CONFLICTS WITH *JUS COGENS* IN INTERNATIONAL LAW

ASIF HAMEED

WADHAM COLLEGE, UNIVERSITY OF OXFORD

DOCTOR OF PHILOSOPHY IN LAW

TRINITY TERM 2012

100,198 WORDS

Conflicts with *Jus Cogens* in International Law

Asif Hameed, Wadham College, University of Oxford

Doctor of Philosophy in Law, Trinity Term 2012

Abstract

Jus cogens is a mysterious body of international law. It comprises legal standards which are thought to be superior to those in ordinary international law, namely, international treaties, customary international law, and general principles of law. The title of this study – 'Conflicts with *Jus Cogens* in International Law' – condenses its main aims. The study examines conflict-situations between *jus cogens* rules and rules of ordinary international law.

The study is divided into four Parts. Part I clarifies what *jus cogens* status means and how *jus cogens* rules are made. Part II analyses some of the different ways in which legal rules come into conflict with each other. I seek to push the boundaries of our understanding of legal conflict, and I also construct a typology of legal conflict. In Part III, I apply the analysis of conflict in Part II to the *jus cogens* context by identifying and classifying situations where rules of ordinary international conflict with *jus cogens* rules. Finally, Part IV explores the consequences of the conflicts with *jus cogens* which were identified in Part III. What we see is that the consequences of these conflicts are varied. Most strikingly, however, we find that in some cases *jus cogens* rules are being defeated by rules of ordinary international law. This challenges the orthodox thinking that *jus cogens* rules are straightforwardly superior to ordinary international law, in the sense that they always prevail in conflict-situations. But while the conclusion of the study may seem radical, it is informed by theoretical writing about law and about how rules conflict.

Ultimately, the study seeks to improve our understanding of *jus cogens* rules in international law, as well as the more general problem of how legal rules conflict with each other.

Table of Contents

Introduction....1

Part I. *Jus Cogens*

Chapter 1. *Jus Cogens*: The Debates Thus Far....6

1.A. Introduction....6
1.B. *Jus cogens* in Article 53 of the 1969 Vienna Convention on the Law of Treaties....8
1.C. Existing debates about how *jus cogens* is made....10
1.D. Problems with the debates thus far....27

Chapter 2. *Jus Cogens* Revisited....38

2.A. Back to basics....40
2.B. Social morality....44
2.C. Why importance?....49
2.D. Why moral importance?....49
2.E. The degree of moral importance: moral paramountcy....50
2.F. Some intervening remarks on methodology....51
2.G. Whose beliefs?....54
2.H. Determining the moral beliefs of legal officials....61
2.I. Moral paramountcy and weight....65
2.J. The existing rules of ordinary international law which acquire *jus cogens* status....68
2.K. Might *jus cogens* not be source-based?....72
2.L. Summing up: the disagreement within the International Law Commission....75

Chapter 3. Some Remaining Questions about *Jus Cogens*....77

3.A. *Jus cogens* is unintentionally made....77
3.B. *Jus cogens* tends to be slowly made....78
3.C. *Jus cogens* does not simply contain obligations....78
3.D. A supposed *jus cogens* rule may in fact be several rules....79
3.E. *Jus cogens* rules and invalidity....80
3.F. Returning to consent....82
3.G. Concluding remarks....84

Part II. Legal Conflict

Chapter 4. Formulating a Theory of Legal Conflict....86

4.A. Introduction....86
4.B. A general theory of conflict?....88
4.C. Outline of the argument....90
4.D. Logic and legal conflict....91
4.E. Returning to the 'impossibility of joint compliance' test: further problems....100
4.F. What counts as a persuasive theory of legal conflict?....103
4.G. The 'impossibility of joint realisation' test....104
4.H. Conflicts involving legal rights....112

4.I. Concluding remarks....130

Chapter 5. Pushing the Boundaries: Accidental Conflicts....131

5.A. Introduction....132
5.B. Existing thinking about legal conflict....133
5.C. Clearing the way forward....138
5.D. The idea of accidental conflicts....142
5.E. Accidental conflicts in action....148
5.F. Concluding remarks....152

Chapter 6. A Typology of Legal Conflict: Commensurability and Seriousness....154

6.A. Introduction....154
6.B. Outline of the typology....154
6.C. Commensurability and legal conflict....155
6.D. The seriousness of the legal conflict....170
6.E. Concluding remarks....177

Part III. Conflicts with *Jus Cogens*

Chapter 7. Conflicts Between Incommensurable Laws: *Jus Cogens* and Ordinary Custom....178

7.A. The immunity of State officials from the criminal jurisdiction of foreign States....179
7.B. International crimes....186
7.C. Legal conflicts between *jus cogens* crimes and the immunities of State officials....196
7.D. Examples of conflicts between immunity rules and *jus cogens* crimes....207
7.E. Objections....213
7.F. Concluding remarks....225

Chapter 8. Conflicts Between Commensurable Laws: *Jus Cogens* and Treaties....227

8.A. An initial problem: supposed evidential limitations....227
8.B. An initial puzzle....230
8.C. Conflicts between treaties and *jus cogens*....233
8.D. Concluding remarks....241

Part IV. Consequences of Conflicts with *Jus Cogens*

Chapter 9. Conflict-Resolution Methods in International Law....242

9.A. Outline of the chapter....242
9.B. Are there different consequences of conflicts with *jus cogens*?....243
9.C. Introducing the various methods of conflict-resolution in the *jus cogens* context....246
9.D. Interpretation....247
9.E. Disapplication....259
9.F. Invalidation....261
9.G. Concluding remarks....271

Chapter 10. Commensurability and Seriousness.....273

10.A. Outline of the argument.....273
10.B. Commensurability and seriousness.....274
10.C. Conflicts between customary immunity rules and *jus cogens* crimes.....280
10.D. Conflicts between treaty rules and *jus cogens* rules.....289

Chapter 11. The Defeasibility of *Jus Cogens*.....294

11.A. Commensurability, finite weight and *jus cogens*.....294
11.B. Incommensurability and its implications for *jus cogens*.....295
11.C. Objecting to defeasibility: the discourse surrounding *jus cogens*.....296

Concluding Remarks.....298

Table of Abbreviations

ECHR	European Convention on Human Rights 1950
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights 1966
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
UNCLT	United Nations Conference on the Law of Treaties
VCLT	Vienna Convention on the Law of Treaties 1969
YILC	Yearbook of the International Law Commission

Table of Cases

Court of Justice of the European Union

Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (CFI, 21 September 2005).....11, 134
Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (ECJ, 3 September 2008).....134

European Court of Human Rights

Al-Adsani v United Kingdom (2002) 34 EHRR 273.....65, 69, 179, 281

Human Rights Committee

General Comment No 29: States of Emergency (Article 4) UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001).....31, 32

Inter-American Commission on Human Rights

Report No 100/03 Case No 12.240 *Douglas Christopher Thomas v United States* (29 December 2003).....64
Report No 62/02 Case No 12.285 *Michael Domingues v United States* (22 October 2002).....63, 64

International Court of Justice

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Further Requests for the Indication of Provisional Measures) [1993] ICJ Rep 325.....151, 152
Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Preliminary Objections) [1996] ICJ Rep 595.....214
Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Merits) [2007] ICJ Rep 43.....151
Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14.....239, 240
Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Merits) [2003] ICJ Rep 161.....235, 236, 237, 238, 239, 291, 292
Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Merits) [2002] ICJ Rep 3.....183, 207, 208, 209, 212, 214, 284, 287
Case Concerning the Right of Passage over Indian Territory (Portugal v India) (Preliminary Objections) [1957] ICJ Rep 125.....256
Delimitation of the Maritime Boundary in the Gulf of Maine Area (Merits) [1984] ICJ Rep 246.....17
Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Merits) [2012], Judgment of 3 February 2012.....218, 219, 281
Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.....25

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Merits) [1969] ICJ Rep 3.....70

International Criminal Tribunal for the former Yugoslavia

Prosecutor v Delalić (Trial Judgment) IT-96-21-T (16 November 1998).....64
Prosecutor v Furundžija (Trial Judgment) IT-95-17/1-T (10 December 1998).....26, 64, 69
Prosecutor v Galić (Trial Judgment) IT-98-29-T (5 December 2003).....26
Prosecutor v Hadzihasanović (Judgment in Jurisdiction Appeal) IT-01-47-AR72 (16 July 2003).....11

Permanent Court of International Justice

The Case of the SS 'Lotus' (France v Turkey) (Merits) PCIJ Rep Series A No 10.....45
The Oscar Chinn Case (Merits) PCIJ Rep Series A/B No 63.....44, 74

National Cases

Application for Arrest Warrant Against General Shaul Mofaz (Bow Street Magistrates' Court 2004).....283
Attorney-General v Zaoui [2005] NZSC 38.....21
Bouzari v Islamic Republic of Iran [2004] 71 OR (3d) 675.....21, 281
Committee of United States Citizens Living in Nicaragua v Reagan 859 F 2d 929 (DC Cir 1988).....70
Eichmann (1962) 36 ILR 277.....282
Filartiga v Pena-Irala 630 F 2d 876 (2nd Cir 1980).....63
Gaddafi 125 ILR 498, 125 ILR 509.....285
Hilao v Estate of Marcos 25 F 3d 1467 (9th Cir 1994).....63
Jiang Zemin 282 F Supp 2d 875 (ND Ill 2003).....283
Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) [2006] UKHL 26.....179, 214
Klaus Barbie 78 ILR 125, 100 ILR 331.....282
Kuwait Airways Corporation v Iraqi Airways Company [2002] UKHL 19.....24
Mvumvu and Others v Minister of Transport and Another (CCT 67/10) [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) (17 January 2011).....267, 268
Nulyarimma v Thompson [1999] FCA 1192.....43, 70
Prefecture of Voiotia v Federal Republic of Germany ILDC 287 (GR 2000).....281
Princz v Federal Republic of Germany 26 F 3d 1166 (DC Cir 1994).....63, 70, 281
R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No.3) (1999) 2 All ER 97.....210, 211, 212, 216, 282
Re Bo Xilai (2005) 128 ILR 713.....283
Re Sharon and Yaron (2003) 42 ILM 596.....283
Siderman de Blake v Republic of Argentina 964 F 2d 699 (9th Cir 1992).....63, 69, 70
Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3, 2002 SCC 1.....20, 62, 63, 69
Tachiona v Mugabe 169 F Supp 2d 259 (SDNY 2001).....283
Wijngaarde et al v Bouterse, Court of Appeal, Amsterdam (20 November 2000).....282

Introduction

Jus cogens is a mysterious body of international law. Although fundamental to the international legal order, its fundamentals remain veiled. The expression *jus cogens* may be translated as 'compelling law'. Alternative expressions, such as 'peremptory norms', are also used. These expressions describe a body of international law comprising legal standards which are thought to be superior to ordinary international law. The sources of ordinary international law are international treaties, customary international law, and general principles of law.[1]

For many decades, international lawyers have sought to answer a range of questions about *jus cogens*. Yet uncertainty persists. We face two main problems when working with *jus cogens*. The first problem is identifying the content of *jus cogens*. Some rules are widely recognised as being *jus cogens* – e.g., the prohibition of the unlawful use of force, or the prohibition of genocide. But as regards other candidate rules, there is persistent and pervasive disagreement.

The second problem concerns the effects or consequences of *jus cogens*. Let us suppose that we have reliably identified a *jus cogens* rule. This is thought to indicate that the rule is superior to ordinary international law. But how exactly is it superior? What are its implications – that is, how does the supposed superiority of *jus cogens* manifest or express itself?

I should add that these problems are not simply of academic interest. They matter to practitioners – judges, advocates, state officials and their advisers, and so on. Cases concerning both the identification and consequences of *jus cogens* are coming before courts and tribunals with increasing frequency.

[1] This is the orthodox understanding of international legal sources, encapsulated in Article 38(1) of the Statute of the International Court of Justice.

The title of this study – 'Conflicts with *Jus Cogens* in International Law' – usefully condenses the essential concerns which I wish to explore. In a nutshell, the study focuses on conflict-situations between rules of ordinary international law and *jus cogens* rules. Conflict is the analytical framework.

I have four main aims in this study, which correspond to its four Parts. The first aim is to clarify the idea of *jus cogens*, and in Part I of the study I push in this direction by exploring what *jus cogens* status is and how *jus cogens* rules are made. I criticise the existing literature on *jus cogens* law-making in Chapter 1. In Chapter 2, I instead suggest that an existing rule of international law becomes *jus cogens* because it is believed by certain legal officials (principally States) to be morally paramount. These moral beliefs are social facts which go to the weight of the existing rule, with the consequence that the rule's weight increases. In that sense, *jus cogens* rules are weighty rules of international law.

My second aim, in Part II, is to clarify the idea of what I call 'legal conflict' (i.e., conflicts between laws or legal rules), and explore some of the different ways in which legal rules come into conflict with each other. I propose that two laws conflict when they cannot both be realised. That formulation is rather empty, however, and I proceed to unpack what it means – and the different ways in which two laws cannot both be realised – in Chapters 4 and 5 (in Part II). I also construct a typology of legal conflict in Chapter 6. There are two dimensions to legal conflicts on which this typology is based: first, whether the conflict involves commensurable or incommensurable laws, and second, the seriousness of the conflict.

My third aim, in Part III, is to apply the analysis of legal conflict in Part II to the *jus cogens* context by identifying situations where rules of ordinary international conflict with *jus cogens* rules. I classify these conflicts according to the typology of legal conflict

advanced in Part II. In particular, I look at conflicts involving incommensurable laws in Chapter 7, and conflicts involving commensurable laws in Chapter 8.

My fourth aim, in Part IV, is to explore the consequences of the conflicts with *jus cogens* which were identified in Part III. In Chapter 9 I make some general remarks about conflict-resolution methods. Then, in Chapter 10, I consider how the conflicts identified in Part III are resolved. Once again, we see that our typology of legal conflict has a role to play in understanding the consequences of the legal conflicts. I suggest these consequences depend, in part, on the type of legal conflict with which we are dealing. Importantly, in some of these conflicts, we see *jus cogens* rules being defeated by rules of ordinary international law.

Finally, Chapter 11 is the theoretical culmination of the analysis in all the preceding chapters. In Chapter 11, we come full circle by revisiting the idea of *jus cogens*, which was first addressed in Part I of the study. *Jus cogens* rules have hitherto been thought to prevail over conflicting rules of ordinary international law. Where any such conflict arises, the *jus cogens* rule will emerge as the victor. This view of *jus cogens* is, as far as I can tell, universally accepted in international law thinking. However, it appears that sometimes *jus cogens* rules come into conflict with rules of ordinary international law and lose. In that sense, I suggest that *jus cogens* rules – while they are indeed weighty rules of international law – are nevertheless defeasible.

The above summary hopefully demonstrates the value of using legal conflict as an analytical framework in this study. Not only does it assist in understanding the central problem in the *jus cogens* context – its effects or consequences on the international plane, which are mediated most notably through conflict-situations involving rules of ordinary

international law[2] – but it also serves as a basis for re-thinking the very idea of *jus cogens* itself. *Jus cogens* is thus clarified through the lens of conflict.

Finally, it may already be clear from the above summary – but deserves emphasising – that the analysis in this study draws upon philosophical thinking, including the philosophical literature on law. We will see this in all four Parts of the study. International lawyers have tended to neglect philosophical writing, and this is dismaying because theorists have already attempted to address many of the basic problems with which international lawyers have been grappling in one way or another. At the same time, I do not wish to suggest that the answers that I propose, even if they are informing by my engagement with some of the philosophical literature, are conclusive. Most of my answers are put forward tentatively. In particular, my sketching of a theory of legal conflict in Part II is vulnerable to challenges from more considered theoretical analyses. These challenges are of course welcome and needed.

Still, my aim is to make modest progress on some of these basic theoretical problems. With that in mind, I spend a substantial amount of time working to establish a set of plausible theoretical foundations in Parts I and II of the study. This means, of course, that I am limited in the number of actual conflict-situations in international law which I can explore in Parts III and IV. There are many additional areas of international law where conflicts with *jus cogens* may arise. Nevertheless, any worthwhile analysis of those areas depends on credible theoretical foundations. Those foundations must not be neglected. Furthermore, the areas of international law which I *have* selected for further analysis in Parts III and IV are instructive precisely because of their range. They do *enough* to demonstrate that, in some conflict-situations, *jus cogens* rules win (as expected according to present

[2] I am not suggesting, however, that the 'effects' of *jus cogens* (however this is understood) are limited only to its operation in conflict-situations involving other rules of international law. Most notably, *jus cogens* rules also bear upon acts (which are not legal norms). Or *jus cogens* rules may serve as inspiration for international law-making, and so on.

thinking), whereas in others they lose. And there is always an opportunity to explore additional conflict-situations in future work.

Chapter 1. *Jus Cogens*: The Debates Thus Far

1.A. Introduction

Part I of the study addresses our first aim: clarifying how *jus cogens* is made, changed, or unmade. There have been many attempts to explain *jus cogens* law-making. The literature is voluminous.[1] The debate about *jus cogens* law-making has tended to resolve itself into two main approaches: the view that *jus cogens* is consensually created, and the view that *jus cogens* is not consensually created. Adherence to either of these approaches influences the way in which we identify whether a rule is *jus cogens*. I suggest that these existing approaches to *jus cogens* law-making are unhelpful. Consent may not be the best lens through which to analyse how *jus cogens* is made. Instead, I propose that an existing rule of international law becomes *jus cogens* because it is believed by legal officials (principally states) to be morally paramount. These moral beliefs are social facts which go to the weight of the existing rule. The consequence is that the rule's weight increases. *Jus cogens* rules are weighty rules.[2]

A brief plan of Part I of the study would be useful. In 1.B, which follows immediately below, I will discuss the formulation of *jus cogens* provided in Article 53 of the 1969 Vienna Convention on the Law of Treaties. No discussion of *jus cogens* law-making is complete without analysis of this provision. In 1.C, I will sketch the main contours of the debate about how *jus cogens* is made. The two prevailing approaches to *jus cogens* law-making will be introduced – namely, consent-based and non-consent-based approaches to *jus cogens* law-making. In 1.D, some of the main drawbacks with both approaches will be

[1] This literature will be surveyed in 1.C below.

[2] And this explanation will assist with the more practical matter of identifying the content of *jus cogens*. For that exercise is based on certain assumptions about how *jus cogens* is made, changed, or unmade.

discussed. As a result, I will suggest that neither approach is convincing, although much can be learned from their failings.

This provides a platform for reconsidering *jus cogens* law-making in Chapter 2, where I provide an alternative explanation which draws upon a number of insights from legal philosophy. Indeed, my reliance on legal philosophy is enough to separate my explanation of *jus cogens* law-making from any of the existing accounts. In Chapter 3, I address several lingering questions about *jus cogens* in light of my alternative explanation of *jus cogens* law-making.

Before launching into the analysis proper, two clarifications are necessary. First, when I refer to *jus cogens* law-making, I mean law-making in the broadest sense – that is, the way in which *jus cogens* rules are made, changed, or unmade.

Second, and more significantly, in providing a theoretical explanation of *jus cogens* law-making, I am necessarily relying upon deeper theoretical assumptions about law itself, and these are worth clarifying. My proposed account of *jus cogens* law-making is a legal positivist explanation. It is based upon the assumption that legal positivism is a persuasive thesis about law, and the philosophical tools on which it draws are common to that tradition of thinking. However, legal positivism has long been misunderstood in international law. At least, the international law understanding of legal positivism is well removed from the philosophical understanding of that tradition. In legal philosophy, the thesis of legal positivism is very modest: simply, that the existence and content of law ultimately depends on social facts or social sources.[3] This thesis comes out of, and is an attempt to specify, a basic thought which legal positivists share. The basic thought is that law is made by human beings. Law is 'a human artefact which has been socially constructed'.[4] Hence legal positivists claim that social facts – what human beings do in the world – make law and

[3] See Julie Dickson, 'Legal Positivism: Contemporary Debates', in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 48, 50-51.

[4] Ibid 50.

determine what it is. Of course, there are many further philosophical questions that one may ask about law – e.g., what it means to interpret law (including different types of law), whether law is by its nature morally valuable, whether and when an individual is morally obligated to obey the law, or how judges decide cases. On all these questions, legal positivists disagree with each other. What makes them legal positivists, though, is their acceptance of the very modest thesis that the existence and content of law ultimately depends on social facts.[5]

Although this is not the place to explore the tradition of legal positivism in detail, the basic point is worthwhile. Drawing attention to underlying theoretical assumptions improves transparency. More generally, the reliance on legal philosophy is suggestive. It indicates that many puzzles in international law may be profitably addressed by engaging with a body of learning in which related problems have been analysed. Of course, philosophical writing about law does not provide ready-made answers. But it contains insights which may push our analysis of *jus cogens*, and other international legal problems, forward. My proposed explanation of *jus cogens* law-making draws upon insights which are both familiar and uncontroversial in legal positivist thinking.

1.B. *Jus cogens* in Article 53 of the 1969 Vienna Convention on the Law of Treaties

In thinking about how *jus cogens* is made, we should begin by turning to the 1969 Vienna Convention on the Law of Treaties. This was the first international instrument to provide a formulation of *jus cogens*.[6] Article 53 VCLT is entitled 'Treaties conflicting with a peremptory norm of general international law (*jus cogens*)', and provides:

[5] For further discussion, see John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 American Journal of Jurisprudence 199.

[6] There are in fact two Vienna Conventions on the Law of Treaties ('VCLT') which deal with *jus cogens*. The first is the 1969 Vienna Convention concerning Treaties between States. The second is the 1986 Vienna Convention concerning Treaties between States and International Organizations or between International

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Also relevant is Article 64 VCLT, entitled 'Emergence of a new peremptory norm of general international law (*jus cogens*)'.[7] It provides:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with the norm becomes void and terminates.

The VCLT 1969 was the culmination of several decades of work on the law of treaties. This began with the International Law Commission's drafting work in the 1950s and 1960s,[8] leading to the ILC's 1966 Draft Articles on the Law of Treaties. States subsequently agreed on the text of the VCLT at the Vienna Conference in 1968-9.[9]

Some writers may question the extent to which the formulation in Article 53 VCLT accurately describes *jus cogens* law-making.[10] Perhaps Article 53 VCLT was always

---

Organizations. Whenever mention is made of the International Law Commission's Draft Articles on the Law of Treaties, the Vienna Conference, or the VCLT or any of its provisions, it should be assumed that I am referring to the VCLT 1969 or its drafting history. Where reference is being made to the VCLT 1986 or its drafting history, this will be made explicit in the text.

[7] There is also Article 71 VCLT, which deals with the consequences of a treaty's invalidity in light of both Articles 53 and 64 VCLT.

[8] There were four ILC Special Rapporteurs working on the Law of Treaties during this period. In order of appearance: James Brierly, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, and finally Sir Humphrey Waldock. The latter three addressed the question of *jus cogens* in their work.

[9] There were two sessions of the Vienna Conference, or United Nations Conference on the Law of Treaties ('UNCLT'). The first session was in 1968 (UNCLT I), and the second in 1969 (UNCLT II).

[10] For instance, Jerzy Sztucki has argued that although the title of Article 53 VCLT equates 'peremptory norms' and *jus cogens*, 'peremptory norms' are a *sui generis* VCLT construct, distinct from the phenomenon of *jus cogens* in general international law. See Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag 1974) 103-105.

inaccurate. Or perhaps Article 53 VCLT has been superseded since its adoption because the idea of *jus cogens*, and the modalities of *jus cogens* law-making in particular, are works in progress.

These views tend to be marginal, however, and are usually confined to academic writing. In this study, I will assume that an explanation of *jus cogens* law-making should, if possible, be consistent with the basic formulation in Article 53 VCLT. This is because the formulation of *jus cogens* in Article 53 VCLT *is* generally taken as a starting point in understanding how *jus cogens* is made. There is little evidence of the outright rejection of that formulation in international legal practice.[11]

1.C. Existing debates about how *jus cogens* is made

I will now sketch the contours of the debates in international law concerning how *jus cogens* is made. This task is necessary to demonstrate where we currently stand, and why we should not be entirely satisfied with existing explanations.

Disagreement about how *jus cogens* is made feeds into disagreement about how to identify the content of *jus cogens*. If we know how *jus cogens* is made, then we might be able to identify its content more reliably.

Some rules are widely regarded as *jus cogens* by states, international courts, and writers, such as the prohibition of the unlawful use of force, genocide, war crimes, crimes against humanity, and slavery. Many rules are claimed to be *jus cogens* on which there is less settled opinion – e.g., rules protecting the environment, or freedom of religion. In the case of *Hadzihasanović*, the International Criminal Tribunal for the former Yugoslavia, discussing the principle of *nullum crimen sine lege*, argued that 'an expansive reading of

[11] As Lauri Hannikainen notes, '[t]here is very little evidence of attempts to revise the basic definition of Art. 53', in Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Finnish Lawyers' Publishing Company 1988) 3.

criminal texts violates the principle of legality, widely recognized as a peremptory norm of international law'.[12] In the case of *Kadi* in the European Union, the right to property was alleged to be *jus cogens*.[13] It has even been alleged that there is a *jus cogens* obligation to assassinate dictators in certain circumstances.[14]

Furthermore, identifying *jus cogens* goes beyond merely producing lists of rules. It also speaks to the content of the rules in question. For example, is the definition of 'crimes against humanity' the same in the *jus cogens* prohibition as it is in Article 7 of the 1998 Rome Statute of the ICC? After all, it has been noted that the definition of crimes against humanity has changed during the course of the 20th century.[15] It is also commonly believed that the prohibition of torture is *jus cogens*. But this is just a convenient shorthand which obscures problems concerning the detailed content of that prohibition. For example, does the *jus cogens* prohibition of torture also include the prohibition of other cruel, inhuman or degrading treatment or punishment? And if so, what amounts to such treatment or punishment for *jus cogens* purposes?

Our answers to these questions depend on a view about how *jus cogens* is made, and it is to this underlying problem that I now turn.

1.C.i. Two approaches to *jus cogens* law-making: *jus cogens* is consent-based, and *jus cogens* is not consent-based

[12] *Prosecutor v Hadzihasanović* (Judgment in Jurisdiction Appeal) IT-01-47-AR72 (16 July 2003) para 55.

[13] Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (CFI, 21 September 2005) paras 234-242.

[14] Louis René Beres, 'Prosecuting Iraqi Crimes against Israel during the Gulf War: Jerusalem's Rights under International Law' (1992) 9 Arizona Journal of International and Comparative Law 337, 357-8. Sztucki provides an interesting historical survey of the literature in which a rule is claimed to be *jus cogens*, and some of the examples are surprising (as well as isolated); see Sztucki, *Jus Cogens*, 82-84.

[15] Contrast, for example, Article 7 of the 1998 Rome Statute with Article 6(c) of the 1945 Charter of the International Military Tribunal. Among other things, the former includes an expanded list of crimes against humanity (eg rape, enforced disappearance of persons, and apartheid).

In the existing literature, the disagreement about how *jus cogens* is made may be roughly divided into two approaches. Both approaches strive to be consistent with the formulation of *jus cogens* in Article 53 VCLT. According to the first approach, *jus cogens* is consensually created; according to the second approach, it is not consensually created. Each approach puts forward its own body of evidence, and struggles to explain the evidence relied upon by the other approach.

Although I am not suggesting that all views on *jus cogens* law-making must necessarily be branded as consent-based or non-consent-based, I have not come across an account which straightforwardly forsakes consent as an organising idea. The influence of consent on existing thinking is pervasive; there is little doubt that it is the dominant paradigm within which *jus cogens* law-making is discussed. For example, Weisburd suggests that 'there are two concepts' of *jus cogens*:

> One embodies a content not dependent on the will of states … The content of the other depends entirely on state acceptance … it seems that the two concepts can hardly co-exist. States are either controlled by rules they cannot change, or they are not. This point – that the two concepts are incompatible – is of fundamental importance….
>
> … [One concept of] *jus cogens* is independent of the consent, and therefore, presumably, of the practice of states. The version of *jus cogens* embodied in Article 53 [VCLT], however, makes state acceptance the only test of *jus cogens*.[16]

Furthermore, as Orakhelashvili has recently written, '[o]ne of the concerns raised in doctrine [i.e., academic literature] relates to the consensual nature of international law and the alleged

[16] Mark Weisburd, 'The Emptiness of the Concept of *Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina' (1995) 17 Michigan Journal of International Law 1, 34-35.

inconsistency of *jus cogens* with that pattern'.[17] Similar concerns occupy Koskenniemi, whose analysis of *jus cogens* is firmly framed in terms of a tension between consent-based and non-consent-based approaches. Referring to the formulation of *jus cogens* in Article 53 VCLT, he states:

> Initially, *jus cogens* seems to be descending, non-consensualist. It seems to bind States irrespective of their consent. But a law which would make no reference to what States have consented to would seem to collapse into a natural morality … Hence the reference to recognition by "the international community of States". To that extent, *jus cogens* becomes ascending, consensualist.[18]

And there are many other examples in the literature.[19]

---

[17] Alexander Orakhelashvili, 'Peremptory Norms as an Aspect of Constitutionalisation in the International Legal System' 2 <ssrn.com/abstract=1286926> accessed 24 August 2012. Orakhelashvili goes on to consider whether *jus cogens* is consensual, stating that 'it should … be possible in international law – where rules derive from consensual sources such as custom and treaty – to have [*jus cogens*] that derives not necessarily from consensual arrangements', ibid, 3 (footnote omitted).

[18] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006) 323-325 (footnotes omitted).

