. Even accepting the assumption that an ordinary norm of customary international law can be brought into existence or modified in a period of four weeks,⁴² it is indeed an absurdity to imagine that in such a short period of time

³⁸ See, e.g., C. Gray, *International Law* (ed., Evans, 2nd edn., 2006), at 602–603; Myjer and White, 'The Twin Towers Attack: An Unlimited Right to Self-Defence?', 7 *J Conflict and Security L* (2002) 7–9; Greenwood, 'International Law and the "War Against Terrorism"', 78 *Int'l Affairs* (2002), at 301; Bring and Fischer, 'Post-September 11: A Right of Self-Defence Against International Terrorism?', in D. Amnéus and K. Svanberg-Torpman (eds), *Peace and Security* (2004), at 185–191; Langille, 'It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001', 26 *Boston College Int'l and Compe LRev* (2003), at 154.

³⁹ In this context, it may be noted that in the Afghanistan Combat Zone Executive Order of 12 Dec. 2001, Sept. 19 was designated as the date of commencement of combat activities. See www.whitehouse.gov/news/releases.

⁴⁰ Italics added.

⁴¹ See Linderfalk, 'Legal Discourse Gone Awry: Why the Scholarly Debate on the Legality of Operation Enduring Freedom Was Poor Science', forthcoming (2008).

⁴² For a more thorough analysis of this argument see *ibid.*

a similar development could ever be effected with regard to a norm of *jus cogens*. It is entirely inimical to the idea of *jus cogens* as an uncommonly permanent set of norms.

4 The Prohibition on the Use of Force and the Right to Use Force Pursuant to a Decision of the UN Security Council

In the literature, the international law on the use of force is often described first of all from the point of view of a UN member state. Using the law of the UN Charter as a point of departure, we have to admit that, of course, there are more exceptions to the prohibition on the use of force than just the right of self-defence expressed in Article 51. If a state acts in violation of Article 2(4), not being prompted by an armed attack, the conclusion *might* be that this action amounts to a breach of the obligations incumbent upon the state under the UN Charter; but not necessarily so. The state might be acting pursuant to a decision of the UN Security Council. According to Article 42 of the Charter as generally interpreted, if this is deemed necessary to maintain or restore international peace and security, the Security Council has the power to decide on the employment of armed force.⁴³ Such a decision confers upon each and every one of the UN member states as against all others a right to resort to force, including such force that would normally be considered a violation of Article 2(4). It confers on the specific member state against which force is directed a corresponding obligation to accept the decision.

It is a rather tricky question whether the right to use force pursuant to a decision of the Security Council taken in accordance with Article 42 of the UN Charter also follows from customary international law. Irrespective of the answer adopted, the assumption concerning the general principle of non-use of force as a norm of *jus cogens* will lead us into trouble. The traditional answer would probably be that according to customary international law, a state has *no right* to use force pursuant to a decision of the Security Council under Article 42.⁴⁴ In other words, according to the position traditionally taken, the international law on the use of force laid down in the Charter of the UN is to some extent different from that contained in customary international law as described in the above. In the face of a decision taken by the Security Council under Article 42 of the Charter, the state who decides to act pursuant to the decision will be acting either in keeping with its international law obligations or in violation of the same, depending on the specific source applied. The regulations contained in the UN Charter and in international customary law, respectively, are in obvious conflict. In such a situation – once again according to the rules expressed in the 1969 Vienna Convention – the relevant Charter provision shall be considered void. This is, of course, not a very attractive conclusion.

⁴³ See, e.g., Frowein and Krisch, 'Article 42', in B. Simma *et al.* (eds), *The Charter of the United Nations. A Commentary* (2nd edn., 2002), i, at 756–758.

⁴⁴ See, e.g., Frowein and Krisch, 'Introduction to Chapter VII', in *ibid.*, at 715.