[19] The following is a brief list of examples from the academic literature, where it is clear that consent plays a prominent role in framing the terms of debate surrounding *jus cogens* law-making. See eg Georg Schwarzenberger, 'International *Jus Cogens*?' (1965) 43 Texas Law Review 455; Christos L Rozakis, *The Concept of JUS COGENS in the Law of Treaties* (North-Holland Publishing Company 1976) 53-55 (where he states at 55: '[t]he fact … that one may agree on the consensual character of the international legal system in general or more particularly on the consensual character of the *jus cogens* norms, does not automatically settle all the problems of the law-making and law-binding processes'); L Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law' (1981) 172 Recueil des Cours de l'Académie de Droit International 219, 244 (where he opens by stating: 'while some authors adhere to international *jus cogens*, denying the importance of the will of States, and particularly the factor of their consent, others, recognizing the importance of the will of States in the norm-creating process in the international arena … come to the conclusion that … leaves no room for the existence of international *jus cogens*'); Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 203-205 (concerning the historical debates about *jus cogens*); Gennady M Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 European Journal of International Law 42, 47 (where he states: 'in international law there is a glaring gap between the requirements of the idea of *jus cogens* and the possibilities of the existing law-making processes. These processes provide for the creation of any rules only by the consent of the members of the international community. The consensual nature of the formation of international law is clearly reflected in the basic norm about the sources, Article 38(I) of the Statute of the ICJ. It lists conventions, custom and general principles of law. In the case of conventions, Article 38(I) requires their express recognition by the contesting states. Article 38(I) holds that customary general practice should be "accepted as law". Finally, "the general principles of law" should also be "recognized" by civilized nations. This essentially consensual view of international law is confirmed and developed by abundant international practice and caselaw'); Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 European Journal of International Law 33, 50-53; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 187-195; Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 American

The idea of consent also shaped the terms of the debate during the drafting of Article 53 VCLT. For instance, at the Vienna Conference where the VCLT was adopted, the representative of Hungary stated that '[t]he source of rules having a peremptory character, like all the other rules of international law, lay in the will of States'.[20] And other such statements are mentioned further below.[21] To some extent, these statements at the Vienna Conference expressed different perceptions about the role of consent in the context of international law-making in general.

This last point suggests that the central role that consent plays in the discussion on *jus cogens* law-making should hardly be surprising. For consent has long been a prominent framework in legal thinking about how international law in general is made.[22] This is most evident in the law of treaties, but can also be seen in other areas such as customary international law.[23]

The two approaches to *jus cogens*, as I have identified them, capture a genuine tension in the international legal materials concerning how *jus cogens* is made. The first approach treats *jus cogens* as consent-based. This approach focuses on the procedure by which *jus cogens* is made. And this is appealing. It makes sense, after all, that we should wish to think about the *processes* of law-making. We want to say that *jus cogens* rules, being rules of international law, are created by recognised law-making methods in that legal order. And consent-giving, it is thought, is the familiar process by which international law is made. This is on account of the decentralised character of the international legal order, where there

---

Journal of International Law 291, 299-302 (analysing the historical debate on *jus cogens* law-making, and framing that debate in terms of consent).

[20] UNCLT I 311 (para 46).

[21] See 1.C.iii below.

[22] Eg Koskenniemi, *From Apology to Utopia*, and especially the chapter entitled 'Sources' (ibid, 303-387); Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 9-11; Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1989) 12 Australian Year Book of International Law 22; D W Greig, 'Reflections on the Role of Consent' (1989) 12 Australian Year Book of International Law 125.

[23] Eg Tullio Treves, 'Customary International Law', *The Max Planck Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> accessed 24 August 2012.

is no central law-making authority which imposes its rules on others – at least in orthodox thinking. Hence the law-making processes are thought to be consensual in character (in a loose sense).

The second approach, however, treats *jus cogens* as non-consent-based. It denies that a rule is *jus cogens* on the basis of familiar (meaning consensual) processes of law-making. Rather, the second approach tends to focus on the content of the rule, and treats this as determinative of its *jus cogens* status. Again, this approach has its attractiveness. We seem to want to think that *jus cogens* status is restricted to certain kinds of rules – i.e., rules of a certain content. Thus, there is an instinctive sense – or expectation – that the prohibition of genocide (for example) is *jus cogens*, given the subject matter of that rule. We do not feel the same way about other rules. We want to confine *jus cogens* on the basis of content.

I have sought to distil the essential elements of the disagreement, and thus I have necessarily simplified matters – although, I hope, not overly so. We have two approaches: a consent-based view, and a non-consent-based (or *content*-based) view, of how a rule becomes *jus cogens*. These reflect certain pressures which we feel when we think about *jus cogens* in international law – pressures which, though reasonable, pull in different directions.

The main arguments of each approach, as well as the bodies of evidence on which each relies, will be introduced below. In 1.D, I will explain how each approach faces a number of difficulties. This lays the groundwork for Chapter 2, where I will suggest a theory of *jus cogens* law-making which may accommodate the basic pressures underlying the two approaches, while also being able to explain the bodies of evidence on which they both rely.

1.C.ii. The idea of consent

As I have noted, the debate about *jus cogens* law-making has typically been organised around the idea of consent. The disagreement has been guided by the question whether *jus*

cogens law-making is consent-based or not. This is not the place for a thoroughgoing philosophical examination of consent. Nonetheless, some brief remarks are warranted.

Consent has been analysed in various areas of philosophy, including moral and political philosophy. Joseph Raz states:

> 'Consent' means consent to a change in the normative situation of another – to a change in his rights and duties. It is sometimes expressed and is spoken of as agreement. Consent is, however, narrower than agreement and is roughly equivalent to the performative sense of 'agreement'. One can agree *that* another has or should have a right, that is, believe that he has or should have it, or agree *to* give him a right. The first is a cognitive agreement, the second is a performative one.[24]

Raz goes on to state:

> Consent is given by any behaviour (action or omission) undertaken in the belief that
>
> 1. it will change the normative situation of another;
> 2. it will do so because it is undertaken with such a belief;
> 3. it will be understood by its observers to be of this character.[25]

Leslie Green has also argued that '[c]onsent is not mere consensus or approval; it is a performative commitment that undertakes an obligation through the very act of consenting'.[26]

If we take these suggestions as a rough starting point for our idea of consent, it quickly becomes apparent that although consent is often believed to be relevant to international law-making generally, that belief may be misplaced. This was recognised by

[24] Joseph Raz, *The Morality of Freedom* (OUP 1986) 80-81 (emphases in original; footnote omitted).

[25] Ibid, 81.

[26] Leslie Green, 'Legal Obligation and Authority', *The Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/entries/legal-obligation/> accessed 25 May 2012.

Hans Kelsen, who claimed that the theory that international law is based on the 'common consent' of states was fictional.[27] For example, customary international law is often thought to be consensually made. Yet acquiescence on the part of some states is sometimes taken to indicate consent on the part of those states.[28] In the *Gulf of Maine* case, the International Court of Justice explained that 'acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent'.[29] This is at odds with the philosophical understandings of consent discussed above.

Perhaps we are seeing different senses of consent. Philosophers may stipulate an understanding of consent for certain philosophical purposes. But the philosophical ambitions which occupy those like Raz, Green and Kelsen are generally not shared by international lawyers, who tend to use consent in a looser fashion to describe a range of situations where certain actors agree to, assent to, accept, recognise, or acquiesce in a particular act. This divergence serves only to emphasise the difficulties surrounding the use of the idea of consent. And this is a reason in itself for avoiding reliance on that idea unless it is necessary. Such reliance risks introducing complexity and confusion. In fact, as we shall see in Chapter 2, it is possible to explain *jus cogens* law-making without resort to consent as an organising idea.

Nonetheless, as in the case of international law-making more generally, consent is usually at the centre of the debates about how *jus cogens* is made. In what follows below, I will attempt to flesh out the two main approaches to *jus cogens* law-making – namely, consent-based and non-consent-based approaches. Unless otherwise stated in Part I of this study, when referring to consent I mean the looser set of understandings which international lawyers have tended to adopt.

---

[27] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange 2009) 250-251.

[28] Shaw, *International Law*, 89-91.

[29] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Merits) [1984] ICJ Rep 246, 305.

1.C.iii. *Jus cogens* is consent-based

The first approach treats *jus cogens* rules as consensually created. I will sometimes refer to this approach as 'consensualism'. According to this approach, the source of the consent is typically thought to be the state. States are generally treated as actors with pre-eminent law-making competence in international law.[30] So on this view, a rule is *jus cogens* because enough states 'agree' that the rule is non-derogable. To this end, reference is made to the formulation in Article 53 VCLT, according to which a rule is *jus cogens* if it is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'.

A consensualist approach traces the requirement of consent to the expression 'accepted and recognized'. The term 'accepted' is drawn from Article 38(1)(b) of the Statute of the International Court of Justice concerning custom, and the term 'recognized' from Article 38(1)(c) concerning general principles of law. This was confirmed at the Vienna Conference (at which the VCLT was adopted) by Chairman Yasseen of the Drafting Committee.[31] The inclusion of the term 'accepted' is particularly significant because, in Article 38(1)(b) of the ICJ Statute, it signifies consent in the context of customary law.

Article 53 VCLT indicates that the source of this putative consent is the 'international community of States as a whole'. This expression is generally understood by consensualists as requiring a large majority of states, and a broad enough range of states to represent the 'essential components of the international community'.[32] This was clarified at

[30] Whether non-state actors might possess law-making competence is addressed further below. For now, I will focus on the orthodoxy of *state* consent.

[31] UNCLT I 471 (para 4). Note that the term 'recognized' also appears in Article 38(1)(a) of the ICJ Statute concerning treaties: 'international conventions ... establishing rules expressly recognized by the contesting States'.

[32] (1976) YILC II Pt 2 119 (para 61).

the Vienna Conference. Chairman Yasseen of the Drafting Committee indicated that Article 53 VCLT did not require the consent of every state in the world.[33]

The consent-based approach towards *jus cogens* law-making is not monolithic. Variations subsist; the loose characterisation of 'consent' in international law allows for different ways in which consent may be given. For example, what actually counts as consent? Many writers examine different modalities of consent-giving – e.g., treaty-making – and consider whether, when and how they can give rise to *jus cogens*.[34] Furthermore, although I suggested above that consensualist approaches tend to focus on the consent of *states*, this need not always be so. The consent of other actors, in addition to or instead of states, may be relevant. The approach may even allow for the consent of a single juridical entity, such as the 'international community' (assuming that we can properly speak of such an entity).

In spite of all this, however, I will consider all these variations of consensualism jointly, because they are united in conceiving of *jus cogens* as consensually created. I wish to examine the basic principle that *jus cogens* status originates in consent. Determining the precise nature of that consent-giving is a question which only becomes relevant if the basic principle is sound.

Defenders of a consent-based approach draw attention to a wide range of supportive legal material. In addition to the evidence mentioned above, they point to the positions of many states at the Vienna Conference.[35] The US delegate stated that a rule's 'peremptory character must be accepted and recognized as a matter of legal obligation by the international community of States as a whole. That would clearly require, as a minimum, the

[33] UNCLT I 472 (para 12).

[34] Eg Robert Kolb, 'The Formal Source of *Ius Cogens* in Public International Law' (1998) 53 Austrian Journal of Public and International Law 69; Byers, *Custom, Power and the Power of Rules*, 187-195.

[35] See, eg, the statements of the US delegate at UCLT II 102 (para 22).

absence of dissent by any important element of the international community'.[36] This suggests that *jus cogens* status was viewed as a matter of consent and dissent. Brazil's delegate stated that

> ... [i]t should be borne in mind ... that all legal rules emerged from the practice of States ... International law was by definition formed by States, and no noble aspirations or sentiments, love of progress or anxiety for the well-being of the peoples of the world could be embodied in international instruments without the collective assent of the international community.[37]

The delegate from Cameroon stated that since Cameroon 'believed in the free will of States, his delegation considered that a norm of international law, if it was to be peremptory, must be recognized and accepted by the greater part, if not the whole, of the international community'.[38] Furthermore, Humphrey Waldock, as the final ILC Special Rapporteur on the Law of Treaties, served as the 'Expert Consultant' at the Vienna Conference, where he stated that '[i]t was for the community of States as such to recognize the peremptory character of a norm'.[39]

There is also some case law, such as the Canadian judgment in *Suresh v Canada*. In considering whether the prohibition of torture was *jus cogens*, the Supreme Court of Canada held that *jus cogens* rules 'develop over time and by general consensus of the international community'.[40] The court examined a variety of state practice and *opinio juris* on this question, which would appear to evince a consent-based approach to *jus cogens*. Again, in the Canadian case of *Bouzari v Iran*, as regards the content of the *jus cogens* prohibition of

[36] UNCLT II 102 (para 22).

[37] UCLT I 317 (para 22).

[38] UNCLT II 98 (para 60).

[39] UNCLT I 327-328 (para 83).

[40] *Suresh v Canada* (Minister of Citizenship and Immigration) [2002] 1 SCR 3, 2002 SCC 1 para 61, reported in ILDC 186 (CA 2002).

torture the Court of Appeal of Ontario held that 'the extent of the prohibition against torture as a rule of *jus cogens* is determined not by any particular view of what is required if it is to be meaningful, but rather by the widespread and consistent practice of states'.[41] And in the New Zealand case of *Attorney-General v Zaoui*, concerning *non-refoulement* to torture, the Supreme Court of New Zealand held that 'there is no support in the state practice, judicial decisions or commentaries to which we were referred for the proposition that the prohibition on *refoulement* to torture has that status'.[42] In both *Bouzari* and *Zaoui*, the reference to state practice would appear to indicate a consent-based approach to *jus cogens*.

Finally, support for a consent-based approach to *jus cogens* can be found among writers.[43] For instance, one writer states that Article 53 VCLT, in its formulation of *jus cogens*, adopted a 'consensual concept of peremptory norms'.[44]

1.C.iv. *Jus cogens* is not consent-based

According to the second approach to *jus cogens* law-making, a rule emerges as *jus cogens* in international law for reasons other than consent. Consent is still the organising idea. Only now, consent-based accounts take their place as the enemy – as explanations of *jus cogens* law-making which are to be rejected. Instead, this second approach tends to focus on the content, or subject matter, of the rule. If a rule is of a certain content, then this in itself may indicate that the rule enjoys *jus cogens* status. Again, within this second approach there may be a variety of specific non-consent-based positions; these track different judgments about

[41] *Bouzari v Islamic Republic of Iran* [2004] 71 OR (3d) 675 para 90, reported in ILDC 175 (CA 2004).

[42] *Attorney-General v Zaoui* [2005] NZSC 38 para 51, reported in ILDC 81 (NZ 2005).

[43] Eg Hannikainen, *Peremptory Norms*, 210-215, 265-269; Sztucki, *Jus Cogens*, 97-98; GM Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993) 235-236.

[44] Sztucki, *Jus Cogens*, 97.

the content that a rule must have in order to be *jus cogens*. In what follows, I will give a flavour of some of these views.[45]

According to one view, a rule is *jus cogens* on the basis of moral considerations. Here, I take 'moral' considerations to mean considerations of objective morality. In other words, I am assuming that there are moral requirements, or moral facts, which are objectively true. Their truth does not depend on what we believe. This is a controversial statement, because it rests on certain meta-ethical assumptions about morality. However, let us grant these assumptions for the time being. The requirements of objective morality do not depend for their truth on whether we agree with them or not, and are not capable of being deliberately changed. If a rule becomes *jus cogens* on the basis of what (objective) morality requires, then its *jus cogens* status may be said to be non-consensual in origin. Summing up, then, according to this view there are objective moral criteria as to what counts as *jus cogens* in international law. A rule is *jus cogens* on account of its content – namely, the (objective) moral goodness of its content. It is difficult to find clear support for this view, either in international legal practice or the academic literature.

One may reject the above view, while still maintaining that *jus cogens* is non-consent-based. Two further possibilities will be discussed. They both hold that a rule is *jus cogens* by virtue of considerations which, while going to the content of the rule, are *not* considerations of objective morality. One suggestion is that *jus cogens* comprises certain standards which are fundamental to, and perhaps even necessary for, the existence of the international legal order. These standards are often described as 'structural' in character, and examples include *pacta sunt servanda* or the sovereign equality of states. This is a non-consent-based approach to *jus cogens*. It claims that a standard is *jus cogens* not because certain actors have so consented, but rather because the standard just *is* fundamental (in a structural sense) to the international legal order. This view is somewhat rare, and usually

[45] And note that since consent tends to be understood very loosely in international law (see 1.C.ii above), this narrows the possibilities as regards what a *non*-consent-based approach might look like.

limited to academic writing.[46] It also stands apart from other accounts of *jus cogens*, because the *jus cogens* standards which it identifies (e.g., sovereign equality) are very different from those isolated by other accounts (e.g., the prohibition of genocide).

Finally, there is the view that *jus cogens* is 'international public policy' or 'international public order'.[47] Put another way, *jus cogens* rules are public policy rules. This would appear to be a non-consent-based approach to *jus cogens* – if, that is, it is understood to hold that the substantive content of the rule alone determines whether it is public policy (and *jus cogens*). This understanding can be seen, for example, in the recent extended defence of *jus cogens* as international public policy by Orakhelashvili, in which he emphasises that *jus cogens* rules 'prevail not because the States involved have so decided but because they are *intrinsically* superior',[48] and that *jus cogens* rules 'effectuate an exception from the otherwise valid and dominant consensual pattern'.[49] He also states that '[t]he

[46] While the references are scattered, various writers draw attention to this possibility – eg Sztucki, *Jus Cogens*, 80; Rafael Nieto-Navia, 'International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law' 12-13 <www.iccnow.org/documents/WritingColombiaEng.pdf> accessed 23 August 2012; Robert Kolb, *Théorie du* Ius Cogens *International: Essai de relecture du concept* (Presses Universitaires de France 2001) 115-120; Christian J Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2005) 142; Stefan Kadelbach, '*Jus Cogens*, Obligations *Erga Omnes* and other Rules – The Identification of Fundamental Norms' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Martinus Nijhoff 2006) 29; Vaughan Lowe, *International Law* (OUP 2007) 58.

[47] Eg Hermann Mosler, 'The International Society as a Legal Community' (1974) 140 Recueil des Cours 1, 33-36; Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006).

[48] Orakhelashvili, *Peremptory Norms,* 7-8 (emphasis added).

[49] Ibid 9. Orakhelashvili also argues: 'Public order operates as a matter of necessity and factors other than State will are necessary to comprehend this phenomenon. This perhaps suggests that consensual positivism cannot be the proper approach for explaining the existence and operation of peremptory norms, and some alternative approach must be sought', ibid 36. And referring to the subject matter which makes a norm peremptory, he suggests that 'this subject-matter must be something independent of the will of States', ibid 44. There is a wrinkle here, however. Elsewhere in Orakhelashvili's writing, a consent-based approach to *jus cogens* appears to be adopted. For example, in a recent article he discusses how a rule becomes *jus cogens*, and states: 'The key requirement under Article 53 [VCLT] is that of the acceptance and recognition by the international community as a whole. What we need to search for is the ways in which the community as a whole speaks … The task is to identify whether the status of the relevant rule is supported by the will of the community as a whole, not necessarily by every single State or most States individually' in Alexander Orakhelashvili, 'Changing *Jus Cogens* through State Practice? – the Case of the Prohibition of the Use of Force and its Exceptions' 6 <ssrn.com/abstract=2084829> accessed 24 August 2012. On this latter view, *jus cogens* status is taken to depend on the consent of certain actors who constitute the international community as a whole. That being said, in what follows below I will favour those positions which Orakhelashvili takes in his extended 2006 monograph on *jus cogens*, where he appears to support a non-consent-based approach to *jus cogens*. For the 2006 monograph is the fullest and most considered expression of his views on the matter.

peremptory character of a rule derives from the substantive importance of the interest protected by that rule'.[50] These statements suggest that a rule is *jus cogens* because it just *is* fundamental to the legal order (albeit not in a 'structural' way, as with the previous view outlined above), and so forms part of its public policy regime.

The characterisation of *jus cogens* as international public policy does purport to offer its own content-based criteria of *jus cogens* status. To see this, a few words must be said about the very idea of 'public policy'. In national legal systems, public policy refers to a body of legal standards which protect the essential interests or values of the legal system. Acts or standards conflicting with those essential interests or values are voided or otherwise not recognised. Public policy has a notable role in private international law. Private international law concerns the regulation by a domestic legal system of foreign legal acts or standards which are inconsistent with its own domestic law. Inconsistent foreign legal acts or standards may be recognised or applied in the domestic legal system, but not always. Take the English legal system. While some foreign legal acts or standards are acceptably inconsistent with English law, others are not, because they conflict with English public policy.[51] An English court may decline to recognise a lawful polygamous marriage under a foreign legal system because that recognition would conflict with the requirements of English public policy. In such circumstances, the English court would be claiming that the English law on (monogamous) marriage is a sufficiently important interest or value in the English legal system that it forms part of English public policy. Equally, the claim is that there exists a corresponding international public policy in international law, and that *jus cogens* rules are international public policy rules.

[50] Ibid 46 (and note that this approach was taken earlier by Simma; see n 60 below). This approach is confirmed by the way in which Orakhelashvili identifies specific *jus cogens* rules – eg '[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance, even if its peremptory character is sometimes disputed' in Orakhelashvili, *Peremptory Norms*, 51. And Orakhelashvili also suggests: 'The character of certain norms makes it difficult to portray them as other than peremptory. According to Dugard, once self-determination is *jus* [i.e., law], it would necessarily follow that it is *jus cogens* in the light of the pivotal position it occupies in the international public order' in ibid, 109.

[51] Eg *Kuwait Airways Corporation v Iraqi Airways Company* [2002] UKHL 19 paras 16-18 (Lord Nicholls).

In some ways, the characterisation of *jus cogens* rules as international public policy remains unhelpfully vague. Such rules are often simply described as 'fundamental' or 'important' to the legal order. Or it is said they protect 'community interests' or 'community values', rather than the interests or values of any particular actor (such as a state).[52] These statements do not take us very far. In treating *jus cogens* as public policy, a more basic worry is that we have now introduced another unusual idea – 'international public policy' – into the mix. This adds a further layer of obscurity (and complexity) to an area of law – *jus cogens* – which is already shrouded in darkness.[53]

Overall, there are different ways of formulating a non-consent-based approach to *jus cogens* law-making. They are unified in locating *jus cogens* status in the content of a given rule. Whichever precise formulation is adopted, those who favour a broadly non-consent-based approach will point to a range of legal materials which suggest that a rule is *jus cogens* on account of its content.

These materials include the drafting history of the VCLT. The Zambian delegate at the Vienna Conference, for example, stated that 'the criterion for rules of *jus cogens* was that they served the interests of the whole international community, not the needs of individual States'.[54] There is also evidence of a content-based approach to *jus cogens* in the case law. In the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ suggested that the 'question whether a norm is part of the *jus cogens* relates to the legal character of the norm'.[55] In his Dissenting Opinion in that case, Judge Weeramantry declared that

[52] Eg Orakhelashvili, *Peremptory Norms*, 46-47, who treats the distinction between community interests and individual state interests as 'a key factor in determining a norm's peremptory character'.

[53] For further analysis of the problems with the idea of international public policy, and the relationship between international public policy and *jus cogens*, see Sztucki, *Jus Cogens*, 8-10.

[54] UNCLT I 322 (para 13).

[55] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 258. Note that this statement may be read in several ways, but on one interpretation it indicates that the *jus cogens* status of a rule depends on its content.

> ... [t]he rules of the humanitarian law of war have clearly acquired the status of *jus cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect.[56]

Again, this *dictum* focuses on the significance of a rule's content in determining its *jus cogens* status.

In *Furundžija*, the Trial Chamber of the ICTY discussed the prohibition of torture, and stated that '[b]ecause of the importance of the values it protects, this principle has evolved into a peremptory norm or *jus cogens*'.[57] And in *Galić*, the Trial Chamber of the ICTY held that the general prohibition of attack on civilians in the law of armed conflict was a *jus cogens* rule, and reasoned that the more specific prohibition of conduct designed to spread terror among civilians could equally be said to share that *jus cogens* character 'for it protects the same value' as the general prohibition.[58]

There is also some support for a content-based approach to *jus cogens* among writers.[59] In addition to Orakhelashvili's approach which was mentioned above, Simma has argued (extra-judicially) that 'the character of a rule of international law as peremptory is to be derived from the substantive importance of the interest protected by the rule'.[60] And Mosler drew a connection between *jus cogens* and those standards which are essential to the existence of the international community, contending that

---

[56] Ibid, 496.

[57] *Prosecutor v Furundžija* (Trial Judgment) IT-95-17/1-T (10 December 1998) para 153.

[58] *Prosecutor v Galić* (Trial Judgment) IT-98-29-T (5 December 2003) para 98. The specific prohibition of conduct designed to spread terror is provided in Article 51(2) of Additional Protocol I to the 1949 Geneva Conventions.

[59] Eg Mosler, 'The International Society', 33-36.

[60] Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1981) 172 Recueil des Cours 217, 288.

> ... [i]n any legal community there must be a minimum of uniformity which is indispensable in maintaining the community. This uniformity may relate to legal values which are considered to be the goal of the community or it may be found in legal principles which it is the duty of all members to realise ...[61]

1.D. Problems with the debates thus far

I will now work through a number of problems with the two approaches to *jus cogens* law-making which were introduced in 1.C. We will see that these approaches, and the debates surrounding them, have not fully succeeded in advancing our understanding of *jus cogens* law-making.

1.D.i. Problems with a consent-based approach to *jus cogens*

Although there can be variations, a consent-based approach to *jus cogens* typically holds that a rule is *jus cogens* because a sufficient majority of states agrees that the rule is non-derogable. This closely follows the wording in Article 53 VCLT (where *jus cogens* is defined). Two key problems will be discussed. The first is that this approach allows for the possibility of trivial *jus cogens* rules. And this seems at odds with the way in which we commonly think about *jus cogens* – i.e., as being (in some sense) 'fundamental' or 'important' rules. The second problem concerns how we determine whether a rule is non-derogable for *jus cogens* purposes under such a consent-based approach.

The examples that I will use below focus on states as the actors who give their consent. But as noted in 1.C, this strictly need not be the case. A consent-based account may locate the appropriate consent in other actors.

[61] Mosler, 'The International Society', 33.

1.D.i.1. Trivial *jus cogens*

The first problem is that a consent-based approach commits its supporters to the view that any rule, no matter how trivial in content, can become *jus cogens* if a sufficient majority of states agrees that it is non-derogable. This is a double-edged sword for a consent-based approach, as illustrated by the following example.

Imagine that all states enter into a multilateral treaty in which they declare that the official documentation of each state should be printed in text of purple colour. The treaty further declares that this provision is non-derogable. Although an observer may regard such a rule as trivial in terms of its content, it might be difficult to deny that it is a *jus cogens* rule. This would be so particularly if all states were to treat the rule as *jus cogens* in their subsequent relations – e.g., the rule is used by states to invalidate treaties, and states perceive themselves as being under an obligation not to recognise or give aid or assistance to states which use non-purple text in their official documentation (per Article 41 of the ILC's 2001 Articles on State Responsibility). This example indicates, on the one hand, the initial appeal of a consent-based approach to *jus cogens* law-making.

On the other hand, we do seem to think that *jus cogens* comprises rules whose content is of a qualitatively fundamental or important nature. That position is also supported in international legal practice and the academic literature (as we saw in 1.C). The lists of *jus cogens* rules produced by states (including national courts), international courts and writers are invariably limited to those rules which would appear important in some sense – the prohibition of the unlawful use of force, genocide, and so on. Moreover, without exception, the discourse surrounding *jus cogens* treats such rules as 'essential', 'fundamental' or 'important'. If a consent-based approach is preferred, we must confront the necessary implication that states can create a rule of *jus cogens* which seems utterly trivial. This is

difficult to come to terms with because it does not cohere with our instincts about *jus cogens* rules.

A more concrete illustration of this problem of trivial *jus cogens* can be given. For example, the 1949 Geneva Conventions have been ratified by all, or virtually all, states. Common Article 6/6/6/7 in the Geneva Conventions provides that 'No special agreement shall adversely affect the situation of [protected persons], as defined by the present Convention, nor restrict the rights which it confers upon them'. Common Article 7/7/7/8 states that persons protected under the Conventions may 'in no circumstance renounce in part or in entirety the rights secured to them' under the Conventions. These Articles are reinforced by Common Article 1, requiring states parties to 'respect and to ensure respect for the present Convention in all circumstances'. These Articles may be taken to indicate that the regime governing protected persons (as defined in the Conventions) enjoys *jus cogens* status. Nevertheless, some writers have argued that certain rules within that regime 'clearly do not' enjoy *jus cogens* status – e.g., the obligation in Article 38 of Geneva Convention III that '[p]risoners shall have opportunities for taking physical exercise, including sports and games, and for being out of doors'.[62] The *jus cogens* status of that rule is doubted precisely because its subject matter appears trivial – even though Article 38 is part of an undifferentiated regime which is considered imperative by all, or virtually all, states.

1.D.i.2. Determining whether a rule is non-derogable for *jus cogens* purposes

The second problem with a consent-based approach to *jus cogens* centres on the supposed non-derogability of *jus cogens*. Article 53 VCLT states that a *jus cogens* norm is 'accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted'. A consent-based approach typically treats non-derogability – as

[62] Iain Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 European Journal of International Law 1201, 1211.

determined by a sufficient number of states – as an essential precondition of a rule's status as *jus cogens*. But determining whether a rule of international law is non-derogable for *jus cogens* purposes is a fraught question.[63]

This is best understood by considering the problem of relying upon non-derogable provisions within treaty regimes, particularly human rights treaties.[64] The difficulty is that non-derogable treaty rules may not reliably indicate that the rules in question are non-derogable for *jus cogens* purposes.

Derogation has different meanings. In the human rights treaty context, derogation typically refers to a factual situation – e.g., a public emergency threatening the life of the nation – justifying a temporary and partial suspension of the treaty provision by the state. This suspension is also subject to strict and continuing control under the treaty regime. But in the *jus cogens* context, derogation is generally understood to refer to legal acts or rules which depart partially or fully from the requirements of a *jus cogens* rule.

This difference in meaning is significant. Meron, for instance, argues that '[b]ecause the prohibition of prolonged arbitrary detention is not mentioned among the nonderogable rights in Article 4 of the [1966 International Covenant on Civil and Political Rights], the [1985 draft US] *Restatement*'s identification of that prohibition as a rule of *jus cogens* creates a particularly difficult problem'.[65] But this is mistaken. Given the different meanings

[63] There are several problems which I will not discuss in detail. For instance, it has often been noted that this formulation is circular. *Jus cogens* status means that the rule is non-derogable; and yet non-derogability is supposed to be a condition or indication that a rule does indeed enjoy *jus cogens* status.