The obvious alternative would be to argue with regard to the right to use force pursuant to a decision taken by the Security Council that, in fact, it can be exercised by invoking not only the provisions of the UN Charter but also customary international law. Hence, when a state S acts in accordance with a decision taken by the Security Council, the state against which force is directed is precluded from invoking the international responsibility of state S, *irrespective of whether it is a member of the United Nations or not*. According to this view, the right of the Security Council to authorize a use of force would have to be described as an objective regime.⁴⁵ Furthermore, we would really have good reason for the characterization of the UN Charter as (in part) a world constitution, in the sense of an instrument transcending the sovereignty of all states.⁴⁶ If we have chosen to characterize as *jus cogens* the prohibition on the use of force – as expressed in UN Charter Article 2(4) – then in our attempt fully to reconstruct the contents of the relevant *jus cogens* norm we would also have to account for all possible exceptions to the prohibition. Obviously, that includes not only the right of self-defence – as explained above – but also the right to use force pursuant to a decision taken by the Security Council under UN Charter Article 42.⁴⁷ The right to use force pursuant to a decision taken by the Security Council is 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’.⁴⁸ Consequently, the UN Security Council would have to be described as a true supranational body having the power to take decisions that are legally binding for each and every state of the world, irrespective of whether it has consented to that power or not. For the traditionally trained lawyer this, too, is a conclusion that provokes. Obviously, the assumption that the principle of non-use of force has a *jus cogens* character forces us to make a choice that we would really like to avoid.

5 Further Expansions of the Relevant *jus cogens* Norm

Let us say that, according to the assumptions adopted for the purpose of this article, we accept that the general principle of non-use of force is a norm having a *jus cogens* character. As I argued earlier, we must then also submit to the idea that the relevant *jus cogens* norm includes not only the prohibition on the use of force, as expressed in Article 2(4) of the UN Charter. It also includes all possible exceptions to this same

⁴⁵ On the concept of objective regimes see, e.g., S.P. Subedi, *Land and Maritime Zones of Peace in International Law* (1996), at 174–205.

⁴⁶ Cf. Fassbender, ‘The United Nations Charter as Constitution of the International Community’, 36 *Columbia J Transnat’l L* (1998) 529–619; Dupuy, ‘The Constitutional Dimension of the Charter Revisited’, 1 *Max Planck Yearbk UNL* (1997), at 1.

⁴⁷ The projected norm sentence would then read as follows: ‘if, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or inconsistent with the purposes of the United Nations, and neither is this action prompted by an armed attack, nor is it pursuant to a decision taken by the UN Security Council according to the provisions of UN Charter Article 42, then it shall be considered a violation of the international *jus cogens*’.

⁴⁸ See Art. 53 of the 1969 Vienna Convention.

prohibition, such as the right of self-defence. Naturally, this idea can be further developed.

Given that we have made it our task to state in the form of a sentence the full contents of the prohibition on the use of force, then in this sentence we need to account for each and every condition relative to which the prohibition applies. In consideration of the line of reasoning laid out in Section 3 above, the relevant *jus cogens* norm was there set out as follows:

If, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or inconsistent with the purposes of the United Nations, and this action is not prompted by an armed attack, then this shall be considered a violation of the international *jus cogens*.

Now, notwithstanding the communicative virtue of representing law in a fairly brief form, I will claim that this norm sentence is still incomplete; and I will make that claim irrespective of the uncertainties regarding whether in the relevant *jus cogens* norm we should or should not include the right to use force pursuant to a decision taken by the Security Council under Article 42 of the UN Charter. According to the view commonly taught in international law literature, and repeatedly confirmed by the International Court of Justice, in order for a measure used in self-defence to remain within the bounds of what customary international law allows, it has to meet the two criteria of necessity and proportionality.⁴⁹ The criterion of proportionality is met if and to the extent that a forcible measure is commensurate with its legitimate purpose, that being to repel an armed attack already in progress (or to prevent one still only impending).⁵⁰

Obviously, determining whether a self-defence measure is a *proportionate* one is not very easy. Hence, in order to add further clarity to the concept, the International Court of Justice has established a number of principles that need to be observed. Most importantly, in its *Use of Nuclear Weapons Advisory Opinion* of 8 July 1996, the Court stated that according to the law of self-defence, in order for a use of force to be proportionate, it must meet 'the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law'.⁵¹ Admittedly, it is far from clear exactly what the Court wishes us to include in the extension of 'the principles and rules of humanitarian law'. Still, this does not detract from the great relevance of its pronouncement. What the Court says is simply that the right of self-defence is supervenient on international humanitarian law, however broadly we wish to define it. If we accept this conclusion, then all of a sudden our attempted project of

⁴⁹ See, e.g., the reasoning of the ICJ in the Oil Platforms Case. *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, ICJ, Judgment of 6 Nov. 2003, [2003] ICJ Rep 161, para. 43, available at www.icj-cij.org.

⁵⁰ See, e.g., *ibid.* at para.73. In this article, I do not wish to take a stand on the issue whether in customary international law a right of self-defence may be exercised for anticipatory purposes or not.

⁵¹ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion of 8 July 1996 [1996(I)] ICJ Rep 226, at para. 42, available at www.icj-cij.org.

reconstruction seems to have expanded considerably. It will have to cover not only the international law on the use of force proper, but also substantial parts of international humanitarian law. Logically, this implies that substantial parts of international humanitarian law, too, would have to be characterized as *jus cogens*.

A similar argument can be made with respect to the general rules of attributability contained in customary international law, and expressed in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts.⁵² As seen from the wording of Article 51 of the UN Charter, a right of self-defence is conferred on a state upon the occurrence of ‘an armed attack’. In the international law literature, the meaning of ‘an armed attack’ is a matter of serious dispute. Following the events of 11 September 2001, for example, it seems that commentators are still not agreed on whether a large-scale attack carried into effect by a non-state agent, such as an international terrorist organization, shall be considered ‘an armed attack’ or not.⁵³ Agreement exists, however, with respect to the right of self-defence being conferred on a state upon the occasion of an attack performed *by one state as against another*. Consensus also seems to have been reached on how to determine whether in the sense of international law, an attack is performed by a state or not. We simply apply the relevant rules contained in the international law of state responsibility: the general rules of attributability.⁵⁴ In other words, the right of self-defence applies in the light of the general rules of attributability. If we accept this suggestion, at the same time conferring on the right of self-defence the character of *jus cogens*,⁵⁵ then naturally the content of *jus cogens* is

⁵² See Arts 4–11. The Arts were adopted by the International Law Commission at its 53rd session in 2001, and acknowledged later that year by the UN General Assembly in its resolution 56/83.

⁵³ See, e.g., Stahn, ‘International Law at a Crossroads? The Impact of September 11’, 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002) 203–214; Gray, *supra* note 38, at 602–603; [inits] Y. Dinstein, *War, Aggression and Self-Defence* (4th edn., 2005), at 204; Cassese, ‘Terrorism is Also Disrupting Some Crucial Categories of International Law’, 12 *EJIL* (2001) 993; Franck, ‘Terrorism and the Right of Self-Defence’, 95 *AJIL* (2001) 839–843; Mégret, ‘“War”? Legal Semantics and the Move to Violence’, 13 *EJIL* (2002) 361; Quénivet, ‘The Legality of the Use of Force by the United States and the United Kingdom Against Afghanistan’, 6 *Austrian Rev Int'l and European L* (2001) 205; Paust, ‘Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond’, 35 *Cornell Int'l LJ* (2002) 533; Greenwood, *supra* note 38, at 301; Bring and Fischer, *supra* note 38, at 185–191; Quigley, ‘The Afghanistan War and Self-Defence’, 37 *Valparaiso U L Rev* (2003) 541–562. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004 [2004] ICJ Rep 136, available at www.icj-cij.org, Declaration of Judge Buergenthal, at paras 5–6, Separate Opinion of Judge Kooijmans, at para. 35, and Separate Opinion of Judge Higgins, at para. 33; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ, Judgment of 19 Dec. 2005, not yet reported, at 53, para. 145, available at www.icj-cij.org.

⁵⁴ See, e.g., Stahn, *supra* note 53, at 216–228; Paust, *supra* note 53, at 540–544; H. Duffy, *The ‘War on Terror’ and the Framework of International Law* (2005), at 47–61; Schrijver, ‘Responding to International Terrorism: Moving the Frontiers of International Law for “Enduring Freedom”’, 42 *Netherlands Int'l L Rev* (2001) 285; Murphy, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter’, 43 *Harvard Int'l LJ* (2000), at 50; Mégret, *supra*, note 53, at 381–384; Franck, ‘Terrorism and the Right of Self-Defence’, 95 *AJIL* (2001) 841; Greenwood, ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’, 4 *San Diego Int'l LJ* (2003) 21, §25.

⁵⁵ See *supra* sect. 3.

affected. Earlier, we observed that the right of self-defence is supervenient on international humanitarian law, and that therefore international humanitarian law (or at least substantial parts of it) must be considered as having a *jus cogens* character. For the same reason it now appears that we are forced also to confer a *jus cogens* character on the general rules of attributability.