[64] For a consent-based approach, the significance of treaties for the question of determining *jus cogens* is clear. For example, as Rozakis notes, at the Vienna Conference 'the majority of [delegations] ... took a position in favour of ... general treaties as a potential vehicle of *jus cogens* norms'; see Rozakis, *The Concept of JUS COGENS*, 73.

[65] Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 American Journal of International Law 1, 15. And Meron restates this point in Antonio Cassese and Joseph HH Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988) 93.

of derogation, we cannot straightforwardly cross-analyse between non-derogability within a human rights treaty regime and non-derogability for *jus cogens* purposes.[66]

The above analysis receives support in the case law. For instance, the UN Human Rights Committee noted in General Comment 29 that the list of non-derogable provisions enumerated in Article 4(2) ICCPR is 'related to, but *not identical* with' the question whether human rights obligations enjoy *jus cogens* status.[67] This indicates that non-derogability for the purposes of a human rights treaty regime, and non-derogability for *jus cogens* purposes, are separate questions.

Furthermore, the HRC noted that other ICCPR provisions (e.g., Article 11)[68] were included in the Article 4(2) list of non-derogable provisions simply 'because it can never become necessary to derogate from these rights during a state of emergency'.[69] Another provision – Article 18 ICCPR concerning freedom of thought[70] – is treated as non-derogable under the treaty merely because it is not factually possible for a state to take measures controlling how people think.

The HRC explicitly contrasts these non-derogable provisions with other non-derogable provisions, whose non-derogability under the ICCPR is taken by the HRC to be a sign of state recognition of their *jus cogens* status. The HRC suggested in General Comment

[66] Eg Article 3 of the European Convention on Human Rights (the prohibition of torture) is, on its face, non-derogable. But this means that it is non-derogable in the limited sense understood under the ECHR treaty regime. We cannot reliably depend on the non-derogability of Article 3 ECHR as evidence that the prohibition of torture is also non-derogable for the purposes of *jus cogens*. This does not mean that the non-derogability of such a treaty provision might not be a *sign* of recognition among states of its *jus cogens* potential. But care must be exercised.

[67] Human Rights Committee, General Comment No 29: States of Emergency (Article 4) UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para 11 (emphasis added).

[68] Article 11 provides that no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

[69] General Comment No 29 para 11.

[70] Article 18 provides that everyone shall have the right to freedom of thought, conscience and religion.

29 that the proclamation of certain provisions in Article 4(2) as non-derogable (e.g., Articles 6 and 7)[71] 'is to be seen partly as a recognition of' the *jus cogens* status of these rules.[72]

The HRC's discussion of non-derogability in the ICCPR reveals a key problem for a consent-based approach to *jus cogens*. That approach treats the non-derogability of a rule (as accepted and recognised by states) as a precondition of its *jus cogens* status. But as the HRC's reasoning in General Comment 29 suggests, state agreement as to non-derogability may reflect *jus cogens* status, or it may reflect some other consideration, such as the simple factual impossibility of derogation. This indicates that non-derogability, as a precondition, is not sufficiently determinative of *jus cogens* status per se.

1.D.i.3. How a non-consent-based approach to *jus cogens* avoids these problems

According to a non-consent-based (or content-based) approach to *jus cogens*, the key determinant of *jus cogens* status is the rule's content. That approach is less susceptible to the two problems discussed above.

A non-consent-based or content-based approach avoids the problem of trivial *jus cogens*. According to that approach, a rule which is not of the appropriate content cannot be *jus cogens* even if it is treated as non-derogable by states. There are, of course, questions to be asked about precisely what the appropriate content is, and this will be explored further below.[73]

A non-consent-based or content-based approach is also better able to circumvent the problem of determining non-derogability. On such an approach, one does not need to determine or establish that a rule is (agreed to be) non-derogable for *jus cogens* purposes.

[71] Article 6 concerns the right to life, and Article 7 the prohibition of torture.

[72] General Comment No 29 para 11.

[73] See 1.D.ii.2 below.

Rather, the non-derogability of a *jus cogens* rule is simply a consequence of its *jus cogens* status, which is established by other means – namely, the substantive content of the rule. It is the content of the rule which makes the rule *jus cogens*, and non-derogability flows from that special status.

Still, a non-consent-based or content-based approach to *jus cogens* faces its own problems. And it is to these that we now turn.

1.D.ii. Problems with a non-consent-based approach to *jus cogens*

According to the second approach to *jus cogens* law-making, *jus cogens* is not made consensually. Rather, a rule is *jus cogens* on account of its content. This content-based approach faces two main problems. First, it struggles to explain the expression 'accepted and recognized by the international community of States as a whole' in Article 53 VCLT. Second, a content-based approach finds it difficult to identify, with sufficient *theoretical* precision, what it is about the content of a rule that grants it *jus cogens* status. In theoretical terms, the formulations put forward tend not to be as clearly defined as we might wish.

1.D.ii.1. Consistency with the formulation of *jus cogens* in Article 53 VCLT

A non-consent-based approach to *jus cogens* law-making should be consistent with the formulation of *jus cogens* in Article 53 VCLT. That formulation may not be an exhaustive statement of *jus cogens*, but few would directly contradict it.

The problem arises if the expression 'accepted and recognized by the international community of States as a whole' is properly understood as some form of consent-based mechanism for making *jus cogens*. A non-consent-based approach, which locates *jus cogens*

status in the substantive content of a rule, inevitably struggles to be reconciled with that expression.

Various attempts may be made by those who advocate a non-consent-based approach. For example, one argument is that the 'international community of States as a whole' may constitute a discrete juridical entity which enjoys law-making capacity – in the field of *jus cogens*, at least – distinct from that of individual states, even when states act collectively. On this view, the phrase 'accepted and recognized by the international community of States as a whole' in Article 53 VCLT refers not to the consent of a sufficient majority of states, but rather to the consent of such a juridical entity.

But this is no solution. For the argument collapses into a consent-based approach. While the consent-givers under a consent-based approach are typically thought to be states, this need not be so. The consent-givers can be other actors, even a single juridical entity (as postulated above). Moreover, it remains to be demonstrated that the 'international community of States' can, in certain contexts, be understood as an independent juridical entity with law-making competence. At the Vienna Conference, the Bulgarian delegate stated that he could not support a joint amendment from Greece, Finland and Spain 'which, by inserting the words "recognized by the international community as a norm", postulated the existence of a coherent and well-demarcated international community capable of giving a ruling as an organized entity'.[74] In addition, the Drafting Committee at the Vienna Conference, and states in general, understood the expression 'international community of States' as meaning simply 'all states', rather than a distinct juridical entity.[75]

1.D.ii.2. The content of a rule which enjoys *jus cogens* status

[74] UNCLT I 314 (para 73).

[75] The phrase 'as a whole', which was appended to the expression 'international community of States', thus served to qualify the idea that *all* states must be involved. As a consequence, it was understood that acceptance and recognition was only required by a sufficient majority of states.

There is a second problem. A content-based approach to *jus cogens* law-making must elaborate what it is about the content of a rule that makes it a *jus cogens* rule. But explaining that content in a theoretically more precise way has proved challenging.

We have seen in 1.C that, within a broadly content-based approach to *jus cogens* law-making, various specific positions may be adopted. On one possible view, a rule is *jus cogens* on the basis of considerations of objective morality – namely, the (objective) moral goodness of the rule. There are various difficulties with this view, and some of these will be analysed in the next chapter.[76] For now, we should note that knowing what (objective) morality requires is, epistemologically, a problematic question – and a question on which we will reasonably disagree. This feeds through into our attempts to know precisely when, according to this view, a rule's content is such that it qualifies as *jus cogens* in international law. Moreover, assuming that we know what a good rule is, a rule can be objectively good in all sorts of ways. Must it be good in certain specified ways (in terms of quality or degree) to be *jus cogens*? These are the questions which would need to be addressed.

According to a second non-consent-based account, *jus cogens* comprises standards which are necessary for the existence of the international legal order. But again, this is not persuasive. To begin with, identifying such standards is a theoretically involved exercise. It raises basic jurisprudential questions about the existence conditions of legal orders generally, and the international legal order in particular. Still, various standards have been proposed – but this generates additional problems. Treating these as *jus cogens* is not persuasive because these 'structural' standards (e.g., the sovereign equality of states) are often not norms.[77] It is uncontroversial in jurisprudential writing that there are legal standards which are not norms – e.g., a statutory provision which simply defines a word. However, *jus cogens* is usually

[76] See 2.K (in Chapter 2).

[77] This is often overlooked in the literature. Thus, for example, Christian Tams is mistaken to treat (all) these 'structural' standards as norms or rules; see Tams, *Enforcing Obligations* Erga Omnes, 142.

taken to comprise norms, such as the rule prohibiting genocide. This is most evident in Article 53 VCLT itself, which refers to peremptory *norms*. Finally and perhaps most tellingly, international legal practice generally does not treat *jus cogens* as comprising structural standards. Rather, the evidence overwhelmingly points to rules such as the prohibition of genocide or the unlawful use of force. In the end, our explanation of *jus cogens* must comport with legal reality or be discarded as mere intellectual fancy.

According to the third suggestion which was introduced in 1.C, *jus cogens* comprises rules of 'international public policy'. As we noted, this argument is incomplete, in that it remains to be shown how a rule becomes part of international public policy.[78] Various attempts have been made – e.g., the idea that *jus cogens* rules, being public policy rules, are just 'fundamental' or 'important' to the international legal order, or that, as public policy rules, *jus cogens* rules protect 'community interests' rather than the interests of individual states. But again, in theoretical terms, these formulations are not sufficiently precise in explaining what it is about the content of a rule that makes it *jus cogens*.

Take the idea that *jus cogens* rules, as public policy rules, are simply 'fundamental' or 'important' to the international legal order. The claim is empty of content. In fact, it simply restates the problem; we are left wondering what makes a rule fundamental or important in the right way. What kind and degree of importance qualifies? In addition, who judges these questions? If we admit that states (or other actors) are the proper adjudicators, the claim threatens to collapse into something more akin to a consent-based approach to *jus cogens* law-making.

Reliance on the idea of community interests is also troubled. First, we face similar problems of theoretical (im)precision in relation to community interests. What counts as a community interest, and who determines what this is? Moreover, who are the members of the community? Second, the idea that *jus cogens* protects community interests is not

[78] This assumes that there is an international public policy regime. And even if this is so, the problem deepens if we ask whether there can be rules of international public policy which are not *jus cogens*.

sufficiently discriminating. In other words, it may over-reach. For instance, in international law, there has emerged the view that some rules of international law are obligations *erga omnes* – that is, obligations owed to the international community as a whole. We may therefore be led to believe that all obligations *erga omnes* are *jus cogens*, because obligations *erga omnes* are also thought to protect community interests. Yet such a conflation is rejected by some international lawyers, who think that a rule can be an obligation *erga omnes* but not *jus cogens*.[79] This illustrates how a content-based approach to *jus cogens* can struggle to offer an explanation of *jus cogens* law-making which, in theoretical terms, is sufficiently precise and discriminating.

1.D.ii.3. How a consent-based approach to *jus cogens* avoids these problems

Overall, a non-consent-based (or content-based) approach to *jus cogens* law-making faces a number of difficulties. It contends that *jus cogens* comprises rules which are substantively important (in some sense); *jus cogens* status depends on the content of the rule. Yet Article 53 VCLT appears to hold the content of *jus cogens* hostage to the acceptance and recognition of the international community of states. Furthermore, it is unclear precisely what it is about the content of a rule that makes it *jus cogens*.

A consent-based approach to *jus cogens* law-making manages to avoid these two problems. It is more clearly consistent with the formulation of *jus cogens* in Article 53 VCLT. And it makes no claim about the necessary content of rules which enjoy *jus cogens* status. Of course, we have also seen that a consent-based approach faces challenges of its own.

[79] Eg Tams, *Enforcing Obligations* Erga Omnes, 151-156; Michael Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nordic Journal of International Law 211.

Chapter 2. *Jus Cogens* Revisited

In the previous chapter, I examined the pattern of disagreement regarding *jus cogens* law-making in international law. I considered the two main approaches to *jus cogens* law-making – i.e., consent-based and non-consent-based explanations of how *jus cogens* is made. I also considered various problems with both approaches, which indicated that neither approach was entirely satisfactory.

These debates about *jus cogens* law-making in international law are long-running, yet the existing answers are not entirely satisfying. A fresh start is needed. In this chapter, I shall make use of a range of insights drawn from philosophical writing about law. There is a wealth of jurisprudential literature concerning (amongst other things) the different ways in which law can be made, and taking advantage of that literature is essential in improving our understanding of how *jus cogens* is made, changed, or unmade. My aim is not to resolve these problems definitively. Rather, the analysis is a modest first attempt at clarifying what the problems really are, and highlighting one way in which they might be resolved. The goal is a more persuasive account of *jus cogens* law-making, and one which is able to explain a wider range of evidence than either of the approaches discussed in Chapter 1. In this respect, I will suggest that the account of *jus cogens* law-making which I propose below is able to accommodate both bodies of evidence on which consent-based and non-consent-based approaches rely. This is more attractive than endorsing one or the other of those two approaches, but then having to disregard or explain away the substantial body of evidence on which the other approach relies.

Of course, one may claim that certain existing accounts of *jus cogens* law-making are in no way defined or even influenced – explicitly or otherwise – by the idea of consent. Even if this were so, it remains the case that none of the existing accounts of *jus cogens* law-making draws upon jurisprudential thinking about how law is made. By contrast, my

proposed explanation does connect with the jurisprudential literature, and for that reason alone it stands apart.

Moreover, discussing consent-based and non-consent-based approaches to *jus cogens* has indeed proved useful. The survey in 1.C (in the previous chapter) does in fact reflect the general pattern of the debate. Additionally, the assessment in 1.D indicates that there are several problems which any account of *jus cogens* law-making should address. One problem is whether there can be trivial *jus cogens*. A second problem is explaining how a rule becomes superior (or non-derogable, as per the formulation in Article 53 VCLT) in the right way, thereby achieving *jus cogens* status. Both these problems afflict a consent-based approach to *jus cogens* law-making. A third problem concerns how we come to terms with the expression 'accepted and recognized by the international community of states as a whole' in Article 53 VCLT. This problem afflicts a non-consent-based approach to *jus cogens* law-making.

All these problems echo the central tension which we feel when thinking about *jus cogens* law-making. We would like to think that *jus cogens* is made through familiar processes which are often treated as 'consensual' (in a loose sense), given the decentralised character of international law. How else do these rules come into being in such a legal order? But we also feel that a rule's content is somehow relevant to (or even determinative of) its *jus cogens* status. We think that *jus cogens* rules are important rules, hence we wish to confine *jus cogens* status to those rules – and only those rules – which have the appropriate content.

In what follows below, I will address these problems by working through a number of steps. But first, we must attend to a basic question. As we have seen, determining whether *jus cogens* is, or is not, consent-based has exercised international lawyers. Yet it is not the

most basic question concerning *jus cogens*.[1] Approached from a philosophical standpoint, the most basic question is whether *jus cogens* is source-based or non-source-based, and it is to this question that we now turn.

2.A. Back to basics

From a philosophical standpoint (in particular, the standpoint of legal positivism), the most fundamental question concerning *jus cogens* law-making is whether *jus cogens* is source-based or non-source-based. By sources, I mean social sources or social facts. Raz explains that '[a] law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intentions, which are necessary for interpretation, for example)'.[2] Raz offers further clarification by explaining that sources mean 'not just law-creating acts but all sorts of facts which make legal statements true or false'.[3] Thus, the notion of sources is not necessarily limited to, say, a Parliamentary statute or a provision of a civilian code.[4] Other social facts may constitute sources of law. Legal positivists disagree over very many issues, but what makes them legal positivists is their commitment to a very modest thesis – namely, that the existence and content of law ultimately depend on social facts or social sources. Source-based criteria may be contrasted with non-source-based criteria. By non-source-based criteria, I have in mind moral criteria – i.e., considerations or requirements of morality.

I shall argue that *jus cogens* is source-based. Furthermore, in order to avoid the problem of trivial *jus cogens*, and to explain why only certain types of 'important' legal

[1] Indeed, it may not be a constructive or useful question at all, as I will suggest further below; see especially Chapter 3.F.

[2] Joseph Raz, *The Authority of Law: Essays in Law and Morality* (2nd edn, OUP 2009) 47.

[3] Ibid, 63.

[4] See further ibid, 47-48.

standard are deemed to be *jus cogens*, I shall argue that considerations of morality determine whether a legal standard is *jus cogens*.

But how can this be? Have I not just drawn a distinction between source-based and non-source-based criteria, and claimed that morality (i.e., moral considerations or criteria) is *non*-source-based? If so, how can I simultaneously claim that *jus cogens* is both source-based *and* determined by moral considerations?

This is not a flat contradiction. In fact, philosophers have long recognised the notion of *social* morality (also known as positive morality or conventional morality). As Neil MacCormick notes, John Austin and other utilitarian philosophers used the expression 'positive morality' in the 19th century.[5] HLA Hart drew upon these ideas when he distinguished between positive morality and critical morality in analysing whether the law should be used to enforce or promote morality.[6]

This notion of social morality is the key to explaining whether *jus cogens* is source-based or not – this being the first step in unlocking the problem of how *jus cogens* is made, changed, and unmade. Social morality describes the moral beliefs of a particular social group or community – i.e., what the group or community believes to be morally true. This may be contrasted with objective morality, which concerns what is actually morally true – i.e., objective moral facts.[7]

An example may help clarify the distinction between social morality and objective morality. A social group may believe it to be morally imperative that blacks be kept separate from whites. It may believe that marriages between blacks and whites are immoral. These moral attitudes or beliefs constitute (part of) the group's social morality. This is to be

[5] Neil MacCormick, *HLA Hart* (Edward Arnold 1981) 47.

[6] Ibid.

[7] I wish to avoid making certain meta-ethical assumptions about the existence of objective morality. However, even if one were to deny that there are objective moral facts, this does not undermine my argument. My argument concerning the source of *jus cogens* relies on the notion of social morality, and social morality is wholly uncontroversial. No one denies that a social group may hold certain moral beliefs at a particular moment in time, this being the group's social morality.

distinguished from objective morality, namely, whether it is actually morally true that blacks be separated from whites. Social groups over the centuries have held many different moral views – e.g., whether human sacrifices, or slavery, are morally permissible or obligatory. By contrast, if there is an objective morality, its standards – at least on these matters – do not depend for their truth on what anyone may or may not think.

Unlike objective morality, social morality is source-based. As Raz notes, '[s]ocial morality is based on sources: the customs, habits, and common views of a community'.[8] These moral beliefs are social facts whose existence and content can, in principle, be determined by empirical investigation.[9] Whether it is true that a particular community believes that polygamy is morally wrong, or that slavery is morally permissible, is empirically ascertainable.[10] The standards of objective morality, by contrast, cannot be empirically verified. Knowing whether it is objectively morally true that polygamy is morally wrong is, epistemologically, a more problematic question.

This begins to throw some much-needed light on the debate about *jus cogens* law-making. I propose that *jus cogens* is indeed source-based – and that a rule of international law is *jus cogens* on the basis of source-based considerations of social morality. Thus, identifying whether a rule of international law is *jus cogens* is a source-based exercise.

This is not to say that the exercise is always easy. In some cases, it will be. For example, if a court is required to decide whether the prohibition of genocide is *jus cogens*, then it may rely on the ample social sources indicating that it is, and the task is

[8] Raz, *The Authority of Law*, 46n7.

[9] Albeit with due caution. I describe the exercise as an 'empirical investigation' for simplicity's sake, but this does not entirely do it justice. Historians, sociologists, anthropologists, and others will be quick to note the practical difficulties that attend to determining the moral beliefs of social groups, past and present – and especially in the case of large and complex social groups. Even the demarcation of one group from another is likely to be a fraught exercise.

[10] For a useful explanation of Hart's account of how certain standards become standards of social morality, see MacCormick, *HLA Hart*, 46.

straightforward.[11] But some legal rules may be alleged to be *jus cogens* in the absence of clear-cut evidence (in terms of the source-based moral beliefs of the community). Those beliefs may be more difficult to locate, for example, or it may require a greater intellectual effort to make sense of them.

Given these preliminaries, the following explanation of *jus cogens* law-making is offered: a rule of international law becomes *jus cogens* if it is believed by certain legal officials (principally states) to be morally important – indeed, morally paramount. These moral beliefs are social facts which go to the weight of the existing rule, the consequence being that the rule's weight is increased. As was noted in Chapter 1, this is a legal positivist explanation of *jus cogens* law-making. That is, the explanation draws upon tools which are uncontroversial in legal positivist thinking about the ways in which law is sometimes made.

I should once again stress that, by legal positivism, I am referring to the thesis as it has been understood in the philosophical literature. And to recap once again, according to that literature, legal positivism is the modest thesis that the existence and content of law ultimately depends on social facts. In international law writing, a connection is often drawn between positivism and consent; hence one often comes across expressions such as 'consensual positivism'.[12] I am breaking that cord here. It is another example of how consent functions as an organising idea in international law thinking, and how this can be unhelpful and unnecessary. According to the thesis of legal positivism as it has been understood in the philosophical literature, the social facts which ultimately determine the existence and content of law can emerge in various ways. This is a question on which legal positivism is agnostic.

[11] Eg *Nulyarimma v Thompson* [1999] FCA 1192; Whitlam J stated that '[i]t is accepted by all parties that under customary international law there is an international crime of genocide, which has acquired the status of *jus cogens* or a peremptory norm' (para 36).

[12] Eg Alexander Orakhelashvili, 'The origins of consensual positivism – Pufendorf, Wolff and Vattel' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing Ltd 2011).

It is not tied to consent as the only means by which the relevant social facts emerge (on the international plane, or indeed elsewhere).

In order to defend my explanation of *jus cogens* law-making, each of its constituent elements will be set out in due course. But I should say more about the idea of social morality first, since that idea is not unknown to some of the existing literature on *jus cogens* law-making. In doing so, I shall further clarify how the existing literature does not fully satisfy.

2.B. Social morality

Critics may point to the fact that the idea of social morality is already expressed in some of the existing thinking on *jus cogens*. For instance, Verdross argued that *jus cogens* rules 'prohibit states from concluding treaties *contra bonos mores* … No juridical order can … admit treaties between juridical subjects, which are obviously in contradiction to the *ethics of a certain community*'.[13] And Lauterpacht suggested that *jus cogens* may 'be expressive of rules of international morality'.[14]

There are also references in the case law. For example, in the *Oscar Chinn* case before the Permanent Court of International Justice, Judge Schücking referred in his Separate Opinion to *jus cogens*, and later stated that 'the Court would never … apply a convention the terms of which were contrary to public morality'.[15]

These statements are best understood as referring to social morality rather than objective morality, and indicate that *jus cogens* status depends upon considerations of social

[13] Alfred Verdoss, 'Forbidden Treaties in International Law' (1937) 31 American Journal of International Law 571, 572 (emphasis added).

[14] (1953) YILC II 155. Although Lauterpacht (as ILC Special Rapporteur) did not expressly use the term *jus cogens* here, it is fair to say that he was referring to that idea. For example, he spoke in this passage of 'overriding principles of international law', ibid. The term *jus cogens* came to be used expressly by subsequent Special Rapporteurs.

[15] *The Oscar Chinn Case* (Merits) PCIJ Rep Series A/B No 63; Separate Opinion of Judge Schücking, 150.

morality. It might also be added that an account of *jus cogens* law-making which draws a connection between *jus cogens* and social morality will be treated as consent-based by many international lawyers. For the claim is that *jus cogens* status depends on what certain actors believe, and the loose understanding of consent in international law (see 1.C.ii) means that such beliefs will generally be taken as a form of consent.[16] Similar reasons motivate the characterisation of customary international law, which is also dependent on certain beliefs (or *opinio juris*), as consent-based.[17]

It is clear, then, that a connection between *jus cogens* status and social morality has already been expressed in some of the academic literature and case law. This should be duly credited. In that case, given that our proposed explanation of *jus cogens* law-making also relies upon such a connection, what added value does it bring? As I will argue, merely expressing a connection is not adequate. Social morality is only one part of a more fully formed explanation of *jus cogens* law-making.

Let us reconsider the statements by Verdross, Lauterpacht and Judge Schücking. These statements refer to social morality – i.e., the moral beliefs of a social group. They suggest that there may be a connection between these moral beliefs and the content of *jus cogens*. In fact, as can be seen in 2.A above, I have already sought to push beyond these

[16] Note that, although the connection between *jus cogens* and social morality is treated as a consent-based approach, it is a little removed from the formulation in Article 53 VCLT (which simply speaks of *jus cogens* in different terms). So further work needs to be done to explain how it fits with Article 53 VCLT. It should also be noted that there may, in fact, be some international lawyers who disagree with the view that the above approach is a consent-based approach. But that would be hard to swallow, given that international lawyers generally have adopted such a loose understanding of consent with regard to other areas of international law (as stated in the accompanying text above).

[17] There may, of course, be problems with this understanding of customary international law (eg the problem of new states, who are deemed to be bound by the existing body of custom); but I will leave these problems to one side. Much of the academic literature treats customary international law as consent-based. For instance, Lowe notes that '[c]ustomary international law is … said to be consensual, and to derive its binding force from the will of states'; see Vaughan Lowe, 'Do general rules of international law exist?' (1983) 9 Review of International Studies 207. And reference is made to the Permanent Court of International Justice's famous dictum in the *Lotus* case, according to which '[t]he rules of law binding upon States … emanate from their own free will'; see ibid, and *The Case of the SS 'Lotus' (France v Turkey)* (Merits) PCIJ Rep Series A No 10, 18. In orthodox thinking, establishing a customary rule requires both practice and *opinio juris* – the latter being the *belief* that the practice is required by law. As this demonstrates, law-making which relies on the beliefs of certain actors – as in the case of customary law – is generally understood to be consensual. Thus, the claim that *jus cogens* status depends on certain actors' moral beliefs may be understood in a similar way.

statements. I agree that there is a connection between *jus cogens* and social morality. But I also claim that *jus cogens* is source-based (i.e., constituted by certain social facts), and that the connection between *jus cogens* and social morality is coherent because social morality is itself source-based. And only with this theoretical foundation established can we begin to address a further set of questions – pressing questions which have been equally neglected by the above writers and judges. For instance, the members of a social group may have moral beliefs on all manner of issues, law-related or otherwise. Clearly, not all of these beliefs have legal force. So when *do* they? How and why might any of this be relevant to law-making – including *jus cogens* law-making? Finally, who are the relevant social actors – the members of the social group whose moral beliefs can be legally significant for *jus cogens* purposes?

Too much is missing. Merely claiming that *jus cogens* status is connected to 'international morality', or 'public morality', does not take us very far. Reliance upon the idea of social morality is only a first step; we need a better understanding of the steps in the *process* by which a rule becomes *jus cogens*, and the role of social morality within that process.

Thus, one key objective of my explanation of *jus cogens* law-making is to clarify precisely how the social morality of a particular social group becomes operationalised in legal form – i.e., how it gains any legal force or significance whatever. This is where jurisprudential analysis proves fruitful. Legal philosophers seek (amongst other things) to understand the various ways in which law is made – and, in particular, when and how moral beliefs are relevant to law-making.

There is a further reason why the existing writing, which recognises some kind of connection between *jus cogens* and social morality, is not adequate. Reliance on social morality sometimes confuses writers as to whether *jus cogens* rules are legal rules at all. For example, Lauterpacht stated that these rules, which he described as 'overriding principles of international law',

> … need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply by virtue of Article 38(3) of its Statute.[18]

This is a puzzling passage. Lauterpacht initially suggests that these rules of 'international morality' are not legal, but then goes on to indicate that they may indeed be legal norms, namely, general principles of law. Equally, McNair wrote that '[i]n every civilized community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore or to modify by their agreements'.[19] McNair's statement is understood to be referring to *jus cogens*,[20] yet it also evinces some hesitation as to whether the rules in question are legal – or whether they could sometimes or always be non-legal norms (to which the law refers),[21] namely, the moral standards of the social group. These passages illustrate how the existing thinking on the connection between *jus cogens* and social morality remains underdeveloped.[22] By contrast, in the explanation which will follow, I will firmly argue that *jus cogens* rules are indeed legal rules. They are legal rules which have acquired weight (relative to other legal rules) through a particular law-making process.

Ultimately, we should not be satisfied with the existing writing on *jus cogens* which draws a connection between *jus cogens* and social morality. The statements in this literature

[18] (1953) YILC II 155.

[19] Lord McNair, *The Law of Treaties* (Clarendon Press 1961) 213.

[20] Eg Orakhelashvili, *Peremptory Norms*, 49.

[21] The law can refer to or apply rules outside the law, but these rules remain non-legal (ie they are not incorporated into the law). For instance, if a judge is awarding compensation, she may be required by the law to calculate (arithmetically) the appropriate sum. Here, the law refers to or applies the rules of arithmetic, but these rules remain non-legal. They are outside the law, even though sometimes the law requires their use.

[22] This can also be seen in recent work on *jus cogens*, such as Orakhelashvili's explanation of the connection between *jus cogens* and social morality; see ibid, 48-49. Orakhelashvili endorses a series of statements of Lauterpacht, McNair and others, but does not go further in exploring what the connection really is.

are terse and cryptic. It is said that *jus cogens* reflects certain moral values or principles which are held in the community – but this, in itself, hardly illuminates the process by which a *jus cogens* rule emerges. In what follows, I will seek to present an account of *jus cogens* law-making which explains the various elements of that process in a theoretically more precise way. It is informed by jurisprudential insights about how law can be made, and this reliance on legal philosophy, in particular, separates my explanation of *jus cogens* law-making from existing explanations.

I should briefly summarise where we have got to thus far. In 2.A, I have established a number of theoretical foundations. I have claimed that *jus cogens* is source-based (i.e., dependent on social facts), that social morality is source-based, and that there is a connection between *jus cogens* and social morality. In what follows below, I will attempt to explain precisely what that connection is. This will be our explanation of *jus cogens* law-making, and it rests on the above theoretical foundations (to which I will return throughout the analysis).