By this time, our projected norm sentence assumes alarming proportions:

If, in the conduct of its international relations, a state resorts to force directed against the territorial integrity and political independence of another state, or inconsistent with the purposes of the United Nations, and this action is not prompted by an armed attack, which according to the relevant rules of state responsibility is attributable to a state, or, if indeed prompted by such an attack, the force resorted to infringes the rules and principles of international humanitarian law, or for some other reason fails to meet the twofold criterion of necessity and proportionality, then this shall be considered a violation of the international *jus cogens*.

It should be noted that the norm is still stated in an abridged form, using intermediary concepts such as ‘the relevant rules of state responsibility’ and ‘the rules and principles of international humanitarian law’. Of course, the sentence would assume a form even more difficult to fathom if each and every rule and principle had been spelled out, one by one.

6 How should the Effects of *jus cogens* Norms be Limited?

By the investigations conducted in sections 3–5 above, I do not pretend to describe in any exhaustive manner the contents of the general principle of non-use of force. On the contrary, I fully recognize that, possibly on further analysis, the norm sentence stated at the conclusion of Section 5 will still be found under-inclusive. My sole ambition is to draw attention to the very far-reaching effects that often *jus cogens* norms will have to be afforded. Hopefully, that purpose has now been achieved.

Given that the effects of *jus cogens*, as described in this article, are considered unacceptably broad, the following policy question quite naturally ensues: how should the effects of *jus cogens* norms be limited? Obviously, still being true to our role as affirmants, we need to redefine our position. We need to establish some new definition of the *jus cogens* concept that corresponds better to the effects that we can agree to afford on *jus cogens* norms. Of course, such a definition may be put together in many different ways. Personally, I conceive of four possible alternatives.

According to a first alternative, *jus cogens* should be defined as limiting the effects of *jus cogens* norms to those established in the law of treaties, as expressed mainly in Articles 53 and 64 of the 1969 Vienna Convention. Obviously, such a solution makes little difference in the field of regulation investigated in the present article. As shown in the above, as far as concerns the customary law principle of non-use of force, the problem envisaged is partly that it exists side by side with a treaty of near-universal applicability – the Charter of the UN – partly that it is over-inclusive.⁵⁶ None of these

⁵⁶ See *supra* sections 3–5.

problems will be solved by simply rejecting each and every effect of *jus cogens*, except for the capacity to void a conflicting treaty. Furthermore, the limitation suggested implies the negation of an international practice, which clearly confers on a *jus cogens* norm several important effects above and beyond those laid down in the law of treaties. For example, if normally a state has the possibility of excluding or modifying the effects of a treaty by making reservations to it, a reservation to a treaty will not have the purported effect if it is incompatible with a norm of *jus cogens*.⁵⁷ If normally a state has the possibility of evading the legal effects of a rule of international custom by persistently objecting to it, objection will have no effects when the rule objected to is of *jus cogens* character.⁵⁸ If normally a state has the possibility of invoking distress or a state of necessity to justify a breach of international law that would otherwise have entailed the international responsibility of that state, such an argument will not be considered valid when the breach consists in the violation of *jus cogens*.⁵⁹

According to a second alternative, *jus cogens* should be defined as moderating in some way the power potential accorded to the concept in Article 53 of the 1969 Vienna Convention. Given the definition set out in Article 53, we would then have to revoke either the criterion of non-derogation or the principle of relative permanence (assuming that *jus cogens* can be modified only by the creation of norms having the same character). Whichever alternative we adopt, we will inevitably find that we have more or less emptied the concept of all contents. According to dictionary definitions, *peremptory* means *absolute; final; decisive; that cannot be denied, changed or opposed*. It simply does not make sense to have peremptory norms of international law which permit of derogation or which can be modified simply by the conclusion of a new treaty or by the creation of a rule of ordinary customary law. Furthermore, moderating the power potential accorded to the *jus cogens* concept does not coincide very well with modern international practice. Actually, the trend seems to be in the opposite direction. More and more, it is being accepted that international *jus cogens* has effects not only including those described by the two-fold criterion of non-derogability and relative permanence, but also going beyond that. For example, it is sometimes said that if normally immunity is enjoyed by a Head of State or a Head of Government, meaning that he or she cannot be tried in a court of law in another country for the commission of a crime, such immunity does not extend to the violation of *jus cogens* norms.⁶⁰ According to the rules expressed in the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, if a state grossly or systematically fails to fulfil an obligation incumbent upon it under a *jus cogens* norm, every other state shall

⁵⁷ See, e.g., Linderfalk, 'Reservation to Treaties and Norms of Jus Cogens: A Comment on Human Rights Committee General Comment No. 24', in I. Ziemele (ed.), *Reservations to Human Rights Treaties and the Vienna Convention Regime* (2004), at 213.