Let us now examine our explanation of *jus cogens* law-making more closely. I introduced the bare outlines of the explanation earlier in the chapter (in 2.A). According to our explanation, a rule of international law becomes *jus cogens* if it is believed by legal officials to be morally important – indeed, morally paramount. These moral beliefs are social facts which go to the weight of the existing rule, the consequence being that the rule's weight is increased. Our task is to defend each of the constituent elements of this explanation. First, why importance? Second, why *moral* importance – and, in fact, why moral paramountcy? Third, why suggest that the given rule is *believed* to be morally paramount, rather than actually morally paramount? Fourth, who are the legal officials, and why do their beliefs count? Fifth, how does the weight of the rule increase as a consequence of these moral beliefs? Does this imply that *jus cogens* status attaches to existing rules of international law – and if so, which rules?

All of these questions will be addressed. If the answers are persuasive, it may mean that there is no longer a need for consent-based or non-consent-based approaches to *jus cogens* law-making. We can move past that debate, and more profitable lines of inquiry about *jus cogens* may be unlocked.

2.C. Why importance?

The problem that there might be trivial *jus cogens* rules was discussed in 1.D.i.1. A consent-based approach to *jus cogens* law-making appears to suffer from this problem. According to a common consent-based approach which follows the wording of Article 53 VCLT closely, a rule which is agreed to be non-derogable by the appropriate actors (usually states) is *jus cogens*. This means that, conceivably, any trivial rule can become *jus cogens*. This is unattractive, because the possibility of trivial *jus cogens* just does not cohere with the evidences of *jus cogens* in international law which a persuasive explanation of *jus cogens* law-making must explain. We tend not to think that *jus cogens* rules can be trivial. Thus, if *jus cogens* status depends on a set of beliefs that the rule is in some way 'important', that possibility is minimised.

2.D. Why moral importance?

My proposed explanation of *jus cogens* law-making goes further, however, because it suggests that the rule in question is believed to be *morally* important. A rule can be important in ways other than moral importance. One might therefore object that my explanation of how a rule becomes *jus cogens* focuses unduly on moral importance, rather than importance in any other sense. Why are we assuming that *jus cogens* reflects certain aspects of (social) morality? Might we not argue that *jus cogens* rules are simply those rules

which are (believed to be) important in a non-moral sense – i.e., without adducing any element of moral importance into the equation?

International lawyers have sometimes contemplated that *jus cogens* might comprise legal rules which are important in a non-moral sense.[23] Rules of international law can be important in different ways. For example, it is difficult to deny that many of the rules governing the creation of states are important. But they are not thought to be *jus cogens*. This suggests that a distinction should be drawn between legal rules which may be important (in various senses) to international law, and those legal rules which are important for *jus cogens* purposes. Focusing on moral importance, rather than importance more generally, is attractive for our explanation of *jus cogens* law-making because it helps explain why we regard some legal rules as *jus cogens*, but not others.

2.E. The degree of moral importance: moral paramountcy

In fact, the category of *jus cogens* is narrower still. Many legal rules are believed to be morally important. *Jus cogens*, however, only comprises those legal rules which are believed to be morally *paramount*. Put another way, some rules are not *jus cogens* because they are not (believed to be) morally important enough. This helps to explain why *jus cogens* status is very limited; only a select group of legal rules is understood to be *jus cogens*.

Moral paramountcy means a certain (high) degree of moral importance. It can sometimes be difficult to pin this notion down. Much of the debate about whether a rule is *jus cogens* will turn on a difficult judgment about whether the rule in question is believed to be morally paramount, or only morally important (i.e., to a lesser degree). However, this uncertainty is not necessarily a drawback for our explanation of *jus cogens* law-making. *Jus cogens* status is sometimes settled, in that some rules are clearly *jus cogens* and some are

[23] And we touched upon such approaches earlier – see, in particular, the survey in 1.C.iv.

clearly not. But it is often the case that *jus cogens* status is controversial, because knowing when the criteria of *jus cogens* status apply is frequently unclear. This explanation of *jus cogens* law-making is authentic to the mix of determinacy (in some cases) and indeterminacy (in other cases) surrounding *jus cogens* status. An explanation of *jus cogens* law-making which claimed to offer a simple formula for conclusively determining whether any given rule was *jus cogens* would be met with suspicion – and rightly so.

That being said, there will be various indicia that the rule in question is believed by legal officials to be morally paramount, not just morally important. We must look to social facts, such as the statements of the relevant legal officials. (As we shall see in 2.G below, these officials may be state officials, judges in international courts, and so on.) Also, in practice, we will reason by analogy. We have settled instances of *jus cogens*, such as the prohibition of genocide, and the moral beliefs on which such status depends may serve as a baseline against which we evaluate the social facts – the moral beliefs – pertaining to other rules.

Finally, as noted above, this explanation addresses the problem of trivial *jus cogens*. But in one sense, it does not entirely remove that possibility. This latter qualification is necessary because I am arguing that a *jus cogens* rule is a rule which is *believed* to be morally paramount. This leaves the possibility that a rule, while it is believed to be morally paramount by the appropriate actors, may nonetheless seem trivial to an outside observer. Of course, if these actors hold moral beliefs which are generally reasonable, then that possibility is slim.

2.F. Some intervening remarks on methodology

The preceding analysis draws attention to a methodological assumption underlying the explanation of *jus cogens* law-making that I have offered. A few intervening remarks on methodology are therefore warranted.

I am relying on the assumption that certain rules are uncontroversially *jus cogens*, such as the prohibition of the unlawful use of force, genocide, war crimes, crimes against humanity, and slavery. My claim is that a successful explanation of *jus cogens* law-making must be able to isolate and account for the *jus cogens* status of these rules. By contrast, other rules are uncontroversially rules of ordinary international law, such as the rules regulating the territorial delimitation of states. Again, a successful explanation of *jus cogens* law-making must be capable of denying the *jus cogens* status of these latter rules. If these are our aims, then the idea of social morality helps to distinguish between those rules which may well be important rules of ordinary international law, and those which are *jus cogens*. Looking at the rules which are indeed uncontroversially taken to be *jus cogens*, we can surmise that *jus cogens* status is available only as regards those rules which are believed to be morally paramount. We see this in the *jus cogens* status of the prohibition of the unlawful use of force, genocide, war crimes, and so on. By contrast, it is not persuasive to claim that *jus cogens* comprises rules which are believed to be important in a non-moral sense, because this does not adequately fit the clear-cut examples of *jus cogens* status which we have – examples which an explanation of *jus cogens* law-making must isolate.

Nevertheless, critics may challenge the above methodology. Perhaps we should build an explanation of *jus cogens* law-making from first principles, they might say – and only then could we fill it. Thus, my analysis is methodologically flawed because it assumes that certain legal rules are *jus cogens*, and seeks the best explanation for why *those* rules – as opposed to *other* rules – are *jus cogens*. I claim that a persuasive account of *jus cogens* should explain why the prohibition of genocide or war crimes are *jus cogens*, and why other rules are not. Critics may think that this is prejudging the matter. For how do we know that

the prohibition of genocide really is *jus cogens*, and that another rule is not *jus cogens*? Might this not be re-evaluated in *light of* our theory of *jus cogens*, which should be constructed independently of the assumption that any particular rule is (or is not) *jus cogens*?

This criticism does not stand up to scrutiny, because it misunderstands the methodology of theory-building. In building a theory of *jus cogens* law-making, we must necessarily draw upon evidences in the world about *jus cogens* – in other words, the legal practices surrounding *jus cogens*. It would be odd, for example, to exclude the legal practice which treats the prohibition of genocide as *jus cogens* from our theory-building. In fact, refusing to rely upon what is uncontroversially accepted as *jus cogens* (such as the prohibition of genocide) is a serious mistake. It is precisely because such rules are uncontroversial that a successful explanation of *jus cogens* law-making must be able to explain them. Consider the alternative. If one were to arrive at an theory of *jus cogens* which denied that the prohibition of genocide was *jus cogens* in modern international law, few (if any) would regard that explanation as persuasive. An explanation of why a rule is *jus cogens* must be based on international realities, not divorced from them. Otherwise, any explanation of *jus cogens* law-making, no matter how fantastical, could be offered.

There are two qualifications to this position. First, while a theory of *jus cogens* law-making should draw upon the international legal practice, it is not enslaved to (all of) it. Some of the practice may be explained away as being, for instance, mistaken – but not too much, lest the groundedness of the theory be threatened.

Second, and relatedly, perhaps the legal practice on *jus cogens* will change significantly. Perhaps some rules will begin to be treated as *jus cogens*, even though they are not believed to be morally paramount. They would appear to fall outside the explanation of *jus cogens* law-making which I have offered. If so, there are several options. On the one hand, this practice may be mistaken (as per above), and the existing explanation still holds.

Alternatively, the very idea of *jus cogens* has evolved or changed, and so a new explanation is needed to account for the changed legal reality.

In that sense, my explanation of *jus cogens* law-making is unashamedly designed to explain the existing legal practice – e.g., why it appears to be the case that, at present, certain rules, but not others, are *jus cogens*. Should the legal practice change substantially, then we will need a new explanation of *jus cogens* law-making. But that is because *jus cogens* has itself changed – and so the need is hardly surprising.

Let us briefly recap. I have argued that a rule is *jus cogens* not because it is believed to be important, or even morally important, but rather because it is believed to be morally paramount. This explanation is attractive because it isolates the uncontroversial list of *jus cogens* rules – i.e., why *these* particular rules, and not *others*, are *jus cogens*. It also clarifies why the more controversial *jus cogens* rules – those rules whose status as *jus cogens* is doubted – are controversial in the first place. This is because it is uncertain whether those rules are believed to be morally paramount.

Finally, this explanation of *jus cogens* law-making – that a rule is *jus cogens* because it is believed to be morally paramount – accounts for the moral discourse about *jus cogens* in the international legal materials. As discussed earlier, there is a pervasive moral vocabulary surrounding *jus cogens*, which is particularly visible in the judgments of national and international courts.

2.G. Whose beliefs?

In determining whether a rule is *jus cogens*, I have suggested that the relevant moral beliefs are those of 'legal officials'. This idea also needs to be unpacked.

In national legal orders, we distinguish between the subjects of the law and the legal officials. The same distinction is useful in international law. On the international plane, the

subjects of international law are those actors which enjoy rights, bear obligations, and so on. However, a subject of international law is not necessarily a legal official. The moral beliefs of legal officials are what really count in determining the *jus cogens* status of a rule, though not all such moral beliefs will be relevant. Legal officials may have moral beliefs on a wide range of matters; the moral beliefs that determine *jus cogens* status are those concerning the moral paramountcy of a given legal rule. Further, these beliefs of legal officials are empirically ascertainable. They are social facts and can be discovered by way of investigation. This explains why we look to the international legal materials to evaluate whether a rule is *jus cogens*.

In what follows, I will expand on the idea of legal officials and their role in *jus cogens* law-making.

2.G.i. Who are the legal officials?

The idea of legal officials is familiar to philosophical writing about law. It has a prominent place, for example, in legal positivist theories about law.[24] But perhaps the idea is less well known to international lawyers. In the broadest sense, the category of legal officials describes those actors who are authorised to make law or apply law.

That formulation may already seem too broad. Consider law-making. Within a single legal order, different actors may be engaged in different forms of law-making. In the English legal system, for example, judges have the authority to make (or 'develop') common law, but they are not empowered to enact legislation. Thus, we can speak of legal officials for the purposes of making English common law, and legal officials for the purposes of enacting

[24] Eg HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 96-98, 100-110, 116-117. Note that in these passages Hart is strictly interested in legal officials who play a role in the emergence (and change) of a *rule of recognition*; that rule, as the ultimate and supreme rule of the legal system, provides criteria for the determination of valid law within that system. However, we may also speak of legal officials in other contexts – e.g., the law-applying officials in the context of a particular legal regime or body of legal rules. I would like to thank Professor Leslie Green for drawing my attention to this distinction.

legislation. Such variation is also present in international law. Consider law-application. There are officials who apply the law of the World Trade Organisation, but these officials do not apply the law of the European Convention on Human Rights. The European Convention has its own law-applying officials.

What all this means is that there are various sub-categories of legal officials. For our purposes, we are concerned with a particular sub-category of legal officials in international law – namely, those officials who make *jus cogens*. In the following analysis, and unless otherwise stated, any references to legal officials should be understood as referring to the (sub-)category of officials who are competent to make *jus cogens*.

Why talk about legal officials at all? Why not discard the idea, and simply discuss those actors with law-making competence in the *jus cogens* context? My aim here is not to introduce unnecessary jargon or complexity, but rather to bracket together a set of questions. The category of legal officials (in the context of *jus cogens* law-making) is useful in two respects.

First, the category is an exclusionary device. Legal officials are involved in *jus cogens* law-making, but this means that certain actors are excluded because they are not legal officials for these purposes. For example, individual human beings may be subject to *jus cogens* rules – most obviously, those *jus cogens* rules which are international crimes (entailing individual criminal responsibility). But while they are subjects of *jus cogens* rules in these circumstances, this does not mean that they are legal officials who can participate directly in *jus cogens* law-making (by virtue of their moral beliefs).

Second, working with the notion of legal officials is helpful because it serves as a rough category to describe the range of actors which do participate in *jus cogens* law-making. In this sense, the category functions as an umbrella. Furthermore, as we shall see below, the range of law-making actors (for *jus cogens* purposes) may not be fixed for all

time. Thus, it is useful that we have a category – legal officials – to which we can refer, even though its content may nonetheless fluctuate in terms of the actors which populate it.

With all this being said, let us turn to consider the identity of the legal officials for the purposes of *jus cogens* law-making. States are unquestionably legal officials in a broad sense in international law (as well as being subjects; states wear both hats). In their capacity as officials in a broad sense, states possess general law-making competence, and the authority to determine the meaning of law, when the law has been breached, and the authority of enforcement. With this in mind, it is clear that states are legal officials whose moral beliefs are relevant to *jus cogens* law-making. For example, the commentary to the ILC's 2001 Articles on State Responsibility has suggested that 'Article 53 [VCLT] recognizes both that norms of a peremptory character can be created and that the States have a special role in this regard as *par excellence* the holders of normative authority on behalf of the international community'.[25] The commentary further suggested that '[t]he insertion of the words "of States" in Article 53 of the [VCLT] was intended to stress the paramountcy that States have over the making of international law, including especially the establishment of norms of a peremptory character'.[26] And all this fits well with the formulation of *jus cogens* in Article 53 VCLT. That provision draws attention to the role of states in *jus cogens* law-making in the expression 'accepted and recognized by the international community of *States* as a whole'. It is difficult to find evidence which directly contradicts that expression in Article 53 VCLT.

The more troublesome question is whether states are the only relevant legal officials for the purposes of *jus cogens* law-making. There are some doubts about whether other actors are competent to make *jus cogens* (by virtue of their beliefs about the moral paramountcy of certain rules). There is evidence from the Vienna Conference, where the

[25] (2001) YILC II Pt 2 56 (para 7).

[26] Ibid 84 (para 18).

VCLT was adopted, of scepticism towards an independent law-making role for non-state actors. And it is not clear how much has changed. For instance, Humphrey Waldock, as ILC Special Rapporteur and Expert Consultant at the Vienna Conference, stated that '[h]e shared the doubts expressed about the United States amendment ... It was for the community of *States* as such to recognize the peremptory character of a norm'.[27] In this passage, Waldock rejected a US amendment that regional legal systems – in other words, a type of non-state actor – were competent to make *jus cogens*.

Similar doubts can be seen in the ILC's Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations. During the drafting phase, the ILC discussed its Draft Article 53 of 1979 (which matched the wording of Article 53 of the VCLT 1969), and considered whether the expression 'international community of States as a whole' should be replaced with the expression 'international community as a whole'.[28] The ILC Special Rapporteur stated that

> ... [i]f the [International Law] Commission affirmed that international organizations could establish precedents binding States, it would be entering the sphere of international custom, which would certainly cause a stir … To avoid alarming Governments without cause, it would probably be preferable to retain the wording of the article as it stood.[29]

This question was re-examined in the ILC's commentary to the completed 1982 Draft Articles on the Law of Treaties between States and International Organizations or between International Organizations. The ILC concluded that

> ... [o]n reflection, and because the most important rules of international law are involved, the Commission thought it worthwhile to point out that, in the

[27] UNCLT I 327-328 (para 83) (emphasis added).

[28] (1979) YILC I 132-133.

[29] Ibid 133 (para 13).

> present state of international law, it is States that are called upon to establish or recognize peremptory norms.[30]

In the ILC's view, the legal officials with law-making competence for *jus cogens* purposes were states.

If this is an accurate reflection of the present state of affairs, the picture may look gloomy for non-state actors. However, even if we accept the orthodox view that states are the legal officials whose moral beliefs count for *jus cogens* law-making, there is still a possibility that other actors may become legal officials under certain circumstances. In particular, there may be cases where states confer their official capacities – here, their authority to make *jus cogens* – onto other actors.

One possibility may arise in the context of international adjudication. Judges in international courts could become legal officials. There are a number of standing and *ad hoc* international courts. Depending on the constituent instruments of these courts, states may seek legally binding judgments from them. In such cases, it may be that the litigating states have conferred authority onto the judges. The judges become legal officials in these circumstances, and their moral beliefs go directly to a given rule's status as *jus cogens*.

Another possibility is international organisations exercising conferred powers, in so far as their practice can be taken as evincing the moral beliefs of the organisation itself.[31] And all these conferrals may be squared with Article 53 VCLT, which is state-centred in its approach to *jus cogens* law-making but does not preclude conferrals by states.

There is a counter-argument to this analysis. Perhaps beliefs about the moral paramountcy of a legal rule may be discerned in the judgments of international courts, or in the practice (decisions, statements, and so on) of international organisations. But the beliefs of these actors do not directly, or formally, determine whether a rule is *jus cogens*. Rather,

[30] (1982) YILC II Pt 2 56 (para 3).

[31] Rather than (or in addition to) the beliefs of states which are members of the organisation and may have been involved in the passage of the decision or resolution.

all this evidence constitutes a material source of law – namely, evidence of what *states* believe. States remain the only legal officials with formal law-making capacity in relation to *jus cogens*.

This is a somewhat unattractive view, at least in its claim that judges in international courts may never directly engage in law-making. But the reasons for this, some of which are philosophical, need not detain us.[32] They touch on long-running debates about the extent to which non-state actors are formally empowered to make international law.[33] This is not the place to revisit those debates in detail. Settling the identity of the legal officials whose moral beliefs determine *jus cogens* status is a secondary question. It assumes that our basic explanation of *jus cogens* law-making is persuasive; that is the primary thesis which I have sought to defend.

2.G.ii. How many legal officials?

A rule is *jus cogens* if legal officials (principally states) believe that it is morally paramount. But how many legal officials are needed? This is a difficult to answer partly because, as we have seen above, the identity of the relevant legal officials is an involved question.

Still, it is plausible that the beliefs of most legal officials will suffice. It is not clear why unanimity amongst all legal officials would be needed for a settled legal position to develop. And this comports with the expression 'accepted and recognized by the

[32] One reason is that, according to legal positivist thinking, the existence and content of law ultimately depends on social facts. Sometimes, however, these social facts run out. The law is underdetermined, and in order to render a decision on a legal question, the court will be forced to make law to fill the gap. This applies just as much to the *jus cogens* context as it does to cases where the legal question concerns rules of ordinary international law. In such circumstances, the courts really are engaged in law-making directly. For further elaboration of a positivist explanation of how judges decide cases, see Joseph Raz, 'Law and Value in Adjudication', in Raz, *The Authority of Law*, 180.

[33] Eg Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale Journal of International Law 107. As regards participation in general law-making, Boyle and Chinkin conclude that states 'retain a tight grip on the formal law-making processes' and 'control ... access to the international arenas relevant for hard and soft law-making'; see Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007) 95.

international community of States *as a whole*' in Article 53 VCLT. The words 'as a whole' may be taken to mean a sufficiently large majority of officials.

2.G.iii. Can states have moral beliefs?

I have argued that states are the principal legal officials for the purposes of *jus cogens* law-making; their moral beliefs are determinative of a rule's *jus cogens* status. But one may query whether a state can even possess moral beliefs.

This may be thought to raise deeper moral and even meta-ethical questions. But the questions can be sidestepped. States act through human beings, and it is uncontroversial that human beings possess moral beliefs. The moral beliefs in question may be said to belong to the individuals who are empowered to act on behalf of the state – i.e., the officials of the state.[34]

2.H. Determining the moral beliefs of legal officials

Our preferred explanation of *jus cogens* law-making holds that a rule is *jus cogens* because legal officials believe it to be morally paramount. This suggests that we must know the moral beliefs of legal officials to know what *jus cogens* is. The preceding analysis has already touched upon this question of how we determine or locate these beliefs.[35] But additional remarks are warranted.

We should begin by reminding ourselves that these moral beliefs – representing the legal officials' social morality – are source-based. Their basis in social sources or social facts means that they can, in principle, be ascertained by examining these facts. This is not to deny

[34] To keep things simple in the remaining analysis, however, I will continue to refer to states themselves as legal officials holding moral beliefs.

[35] See 2.A and 2.G.

that, in practice, the task can be difficult and uncertain. States, being the principal legal officials in international law, are complex juridical entities. Moreover, the evidential record of their beliefs will be partial, and there is always the worry that this record does not reflect their genuine beliefs.

The explanation of *jus cogens* law-making which I have advanced is not meant to revolutionise the ways in which *jus cogens* status is identified. Quite the opposite. One of the strengths of this explanation is that it accounts for the approach of, say, courts when they seek to identify *jus cogens* in cases. Courts are searching for indications that the rule presented to them is believed to be morally paramount by legal officials (principally states). We tend to find that courts consult a breadth of materials – e.g., treaties, resolutions of international organisations, governmental statements, and so on. Such materials may be expressive of (amongst other things) the legal officials' moral beliefs.

Evidence of this approach to determining *jus cogens* status can be found in both national and international judicial decisions. For instance, in *Suresh v Canada*, the Supreme Court of Canada referred to a range of materials in assessing whether the prohibition of torture was *jus cogens*:

> 62. … there are [several] compelling indicia that the prohibition of torture is a peremptory norm. First, there is the great number of multilateral instruments that explicitly prohibit torture…
>
> 64. Last, a number of international authorities state that the prohibition on torture is an established peremptory norm: see … Prosecutor v. Furundzija, 38 I.L.M. 317 (1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, No. IT-95-17/1-T, December 10, 1998); R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3), [1999] 2 W.L.R. 827 (H.L.)…

> 65. Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.[36]

A similar approach has been taken in many other national judicial decisions, such as the US cases of *Siderman de Blake* (again regarding the prohibition of torture)[37] and *Princz* (concerning the *jus cogens* status of the prohibition of genocide and slavery).[38]

The pattern is also repeated in the international case law. A particularly useful illustration can be found in the decisions of the Inter-American Commission on Human Rights. A number of cases have come before the IACHR concerning the death penalty for offenders under the age of eighteen. The IACHR has considered whether the juvenile death penalty is prohibited in international law – and, significantly, whether the prohibition enjoys *jus cogens* status and what its content is. In the case of *Michael Domingues*, the IACHR noted that, although it accepted 'the existence of a *jus cogens* norm prohibiting the execution of children, it found that there was uncertainty under international law regarding the definition of the age for reaching adulthood'.[39] In determining the relevant age, and thus the content of the *jus cogens* prohibition, it explained that

---

[36] *Suresh v Canada* [2002] 1 SCR 3, 2002 SCC 1.

[37] *Siderman de Blake v Republic of Argentina* 964 F 2d 699 (9th Cir 1992) 716-717. In these passages in *Siderman de Blake*, the court based the *jus cogens* status of the prohibition of torture on, amongst other things, the survey of international legal materials in the earlier US case of *Filartiga v Pena-Irala* 630 F 2d 876 (2nd Cir 1980) 882-885; that survey in *Filartiga* made mention of the 'universal renunciation [of torture] in the modern usage and practice of nations' (883), and also drew attention to various UN General Assembly resolutions, international treaties, and so on. See also *Hilao v Estate of Marcos* 25 F 3d 1467 (9th Cir 1994).

[38] *Princz v Federal Republic of Germany* 26 F 3d 1166 (DC Cir 1994) 1180-1181 (referring to state practice, international treaties, ICJ jurisprudence, and academic writing).

[39] Report No 62/02 Case No 12.285 *Michael Domingues v United States* (22 October 2002) para 40. The IACHR's suggestion that there is an international law rule, of *jus cogens* status, prohibiting the execution of children may in itself be controversial to some. But I will leave this to one side. I am concerned here only with highlighting the general *approach* that the IACHR adopts when assessing *jus cogens* status.

> while based on the same evidentiary sources as a norm of customary international law, the standard for determining a principle of *jus cogens* is more rigorous, requiring evidence of recognition of the indelibility of the norm by the international community as a whole.[40]

On this basis, the IACHR went on to examine a broad range of international legal materials. It stated that

> it is appropriate for the Commission to take into account evidence of relevant state practice as disclosed by various sources, including recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of the United Nations and other international governmental organizations, and the domestic legislation and judicial decisions of states.[41]

The IACHR subsequently confirmed this approach in the case of *Douglas Christopher Thomas*.[42] And the same approach can be seen in many other international cases, including ICTY cases such as *Furundžija*[43] and *Delalić*,[44] and ECHR cases such as *Al-Adsani*.[45]

---

[40] Ibid, para 50.

[41] Ibid, para 54. Among other things, the IAHCR in *Domingues* examined treaties (paras 55-68), UN resolutions and standards (paras 69-71), and the domestic practice of states (paras 72-79). In its conclusions, the IACHR stated that there was a customary rule prohibiting the execution of offenders under the age of eighteen at the time of their crimes (para 84), and that this had now achieved *jus cogens* status (para 85).

[42] Report No 100/03 Case No 12.240 *Douglas Christopher Thomas v United States* (29 December 2003) para 41.

[43] *Prosecutor v Furundžija* (Trial Judgment) IT-95-17/1-T (10 December 1998) paras 134-157. In these paragraphs, the ICTY refers to a raft of treaty and customary rules concerning the prohibition of torture. At para 144, the court states: 'It should be noted that the prohibition of torture laid down in human rights treaties enshrines an absolute right … This is linked to the fact … that the prohibition on torture is a peremptory norm or *jus cogens*'. At para 146: 'The existence of this corpus of general and treaty rules proscribing torture shows that the international community, aware of the importance of outlawing this heinous phenomenon, has decided to suppress any manifestation of torture by operating both at the interstate level and at the level of individuals. No legal loopholes have been left'. And at para 147: 'There exists today universal revulsion against torture … This revulsion, as well as the importance States attach to the eradication of torture, has led to the cluster of treaty and customary rules on torture acquiring a particularly high status in the international, normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination'.

[44] *Prosecutor v Delalić* (Trial Judgment) IT-96-21-T (16 November 1998) paras 452-454 (where the court again refers to a raft of treaty and customary law outlawing torture, and then indicates that the prohibition of torture is *jus cogens*).

As we can see from international and national judicial decisions in which the *jus cogens* status of a rule is being assessed, the approach to determining *jus cogens* status is broad-brushed. And this reflects the fact that there is no easy formula for determining the relevant moral beliefs of legal officials. But this should not surprise us. And although this can lead to uncertainty about the content of *jus cogens*, the problem is not isolated to the *jus cogens* context. Indeterminacy afflicts other kinds of international law, such as customary law. These problems are partly a symptom of the underdevelopment of international law.

2.I. Moral paramountcy and weight

We must now consider the function or consequence of our explanation of *jus cogens* law-making. This is a centrally important issue. If a *jus cogens* rule is a rule which is believed to be morally paramount, what does this mean for the rule itself? Put simply, it means that the rule has a particular weight relative to other rules in international law. *Jus cogens* rules are weighty rules, and this explains their superiority.

These statements need to be unpacked. Weight is relative; legal rules possess different weights relative to each other. Furthermore, the weight of a legal rule is source-based. In other words, the rule's weight depends on, or is determined by, social facts. Finally, the weights of rules become significant in the context of conflicts between rules. When two rules conflict, their relative weights may resolve the conflict, in the sense that the weightier rule prevails.[46] Once again, these are all familiar ideas in philosophical writing about law.[47]

---

[45] *Al-Adsani v United Kingdom* (2002) 34 EHRR 273, paras 60-61. In para 60, the court states that '[o]ther areas of public international law bear witness to a growing recognition of the overriding importance of the prohibition of torture', and cites a range of international legal instruments as well as international and national judicial decisions. And then in para 61, the court explains that it 'accepts, on the basis of these authorities, that the prohibition of torture has achieved the status of a peremptory norm in international law'.

[46] It should be noted that, in conflict-situations, the relative weights of the two rules need not be the *only* factor which determines how the conflict is resolved. Moreover, whenever weight is indeed a factor (exclusive or

For instance, judicial decisions are source-based considerations which may determine a rule's weight. If courts find that one rule prevails, or would prevail, over another rule in a case of conflict, this indicates that the former rule is weightier than the latter – as determined by social facts, namely, judicial statements. And the weightiness of one of the rules can now help to resolve conflicts between the two rules in the future.[48] That being said, the weight of rules can itself be a source of uncertainty. As Raz mentions, sometimes the social facts can determine the weight of certain rules 'with precision', but at other times the law may provide 'only incomplete indications'.[49]

Let us return to *jus cogens* rules. A rule is *jus cogens* because it is believed by legal officials to be morally paramount. These beliefs – the moral beliefs (or social morality) of legal officials – are social facts. And it is these particular social facts which add weight to the rule, thereby making it a *jus cogens* rule.[50] This neatly explains the 'superiority' which *jus cogens* rules are thought to possess – the quality which the drafters of Article 53 VCLT attempted to capture with the idea of non-derogability. This superiority of *jus cogens* is manifested, most notably, in conflict-situations. In conflicts between legal rules in international law, *jus cogens* rules have the capacity to prevail over other rules on account of their superior weight.

---

otherwise) in resolving a conflict between two rules, this assumes that the two conflicting rules are commensurable. For it is only where the two rules are commensurable that their relative weights can be assessed according to a common measure, thereby allowing for the weightier rule to prevail simply on account of its greater weight. I address the role of commensurability in conflicts between legal rules in other work.

[47] Namely, legal positivist explanations of law. See eg Joseph Raz, 'Legal Reasons, Sources, and Gaps', in Raz, *The Authority of Law*, 53, 74 ('… the weight or strength of legal reasons is, just like their content, … determined by social facts. Those do for the most part provide enough indications as to how to resolve conflicts of legal reasons').

[48] Bearing in mind the caveats which I have just mentioned (see n 46 above).

[49] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823, 846.

[50] We can now see the pay-off in recognising that *jus cogens* is source-based (or dependent on social facts), and equally, that social morality is source-based (in 2.A above). This helps us to understand how the moral beliefs of a group can become legally operationalised – in this case, by going to the weight of legal rules (such weight being source-based as well).

This explanation of how a rule becomes *jus cogens* may appear simple. But therein lies one of its key strengths – namely, in the promise that it might bring some clarity to a difficult area of international law.

I should add that, according to the above explanation, *jus cogens* status attaches to existing rules of ordinary international law. The moral beliefs crystallise around an existing, positive rule; the legal officials come to believe that the existing rule is morally paramount, its weight increases for that reason, and thus the rule is said to have become *jus cogens* or enjoy *jus cogens* status. And there is overwhelming evidence in favour of this position. Those rules which are uncontroversially regarded as *jus cogens* (e.g., the prohibition of genocide), as well as those rules whose *jus cogens* status is more controversial (e.g., rules protecting individuals' right to a fair trial), are invariably present already in ordinary international law. These are existing rules in international law, and the question is always whether *these* rules are (or have become) *jus cogens*. There is no evidence of which I am aware where it has been claimed that a positive rule is *jus cogens*, yet the rule is not already present (in one form or another) in ordinary international law.[51]

One final point. The above analysis has implications beyond the *jus cogens* context. It would suggest that rules of international law in general may possess different weights. This prompts new questions. Can a rule of ordinary international law be equally as weighty as a *jus cogens* rule, but not be *jus cogens* itself? If so, how – and why – do we distinguish *jus cogens* rules from other weighty rules in international law? There is no reason why a rule of ordinary international law cannot be very weighty indeed – i.e., perhaps even weightier than a particular rule which is *jus cogens*. And again, this weight depends on social facts. What makes a rule *jus cogens* is that it is weighty because of a particular set of social facts –

[51] This position is also well supported in the academic literature – eg Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 126 (who states: 'Rules of *jus cogens* are not new rules of international law as such. It is a question rather of a particular and superior quality that is recognised as adhering in existing rules of international law'); Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson and John Tasioulas, *The Philosophy of International Law* (OUP 2010) 163, 171.

i.e., because the rule is believed by legal officials to be morally paramount. There may be other weighty rules in international law, but these are not *jus cogens* because their weight is not based on officials' beliefs in their moral paramountcy. Thus, a *jus cogens* rule is defined not just by its weightiness, but also by the reasons for its weightiness. These remarks are necessarily brief. Nonetheless, they may suggest constructive ways for thinking about *jus cogens* rules – including how they resemble, differ from, and interact with, rules of ordinary international law – in future work.

2.J. The existing rules of ordinary international law which acquire *jus cogens* status

I have repeatedly suggested that *jus cogens* law-making is the process by which an existing rule of ordinary international law acquires additional weight on the basis of a relevant set of social facts (namely, the moral beliefs of legal officials). In other words, *jus cogens* status is attributed or 'attached' to existing rules of international law which become weightier in a certain way. But which rules? We should explore this question a little further.

2.J.i. Specifying the rules on which *jus cogens* status is based

A *jus cogens* rule can be expressed simultaneously in a variety of different sources. Many *jus cogens* rules are expressed in both treaty and custom. And even within a single source, such as treaty law, the rule is often expressed in more than one treaty instrument. For example, the prohibition of torture (which is thought to be *jus cogens*) is regulated both in customary law and in various treaties, such as the Convention Against Torture, the European Convention on Human Rights, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Geneva Conventions.

When looking at international and national judicial decisions in which the *jus cogens* status of a rule is being assessed, we tend to find that courts consult a breadth of materials – e.g., treaties, resolutions of international organisations, governmental statements, and so on. Earlier, we considered examples of this in international cases such as *Furundžija*[52] and *Al-Adsani*,[53] and national cases such as *Suresh*[54]and *Siderman de Blake*.[55]

What we are seeing in these cases is the manner in which courts identify whether legal officials (principally states) believe a rule to be morally paramount. The process is a flexible one, given the nature of the task, and indications are sought across a range of legal materials. The candidate rule is usually expressed in various forms – e.g., in several treaties, and in custom, too. And one possible reason why the standard is well-regulated, perhaps even over-regulated, in treaties and elsewhere is because officials[56] believe it to be important – indeed, morally paramount.

As a result, there is a risk in becoming too preoccupied with specifying the precise source of the existing rule which becomes *jus cogens* – whether it is the rule expressed in treaty *A*, or treaty *B*, or in customary international law. There is often discussion about this question. For example, there are theoretical debates about whether a treaty rule can even achieve *jus cogens* status; for the orthodox view is that a treaty is binding only upon its parties (whereas *jus cogens* rules are generally binding).[57] But the practical significance of such debates is often limited, and so they can be sidestepped.[58] The basis of *jus cogens* is

[52] *Prosecutor v Furundžija* (Trial Judgment) IT-95-17/1-T (10 December 1998) paras 134-157.

[53] *Al-Adsani v United Kingdom* (2002) 34 EHRR 273, paras 60-61.

[54] *Suresh v Canada* [2002] 1 SCR 3, 2002 SCC 1, paras 62-65.

[55] *Siderman de Blake v Republic of Argentina* 964 F 2d 699 (9th Cir 1992) 716-717.

[56] Especially states, being the principal legal officials for *jus cogens* purposes.

[57] Eg Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Finnish Lawyers' Publishing Company 1988) 216-226.

[58] This is shared by some writers – eg Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag 1974) 73 ('The importance of the problem of sources seems to be rather secondary for both theoretical and practical reasons'). The circumstances in which this problem

located in the moral beliefs of the legal officials, crystallising around a rule of international law which is typically expressed in multiple sources. This is the normal way in which *jus cogens* status is demonstrated.

Some international lawyers may still demand that we always specify the underlying rule which has become *jus cogens*. Without wishing to generalise, we might say that the rule acquiring *jus cogens* status is a rule of 'general international law' – often thought to refer to customary law or general principles of law. If that is correct, it sits well with the references to a 'peremptory norm of general international law' in the VCLT, including Article 53 VCLT.[59] And *jus cogens* rules do tend to be expressed in custom or general principles of law, even if they are also expressed in various treaties. It is perhaps more likely that the rule is customary rather a general principle of law;[60] general principles of law are often understood to be gap-filling standards, such as procedural standards which are applicable to adjudication (principles of evidence and so on).

---

might, in fact, be practically relevant are rare. For instance, suppose that we are determining the precise content of a *jus cogens* rule, and we find subtle variations in the rule as it is expressed in different sources of international law, different instruments, and so on. In such a case, specifying the rule which has achieved *jus cogens* status may well be significant. But this is simply an area – one of many – where the content of *jus cogens* can be indeterminate. And as mentioned, it is rare for this problem (concerning the precise contours of a *jus cogens* rule) to be practically significant. More often, courts and international lawyers are wrestling with more basic questions about whether a given rule (whatever its precise contours, and howsoever it has been expressed in various sources) has become *jus cogens* at all.

[59] Although there may be other interpretations of that phrase in the VCLT.

[60] Suggestions of a connection between custom and *jus cogens* can be found, for example, in the reasoning of judges in international courts. Consider various statements in *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Merits) [1969] ICJ Rep 3. In his Separate Opinion, Judge Padilla Nervo referred to '[c]ustomary rules belonging to the category of *jus cogens*…', ibid. 97. And in his Dissenting Opinion, Judge Sørensen stated: 'Provided the customary rule does not belong to the category of *jus cogens*…', ibid. 248. In the Australian case of *Nulyarimma v Thompson*, concerning the jus cogens prohibition of genocide, Wilcox J stated: 'I accept that the prohibition of genocide is a peremptory norm of customary international law' (para 18); see also Whitlam J (para 57) and Merkel J (paras 140-141). A similar connection between custom and *jus cogens* was drawn in various US cases, such as *Committee of United States Citizens Living in Nicaragua v Reagan* 859 F 2d 929 (DC Cir 1988) 940 (eg 'it is useful to clarify the criteria that determine when a rule becomes not only a customary but also a peremptory norm of international law'); *Siderman de Blake v Republic of Argentina*, 714-715 (eg '[c]ourts [seek] to determine whether a norm of customary international law has attained the status of *jus cogens*…'); *Princz v Federal Republic of Germany*, 1180. There is also support for this view in the academic literature – eg André de Hoogh, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the Responsibility of States* (Kluwer Law International 1996) 45; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 187-195.

2.J.ii. Might *jus cogens* not be based on existing rules?

Let us briefly consider an alternative view. On this view, *jus cogens* may well be weighty legal rules, but these rules are entirely new, rather than being pre-existing rules of international law which have become *jus cogens*. There are several problems with this position.

Legal officials may have moral beliefs about many kinds of issues. Only some of these are legally significant. The question is which of these moral beliefs are operationalised in legal form – i.e., how these beliefs come to have legal significance. Our preferred explanation provides a simple answer. Officials' moral beliefs are social facts about the importance of pre-existing legal rules, and this serves to grant such rules – which are *already* legal – greater weight.

But if we adopt the alternative view, we need another way of explaining how some moral beliefs of legal officials acquire legal force, and some do not. The only option is to argue that *jus cogens* comprises the beliefs of legal officials as regards what is morally paramount, accompanied by a belief that these morally paramount rules are required by law. This second element is needed to distinguish the ordinary moral beliefs of legal officials (on all kinds of matters) from those moral beliefs which are *legally* significant, and which constitute *jus cogens*. Only this latter kind of moral belief has legal force.

The problem is that this alternative view appears to satisfy the orthodox requirements for the establishment of a rule of customary international law. We have the beliefs of legal officials (principally states), which are social facts-based and constitute a body of practice on the international plane. In addition, we have *opinio juris* – the belief that this practice is required by law. The two elements of customary international law – according to orthodox thinking, practice and *opinio juris* – are satisfied. In other words, the alternative view

actually reaffirms that a *jus cogens* rule is also a rule of ordinary international law – here, a rule of customary international law. The *jus cogens* rules are, in this way, mirrored in customary international law.

The alternative view is self-defeating. We should accept that *jus cogens* describes existing rules of ordinary international law which, over time, have acquired a certain degree of weight (based on a certain kind of law-making process). Indeed, this connection between *jus cogens* and existing rules of ordinary international law helps to explain why all those rules which are uncontroversially regarded as *jus cogens* are simultaneously rules of ordinary international law – e.g., the prohibition of the unlawful use of force or genocide. There is little reference to rules which are said to be uniquely *jus cogens*.

2.K. Might *jus cogens* not be source-based?

Thus far, I have argued that *jus cogens* is source-based. I have claimed that whether a rule is *jus cogens* is determined by social facts or social sources – namely, the social morality of a social group (here, the moral beliefs of certain legal officials in international law). These social facts go to the weight of the rule, which explains the rule's superiority.

But we should think further about whether *jus cogens* is not source-based. A critic may continue to insist that a rule only becomes *jus cogens* on the basis of objective morality (which is not source-based), not the social morality of legal officials (which is source-based). Put another way, the question is whether a rule is *jus cogens* because it is actually (or objectively) morally paramount, rather than because legal officials *believe* that it is morally paramount. The preceding analysis has already considered various reasons why we should prefer an explanation based on social morality, so I will focus in this section on the problems with an explanation based on objective morality.

The first problem is that it is generally accepted that the content of *jus cogens* can change. This is indicated by the wording of Article 53 VCLT itself. It is possible that the prohibition of genocide, which is presently *jus cogens*, is one day demoted. But if *jus cogens* status depended on considerations of objective morality, that possibility would be doubted. For, as a matter of objective morality, one might assume that the (objective) moral wrongfulness of genocide would not change. It is hard to believe that one day it would be morally wrongful, but on another day it might not. If it is doubtful that objective morality would change, at least on this issue concerning the basic wrongfulness of genocide,[61] then this does not fit with the accepted view that *jus cogens* is subject to change – even radical change.

The second problem is as follows. If we hold that a rule is *jus cogens* because it is actually or objectively morally paramount, then we are saying that the content of *jus cogens* reflects the paramount demands of objective morality. But this may not be attractive. Assuming that there is an objective morality, we would seem to want to think that, sometimes, *jus cogens* is at odds with what objective morality requires. This allows for the possibility of wicked *jus cogens*. If the international legal order were deeply perverse or debased, then we would probably wish to think that this might be reflected in its *jus cogens* rules. That possibility emerges if *jus cogens* status depends on the contingent moral beliefs of legal officials in international law, rather than considerations of objective morality. And so the (theoretical) appeal of that possibility is satisfied only if we adopt the former explanation, not the latter. It is a familiar truth that the social morality of legal officials can be depraved – e.g., the moral beliefs of officials in Nazi Germany – and that societies can

[61] It should be noted that I am not suggesting that *all* the requirements of objective morality are established and permanently fixed. Since objective morality is, on a common view, underdetermined, it could be that certain facts in the world bring into existence objective moral requirements which would not otherwise be present without those facts. However, these issues must be set to one side, because they engage with deeper meta-ethical questions about objective morality. And more importantly, they do not detract from the analysis above, concerning the basic wrongfulness of genocide. If genocide is basically wrongful under objective morality, it is plausible that no contingent set of facts could ever reverse that basic wrongfulness. The basic *essence* or core of genocide would remain objectively immoral, no matter what happens in the world.

have wicked legal rules. If we think that international law can be wicked, and more specifically that *jus cogens* can be debased, then this tends to exclude an explanation of *jus cogens* status which relies upon considerations of objective morality.

The third problem with favouring an explanation based on objective rather than social morality is that it is less successful in accounting for the discourse on *jus cogens* in the international legal materials. Earlier in this chapter, I referred to various statements in which a connection is drawn between *jus cogens* and morality. For example, in the *Oscar Chinn* case, Judge Schücking referred to *jus cogens*, and later stated that 'the Court would never … apply a convention the terms of which were contrary to public morality'.[62] And Lauterpacht suggested that *jus cogens* may 'be expressive of rules of international morality'.[63] As I suggested earlier,[64] these statements, if correct, are best understood as referring to social morality, not objective morality. We do not find states (including their national courts), international courts, and international lawyers arguing that a rule is *jus cogens* because this is what morality itself – objective morality – requires. Asked to identify *jus cogens*, a lawyer does not turn to ethical (and perhaps even meta-ethical) debates about what objective morality requires. Rather, what we find in the submissions of practitioners, or in academic writing, is copious reference to sources – e.g., treaties, resolutions of international organisations, state practice more generally, and so on. All these reference would be unnecessary if *jus cogens* status depends on objective morality. For it simply would not matter whether there were any social facts in support of a proposition about *jus cogens*. The proposition would be true simply by virtue of objective morality.

[62] *The Oscar Chinn Case* (Merits) PCIJ Rep Series A/B No 63; Separate Opinion of Judge Schücking, 150.

[63] (1953) YILC II 155.

[64] See 2.B.

Ultimately, we should reject the view that non-source-based considerations of objective morality determine *jus cogens* status. Rather, this status is dependent on social facts or sources – namely, the social morality of legal officials.

2.L. Summing up: the disagreement within the International Law Commission

In Chapter 1, I introduced consent-based and non-consent-based approaches towards *jus cogens* law-making. We can find evidence of both these approaches in the ILC's work on the law of treaties in the 1950s and 1960s. This demonstrates the long history behind the two approaches, as well as the enduring disagreement between them. However, we can now properly evaluate these approaches, and put the disagreement in its place, by adopting an explanation of *jus cogens* law-making which manages to draw upon certain strengths in both approaches while also avoiding their pitfalls.

Certain passages of the ILC's 1966 commentary to its Draft Articles on the Law of Treaties support a non-consent-based approach towards *jus cogens*. The ILC argued in its commentary that '[i]t is *not* the *form* of a general rule of international law but the particular nature of the subject matter with which it deals that may, in the opinion of the Commission, give it the character of *jus cogens*'.[65] This is characteristic of a non-consent-based approach. The ILC expressly acknowledges that the mere fact that a treaty provision is agreed to be non-derogable by the treaty parties does not necessarily grant it the status of *jus cogens*. The ILC notes that such a provision 'may be inserted in any treaty with respect to any subject matter for any reasons which may seem good to the parties', and points out that it would be misguided to regard later treaties as void simply because they derogate from a stipulation in an earlier treaty which the parties have deemed non-derogable.[66]

[65] (1966) YILC II 248 (emphasis added).

[66] Ibid.

Yet other passages in the very same commentary favour a consent-based approach to *jus cogens*. For example, the ILC also states that 'a modification of a rule of *jus cogens* would to-day most probably be effected through a general multilateral treaty'.[67] Treaties, of course, are widely understood to be consent-based instruments.

These statements about *jus cogens* are found within a single ILC commentary, and usefully illustrate the conflicting intuitions which we often have when thinking about *jus cogens*. I have proposed that *jus cogens* status should be understood as being based on (certain aspects of) the social morality of a particular set of legal officials in international law. An existing rule of international law attains *jus cogens* status if it is believed by certain legal officials (principally states) to be morally paramount. These moral beliefs are social facts which go to the weight of the existing rule, with the consequence that the rule's weight is increased. This understanding of *jus cogens* explains how states can change *jus cogens*, states being legal officials for the purposes of *jus cogens* law-making – and indeed the pre-eminent legal officials in international law. It also explains how *jus cogens* status is nonetheless sensitive to a rule's content – namely, its content is believed to be morally paramount by these legal officials. This characterisation of *jus cogens* promises to reconcile our conflicting intuitions about *jus cogens*, and sidesteps the key problems afflicting consent-based and non-consent-based approaches.

[67] Ibid.

Chapter 3. Some Remaining Questions about *Jus Cogens*

Chapter 2 offered an alternative explanation of *jus cogens* law-making, which is distinctive in drawing upon jurisprudential thinking about how law is made. In this chapter, I address several additional implications of my proposed explanation. This also provides an opportunity to reconsider some lingering questions about *jus cogens* which have troubled international lawyers. I hope to show that these questions are not as troubling they may first seem.

3.A. *Jus cogens* is unintentionally made

It is uncontroversial that law-making is sometimes unintentional.[1] If we accept the view that *jus cogens* comprises those rules which legal officials believe to be of paramount moral importance, then this suggests that *jus cogens* is made, changed or extinguished unintentionally. This is because moral beliefs are not intentionally made. As Hart rightly noted in relation to the content of social morality, 'rules and standards of this kind enjoy "immunity from deliberate change" since no one can or does establish or abrogate them by any act of or akin to legislation'.[2] Thus, the moral beliefs of a social group (i.e., its social morality) can evolve, but these beliefs are not modified by deliberate or intentional acts. This is familiar to each of us, in terms of the way in which we develop moral beliefs on issues such as capital punishment or assisted suicide. And it is equally true for the legal officials in international law.

[1] The most obvious example is law-making by mistake. By way of illustration, in the English legal system, it is possible that a judge misunderstands earlier, binding case law; he thinks that he is applying existing precedent, when in fact he has departed from it and has made new law. And there may be other examples. John Gardner suggests that customary law is not intentionally made; see John Gardner, 'Some Types of Law', in Douglas E Edlin (ed), *Common Law Theory* (CUP 2007) 51, 63-64.

[2] See Neil MacCormick, *HLA Hart* (Edward Arnold 1981) 46.

This explanation excludes the possibility that states (as the principal legal officials) can make *jus cogens simply* through deliberate law-making processes, such as a treaty. That possibility, contemplated by a consent-based approach to *jus cogens* law-making, does not seem right to us for reasons that were discussed in Chapter 1 (in 1.D). It does not cohere with international legal practice; it is not the case that rules become *jus cogens*, and are then demoted, at will and at any time. This leads in to our next point.

3.B. *Jus cogens* tends to be slowly made

Jus cogens is resistant to change; it tends to be made slowly. This is so on account of the explanation of *jus cogens* law-making offered in Chapter 2 – that a rule is *jus cogens* because it is believed by legal officials to be morally paramount. Moral beliefs tend not to change easily or quickly.

This aspect of *jus cogens* law-making is reflected in international legal practice. The rules which are thought to be *jus cogens* are limited in number, and have been recognised as such for some period of time – e.g., the prohibition of the unlawful use of force or genocide. *Jus cogens* law-making is not as dynamic as, say, law-making by treaty.

3.C. *Jus cogens* does not simply contain obligations

It is accepted that *jus cogens* can comprise legal obligations. In fact, *jus cogens* rules have classically been understood as obligations or prohibitions.

However, *jus cogens* can comprise other legal standards – e.g., rights, permissions or powers. Some international lawyers may doubt this. Take a legal power, which an empowered actor is free to exercise or not. Some may think it odd that a state can choose whether to exercise a power which is, at the same time, supposed to be 'non-derogable'.

However, this is an unhelpful way of thinking about *jus cogens*. By characterising *jus cogens* as those rules which are believed to be morally paramount by legal officials, we can see more clearly that all kinds of rules – be they duty-imposing, power-conferring, and so on – can be *jus cogens*. *Jus cogens* status simply entails that the legal rule in question is very weighty, and has acquired its weight through a particular kind of law-making process.

3.D. A supposed *jus cogens* rule may in fact be several rules

We often talk about the *jus cogens* prohibition of the unlawful use of force, or the *jus cogens* prohibition of genocide. And some have thought that, in such cases, we mean a single rule. For example, one writer takes the *jus cogens* prohibition of the unlawful use of force and attempts to construct a single 'norm-sentence' which encompasses all the rules, principles and exceptions concerning the use of force in international law.[3] As he explains, '[g]iven that we have made it our task to state in the form of a sentence the full contents of the prohibition [of the unlawful use of force], then in this sentence we need to account for each and every condition relative to which the prohibition applies'.[4] As might be expected, the ensuing sentence is lengthy, complex and unwieldy, and this is treated as an indication of the theoretical oddness of *jus cogens*.

But this is a false problem. There is no reason to treat the *jus cogens* prohibition of the unlawful use of force as a single, complete rule. I have suggested that *jus cogens* rules are those rules in international law which have acquired a certain weight because they are believed to be morally paramount by legal officials. And when we say that the prohibition of the unlawful use of force is *jus cogens*, this is merely a convenient shorthand. We are actually describing a cluster of legal standards which are in a relationship with each other.

[3] Ulf Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853, 859-867.

[4] Ibid, 865.

They have all acquired a certain weight and been elevated to *jus cogens* status. Thus, the rule of ordinary international law prohibiting the use of force has become *jus cogens*, as has the rule permitting self-defence, and so on.

3.E. *Jus cogens* rules and invalidity

I now wish to consider the alleged role that invalidity plays in defining what jus cogens status is, and thus what it takes for a rule to achieve jus cogens status.

There is a risk that some may treat invalidity – or, more specifically, the *capacity* to invalidate – as an *instrinsic* quality, a special property, of a rule which acquires jus cogens status. The formulation of jus cogens in Article 53 VCLT, according to which valid treaties must comply with jus cogens rules, is a leading influence in this regard. One may also think that the capacity of jus cogens rules to invalidate extends (or may extend) beyond treaty law to other kinds of acts. As one writer puts it, this is all part of the '*effect*-oriented character' or profile of jus cogens.[5] Overall, though, the impression one sometimes gets is that the capacity to invalidate is treated as an inherent quality of jus cogens status – i.e., a conceptual property of jus cogens.[6] A rule just has to be capable of invalidating in this way in order to be jus cogens. And this leads to worries about the formal sources of jus cogens rules – e.g., whether jus cogens rules are customary rules, given doubts about whether customary rules can govern the validity of other rules (including treaties) in the way that jus cogens rules seem to be able to do. Thus, it has been suggested that '[c]ustomary law by its nature is not an apt instrument for the development of non-derogable rules that are superior even to treaties'.[7]

[5] See Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 78.

[6] For example, Orakhelashvili states: '*Jus cogens* is an inherent attribute of norms which safeguard the public interest and envisages their special effect of non-derogability'; ibid 68.

[7] Ibid 114.

This approach is not a helpful way of thinking about jus cogens,[8] mainly because it leads to unnecessary confusion. We do not need to think that the capacity to invalidate must be an intrinsic quality or precondition of a rule which becomes jus cogens. As I have argued in Chapter 2, jus cogens rules are best understood as weighty rules in international law – rules which have become weighty through a particular law-making process.

Of course, there is the matter of Article 53 VCLT, which provides that jus cogens rules govern the validity of treaties. The best way to understand that provision is that it is a separate rule about treaties and the criteria of validity which they must satisfy. The VCLT contains a number of rules providing criteria of validity for treaties, and Article 53 VCLT is another such rule. Article 53 VCLT happens to provide that the validity of treaties is governed by jus cogens rules. H.L.A Hart distinguished between primary rules (which, in the case of obligations, require subjects to perform or not to perform certain acts) and secondary rules (which are rules 'about' other rules, and which concern among other things the creation, change and extinction of other rules). In Hart's terminology, Article 53 VCLT is a secondary rule – a rule 'about' other rules.

To press the point, the drafters of the VCLT could have decided that the validity of treaties turned upon their conformity with other rules – or even depended on natural events such as whether the average global temperature that calendar year was above a certain level. This does not mean that it is an inherent feature or special property of the average global temperature that it can invalidate treaties. It just means that a rule was provided in the VCLT which made a treaty's validity dependent on this event.

Thus, Article 53 VCLT is a separate (secondary) rule which happens to bear upon the role of jus cogens rules in a certain context. It does not mean that there is an *intrinsic* and special property of jus cogens status as such – a mysterious conceptual quality which needs

---

[8] In addition to the reasons I am about to give, the approach may also be circular. It may be understood to claim that a rule must possess the capacity to invalidate as a *precondition* of jus cogens status; but then, simultaneously, the capacity to invalidate is thought to flow from or be a *consequence* of jus cogens status.

to be accounted for. Rather, it is simply a rule which provides an additional set of criteria of validity for treaties.

And even outside the jus cogens context, the VCLT contains varied provisions governing the validity of treaties – rules which are now to be found in customary law. Thus, ordinary rules of customary law can indeed govern the validity of other rules, including treaty rules.

3.F. Returning to consent

Jus cogens is source-based; in other words, *jus cogens* status depends on social facts. An existing rule of international law becomes *jus cogens* if it is believed to be morally paramount by legal officials (principally states). These moral beliefs are social facts which go to the weight of the existing rule, the consequence being that the rule's weight is increased. Further, *jus cogens* is unintentionally made, and slowly made. We may now come full circle by returning to the problem of whether or not *jus cogens* is consent-based.

One may think that the above account of *jus cogens* law-making is a consent-based account. For I suggest that *jus cogens* status is dependent on the (moral) beliefs of legal officials, and perhaps the understanding of 'consent' in international legal thinking is sufficiently loose that it could treat such beliefs as consent-based.

We should be sceptical, however. In particular, we may doubt whether such a loose understanding of consent is, in itself, persuasive.[9] It seems odd to say that moral beliefs are consent-driven. As individuals, we each have moral beliefs on all manner of issues. Should I really treat my moral beliefs about the wrongness of murder as being based in my 'consent' (on some matter or other)? This touches upon my earlier suggestion that *jus cogens* rules are

[9] This issue was discussed further in Chapter 1 (1.C.ii).

unintentionally made, and tend to be slowly made.[10] This is characteristic of the way in which moral beliefs form and evolve. Consequently, if we adopt an explanation of *jus cogens* law-making which is based around moral beliefs, we will struggle to maintain a consent-based approach which is more suited to deliberate or intentional forms of law-making.

Given that I reject a consent-based approach to *jus cogens*, however, a critic may suggest that I am necessarily adopting a *non*-consent-based approach. This criticism is not persuasive, however, because it misses certain shades of the argument. I reject consent as a useful organising idea in explaining *jus cogens* law-making, and this rejection is more thoroughgoing than existing non-consent-based accounts. Arguably, those accounts still take consent seriously. They tend to define or set themselves *against* consent-based explanations. Consent remains the framework – sometimes explicit, sometimes not – within which the analysis takes place.

By contrast, I jettison consent out of hand as an organising idea. In my view, consent (or its absence) is not an appropriate tool or measure by which to understand *jus cogens* law-making in the first place. To press this further, there are other ideas – pleasure, beauty, efficiency, and so on – which would also be unsuitable if used to explain *jus cogens* law-making. Imagine a pleasure-based approach to *jus cogens* law-making. We might argue against such an approach by tolerating the relevance of pleasure as an analytical framework, but nonetheless preferring a non-pleasure-based account. Or we might go further by rejecting the very suitability of pleasure as an organising idea with regard to *jus cogens* law-making. My rejection of consent is of the latter form.[11]

[10] See 3.A and 3.B above.

[11] And even if it is claimed that some of the existing accounts of *jus cogens* law-making do forsake consent as an organising idea as well, they continue to struggle because they do not explain the various steps in the process of *jus cogens* law-making. As I have stressed, what is urgently needed is engagement with jurisprudential writing about how law is made; this will greatly aid in our attempt to substantiate the process of *jus cogens* law-making in a theoretically sounder fashion. And that has been the goal of Part I.

As has hopefully been demonstrated, it is possible to unpack *jus cogens* law-making without resorting to the idea of consent at all. Thinking about whether or not *jus cogens* is consent-based adds a further layer of complication which can be avoided without losing analytical insight.

These points may have broader significance. Perhaps our doubts about the usefulness of the idea of consent in the *jus cogens* context may spur us on to question the role that it plays in explanations of international law-making more generally. This is not to deny any role to the idea of consent. It may be highly relevant to how we understand certain areas such as treaty-making. But its broader amplification, as can be seen in so much of the literature on international law-making,[12] may come at a price. For it may amount to an intellectual straitjacket. The universe of ideas is richer than simply consent.