⁵⁸ See, e.g., Brownlie, *Principles of Public International Law* (6th edn., 2003), at 12, n. 56; Byers, 'Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules', 66 *Nordic J Int'l L* (1997) 220; Charney, 'Universal International Law', 87 *AJIL* (1993), at 541.

⁵⁹ Cf. Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 51, Art. 26.

⁶⁰ See, e.g., *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [1999] WLR 827, 119 Int'l LR 136, at 231–232, *per* Lord Millet.

be prohibited from recognizing as lawful the situation created by that breach, and from rendering aid or assistance in maintaining the situation.⁶¹

According to a third alternative, we should adhere to the definition in Article 53 of the 1969 Vienna Convention, also accepting that *jus cogens* norms have effects going beyond those described in Article 53, whichever they are. Instead, we should address the question of how in any intelligent way the *jus cogens* and the ordinary international law can be delimited. (Of course, such an approach requires a redefinition of the very concept of a *legal norm*, if only for the specific purpose at hand.) The delimitation can be accomplished in various ways.

For instance, using the principle of non-use of force as a point of departure, we may decide to confer on the prohibition on the use of force a *jus cogens* character, but not the exceptions to that same prohibition. As indicated earlier, we would then have to accept that whenever a state exercises a right of self-defence, or a right to resort to force pursuant to a decision of the UN Security Council taken under Article 42 of the UN Charter, it is in fact unlawfully derogating from the international *jus cogens*.⁶² Admittedly, this latter conclusion is not analytically necessary. The right of self-defence, and the right to resort to force pursuant to a decision of the UN Security Council, might be seen not as primary rules of law stating when and under what circumstances the action of a state shall be considered illegal, but as secondary rules stating when and under what circumstances the international responsibility for such action may not be invoked. This solution possibly finds support in the 2001 Articles on Responsibility of States for Internationally Wrongful Acts,⁶³ but on closer scrutiny it is not as attractive as it may at first seem.

First of all, adopting this solution, we would have to agree to describe the right to use force pursuant to a decision of the Security Council as one that can be exercised according to customary international law. As explained earlier, that is indeed a description bound to provoke.⁶⁴ Secondly, however useful the solution may be relative to the principle of non-use of force, it does not lend itself to generalizations. For example, it is commonly accepted that according to a rule of peremptory international law, the commission of war crimes shall be prohibited.⁶⁵ As is evident from the decision of the International Criminal Tribunal for Former Yugoslavia in the well-known *Tadić Case*,⁶⁶ that rule, too, would have to be applied relative to the general rules of attributability. Obviously, if we wish to avoid categorizing the general rules of attributability as *jus cogens*, in this case restating in terms of secondary rules of law the right

⁶¹ Cf. Arts 40–41.

⁶² See *supra* section 3.

⁶³ Cf. Art. 21.

⁶⁴ See *supra* section 4.

⁶⁵ See, e.g., *Prosecutor v. Zoran Kupreškić* (Case IT-95-16), Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Judgment of 14 Jan. 2000, at para. 520, available at: www.un.org/icty.

⁶⁶ *Prosecutor v. Tadić* (Case IT-94-1), Appeals Chamber of the ICTY, Judgment of 15 July 1999, at paras 68–171, available at: www.un.org/icty.

of self-defence and the right to use force pursuant to a decision of the UN Security Council is of no help whatsoever. Thirdly, the solution implies a negation of international practice. From the perspective of legal argumentation, there is an important difference between describing a right as a primary rule regulating state behaviour and describing it as a secondary rule laying down some possible circumstance precluding wrongfulness. Applying the right relative to a forcible measure resorted to by a state S, in the former case we would come to the conclusion that state S has acted in a way *consistent* with the international law on the use of force. In the latter case, we would be forced to conclude that even though the international responsibility of state S may not be invoked, the fact remains that it has acted in *violation* of the international law on the use of force. Clearly, in the practice of states, neither the right of self-defence nor the right to use force pursuant to a decision of the Security Council is used in this latter sense.