3.G. Concluding remarks

Ian Sinclair once wrote that '[t]he mystery of *jus cogens* remains a mystery'.[13] There is no doubt that *jus cogens* is an enigmatic body of law, and it continues to attract academic interest. This is sometimes to the frustration of international lawyers with little patience for a topic which seems resistant to analysis. The task may appear futile. But we should not give up.

My aim in Part I is modest. It is a first attempt at better explaining *jus cogens* law-making. I have been sceptical of the prominent role that consent has played in our thinking about *jus cogens* to date. Existing accounts of *jus cogens* law-making have been influenced by consent as an organising idea. There is much that we should learn from these accounts,

[12] See Chapter 1.

[13] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 224.

but they do not fully convince, and many of their failings may be traced back to the problematic idea of consent. I step away from that idea, and instead reconnect with some familiar insights about how law is made in the jurisprudential literature. We have seen these tools in action – social sources or social facts, the source-based character of social morality, legal officials, the weight of rules, and so on. Reliance on legal philosophy alone separates our explanation of *jus cogens* law-making from the existing accounts.

This explanation of *jus cogens* law-making is, of course, no silver bullet. There remain a host of unanswered questions which are ripe for further investigation. Still, the analysis has attempted to clarify some of the most basic problems which gnaw away at our intellectual confidence – problems about where *jus cogens* comes from, and what it is. These are, after all, important rules in the international legal order. Part I has succeeded if they seem a little less mysterious.

Chapter 4. Formulating a Theory of Legal Conflict

4.A. Introduction

Part I explored the problem of *jus cogens* law-making. In Part II of this study, we now shift gear by exploring the problem of conflicts between laws. In what ways do laws conflict with each other? Why are these properly thought of as *conflicts*? In Part II, I will consider the problem of conflicts between laws, focusing mainly on conflicts between legal norms.[1] Legal norms tell subjects of the law what they are permitted, or what they ought, to do or refrain from doing. Legal norms may take the form of 'rules', 'principles', or other forms. These other forms are often neglected. For example, judicial orders are also legal norms because they are statements by a legal authority (a court or tribunal), directed to one or more parties, about what they ought to do – e.g., an order that I pay Hector £100 in compensation.[2] However, in analysing conflicts between legal norms, I will focus on conflicts involving rules, rather than conflicts involving (for example) judicial orders. My focus, therefore, is on general legal norms (i.e., rules) rather than particular legal norms.[3] When I refer to legal norms, I usually mean general legal norms (i.e., rules).

The problem of legal conflict has exercised many international lawyers.[4] But it has also been addressed in the philosophical literature, and this literature will be my main focus

[1] It has been suggested that there are laws or legal standards which are not norms – e.g., a law defining a word or a concept. See Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press 1980) 168ff. I will leave these issues to one side because they are marginal to a theory of legal conflict. Conflicts between legal norms are my main focus.

[2] Hence, for example, Joost Pauwelyn is mistaken to think that judicial decisions are not norms, and therefore 'cannot be part of a [study on the] conflict of norms'. See Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge University Press, Cambridge 2003) 114.

[3] This terminology is used by Joseph Raz; see Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823, 824.

[4] Eg C Wilfrid Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401; W Czapliński and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 Netherlands Yearbook of International Law 3; Pauwelyn, *Conflict of Norms*; Rüdiger Wolfrum and Nele Matz, *Conflicts in*

in this chapter, and throughout Part II of this study. I will critically engage with some notable theories of conflict that have been proposed by philosophers. Sometimes these theories expressly address conflict-situations in law, and sometimes they only focus on conflict-situations in other or different areas – e.g., conflicts between 'rights' (in morality), or conflicts between reasons. I will engage with both kinds of theories where they are useful in better understanding the phenomenon of legal conflict.

My specific aim in this chapter is to survey some of the main attempts to formulate a theory of legal conflict in the philosophical literature. During the survey, I will also critically assess each of these theories. In the latter part of the chapter, I will advance a formulation of legal conflict which, in my view, is more suitable than the others. The formulation holds that two laws conflict when they cannot both be realised.

This bare formulation reveals little, and much of the work will involve exploring what it means to say that two laws cannot both be realised, examining the different ways in which this might take place, and addressing certain difficult problems that the formulation might be asked to overcome. One of the more difficult problems, and a running theme in this chapter, is whether and how a theory of legal conflict should accommodate conflicts involving legal rights, permissions or powers.

One final point. A critic may question the value of analysing other theories of (legal) conflict. Why should I spend time on these theories, rather than simply presenting my own preferred formulation of legal conflict? George Rainbolt puts it best:

> The evaluation of philosophical theories is a comparative matter. Perhaps it is possible in principle to provide an argument or set of arguments that, without reference to other views, shows that one's preferred view on a complex

---

International Environmental Law (Springer-Verlag 2003); Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 George Washington International Law Review 573; Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theroy' (2006) 17 European Journal of International Law 395; Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the ILC (2006) A/CN.4/L.682, 17-20; Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009).

> philosophical issue is true. In practice, I do not believe that this ever happens. On any issue worth philosophical ink, there will be a number of competing plausible theories. One defends one's view by showing that it is superior to competing theories. So one must compare one's preferred theory to other plausible views.[5]

4.B. A general theory of conflict?

This study addresses the problem of *legal* conflict. By this, I mean conflicts between two laws. And by laws, I mean legal rules (i.e., general legal norms). But legal conflicts, so defined, are only one kind of conflict. Can there be a general theory of conflict, which accounts for all kinds of conflict? Should we be aiming to find such a general theory instead, or is this not possible? Even if this were possible, how meaningful would such a theory be? Would it be operating at such a high level of abstraction as to lack explanatory power?

By a 'general' theory of conflict, I mean a theory which is universally true. There are two related problems with developing a general theory of conflict: ambition and feasibility. First, a general theory of conflict is ambitious. We recognise, at least on some level, conflicts in many different domains. As Peter Baumann and Monika Betzler note, '[t]he list of items that give rise to potentially conflicting reasons is long and might even appear open-ended. Consider, for example: desires, preferences, emotions, interests, goals, plans, commitments, values, virtues, obligations, and moral norms'.[6] Thus, for example, we recognise conflicts of interest in business or professional life generally. These are practical conflicts because the reasons involved bear upon our practical reason. Practical reason is the reasoning process by

[5] George W Rainbolt, *The Concept of Rights* (Springer 2006) xv.

[6] Peter Baumann and Monika Betzler, 'Introduction: Varieties of Practical Conflict and the Scope of Practical Reason', in Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (CUP 2004) 1.

which we decide what to do. There are also theoretical conflicts, but here the conflicting reasons are reasons for belief, not reasons for action – i.e., the reasons bear upon our reasoning about what we are to believe. Examples of possible theoretical conflicts include conflicts between scientific theories.[7] However, developing a general theory of conflict which embraces all these domains is too ambitious to be contemplated in this study. Such a task would require consideration of conflict-situations within each of these domains.

Relatedly, there is also a view that a general theory of conflict is not feasible. Rather, there are various parochial theories, all of which are true as regards explaining their chosen domains. It is difficult to deny that a more attractive theory of, say, *X* is a theory which explains all domains (e.g., all instances or contexts) where *X* is or may be relevant. Joseph Raz adopts the latter approach in his writing on authority. Raz thinks that his theory of authority can explain parental authority, the authority of a doctor over a patient, legal authority, and so on. Raz further thinks that this is one reason why his theory of authority is an attractive theory. In light of this, we might at least *try* to build a general theory of conflict, rather than a number of more parochial theories. Nevertheless, the very feasibility of a general theory of conflict remains controversial. This scepticism relates in part to the ambition of such a theory, as discussed above. And even if a general theory were feasible, its explanatory usefulness might be questioned if it were highly abstract.

For these related reasons – ambition and feasibility – I will not seek to build a general theory of conflict in this study. The kinds of conflict-situations with which I am concerned must therefore be explained.

I am not concerned with norm-conflict in general. A general theory of norm-conflict would have to explain all those domains which contain norms, and in which these norms may conflict. For example, there are norms in morality. There are ordinary social norms – e.g., norms regarding the courtesy that a host should show to her guest. This study is

[7] Ibid.

concerned mainly with *legal* norms (and, perhaps, legal standards which are not norms). I therefore reserve judgment on conflicts between norms in a broader sense. The considerations that apply to such cases may not (always) be the same as those where the two norms are legal. This may be because of the social facticity of law, the particular ideals that *law* as a certain kind of social practice strives (or should strive) to meet (e.g., the ideal of the rule of law), the nature of legal interpretation, and so on.

We may also talk about conflicts in terms of violations or breaches of a norm by an act. Again, I will reserve judgment on this issue. Violations of norms by the acts of subjects may in some ways be similar, but in other ways be different, from conflicts between norms.

Nonetheless, in spite of the above qualifications, I will draw upon analysis of conflicts in other domains where these may assist in better understanding the nature of legal conflict. For example, legal norms are reasons for action.[8] Our understanding of conflicts between legal norms may therefore be aided by consulting analyses of conflicts between reasons more generally.

4.C. Outline of the argument

In what follows below, I will critically engage with some of the literature concerning how and why legal conflicts arise. Some of this literature expressly addresses conflict-situations in law. Some focuses on conflicts in other areas (or more generally), but the analysis is still applicable to conflict-situations in law.

I first consider whether logic has a role in understanding legal conflict. Logic is concerned above all with the question of consistency, so relying on logic might seem like an

[8] See Joseph Raz, *Practical Reason and Norms* (new edn, OUP 1999). The characterisation of legal norms as reasons for action is generally regarded as persuasive, but it is not wholly uncontroversial. That thesis is generally rejected by legal realists, for example. And see eg Enrico Pattaro's claim that legal norms are in fact motives for behaviour, and not reasons for action – as noted in Sean Coyle, 'Apropos of *A Treatise of Legal Philosophy and General Jurisprudence*: Volume 1' (2009) 22 Ratio Juris 155, 165.

obvious choice. However, I suggest that logic is not especially helpful in identifying conflicts between legal norms. The main problem is that norms are not susceptible to truth-values (i.e., a norm cannot be true or false), whereas logic is generally thought to rely upon truth-values to determine logical inconsistencies. Nevertheless, I discuss certain ways in which logic might have *some* limited relevance in understanding legal conflicts.

Putting logic to one side, I then consider, and reject, a number of formulations of legal conflict.[9] This analysis is meant to be healthy and constructive engagement with the work of others; for there is much to be learned from their writing. In that sense, the analysis represents a process of dialogue well familiar to those working in philosophical fields.

On this basis, I advance my preferred formulation of legal conflict, according to which two laws conflict when they cannot both be realised. As mentioned earlier, the bare formulation itself means little. I will unpack the formulation, and explore different ways in which two laws cannot both be realised. In particular, I will explore whether and how my preferred formulation addresses conflicts involving legal 'rights' (understood in a loose sense) – this being a persistent problem for theoretical writing about conflicts between legal norms. This leads us into the next chapter (Chapter 5), where I will consider some additional problems which push the boundaries of my preferred formulation of legal conflict (or indeed any formulation). Finally, in Chapter 6, I construct a typology of legal conflict which draws upon the formulation provided in this chapter. I will rely upon that typology in the remainder of the study as a framework for analysing conflicts between *jus cogens* rules and rules of ordinary international law.

4.D. Logic and legal conflict

[9] As mentioned earlier, I focus mainly on analysis in the philosophical literature, rather than analysis in the international law literature.

Can logic assist in understanding legal conflicts? It may seem that logic is an obvious starting point, since logic is concerned (perhaps above all) with consistency. However, logic is arguably of limited relevance in understanding legal conflicts. I will first discuss some of the main problems with using logic to understand legal conflicts. I will then explain how logic may nonetheless possess some modest relevance.

I should emphasise that the following analysis of logic is tentative and provisional. The literature is vast, and the problems that I consider could certainly warrant book-length treatment.

4.D.i. Problems with using logic to understand legal conflicts

Although logic is concerned with consistency, it is not concerned with every kind of consistency. There can be inconsistencies which need not be illogical. As Wilfrid Hodges indicates, if I support Manchester United FC one week, and then Manchester City FC the next, this may reflect an inconsistency in my behaviour which is not necessarily illogical.[10] If we treat all inconsistencies as conflict-situations, then this demonstrates that logic cannot identify or explain all conflicts.

Putting this to one side, the main problem with using logic to understand *legal* conflicts is that law contains norms, and there are difficulties in applying logic directly to assess conflicts between legal norms (or indeed other kinds of norms).[11] The kinds of norms that we are concerned with are deontic norms – i.e., obligations and rights. Standard or classical logic relies upon truth-values to determine consistency. Therefore, standard logic is concerned with consistency between the kinds of sentences that are susceptible to truth-

[10] Wilfrid Hodges, *Logic* (2nd edn, Penguin Books 2001) 1.

[11] Of course, as I have argued earlier, there are also legal standards other than norms, and logic may not face the same difficulties in respect of these kinds of legal standards. I will address this issue further below.

values in the first place – i.e., the kinds of sentences that can be said to be true or false.[12] (The truth or falsity in question is a logical truth or a logical falsity, rather than truth or falsity in terms of what a sentence actually means.) Thus, logic is concerned with evaluating the consistency of declarative sentences, propositions or beliefs. Take a declarative sentence such as 'grass is green'. If there is another declarative sentence, e.g., 'no grass is green', then we may evaluate the logical consistency of the two statements by asking whether both can be true, or whether both can be false – or both.

The problem is that norms are not the kinds of sentences which have truth-values. A norm, such as the order 'Eat this pumpkin', cannot be true or false. Accordingly, if standard logic relies upon truth-values to determine the consistency of a set of sentences, standard logic cannot assist in determining the consistency of sentences which cannot be true or false. This is the well-known Jørgensen's Dilemma.[13] Kelsen also drew attention to the problem of applying logical principles such as the exclusion of contradiction and the rules of inference to legal norms.[14]

So logic cannot explain the reason why we regard two norms as conflicting. Some writers have noted these problems with relying upon logic to understand conflicts between legal norms. For instance, Fuller is critical of those who regard the problem as 'simply one of logic', in the sense that a logical contradiction is 'something that violates the law of identity by which A cannot be not-A'.[15] Fuller argues that this is of no value in helping us to understand or deal with conflicting legal norms,[16] giving the example of one law which

[12] In addition to standard or classical logics, where truth-values are restricted in number to two (ie true or false), there are also many-valued logics, where truth-values need not be so restricted. But discussion of this must be put to one side; see further <http://plato.stanford.edu/entries/logic-manyvalued/>.

[13] Jørgen Jørgensen, 'Imperatives and Logic' (1937) 7 Erkenntnis 288.

[14] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange 2009) 74, 205-208.

[15] Lon L Fuller, *The Morality of Law* (Rev'd edn, Yale University Press 1969) 65.

[16] In this regard, Fuller criticises Kelsen's 'highly formal analysis of the problem of contradictory norms', as well as Bentham's analysis of 'repugnancies'. See Fuller, *The Morality of Law*, 65fn24. For further criticisms of Kelsen's understanding of conflict, see also ibid 111-112. However, it is doubtful whether Fuller's criticisms

requires a car owner to install new licence plates on New Year's Day, and another law which criminalises any labour that is performed on that day. Fuller suggests that enacting these two laws has not 'trespassed against logic', even though they conflict.[17] This is because enacting the first legal norm does not mean that the second legal norm cannot be true, or vice versa.[18] What has simply happened is that a car owner must install new licence plates on a certain day by law, and in doing so she will then be punished by law. The law is perverse, but not illogical.

However, there have been attempts to use logic to explain conflicts between legal norms.[19] It is worth examining some of this analysis more closely – including, in particular, the problems that they face.

Some logicians have tried to demonstrate, for example, that norms are susceptible to truth-values, or that evaluating logical consistency need not always depend upon truth-values (but rather other kinds of value, or on some other basis).[20] For reasons of space, and as an outsider to this area, I must leave these issues to one side. Instead, I will focus on those arguments that have been proposed by writers addressing conflicts between norms in the law.

---

of Kelsen are entirely justified. In his later work, Kelsen recognised that laws could conflict, and expressly stated that he did not regard these conflicts as logical contradictions:

> A conflict of norms is thus something entirely different from a logical contradiction. If it can be compared with anything at all, it is not with a contradiction in logic, but rather … with two forces operating in opposite directions. Both situations, the conflict of norms and the conflict of forces, can be described without any contradiction.

On this, see Hans Kelsen, 'Law and Logic', in Ota Weinberger (ed), *Essays in Legal and Moral Philosophy* (Reidel 1973) 235; see also H Hamner Hill, 'A Functional Taxonomy of Normative Conflict' (1987) 6 Law and Philosophy 227, 235. Hart also suggests that Kelsen's understanding of conflict may have been broader – eg in recognising conflicts between obligations and permissions – in HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 327.

[17] Fuller, *The Morality of Law*, 65-66.

[18] To give an example of two statements which cannot both be true: it is rainy, and (not) it is rainy. This corresponds to Fuller's example of A and not-A.

[19] Eg Bruno Celano, 'Norm Conflicts: Kelsen's View in the Late Period and a Rejoinder', in Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 343, 351-353.

[20] See Jaap Hage, 'Jörgensen's Dilemma' <http://ivr-enc.info/index.php?title=Jörgensen's_Dilemma> accessed 20 June 2012.

The main way of using logic to explain conflicts between legal norms has been to convert legal norms into propositions or declarative sentences – these being susceptible to truth-values. Hart takes this approach. As regards conflicts between norms which are *obligations*, Hart adopts an understanding of conflict based on the logical possibility of joint compliance or obedience. He notes that '[m]any writers favour the idea (which seems intuitively acceptable) that conflict between two rules requiring or prohibiting actions [i.e., obligations] is to be understood in terms of the logical possibility of joint obedience to them. Two such rules conflict if and only if obedience to them both ("joint obedience") is logically impossible'.[21] The logical impossibility is revealed, according to Hart, when the two rules are converted into two obedience statements so that we can test whether they are both true.[22] To give an example, imagine a rule *A* which states that a subject is legally obligated to drive on the left side of the road, and another rule *B* which states that a subject is not legally obligated to drive on the left side of the road. The two obedience statements are: (1) I drive on the left side of the road, and (2) I do not drive on the left side of the road. Since the two obedience statements cannot both be true, they are logically inconsistent. According to Hart, this satisfies the test of 'logical impossibility of joint obedience', and represents an uncontroversial example of a legal conflict that can arise between two obligations.

The above approach raises an immediate problem. The target has now shifted. We are now claiming that the propositions or norm-sentences are logically inconsistent, while still leaving open the question whether we can ever say that the norms *themselves* are logically inconsistent. Nick Barber, for example, openly acknowledges this problem of using logic to identify inconsistencies between norms or rules.[23] Nonetheless, he ultimately holds

[21] Hart, *Essays in Jurisprudence and Philosophy*, 325.

[22] See also Hamner Hill, 'A Functional Taxonomy of Normative Conflict', 229.

[23] NW Barber, *The Constitutional State* (OUP 2010) 148-156.

to the notion that logic can indeed assist in understanding conflicts between rules, subject to the qualifications outlined in the following passage:

> … when I assert that two rules are inconsistent, I mean that complete joint compliance with each rule is logically impossible. This can be tested by transposing the rule into its equivalent compliance statement. Whilst it is appropriate to judge assertions of the possibility of joint compliance as being true or false, I do not assume that the norms themselves that generate these compliance statements are susceptible to attributions of truth-value. Consequently, I will describe the relationship between pairs of contrary or contradictory rules as one of inconsistency, which is not intended to imply that one of the imperatives must be invalid or untrue.[24]

These comments are an admission that logic struggles to explain conflicts between norms directly. As noted above, the norm-sentences (in the form of obedience or compliance statements) may be logically inconsistent, but strictly the norms are not.

These problems of using logic to understand conflicts between norms becomes more acute when we are dealing with norms which are not obligations – in particular, norms which are rights, permissions or powers. These are norms from which it is difficult to derive reliable or sensible norm-sentences in the form of obedience or compliance statements. In the case of a permission which a subject can choose to exercise or not, it makes little sense to talk of obedience or compliance with the permission. For just as the subject satisfies or meets the expectation of the permission by availing herself of the permission, she also does so by not availing herself of the permission.

Once again, these problems are reflected in Hart's analysis, as he moves away from conflicts between two obligations. Hart thinks that it is clear that obligations and permissions

[24] Ibid 156.

can conflict.[25] And as Hamner Hill suggests, the problem is that permissions are not the sort of norms for which obedience statements can be constructed.[26] This is because, as discussed above, it does not make sense to talk of (lack of) obedience to a permission. A subject can choose whether to exercise her permission or not. Accordingly, Hart argues that

> … [t]o meet such cases, we should have to use not only the notion of [joint] obedience [to the two norms], which is appropriate to rules requiring or forbidding action, but the notion of acting on or availing oneself of a permission. We might adopt the generic term "conformity" to comprehend both obedience to rules that require or prohibit and acting on or availing oneself of permission, and we could adopt the expression "conformity statements" to cover both kinds of corresponding statement. In fact, the conformity statement showing that a permissive rule (e.g. permitting though not requiring killing) had been acted on will be of the same form as the obedience statement for a rule requiring the same action (killing is done). So if one rule prohibits and another rule permits the same action by the same person at the same time, joint conformity will be logically impossible and the two rules will conflict.[27]

By replacing obedience statements with 'conformity' statements, Hart argues that there can be logical conflicts between obligations and permissions where the two conformity statements are logically inconsistent. So Hart's preferred test or formulation of conflict is the logical impossibility of joint *conformity*.

Nonetheless, this analysis still raises questions, demonstrating the continuing difficulty with using logic to understand conflicts between legal norms. For example, it is

[25] Hart, *Essays in Jurisprudence and Philosophy,* 327.

[26] Hamner Hill, 'A Functional Taxonomy of Normative Conflict', 231.

[27] Hart, *Essays in Jurisprudence and Philosophy*, 327.

unclear how 'conformity' differs materially from compliance or obedience – at least, how it differs in a way which is relevant to the problem of norm-conflict.[28] Hart may stipulate that there is a difference, but if so he uses the stipulation to solve the problem, and without further explanation this does not seem satisfying.[29] Furthermore, Hart relies on the new test – the logical impossibility of joint conformity – to deny that two permissions can conflict with each other.[30] But is this plausible? Imagine that a rule permits subjects to drive on the left side of the road, and a second rule permits subjects to drive on either side of the road. Hart does not seem to think that there is a conflict in such cases:

> The 'joint-conformity' test of conflict is applicable only to rules all or all but one of which require or prohibit action. Permissive rules cannot conflict, but joint conformity with two permissive rules may be logically impossible (e.g. 'Opening the window is permitted'; 'Shutting the window is permitted').[31]

By contrast, other writers have argued that two permissions can indeed conflict – e.g., Risto Hilpinen,[32] and Stephen Munzer.[33] Munzer adopts (to a certain extent) Hart's 'logical impossibility of joint conformity' test to explain why two permissions can conflict, but runs into some of the same problems that Hart faces, and some new problems. Munzer argues that some permissions are 'backed by a strong, intimately related pressure or

---

[28] Conformity and obedience may be different in other, less relevant ways. For example, as Raz has suggested, one may conform to a law without necessary knowing that the law exists and is applicable; but one cannot *obey* a law without such knowledge.

[29] This can be stated more fully. In the case of a supposed conflict between an obligation and a permission, it is always possible not to exercise or avail oneself of the permission. In one sense it seems fair to say, in these circumstances, that one is still 'conforming' to the permission. As I suggested, perhaps Hart wishes to *stipulate* that conforming to a permission always means exercising or availing oneself of the right. But then it seems that he has used stipulation to evade the very problem which needs to be addressed. We need a further explanation of why, in analysing conflicts, we *should* think of permissions as being exercised.

[30] Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 327.

[31] Ibid 327fn43.

[32] Risto Hilpinen, 'Normative Conflicts and Legal Reasoning', in Eugenio Bulygin et al (eds), *Man, Law and Modern Forms of Life* (D Reidel 1985) 191.

[33] Stephen Munzer, 'Validity and Legal Conflicts' (1973) 82 Yale Law Journal 1140.

policy',[34] and where this is so, availing oneself of one permission means that the subject 'fails to act on a different permission which is backed by a strong, intimately related pressure or policy'.[35] Hence there is a conflict in Munzer's view. We need not be detained by analysing the detail of Munzer's argument, but as Hamner Hill rightly notes, one problem with Munzer's approach is that he ultimately seems to be treating certain permissions as being 'imbued with quasi-imperative force'[36] – i.e., converting such permissions into quasi-obligations.

4.D.ii. The (limited) relevance of logic

I have argued above that there are difficulties in relying upon logic to understand conflicts between legal norms. Nonetheless, logic may have some limited relevance.

For example, not all legal standards are norms, and so logic can directly assess logical inconsistencies between legal standards which are not norms. Legal standards which are not norms may take the form of declarative sentences or propositions, which are susceptible to truth-values and whose logical consistency may therefore be determined. I discuss why this additional logical inconsistency may be significant further below.

I will now put logic to one side, and will instead consider some non-logic analyses of legal conflict in the philosophical literature. In these passages, the theorists do not openly resort to logic. But this is not to say that our examination of logic has been futile. Among other things, it has been a useful introduction to some of the problems faced by logic-based explanations of legal conflict. It has also provided a lead-in to the assessment of some popular formulations, such as the 'impossibility of joint compliance' test which Hart

[34] Ibid 1146.

[35] Ibid. Munzer also addresses the situation where availing oneself of *both* permissions can result in a conflict, ibid 1146-1147.

[36] Hamner Hill, 'A Functional Taxonomy of Normative Conflict', 236.

discusses. I will revisit that formulation of legal conflict, and some other formulations, in what follows below.

4.E. Returning to the 'impossibility of joint compliance' test: further problems

Various formulations of legal conflict have been proposed. As noted earlier, in discussing these formulations, I am interested in explanations of conflicts between legal rules. Legal rules, being norms, are directed to subjects (or 'norm-subjects'), and the legal norms indicate what the subjects ought to do or may do.

As we have seen earlier, a prominent formulation of conflicts between legal norms is the 'impossibility of joint compliance' test. To recap, it may be stated as follows: there is a conflict between two laws where it is impossible jointly to comply with both laws. The two laws are envisaged as legal norms, and it is further envisaged that the impossibility falls upon a subject of the two laws. Thus, according to the formulation, the two laws each require or expect behaviour from a subject, and yet it is impossible to comply with both laws simultaneously.

We have seen above that Hart constructs a test on the basis of the 'impossibility of joint obedience', which he modifies into a test of 'the impossibility of joint conformity'. Raz has also provided a formulation of legal conflict which is based on this test, and which Raz calls 'normative conflict': '[n]ormative conflict exists when two valid requirements cannot both be complied with'.[37] The focus on 'requirements' suggests that the two laws in question must be obligations, since only obligations require behaviour. Variations on this test can also be found – e.g., in the work Risto Hilpinen,[38] and Barteld Kooi and Allard Tamminga.[39]

[37] Joseph Raz, *The Authority of Law: Essays in Law and Morality* (2nd edn, OUP 2009) 201.

[38] Writing about conflicts between mandatory norms, Hilpinen states: 'A norm conflict occurs when the person is subject (by the normative system) to several requirements which cannot be simultaneously satisfied', in Risto Hilpinen, 'Conflict and Change in Norm Systems', in Å Frändberg and M Van Hoecke (eds), *The Structure of Law: Proceedings of the 2nd Benelux-Scandinavian Symposium in Legal Theory* (Iustus Förlag 1987) 37, 38.

We might raise a query about the 'impossibility of joint compliance' test. This has already been touched up in the discussion of logic-based explanations of legal conflict, but a closer examination is warranted. The query is this: why is the test centred around the idea of 'compliance'? It is for this reason that this formulation of conflict may appear to exclude certain kinds of legal norms (e.g., legal rights, permissions or powers) from its purview. There is little difficulty in talking about compliance or obedience with legal norms which are obligations. (And as we have seen above, Raz's notion of 'normative conflict' seems to focus only on obligations.) But not all legal norms are obligations. Legal rights, for example, are commonly understood to be legal norms. And it makes little sense to talk of compliance or obedience with a right, since a right is (or could be) a norm which a subject may, or may not, exercise or avail herself of. So a theory of conflict which relies on the 'impossibility of joint compliance' test may not appear to recognise, for example, that two legal rights can conflict. The question is whether this is the appropriate conclusion to reach (i.e., that rights cannot conflict), or whether there is a flaw in the test or formulation itself.

The notion that rights cannot conflict seems surprising, since lawyers often talk about conflicts between, say, constitutional rights. But perhaps we are being a little too uncharitable to the 'impossibility of joint compliance' test. Those who defend that test may explain that there are certain rights which generate corresponding obligations or duties – e.g., Hector's right to *X* means that Octavian is under a duty to *Y*. One may therefore argue that conflicts between a mandatory norm and one of these rights, or indeed conflicts between two such rights, can indeed be recognised as conflicts under the 'impossibility of joint compliance' test. What we should do is focus on the obligation (or obligations) which are correlative to these rights. In other words, conflicts involving these rights are in fact conflicts

---

[39] Kooi and Tamminga state: 'From … a single-agent point of view, an agent faces a moral conflict if the agent has two moral obligations that cannot both be fulfilled', in Barteld Kooi and Allard Tamminga, 'Moral Conflicts between Groups of Agents' (2008) 37 Journal of Philosophical Logic 1.

involving (any of) the corresponding obligations that flow from said rights.[40] In the end, we are still dealing with obligations, and the 'impossibility of joint compliance' test is comfortable with conflicts between obligations.

However, there are some legal rules – e.g., permissions – which may be treated (colloquially or otherwise) as 'rights' but which do not appear to imply correlative duties. So one difficulty is how best to explain conflicts involving these other kinds of rules (if indeed such rules can be involved in conflicts).

These points begin to touch upon complex debates about the nature of 'rights'. For instance, I have referred earlier to *rights*, *permissions* or *powers* – and while some theorists may place all these forms within a loose category of 'rights', others may not. I will postpone further discussion of this problem concerning 'rights' – and, of course, the problem of *conflicts* involving rights, permissions or powers – until later in the chapter. A notable attempt to clarify the idea of 'rights' was undertaken by Wesley Hohfeld, and I will also engage with his analysis further below. For now, though, I will push ahead with a more manageable objection to the 'impossibility of joint compliance' test which centres on permissions (which I mentioned just above).