As another possible way of delimiting the *jus cogens* and the ordinary international law – still using the principle of non-use of force as our example – we could decide to confer a *jus cogens* character on the prohibition on the use of force, as well as on the possible exception or exceptions to that prohibition, but choose to leave out of consideration most of international humanitarian law (IHL) and most of the rules of attributability. Stated more specifically, we could decide to consider IHL and the general rules of attributability as peremptory, but then only relative to the right of self-defence. Except for those cases where IHL and the general rules of attributability assist in the understanding and application of the right of self-defence, they will maintain their status as ordinary customary international law. The character of *jus cogens* will not be afforded to IHL and the general rules of attributability as such. It will be afforded to the twofold condition that force used in self-defence must be prompted by an armed attack attributable to a state, and that it must meet the requirements of IHL.

I guess that by sheer instinct, this is the solution most affirmants would favour. No doubt, legal tradition recognizes a close affiliation between on the one hand, the prohibition on the use of force, as expressed in Article 2(4) of the UN Charter, and on the other hand, the right of self-defence and the right to use force pursuant to a decision taken by the UN Security Council under Article 42 of the UN Charter. Arguably, in the minds of most commentators, this close affiliation does not exist when the prohibition and the two rights just referred to are opposed to IHL and the general rules of attributability.⁶⁷ However, this approach, too, entails some rather problematic consequences.

First, adopting the solution just suggested implies that IHL and the general rules of attributability will exist in two versions. The one version will require, for example, that a military attack not be directed against a civilian population as such. It will apply to the use of force in general. The other version will require that a self-defence measure not be directed against a civilian population as such. It will apply to the exercise

⁶⁷ It is symptomatic that in international law commentators speak about the *jus ad bellum* and the *jus in bello* as two distinct branches of law.

of a right of self-defence. As is evident, this solution entails the fragmentation of international law. Adopting the solution, *jus cogens* will not be the uniting force it is often claimed to be,⁶⁸ but rather a force working in the exactly opposite direction, for the disintegration of international law.

Secondly, the solution will leave the door open for some clearly very disconcerting future clashes. Certainly, from the very beginning, the two versions of attributability rules and IHL will not be in conflict, since the one version is modelled entirely on the contents of the other. However, this applies only as long as the contents of the attributability rules and the IHL remain altogether the same. Of course, the contents of the attributability rules and the IHL will eventually change. I would suggest that since 1996, when the International Court of Justice first remarked on the relationship of the *jus ad bellum* with the *jus in bello*, the contents of the IHL have indeed already changed. In the longterm, this will naturally lead to a change in the *jus cogens* as well, but – and this is the crucial point – it will not do so immediately, since a norm of *jus cogens* can be modified only by the creation of a subsequent norm having the very same character. Hence, the two versions of attributability rules and IHL will no longer be logically compatible. In such a situation, according to the rules of conflict recognized in international law,⁶⁹ the new rule of attributability or IHL will have to be considered void.

This leaves us with a fourth remaining alternative for a new definition of the *jus cogens* concept. According to this last alternative, our attempt at a suitable definition should be seen as in fact a search for the Holy Grail. *Jus cogens* is a term used for rhetorical purposes, but on closer analysis we should admit that in positive international law *jus cogens* norms simply do not exist. Accepting this proposition, we do not dismiss entirely the idea that there might be a difference between *jus cogens* and the ordinary international law. However, we are content with the difference lying not with what the two terms describe – what linguistics would call their descriptive meaning – but only with the different emotions they evoke – their social meaning.⁷⁰ We are content with the difference between the *jus cogens* and the ordinary international law being no greater than that between ‘dying’ and ‘passing away’, or between ‘towel-head’ and ‘Muslim wearing a turban’.⁷¹ But, of course, this implies the complete abandonment of our position as affirmants held hitherto.

⁶⁸ See, e.g., Paulus, ‘Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and the Role of the State’, 25 *Michigan J Int’l L* (2004) 1050.

⁶⁹ See *supra* section 1.

⁷⁰ On descriptive and social meaning generally see, e.g., Lyons, *supra* note 21.

⁷¹ Personally, I consider ‘towel-head’ a terrible word. If you share this opinion, it just goes to illustrate my point that in the practice of a language some words are indeed very powerful.