That test fails to recognise conflicts between a permissive rule and an obligatory rule. Imagine two rules, one which provides that subjects are obligated to drive on the left side of the road, and another which provides that subjects are permitted to drive on either side of the road. (We might colloquially refer to the latter rule as providing a 'right' to drive on either side of the road.) According to the 'impossibility of joint compliance' test, there is no conflict between these two rules, because it is always possible for a subject simply to drive on the left side of the road. Yet this does not seem to accord with our common understanding of legal conflict. Faced with those two rules, I think that we would appreciate that there is a

[40] I will discuss this problem further below (when examining Hohfeld's explanation of the relationship between claim-rights and duties), and other related problems.

conflict. If a law-making authority were to pass two such laws, there would rightly be confusion among drivers and probably subjects more generally (e.g., pedestrians). Questions would be raised. Perhaps, then, a formulation of conflict should accommodate these cases as conflicts because that is how we treat them. In straightforwardly excluding such cases, the 'impossibility of joint compliance' test would appear to lose some persuasive force.

4.F. What counts as a persuasive theory of legal conflict?

Before pressing further, however, we should stop and reflect. What counts as a persuasive theory of legal conflict? Why should one formulation of legal conflict be more promising than another? Some intervening remarks on methodology would be helpful.

As I have hinted at throughout the above analysis, the answer must be that a persuasive theory of legal conflict best accords with our general understanding of what a conflict is. In this sense, a theory of conflict is descriptive. Moreover, a philosophical analysis of conflict seeks to unpack and clarify our general understanding, and in so doing provide an accurate and precise account of our ideas about conflict. And in the process certain aspects of our understanding of conflict may be discarded as being erroneous or as less important than other aspects. In this second sense, the exercise of theory-building is also evaluative or critical. The exercise as a whole is the familiar task of theory-building.[41]

A more promising formulation of legal conflict is better able to grasp what is important about how we understand conflicts generally. As agents or subjects, we appreciate conflicts (consciously or otherwise) where there is an inadequacy in the guidance of our conduct. But there is also more than this, in the sense that there is a kind of 'cross-talk' or interference (which is antimonious) in the guidance being offered.

[41] Although this is not to say that theory-building is not itself a fraught question – as can be seen, for example, in the modern debates about methodology in the jurisprudential literature. See eg Julie Dickson, 'Methodology in Jurisprudence: A Critical Survey' (2004) 10 Legal Theory 117.

We have considered several formulations of legal conflict in the preceding analysis, and we have found them wanting in various ways. Let us turn, at last, to a formulation which might have the potential to escape most of these problems.

4.G. The 'impossibility of joint realisation' test

According to the 'impossibility of joint realisation' test, a legal conflict arises where it is impossible for two laws to be jointly realised – or, stated more simply, where two laws cannot both be realised. The formulation appears, at first glance, to be rather elegant. It has been stated previously by Lars Lindahl.[42]

This is the formulation of legal conflict which I will defend, and which I will rely upon in the remainder of this study. In what follows, I will elaborate on the formulation – what it means to for a law to be 'realised', the different ways in which two laws cannot both be realised, and so on. This analysis should not be underestimated. The bare formulation – the 'impossibility of joint realisation' test – in itself carries very limited merit. As a vessel it is largely empty, and it needs to be filled. Our goal is to examine the various ways in which laws conflict, and to give clarity to our (often undeveloped) thoughts. The 'impossibility of joint realisation' test becomes, then, a useful form of words which summarises this analysis. But it is the analysis itself that matters.

I will also attend to certain problems which were identified earlier in the chapter – including, in particular, the problem of legal conflicts involving rights, permissions or

[42] Lars Lindahl, 'Conflicts in Systems of Legal Norms: A Logical Point of View', in Bob Brouwer et al (eds), *Coherence and Conflict in Law: Proceedings of the 3rd Benelux-Scandinavian Symposium in Legal Theory* (Kluwer Law and Taxation Publishers 1992) 39.

Note that Lindahl focuses mainly on two kinds of conflict. The first is what he calls 'disaffirmation'. According to Lindahl (42), '[d]isaffirmation is a relation between two norms of *different* deontic mode, one being permissive and the other mandatory. In particular, a permission to do something disaffirms a prohibition against doing the same thing, and *vice versa*' (emphasis in original).

Second, Lindahl discusses 'compliance conflict', and states (at 45) that '[t]his kind of conflict occurs only in connection with *mandatory* norms. By a (compliance) conflict between two mandatory norms, then, is meant that it is impossible to comply with both of them' (emphasis in original).

powers. I will explain why a theory of legal conflict should be able to explain (some of) these cases as conflicts, and how the cases may be accommodated within the 'impossibility of joint realisation' test in a more natural way than other competing tests.

Finally, a caveat. The following analysis does not purport to be exhaustive in terms of what it covers, nor does it purport to be conclusive even in relation to those issues which it does cover. My aim is to suggest the beginnings of a more persuasive understanding of legal conflict. There are many questions which, regrettably, must wait for another day.

4.G.i. Unpacking the test

The central elements of the formulation need to be unpacked. What does it mean to say that two laws cannot both be realised?

By laws, I mean legal rules. The way in which a law is realised depends on whether it is mandatory or non-mandatory. By mandatory laws, I mean obligations (duties)[43] and prohibitions. By non-mandatory laws, I mean permissions and powers.

A mandatory law is realised where the subject of the law complies with the obligation or prohibition in question. A non-mandatory law – either a permission or a power – is realised where the subject of the law avails herself of the permission or power.

With these stipulations in mind, I will now discuss some important ways in which two laws cannot both be realised.

4.G.ii. Elaborating on the test

In what follows below, I will seek to elaborate on the 'impossibility of joint realisation' test. Several ideas will be discussed: first, the idea of conflicts on certain occasions (or occasional

[43] I treat obligations and duties synonymously.

conflicts); second, the idea of conflicts between sets of laws; and third, the relationship between rules and their exceptions. I will draw upon these ideas at various points in the remainder of this study.

4.G.ii.1. Conflicts on certain occasions, or occasional conflicts

Laws can come into conflict only on certain occasions. Hart elaborates on this important point. He notes that 'the *crudest* case of … a conflict are rules which respectively require and forbid the same action on the part of the same person at the same time or times'.[44] An example of such a conflict arises where one law obligates subjects to drive on the left side of the road, and another prohibits subjects from driving on the left side of the road. Hart argues that such conflicts are crude because '*most* cases of conflict between two rules arise because some contingent fact makes it impossible only on particular occasion to obey them both, and not because the rules by explicitly forbidding and requiring the same action are such that on no occasion could they both be obeyed'.[45]

---

[44] Hart, *Essays in Jurisprudence and Philosophy*, 325 (emphasis added).

[45] Ibid 325fn39 (emphasis added).

The contingencies which go to the emergence of conflicts have been explored, in a different context, by Fuller, and these are also worth noting (and revisiting) here. See Fuller, *The Morality of Law*, 69 (footnote omitted, italics in original), where Fuller states:

> It has been suggested that instead of speaking of "contradictions" in legal and moral argument we ought to speak of "incompatibilities," – of things that do not go together or do not go together well. Another term, a great favorite in the history of the common law, is useful here. This is the word "repugnant." It is especially apt because what we call contradictory laws are laws that fight each other, though without necessarily killing one another off as contradictory statements are assumed to do in logic. Another good term that has fallen into disuse is the word "inconvenient" in its original sense. The inconvenient law was one that did not fit or jibe with other laws. (Cf. modern French, *convenir*, to agree or come together.)
>
> It should be apparent from the analysis presented here that to determine when two rules of human conduct are incompatible we must often take into account a host of considerations extrinsic to the language of the rules themselves. At one time in history the command, "Cross the river, but don't get wet," contained a repugnancy. Since the invention of bridges and boats this is no longer true … The context that must be taken into account in determining the issue of incompatibility is, of course, not merely or even chiefly technological, for it includes the whole institutional setting of the problem – legal, moral, political, economic, and sociological.

Raz provides a useful example. Take the following two norms: 'People ought to pay their debts punctually', and 'One ought to vote in parliamentary elections'. Raz notes that these norms may occasionally conflict: 'On a particular day it may be the case that one would not be able to vote in the election if one were to pay one's debts punctually and vice versa'.[46]

Alf Ross also usefully elaborates on this phenomenon by distinguishing between what he calls total-total inconsistency, total-partial inconsistency, and partial-partial inconsistency. Total-total inconsistency arises where 'neither of the norms can be applied under any circumstances without conflicting with the other'. Total-partial inconsistency arises where 'one of the two norms cannot be applied under any circumstances without coming into conflict with the other, whereas the other norm has in addition a further field of application in which it does not conflict with the first one'.[47] Finally, partial-partial inconsistency refers to the occasional overlapping of norms, which can be seen in Raz's example above.

Raz himself explores the theory of partial conflicts at greater length. In one passage, he distinguishes between three types of partial conflict, and for now only the first two types concern us. The first type of partial conflict arises where a person, while she can usually perform two actions, in some cases must choose between performing one or the other. As Raz states, '[o]ne can usually both tell the truth and keep one's word, but sometimes they

[46] Joseph Raz, 'Reasons: explanatory and normative', at <http://www.princeton.edu/~msmith/mycourses/Raz-Reasons-Explanatory-Normative-draft.pdf> accessed 23 November 2009, 13-14. Lindahl also distinguishes between immediate disaffirmation and conflict on the one hand, and disaffirmation and conflict that 'are conditional on the truth of some contingent proposition F'; see Lindahl, 'Conflicts in Systems of Legal Norms', in Brouwer et al (eds), *Coherence and Conflict in Law*, 46-47. This has some similarity to the notion of occasional conflicts – namely, conflicts that are occasioned only by certain contingent facts in the world which makes realisation impossible.

[47] Alf Ross, *On Law and Justice* (The Lawbook Exchange 2004) 128-129.

prove to be incompatible and a choice has to be made'.[48] And as regards the second type of partial conflict, Raz states that

> A reason for performing A partially conflicts with a reason for performing B if some ways of doing B, though not incompatible with doing A, are incompatible with some ways of doing A. In other words if there is an act B1 by which B can be done and which is incompatible with the doing of A1 which is a way of doing A. To the extent that a reason for an act is also a reason for any act by which it can be done, the second type of partial conflict can also be characterized in terms of diametrical conflict….[49]

Raz's elaborations are useful. And finally, Schauer provides a further gloss to the above analysis, in particular Ross' notion of partial-partial inconsistency:

> We have seen that sometimes several conflicting rules (possibly at different distances from the event) will apply to the same description of the same event. More commonly, however, conflicts among rules will arise as a product of the way in which any complex event can be characterized in various ways.[50]

Schauer argues that since a complex event, containing several properties, can be characterised in a number of different ways, these different characterisations (on account of these different properties) may mean that the event can fall under different rules. This can lead to conflicts between these rules – i.e., determining which rules(s) should apply to the complex event.

---

[48] Joseph Raz, 'Comment: Reasons, Requirements and Practical Conflicts', in Stephen Körner (ed), *Practical Reason* (Yale University Press 1974) 22-35, 25-26.

[49] Ibid 26.

[50] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991) 193-194.

4.G.ii.2. Conflicts involving multiple laws (or sets of laws), and/or multiple agents

In the preceding analysis, I have generally spoken about conflicts between *two* laws. But conflicts may involve more than two laws. In particular, there may be a third (or fourth, etc.) law which forms part of the conflict-situation. Lars Lindahl provides the following example:

> For instance, there are two mandatory norms, one of which enjoins Jones, a bus driver, to drive carefully, while another enjoins him to keep the time-table; moreover, there is a norm permitting Jones to have a break every two hours: each *pair* of norms (we suppose) can be jointly realized but it is impossible to realize all *three* norms jointly.[51]

This seems to be right. Imagine the following situation. I have two spare hours in the evening. I can use this time to catch up with some friends, finish an article that I have been working on, or go for a jog. I can do any two of these things, but not all three. It would be wrong to say that any one of these reasons conflicts with any other of these reasons. Rather, there is a conflict between all three jointly.

How should we explain conflicts involving multiple laws theoretically? This is where the main problems arise. The following analysis does not provide conclusive answers, which must be postponed for another time. Nonetheless, it may be worth sketching Lindahl's own suggested views on the matter. Lindahl proposes the idea of conflicts between two *sets* of norms (into which the various norms are allocated). Imagine three laws – A, B, and C. No two pairs of these laws conflict. A and B are compatible, B and C are compatible, and A and C are compatible. However, all three laws conflict when taken jointly – that is, there is a conflict between A, B, and C together. Lindahl's method of explaining this conflict-situation using sets is as follows. We can construct two sets. In the first set (set 1), say, we include

[51] Lindahl, 'Conflicts in Systems of Legal Norms', in Brouwer et al (eds), *Coherence and Conflict in Law*, 43 (emphases in original).

laws A and B – and in the second set (set 2), law C. We can now say that there are conflicts between sets 1 and 2, because (for instance) set 2 limits the realisation of set 1.

There are two unresolved questions, however. First, there is a certain significance in how we allocate laws to each set, but it can be unclear how we should do this. Let us say that the two sets mentioned above are conflicting. Now let us say that the consequences of the conflict are such that set 2 prevails. This means that two laws (A and B) are defeated. However, if we were to construct the sets in a different way by reallocating the laws differently, the outcome may be rather different. If we place A in set 1, and B and C in set 2, then there is again a conflict between the two sets. But if set 2 prevails over set 1 (and let us assume that it does), then the outcome is different, in that only one law (A) is defeated. It may be, then, that the usefulness of relying upon sets to understand legal conflicts – or at least, these kinds of legal conflicts – is limited, unless we can find a way to explain the allocation of laws to sets.

The second issue follows from the preceding point. Why should we regard conflicts between multiple laws as conflicts between two *sets*? Do we create more problems than we solve? Arguably, this approach does offer a way to manage legal conflicts involving multiple laws. This will become apparent in Chapter 6, where I discuss conflicts involving incommensurable legal choices, and also in Parts III and IV of the study where I examine certain conflict-situations in international law which may involve multiple laws. Accordingly, there is reason not to abandon the use of sets to explain conflicts involving multiple laws. Still, as I suggested above, the defence of a set-based approach is not entirely settled.

Furthermore, just as there may be conflicts faced by a single agent, there may also be conflicts involving multiple agents (also known as interpersonal conflicts).[52] Goble gives the

[52] Baumann and Betzler, 'Introduction', in Baumann and Betzler (eds), *Practical Conflicts*, 1-2.

example of two agents, A and B, where agent A ought to do X, while agent B ought to do Y, and A's doing X precludes B's doing Y (and vice versa).[53]

4.G.ii.3. Conflicting rules, and rules which are exceptions

A theory of conflict must explain the relationship between rules which conflict with other rules, and rules which are exceptions to other rules.

Rules can have exceptions. Sometimes when we talk about a rule having an exception, we mean a qualification which is located within the content of the rule itself. One example might be a single rule which provides that 'murder is prohibited, except in self-defence'. The qualification or exception – here, self-defence – is contained within the rule itself. In other words, the rule is a conditional rule. There is no conflict here, because a conflict requires (at least) two rules.

However, exceptions to rules are often separate rules in their own right. There might be one rule in a legal system which provides that killing is prohibited.[54] And there might be a separate rule in the legal system which provides a right of self-defence. There are two rules here, but the relationship between them is colloquially understood as being a relationship of rule and exception. There is a rule prohibiting killing, and another rule permitting self-defence which serves an exception to the first rule.

It is this latter situation – exceptions to rules which are rules in themselves – which creates difficulties for any analysis of conflict. How do we determine whether rule *B* is an exception to rule *A*, or really in conflict with rule *A*? Moreover, it may be unwise to take the colloquial use of these terms by lawyers or courts at face value, in that they may describe rule *B* as an exception when in fact it ought properly to be regarded as a conflicting rule.

[53] Lou Goble, 'Normative Conflicts and the Logic of Ought' (2009) 43 Noûs 450, 457.

[54] Or perhaps more narrowly, that intentional killing is prohibited (or killing that the law deems to be accompanied by the appropriate state of mind).

Attempts have been made to demonstrate that a rule which is an exception is different from a conflicting rule.[55] However, these attempts do not seem convincing. As a *theoretical* matter, a rule which is an exception is no different from a rule which is conflicting. We may often refer to such exceptions as 'exceptions', rather than conflicting rules, for rhetorical reasons – e.g., because we wish to suggest that a given body of law has some degree of unity, and that there are settled relationships between its various rules. But this should not blind us to the theoretical similarity between exceptions (of this form) and conflicts.

For example, in international law, the prohibition on the use of force is understood as being subject to various 'exceptions', including the right of self-defence. The right of self-defence is treated as an exception to the rule prohibiting the use of force because they are considered to form part of a unified whole, i.e., a body of law regulating when force can be used. In treaty-form, both rules were conceived of and drafted at the same time and can be found in the United Nations Charter. But now imagine that the Charter, in its original draft, only contained a provision which flatly prohibited of the use of force. Ten years later, a group of States enter into a treaty in which they declare that there is a right of self-defence. Few would argue that this later treaty rule conflicts with the earlier Charter prohibition on the use of force. This would suggest that exceptions (which are separate rules in their own right) are, in theoretical terms, conflicting rules.[56]

4.H. Conflicts involving legal rights

[55] Eg Claire Oakes Finkelstein, 'When the Rule Swallows the Exception', in Linda Meyer (ed), *Rules and Reasoning: Essays in Honour of Fred Schauer* (Hart Publishing 1999). And Dworkin, in his early writing, attempted to show that two valid rules did not conflict; rather, in the case of a supposed conflict, one of the rules was either invalid or an exception to the other rule; see Ronald Dworkin, 'The Model of Rules I' and 'The Model of Rules II', in Ronald Dworkin, *Taking Rights Seriously* (new edn, Gerald Duckworth & Co 1996).

[56] For a different analysis of how exceptions are conflicting rules, see Raz, 'Legal Principles and the Limits of Law'.

This chapter has been concerned with finding a theory of legal conflict that is best able to explain conflicts between legal norms.[57] Of course, there are various types of norms. Conflicts between mandatory norms – obligations or prohibitions – seem like easy cases, in the sense that the formulations of legal conflict that we have considered are all able to recognise that there are conflicts between mandatory norms.

But matters become trickier when we are dealing with a mandatory norm and a non-mandatory norm – or, for that matter, two non-mandatory norms. One of the running themes of this chapter has been our attempt to understand whether legal conflicts involving non-mandatory norms (or 'rights', in the loosest sense) can arise – and if so, how.

We must revisit this issue once again. And we must also consider my earlier suggestion that the 'impossibility of joint realisation' test is more naturally able to recognise conflict-situations involving non-mandatory norms.

I refer in the heading to conflicts *involving* legal rights. By this, I mean conflicts between two (or more) legal rights, or conflicts between a legal right and a legal obligation or prohibition (these being mandatory norms). I am interested in the variety of conflict-situations in which a legal right is engaged.

As mentioned above, we have seen in the preceding analysis that various attempts have been made to understand conflicts involving legal rights. We saw, in particular, that there were difficulties faced by those who endorsed an understanding of legal conflict as the 'impossibility of joint compliance'. One way in which adherents to the 'impossibility of joint compliance' test sought to explain conflicts involving rights was to focus on the duty (or duties) which they thought were correlative to the rights in question. However, we have seen that there are some legal rules – e.g., permissions – which may be treated colloquially as 'rights' but which do not imply correlative duties. So one difficulty is how best to explain

[57] And, in fact, *general* legal norms – ie rules.

conflicts involving the latter kinds of rules (if indeed such rules can come into conflict with other rules).

In fact, the nature of rights – and, in particular, legal rights – is a fraught question in itself.[58] I do not propose to analyse that question in depth. Nonetheless, it is necessary to make *some* remarks on how rights might be understood in order to make progress in explaining how rights conflict (with each other, or with obligations, etc.). I am aware that there are many ways of understanding legal rights, which may have implications for understanding rights in conflict-situations.[59] The following analysis is therefore provisional. It seeks to develop *one possible way* in which conflicts involving legal rights might be understood.

But first, we should remind ourselves as to why a formulation of legal conflict ought to recognise that 'rights' (in a loose sense) can indeed be involved in legal conflicts – either with each other, or with mandatory norms.

4.H.i. Why should a theory of legal conflict recognise conflicts involving rights?

Any theory of how legal rules conflict with each other would be inadequate if it did not recognise conflicts involving legal rights. Conflicts between, or involving, rights is treated as a commonplace in the legal realm.

Ronald Dworkin provides a useful example of conflicts between rights. (Note that this is an instance of a multi-agent conflict, as opposed to the single-agent conflicts that I have been considering above.) *A* may have a right to use her apartment however she wishes,

[58] The literature – as regards rights generally, and also legal rights – is vast. There have been contributions by many distinguished theorists, including Hohfeld, Hart, Bentham, Raz, Waldron, Wellman, Griffin, Rainbolt, Steiner, Kramer, Dworkin and Nozick.

[59] E.g., will theories of rights, or interest theories of rights. Other theories of rights may also have implications for how rights behave in conflict-situations – e.g., Robert Nozick's view that rights are side-constraints. On this latter issue, see Jeremy Waldron, 'Rights in conflict', in Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (CUP 1993).

including playing on a musical instrument, while *B* may have a right to use her adjoining apartment as she wishes, including being able to study algebra without facing disturbances.[60] The conflict arises, according to Dworkin, because *A*'s exercise of her right can interfere with or restrict that of *B*.[61]

Or take rules which grant permissions, and how they sometimes appear to conflict with obligations. Earlier, we considered a scenario where, according to one rule, subjects are obligated to drive on the left side of the road, and according to a permissive rule subjects are permitted to drive on either side of the road. I suggested that we would generally think that a conflict has arisen between the two rules. For example, as drivers, we would not be sure about what to do. The rules, being norms, purport to guide us, and yet their guidance seems to be undermined.

The idea here, I think, is that we expect to be able to avail ourselves of permissive rules. And we can also find evidence of this view in the theoretical literature. For example, as Carlos Alchourron argues, '[i]n relation to permissive norms we expect that the agent has an opportunity to perform the authorized action'.[62] This connects back to our preferred formulation of legal conflict – that two laws conflict if they cannot both be realised. As I stipulated earlier (see 4.G.i above), in the case of a non-mandatory norm (a permission or a power), realising that norm means availing oneself of the permission or power.

We can see this view adopted in Hart's writing on conflicts as well. Hart also felt that permissive rules and mandatory rules could conflict. And although his explanation of the basis of the conflict was logic-based (and therefore troubled), in relation to permissive rules Hart thought it necessary to construct declarative sentences in which the subject was indeed

[60] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 293.

[61] Ibid.

[62] Carlos E Alchourrón, 'Conflicts of Norms and the Revision of Normative Systems' (1991) 10 Law and Philosophy 413, 417.

availing herself or acting on the permissive rule. This can be seen in the following passage (which was quoted earlier, but is worth repeating here):

> … [t]o meet such cases, we should have to use not only the notion of [joint] obedience [to the two norms], which is appropriate to rules requiring or forbidding action, but the notion of *acting on or availing oneself of a permission*. We might adopt the generic term "conformity" to comprehend both obedience to rules that require or prohibit and *acting on or availing oneself of permission*, and we could adopt the expression "conformity statements" to cover both kinds of corresponding statement. In fact, the conformity statement showing that a permissive rule (e.g. permitting though not requiring killing) *had been acted on* will be of the same form as the obedience statement for a rule requiring the same action (killing is done). So if one rule prohibits and another rule permits the same action by the same person at the same time, joint conformity will be logically impossible and the two rules will conflict.[63]

Let us now turn to the problem itself – namely, understanding what a 'right' is (or a permission, or a power), and exploring whether and how these can appear in conflict-situations. Finally, I will briefly explain why our preferred formulation of legal conflict – the 'impossibility of joint realisation' test – can more naturally accommodate these cases.

4.H.ii. Starting with Hohfeld

In seeking to understand what we mean by a legal right, an obvious place to start is Wesley Hohfeld. Hohfeld tried to unpack the various ways in which the term 'right' was used, and he did this by noticing that the term 'right' is often used to describe any one of the following

[63] Hart, *Essays in Jurisprudence and Philosophy*, 327 (emphases added).

incidents, or bundle of such incidents: privileges or liberties,[64] claims, powers, and immunities. Hohfeld also explored these incidents by constructing tables of correlatives (and opposites). Each of these incidents, and their correlatives, should be explained briefly.

I have a liberty to X only if I have duty not to X. If I have this liberty, then Hector (or any other person) has a no-claim. Hector's no-claim is the correlative of my liberty.

I have a claim that Hector do X only if Hector has a duty to me to do X. If I have this claim, then Hector has a duty. Hector's duty is the correlative of my claim.

I have a power if I have the ability to alter any Hohfeldian incidents,[65] either for myself or for others (including, say, Hector). If I have this power (in relation to Hector), then Hector has a liability. Hector's liability is the correlative of my power.

I have an immunity if Hector does not have the ability to alter my Hohfeldian incidents. If I have this immunity, then Hector has a disability. Hector's disability is the correlative of my immunity.

Liberties and claims are 'first-order' incidents, in the sense that they are concerned with what I am permitted to do, what I am duty-bound to do, etc. Powers and immunities are 'second-order' incidents in that they are about changing, extinguishing, etc. first-order (or indeed second-order) incidents.[66] For instance, Hector may have the *power* to extinguish my liberty (what I am permitted to do).

Hohfeld's analysis is useful because it helps to clarify the various colloquial senses of 'right' that we have. For example, in some cases, we might mean a power, and in other cases a claim. Hohfeld's analysis also helps us realise that many rights to which we refer are in fact bundles of Hohfeldian incidents. For example, the legal right of freedom of expression may encompass a number of Hohfeldian incidents – e.g., a liberty (to express

[64] I shall use 'privilege' and 'liberty' synonymously, even though some writers choose to distinguish between them. I will mainly refer to liberties.

[65] That is, liberties, claims, powers, or immunities.

[66] Leif Wenar, 'Rights', <plato.stanford.edu/entries/rights/> accessed 20 July 2012.

myself however I see fit), protected by a claim that others do not interfere with my liberty, and an immunity (that my liberty and my claim not be extinguished by others). And there may be other ways of explaining the legal right of freedom of expression using Hohfeldian analysis.

4.H.iii. Legal rights as constraints

Hohfeldian analysis can be useful in explaining legal rights. So what *is* a legal right? A useful way to think about legal rights is that they imply constraints. As Rainbolt argues, rights are normative constraints on the actions of others.[67] This insight about rights as constraints is also shared by other writers, such as Hart,[68] Raz, Wellman and Steiner.[69]

If rights are constraints, then we might think – in Hohfeldian terms – that rights are *claims*, because Hohfeldian claims imply duties, and duties are constraints on the actions of others. But it is not the case that all rights imply duties (nor indeed that all duties imply rights). For there are normative constraints other than duties. There are two Hohfeldian relations which imply constraints on others: claims and immunities.[70]

As noted above, it is well known that a Hohfeldian claim implies a constraint. A claim has, as its correlative, a duty, and the duty is the normative constraint. But an immunity also generates a normative constraint. An immunity generates a disability, and the disability is the normative constraint.

---

[67] Rainbolt, *The Concept of Rights*, 194. For further discussion of what is meant by a 'normative' constraint (as opposed to, e.g., a physical constraint), see ibid 26-27.

[68] HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (OUP 1982) 173. Hart is critical of Bentham and Hobbes for regarding 'naked' liberties – ie mere Hohfeldian liberties – as rights.

[69] Various references are collected at Rainbolt, *The Concept of Rights*, 29fn4. Hohfeld himself thought that rights were properly understood as claims.

[70] Ibid 76.

Therefore, it may be mistaken to argue that conflicts between rights, for instance, are best understood as conflicts between the corresponding duties. For some rights are immunities – and the role that immunities play in conflicts is a question which remains to be explored.

Why is it useful to think of rights as involving, in some way, constraints on the actions of others? One explanation is that it captures the way in which we ordinarily think about rights. It would be odd to talk about my having a *right* to X if my right could simply be ignored or interfered with by Hector whenever he chooses. If I have a *right* to X, there is a sense that this in some way constrains what others can do. If this is correct, Hohfeldian analysis is useful because it identifies constraining incidents – i.e., by isolating claims and immunities, and their correlatives (duties and disabilities, respectively). Rights, as either claims or immunities (or including claims or immunities as part of their bundle of incidents), constrain the actions of others (through their respective correlatives).

Furthermore, this view of rights as normative constraints is useful given the particular concern of the study – namely, the problem of legal conflict. It makes sense to regard legal rights, for the purposes of this study, as constraints. Take conflicts between two rights. If there are no constraints implied by the two rights, then it is hard to see how the rights could ever intersect in such a way that they conflict with each other.

This becomes clearer when we consider mere Hohfeldian liberties. Two mere liberties cannot conflict. I have a mere liberty to walk along the beach (i.e., I have no duty not to walk along the beach), but then so does Hector – and so do one thousand other individuals. If enough individuals exercise their liberty, then I may be prevented from walking along the beach because, say, it becomes too crowded. But this does not mean that there has been a conflict between liberties. My liberty implied no (constraining) correlative.

If it did, it would be a claim. But it does not, so it is the kind of incident that can be trampled upon or interfered with by others.[71]

Furthermore, a mere liberty to X is not a rule. It is simply the absence of a duty not to X. Since I am interested in conflicts between legal rules, it is not possible to have such a conflict between two mere liberties. (I deal below with the problem of laws which appear on their face to contain – to *grant* – mere liberties.)

This discussion about liberties raises the problem of 'permissions' in law. There is a remaining uncertainty about permissions, and their role (if any) in conflict-situations. What is the relationship between permissions and liberties? Are there different kinds of permissions in law, and if so, what role do they play in conflict-situations? I will deal with permissions in further detail below.

4.H.iv. Claims and duties

I will continue with the idea that legal rights are constraints. And to keep things simple, I will tend to discuss rights as single Hohfeldian incidents (rather than bundles of Hohfeldian incidents).

As noted above, there are two Hohfeldian incidents which impose constraints on the actions of others – first, claims, and second, immunities. As understood for the purposes of this study, any right must be either a claim or an immunity (or include one or both such incidents as part of its bundle of incidents).

For now, let us consider claims. Where two legal rights are claims, there is a conflict between the two claims in the sense that there is a conflict between the correlative duties implied by each claim. In other words, conflicts between these rights are conflicts between

[71] It has been suggested that even a mere Hohfeldian liberty implies some kind of constraint. If I have a liberty, then Hector has a no-claim. That is, the correlative of my liberty is that Hector cannot have a claim against me. This, it has been suggested, is the constraining element in mere liberties.

(any of) the corresponding duties that flow from each right. This is a familiar idea, and has been discussed by various writers.[72]

There can also be conflicts between a legal right (understood here as a claim) and a legal obligation. Again, in these cases, the conflict is best understood as follows. The legal right in question – the claim – implies a correlative duty (or duties), and this correlative duty (or duties) conflicts with the legal obligation.

4.H.v. Immunities and powers

A legal right, understood as a constraint, may also be a mere Hohfeldian immunity. An immunity constrains the actions of others, because it means that others are under a disability. What role, if any, do legal rights as immunities play in conflicts?[73]

The matter is clarified by considering Hohfeldian opposites. We can imagine a conflict between two provisions. Provision A consists of an immunity (implying a disability), and provision B consists of a power (implying a liability). In the Hohfeldian system, the disability implied by provision A is opposite to the power in provision B – and, equally, the immunity in provision A is opposite to the liability implied by provision B.

In this way, we can see that mere immunities can conflict with mere powers.[74] The analysis also applies to cases where the immunity, and/or the power, are part of a bundle of Hohfeldian incidents.

[72] Eg Waldron, 'Rights in conflict', in Waldron, *Liberal Rights*.

[73] Rainbolt discusses conflicts involving rights in Chapter 6 of Rainbolt, *The Concept of Rights*. However, he focuses on conflicts between or involving claims (and their correlative duties). Conflicts between or involving rights as immunities (and their correlative disabilities) are not discussed.

[74] And note that while mere immunities are rights (since they imply constraints on the actions of others), mere powers are not.

This seems to be the role that immunities, and indeed powers, have in conflict-situations – i.e., they conflict with each other. It is difficult to see how two immunities can conflict with each other.

It is also difficult to see how two powers can conflict with each other – since a power can be exercised or not exercised. (In this respect, the impossibility of conflicts between two mere powers is analogous to the impossibility of conflicts between two mere liberties.) For instance, imagine two legal rules. Rule A states that citizens have the power to make wills. Rule B states that citizens have the power not to make wills. There is no conflict between rules A and B.

If all this is correct, then a formulation of legal conflict must accommodate cases where a mere power conflicts with a mere immunity. A formulation which focuses on the impossibility of joint compliance cannot adequately capture such cases, because it is always *possible* for a subject to comply with both rules – i.e., by not exercising the power.

4.H.vi. Permissions

There is also the curious issue of permissions, which pose a particular problem for any analysis of how legal rules conflict. I will discuss permissions in this section, even though (as will become clear) I do not think that some such permissions are rights (even though they may be treated colloquially as such), or norms.

The first problem is this: what do we mean by permissions? Furthermore, how does this new notion of permissions relate to the Hohfeldian incidents which were analysed above? I will seek to address both questions below, before examining the role that permissions may play in legal conflicts.

When we talk about permissions in law, we mean (at least) two things. First, we might say that Hector is permitted to walk along the beach by law, or under the law, or

according to the law. In these statements, we are not saying that there is an identifiable rule of law which provides that Hector is so permitted. Rather, Hector is so permitted because he is under no legal duty not to walk along the beach. And, accordingly, we state that 'the law' permits such walks. In other words, this sense of legal 'permission' is analogous to a mere liberty (in Hohfeldian terms). It is not a right. Furthermore, it is not a norm. It is simply the absence of a duty or prohibition.

But not all legal permissions are mere liberties. A permission may also be granted by or provided for in an identifiable rule of law. Imagine, for instance, a duly enacted statutory provision which expressly states: 'Individuals are permitted to walk along the beach'. (And Hector is an individual.)

The statutory permission in this second case seems to be different from the first case. In this second case, it is arguable that the statutory permission-sentence is a right. I will assume, on the facts that we have, that the statutory permission-sentence is not a claim. Hence there is no corresponding duty (or set of duties) on others concerning, say, non-interference. However, arguably the statutory permission-sentence is a bundle of two Hohfeldian incidents – a liberty and an immunity.

The liberty simply reflects – expresses – the absence of a duty.[75] The immunity arises because another person (an ordinary citizen) does not have the ability to change or extinguish my liberty, for instance, by prohibiting me from walking along the beach. Such attempts would not be recognised because ordinary citizens lack the power to change my Hohfeldian relations.[76] In other words, other people are disabled from modifying my Hohfeldian incidents (in this case, my Hohfeldian liberty), which is protected by the

[75] Some have tried to argue that mere authoritative enactment can transform a permission from a 'weak permission' (the mere absence of a duty) into a 'strong permission' (ie a permission granted by a norm, which therefore has a role in practical reasoning). But it is doubtful that this is the case. See Raz, *Practical Reason and Norms*, 85ff.

[76] Of course, a certain body may indeed possess such a power – e.g., the legislature which enacted the statutory permission in the first place, and which has the power to change or withdraw it.

immunity. This immunity, being a constraint on the action of others, means that the statutory permission is a right.

Is the statutory permission a norm? If we are interested in conflicts between legal norms, then the statutory permission can only have a role in conflict-situations if it is normative. Thus, we would be interested in permissions which are norms, rather than permission-sentences which refer simply to a liberty in the absence of any mandatory norm to the contrary. For in the latter situation, there is no norm – and we would need (at least) two norms for there to be a conflict between them.

The statutory permission is a norm, but it is not a reason for action. As a norm, it has normative force, in the sense that it has a role in practical reasoning. These statements will become clearer by considering Raz's analysis of permissions.

In discussing whether permissions can have normative force, Raz first focuses on permissions which are mere liberties, and states that '[r]easons for action impose practical constraints, constitute requirements to act in a certain way and not in others. Permissions indicate the absence of constraints'.[77] In such cases, the permission is merely the absence of constraints, and there is no norm. This is what Raz calls a 'weak permission' – akin to a mere Hohfeldian liberty.

However, Raz also suggests that there can be cases of *permission-granting norms* (i.e., norms granting permissions). He describes the permissions so granted as 'exclusionary permissions',[78] which he contrasts with weak permissions and exclusionary reasons. Raz explains exclusionary permissions as follows:

> I am permitted to perform an act despite the fact that there are conclusive reasons for not performing it if I *may* disregard those reasons. A permission of this kind differs from a weak permission which is based on the absence of

[77] Raz, *Practical Reason and Norms*, 89.

[78] Although Raz is careful to note that not all exclusionary permissions are based on permissive norms – ie are permission-granting norms. See ibid 95.

> conclusive reasons for not performing the act … Exclusionary permissions [also] differ from exclusionary reasons in that they do not entail that one ought to disregard the excluded reasons. They merely entitle one to do so. I act against reason if I do not disregard reasons excluded by an exclusionary reason, whereas I am not acting against reason when I act on reasons which I am merely permitted to disregard.
>
> Exclusionary permissions are strong permissions. They are not merely the result of the absence of reasons to the contrary. Since they allow disregarding conclusive reasons for refraining from an action, they cannot be taken for granted. They always require a justification. They are, however, permissions. They do not impose constraints on action, they do not in themselves determine what one ought to do. Being permitted to perform an action means being free from constraints. In the case of exclusionary permissions, however, this is not a result of the absence of reasons to the contrary; it is the result of considerations which establish that one may disregard conflicting reasons. At the same time, since exclusionary permissions counteract reasons, they are relevant to practical reasoning in a way in which weak permissions are not … Exclusionary permissions, because they counteract the power of reasons, do affect the outcome of practical inferences. Despite the fact that they do not directly guide behaviour and are not reasons for action, they have a normative force which is manifested in their contribution to practical inferences.[79]

Raz uses exclusionary permissions to explain supererogation, and then states:

> The use of exclusionary permissions in the analysis of supererogation … helps to bring out their role in practical reasoning. They are second-order

[79] Ibid 90-91 (emphasis in original).

> permissions in the sense in which exclusionary reasons are second-order reasons. They are permissions not to act on reasons, whereas exclusionary reasons are reasons for not acting on reasons.[80]

Finally, Raz discusses the granting of exclusionary permissions:

> Just as mandatory norms can be prescribed so permissions can be given or granted. Giving a permission differs from stating that an act is permitted. Giving a permission turns an act which is not permitted into one which is permitted … [E]xclusionary permissions can be granted … An exclusionary permission is granted if a person can and does act in a way which does not change the reasons for refraining from an act but entitles a person to disregard them. The simplest case of giving an exclusionary permission is a case of a man who consents that another shall perform an act harmful to his interests.[81]

Let us return to the statutory provision discussed earlier – namely, a statutory permission which states that 'Individuals are permitted to walk along the beach'. This is an exclusionary permission.[82] This becomes clear if we imagine another provision which states 'The beach is closed at night'. It is clear that these two provisions conflict in certain circumstances. The latter provision imposes a duty not to walk on the beach at night. So the conflict is between a permission and a duty. The permission is also a right, in the sense that it consists of a Hohfeldian liberty and a Hohfeldian immunity (as discussed above).

If we accept that the two provisions conflict, then this is a conflict between a right (which is a permission-sentence) and a duty. But the conflict is not between two duties, one being correlative to a claim. The permission is not a claim. Rather, it consists of a liberty and an immunity. The conflict is between a mere liberty and a duty. The conflict emerges

[80] Ibid 94.

[81] Ibid 96.

[82] I am only concerned with the exclusion of legal considerations, as opposed to non-legal considerations.

because, in certain circumstances (i.e., when night falls), the liberty purports to negate the duty. In other words, mere liberties and duties can conflict.

This view is also supported by Rainbolt, who argues that some cases of rights conflict do not involve a conflict between two duties, but rather a conflict between a duty and a liberty.[83]

Let us return to the scenario involving driving on the road, which we considered in the previous chapter. There is a conflict between a legal provision stating that drivers are obligated to drive on the left side of the road, and a legal provision stating that drivers are permitted to drive on either side of the road. This is because the legal provision which is a permission negates the obligation. The permission can be rewritten to as follows: 'Drivers are not obligated to drive on the left side of the road (or indeed the right side of the road)'. And this negates the legal provision stating that drivers *are* obligated to drive on the left side of the road.

To summarise, then, legal permissions (that is, legal rules which state permissions)[84] can conflict with legal obligations. And this seems to conform to our intuitions. Imagine that we are faced with the situation described above. As drivers, we would expect to feel confused or conflicted.[85] On the one hand, the law is stating that we must drive on the left, and on the other hand the law is also stating that we are free to drive on either side of the road.

Finally, can legal permissions (in the sense of legal rules which state permissions) conflict with each other? This does not seem to be the case, and again, Hohfeldian analysis offers some illumination. Imagine two statutory provisions. Provision A states that 'Drivers

[83] Rainbolt, *The Concept of Rights*, 158.

[84] As opposed to legal permissions in the sense of the mere lack of an obligation – ie residual permissions in those areas which are not regulated by legal obligations.

[85] I am not directly basing my analysis of conflict on the psychological feelings of subjects. The psychological dimension of conflicts is a separate question. Nonetheless, the example given above is potentially a sign or mark that a conflict is present.

are permitted to drive on the left side of the road', and provision B states that 'Drivers are permitted to drive on the right side of the road'. These provisions are permission-sentences. Each of the provisions is, in Hohfeldian terms, a mere liberty protected by an immunity. There is no conflict between these two provisions. The immunities are not implicated here, since no ordinary citizen is attempting to alter another citizen's liberties (as provided for by each provision). We are more concerned with the position of a driver who happens to be faced with these two provisions. In other words, we are concerned with the mere liberty in each provision. But mere liberties cannot conflict with each other, hence there is no conflict between these two provisions from the position of the driver. Taking these two provisions together, the driver is permitted to drive on the left side of the road, or drive on the right side of the road. And again, this seems to conform to our intuitions. If we imagine ourselves in such a situation, then we would not (for instance) find difficulty in knowing what we may do. We would not feel conflicted. The two provisions may lead to chaos on the roads, of course, but that is an entirely separate question about how best to coordinate driving on the roads.

Once again, if all this is correct, then a formulation of legal conflict needs to capture such instances where a mere liberty conflicts with an obligation. In particular, a formulation which focuses on the impossibility of joint compliance cannot adequately capture such cases, because it is always possible for a driver to 'comply' with both rules – i.e., by complying with the obligation.

4.H.vii. Our preferred formulation of legal conflict

Our preferred formulation of legal conflict – the 'impossibility of joint realisation' test – does not appear to suffer from these problems. I think that it has sufficient flexibility to accommodate both the more straightforward conflict-situations discussed above (e.g.,

conflicts between two claims, or between a claim and an obligation), and the more problematic conflict-situations (e.g., conflicts between a power and an immunity, or between a liberty and a duty).

The more straightforward conflict-situations – those conflicts where the rights involved are claims, implying correlative duties – are straightforward precisely because they are not troublesome to explain. The conflicts are simply conflicts between duties. Let us instead take a closer look at the more problematic conflict-situations.

Conflicts between a power and an immunity are conflicts involving rights; although a mere power is not a right, a mere immunity is. Conflicts between a liberty (or permission) and a duty are not conflicts involving rights, since neither a mere liberty nor a duty is a right. However, for reasons of analytical convenience, I have dealt with conflicts involving permissions in this section of the chapter.

Our preferred formulation of conflict can explain both situations, and this accords with our commonly held views that there are indeed conflicts in such situations. According to the formulation, there is a legal conflict when two laws cannot both be realised. And as I stated at the outset of this chapter, a mandatory law is realised where the subject of the law complies with the obligation or prohibition in question, and a non-mandatory law – either a permission or a power – is realised where the subject of the law avails herself of the permission or power.

So in the case of conflicts between a power and an immunity, the realisation of (i.e., exercise of) the power limits the realisation of (i.e., compliance with) the immunity – and vice versa. In the case of conflicts between a liberty and a duty), the realisation of (i.e., exercise of) the liberty limits the realisation of (i.e., compliance with) the duty – and vice versa. For in each case, as we saw above, one negates the other.

At the heart of our preferred formulation of legal conflict is the idea of ‘realising’ a law, and in the way that I have stipulated, it can be more flexible than a ‘compliance’-based

model of legal conflict. For in the context of non-mandatory norms, the idea of *realising* a norm more naturally suggests the possibility of availing oneself of or acting on a non-mandatory norm. One could of course stipulate that 'compliance' with a non-mandatory norm means availing oneself of or acting on the norm; but, as I have suggested, this is less natural.

4.I. Concluding remarks

In this chapter I have sought to defend a formulation of legal conflict against several competing tests that have been proposed in the literature. According to the preferred formulation, there is a legal conflict where two laws cannot both be realised. Nonetheless, it is vital not to become preoccupied with the bare formulation itself. The analysis above has attempted to explain what the formulation actually means, and to explore the different ways in which two laws cannot both be realised. As I emphasised earlier (see 4.G above), whichever form of words we adopt by way of summary, it is the analysis itself that matters.

Chapter 5. Pushing the Boundaries: Accidental Conflicts

In the previous chapter, I criticised various formulations of legal conflict which have received attention in the literature. In particular, I challenged the 'impossibility of joint compliance' test, according to which two laws conflict if it is impossible for a subject to comply with them jointly. Instead, I advanced the 'impossibility of joint realisation' test, according to which two laws conflict if they cannot both be realised. I elaborated on that test, and suggested that it held greater promise particularly in light of its potential to accommodate, in a more natural way, conflicts involving certain non-mandatory norms.

In this chapter, I wish to push the boundaries of our preferred formulation of legal conflict – the 'impossibility of joint realisation' test. In fact, the analysis that follows stretches any such formulation, including the 'impossibility of joint compliance' test. I will argue that existing thinking about how laws conflict may have overlooked the phenomenon of what I call 'accidental conflicts'. And this is irrespective of whichever formulation one might prefer – e.g., the view that two laws conflict they cannot both be complied with, or the view that two laws conflict when they cannot both be realised. On either formulation, and supposing (for the moment) that we are dealing with *mandatory* norms, it has normally been thought that a legal conflict arises because the action which one law *requires* is inconsistent with the action which the other law *requires*. However, I suggest that one law can conflict with another law accidentally. In such cases, the actions *required* by both laws are consistent. But still, the two laws can come into conflict with each other – and this chapter explores how this might be possible.

Staying with our preferred formulation of legal conflict, the analysis in this chapter is meant to clarify another way in which two laws cannot both be realised. And once again, it is the analysis itself that is important, for I will rely upon the idea of accidental conflicts later in the study (see Parts III and IV).

5.A. Introduction

Suppose that my pushy but well-meaning partner tells me that I must keep fit. She also tells me to work on my budding crime novel every afternoon from 1 pm to 6 pm. The work is stressful, however, with the consequence that I eat lots of food to keep me going.

My partner has set down two rules. Let us stipulate that the first rule requires only that I keep fit; and the second rule requires only that I work all afternoon on my novel. What the first rule requires is consistent with what the second rule requires. Nonetheless, in the circumstances, something has gone wrong. It just so happens that an accidental consequence or side-effect of my compliance with the second rule is such that my compliance with the first rule is not possible. Ultimately, I cannot comply with both rules. I must keep fit, but then I must also work on my novel, which means that I cannot keep fit (since I spend the afternoon indulging myself on account of my work-related stress). The situation is counterproductive.

In the above case, I will argue that a conflict has emerged between the two rules. I will describe such conflicts as 'accidental' conflicts. Importantly, these kinds of conflict arise in the law; sometimes, legal rules conflict with each other accidentally.

However, as I mentioned at the outset of this chapter, accidental conflicts in the law appear to have been overlooked by existing thinking on how laws conflict. That thinking does not quite capture the phenomenon of 'accidental conflicts'. We will see this in scenarios like the one described above.

The various claims that I have presented above need to be developed, and so the plan of the chapter is as follows. I will first survey some of the existing thinking about how laws conflict with each other; this will to some extent be a recap of the analysis in the previous chapter. I will then introduce the idea of accidental conflicts, and suggest that these conflicts

may have been overlooked by existing theories. I will also explain why accidental conflicts really do belong within a theory of legal conflict. Finally, I will provide an illustration of accidental conflicts in the law, this being drawn from international law.

Before going any further, some early clarifications are necessary. Once again, in this chapter I am interested only in conflicts between legal rules, these being general legal norms. I therefore exclude conflicts involving particular legal norms,[1] and conflicts involving legal standards which may not be norms at all.[2] Furthermore, in order to keep things simple, I should emphasise that I will *only* discuss conflicts involving mandatory norms – in other words, rules which obligate or prohibit conduct. Conflicts involving other kinds of norm are left to one side because of their theoretical complexity. For the same reason, I will only discuss situations in which two legal rules are conflicting with each other. I do not address the possibility of conflict-situations involving more than two legal rules. In places I refer to incompatibility or inconsistency; these terms will be treated as synonymous with conflict. Finally, I will often refer to 'compliance', or to a subject 'complying with' a rule. This is not turning my back on the analysis in the previous chapter, where the 'impossibility of joint realisation' test was preferred over the 'impossibility of joint compliance' test. However, as mentioned in the previous chapter (at 4.G.i), in case of mandatory norms, a subject's *realising* a mandatory norm means that a subject is *complying* with the norm. And since I am only concerned with mandatory norms in this chapter (for simplicity's sake), we can understand references to the idea of 'compliance' with such norms.

5.B. Existing thinking about legal conflict

[1] For instance, judicial orders are particular legal norms, because they are directed by a legal authority (a court or tribunal) to one or more parties, instructing them about what they ought to do – eg an order that I pay Hector a sum in compensation.

[2] There is controversy about this. As noted in Chapter 4, it has been suggested that there are laws or legal standards which are not norms – eg a law defining a word or a concept. See Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press 1980) 168ff. However, I will leave these issues to one side because they are marginal to a theory of legal conflict.

First, I should survey existing thinking about how laws conflict – the aim being to lay the foundations for our analysis of the idea of accidental conflict below. This will, to some extent, be a recapitulation of what was discussed in the previous chapter, albeit with a different focus.

Let us briefly remind ourselves that we are concerned here only with conflicts between mandatory norms – namely, rules which are obligations or prohibitions. These obligations or prohibitions may be termed 'requirements', and we may say that a rule requires an action when it obligates or prohibits that action.

In these kinds of cases, theorists have supposed that a conflict emerges when two rules impose incompatible requirements in the sense that the very actions *required* by the two rules are inconsistent. To illustrate: imagine one legal rule which provides that government authorities are obligated to freeze the assets of certain individuals who are suspected of involvement in terrorism, and a second rule which prohibits said authorities from such action.[3] No one would deny that a conflict has emerged. For our purposes, what is important is that, in the example just given, the very actions required by the two rules are incompatible. I shall call this the 'standard model' of legal conflict.

5.B.i. Illustrating the standard model in the existing writing

We can find endorsement for the standard model of legal conflict throughout the existing writing. For instance, Hans Kelsen states that 'a conflict of norms is present, if one norm prescribes a certain behavior, and another norm prescribes another behavior incompatible

[3] This issue was raised in the *Kadi* cases in the European Union courts. See Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* (CFI, 21 September 2005); Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (ECJ, 3 September 2008).

with the first'.[4] For a subject of the two norms, the conflict arises because incompatible conduct is prescribed – meaning required – by the two norms.

Similarly, HLA Hart's approach to conflicts between mandatory legal norms was centred on the incompatibility between the actions *required* by the norms. His analysis is worth quoting in full:

> Many writers favour the idea (which seems intuitively acceptable) that conflict between two rules requiring or prohibiting actions is to be understood in terms of the logical possibility of joint obedience to them. The crudest case of such a conflict are rules which respectively require and forbid *the same action* on the part of the same person at the same time or times. The logical impossibility of joint obedience may be exhibited in the following way. For any rule requiring or prohibiting action, we can form a statement (an 'obedience statement') asserting that the action that is required by the rule is done, or the action prohibited by the rule is not done. Two such rules conflict if their respective obedience statements are logically inconsistent and so cannot both be true. Thus (to take one of Kelsen's examples), suppose one rule requires certain persons to kill certain other human beings, and another rule prohibits the same persons from killing the same other human beings, the obedience statements corresponding to those rules would be of the general form, 'killing is done', and 'killing is not done' … If the same agents are required by one rule to do, and by another rule to abstain from, *the same action* at the same time this will be reflected in the corresponding obedience

[4] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange 2009) 205. See also Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange 2009) 375, and Hans Kelsen, 'Law and Logic' in Ota Weinberger (ed), *Essays in Legal and Moral Philosophy* (Reidel 1973) 235. There are complications concerning how Kelsen understood conflicts, including whether he recognized conflicts between *valid* legal norms. But these issues need not be discussed further here.

> statements which would be logically inconsistent. Joint obedience to the rules would be logically impossible.[5]

Just to reiterate, then, what we can see very clearly in Hart's analysis – and, in particular, in his construction of 'obedience statements' – is that the conflict is located in the incompatibility between the very actions that the two rules *require*.

And this is also reflected in Carlos Alchourrón's analysis of normative conflicts between mandatory norms:

> An act-sentence preceded by a deontic operator is an atomic norm-sentence. The deontic operators are: 'O' for the notion of *ought*…
>
> A norm expressed by a norm-sentence of the form 'Ox' (where 'x' indicates the content of the form) is called a mandatory norm … Now I define … semantic relations … for mandatory norms … I will say that each mandatory norm requires the action referred to by the act-sentence which immediately follows the deontic 'O' operator … Hence 'Oa' requires a …
>
> Related to the meaning and function of a mandatory norm is the expectation that the agent involved performs the action required by the norm and since this holds for each mandatory norm, we may say that a set of mandatory norms is consistent iff it is possible to perform all the actions required by the norms of the set, in other words, iff there is an interpretation which makes true all the act-sentences which immediately follow the occurrence of the deontic 'O' operator in each of the norm-sentences of the set.[6]

---

[5] HLA Hart, 'Kelsen's Doctrine of the Unity of Law', in HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 325 (footnotes omitted; emphases added).

[6] Carlos E Alchourrón, 'Conflicts of Norms and the Revision of Normative Systems' (1991) 10 Law and Philosophy 413, 415-417 (emphasis in original). Alchourrón himself suggests (ibid 417) that this approach is similar to that of Risto Hilpinen; see Risto Hilpinen, 'Conflict and Change in Norm Systems' in Å Frändberg and M Van Hoecke (eds), *The Structure of Law: Proceedings of the 2nd Benelux-Scandinavian Symposium in Legal Theory* (Iustus Förlag 1987) 38.

This understanding of conflict – the standard model, as I call it – is adopted throughout the existing writing. It is neither possible nor desirable to run through all of this writing. Nonetheless, I have sought to provide important statements which are representative of the thinking on conflict, and I have quoted these statements in full for convenience.

5.B.ii. What makes a conflict?

Of course, there have been various explanations as to *why*, precisely, the standard model counts as a conflict – what it is that makes the two requirements conflicting.[7] This is the basic question about what a conflict is. A full answer to that question requires more extended treatment. Nonetheless, I must offer some modest thoughts here, because the question is relevant to whether we should treat 'accidental conflicts' as legal conflicts. Since the analysis is provisional, I would ask the reader to bear with me.

Existing thinking on legal conflict focuses on the incompatibility between the very requirements of two rules, in the sense that the two rules require actions which are inconsistent. Arguably, these cases are treated as conflicts because they are defined by the choice imposed upon a subject of the rules. Hector, confronted with two rules which are conflicting, must choose between them. And not just that: in choosing one rule, Hector must disobey the other rule. The nature of the choice forces this upon him.

We find this consideration in play in the standard cases contemplated by the existing writing, according to which the very requirements of two rules are conflicting, such that the actions required by the two rules are incompatible. A subject may act in compliance with one

---

[7] For instance, some have attempted to explain this problem by turning to logic – as we saw in Chapter 4. A logic-based explanation is criticised, most commonly on the basis that norms are not susceptible to truth-values – that is, a norm cannot be true and false. And classical logic is generally thought to rely upon the truth-values of sentences to determine logical inconsistencies. However, other theorists have argued that norms are indeed susceptible to truth-values, or they have turned to logics which do not rely upon truth-values to determine consistency.

normative requirement, but in doing so she will disobey the other normative requirement. What we will find is that this consideration is at play in the case of accidental conflicts.

5.C. Clearing the way forward

Before pushing ahead much further, there is an additional group of questions which I must address. This is necessary groundwork because, as we have seen in the previous chapter, the problem of legal conflict is a theoretical minefield. The issues are highly complex and interrelated, and the opportunities for confusion are very great.

Two questions will be discussed. The first concerns the issues surrounding the 'purpose' of a legal rule. The second concerns the problem of knowing what two legal rules require, which is prior to knowing whether they conflict.

5.C.i. Legal rules and their purposes

It is commonly said that a legal rule has a purpose. Of course, a rule may have multiple purposes, or possibly none at all; but I will leave these more problematic cases to one side because they are not relevant to the argument.

The idea that a legal rule has a purpose may be relevant to legal conflict in two ways. First, this 'purpose' may be encapsulated within the normative requirement itself. Put another way, it may be what the rule requires. This needs some explaining. For instance, we often say about some legal rules that a subject has not violated the strict letter of the law, but has violated its purpose. What this means is that the rule requires that its subjects comply with what it requires. And it just so happens that some distinguish between different 'elements' of what the rule requires – here, the letter and the purpose.

Those distinctions, while they may have analytical value elsewhere, are unnecessary and can be confusing in the context of legal conflicts. For this reason, in analysing conflicts between legal rules, I will refer simply to what each rule *requires*. In that regard, and as stated at the outset, I am concerned simply with norms in the sense of normative requirements. This liberates the analysis, and allows us to focus single-mindedly on the problem at hand – namely, the problem of norm-*conflict*.

The idea of a rule's 'purpose' may be considered relevant to conflict in a second way. Often, we say that a rule *has* a purpose. Take a rule which obligates subjects to drive on the left side of the road. Let us suppose that this rule's purpose is to coordinate transportation on the roads. If so, we may think that this kind of purpose may have some bearing upon, or relevance for, a theory of legal conflict.

That may well be so, but once again, it is not my immediate concern in this chapter. This chapter is concerned with norm-conflict. To the extent that a particular legal rule has a 'purpose' (which is *not* what the rule requires – that is, which is not normative), then the issue of how such a purpose may be involved in legal conflict must be left for another time. It is worth noting, however, that this is a controversial issue. For it goes to the question whether law is concerned with more than just action-guiding, and whether this implicates our understanding of the various ways in which legal rules conflict. The idea is that law exists to achieve certain social, economic and other kinds of purposes or goals that are not concerned simply or straightforwardly with action-guiding. For instance, governments may use legal regulation to achieve equality of pay between the genders, or to improve social mobility, or to reach targets regarding the successful treatment of various health conditions. Action-guidance may well be the most important *component* in realising such purposes or goals – by directing employers, health professionals, and so on, in order to achieve the laws' purposes. But the purposes themselves are analytically independent from the action-guiding laws that achieve them. Law has a broader role than simply action-guiding, at least on this view.

Consequently, one may think that this impacts on our understanding of legal conflict, in the sense that there can be conflicts between laws in relation to these purposes or goals that law (or a government via law) strives to achieve.

Some of Joseph Raz's writing on conflict indicates that he endorses this broader (or additional) role of law. In a passage discussing the partial reform of laws by the courts, Raz argues that partial reform may introduce 'a new discordant element into an existing doctrine. It means that the law will now include provisions reflecting and pursuing different and inconsistent social goals. It incorporates pragmatically conflicting provisions'.[8] In this passage, Raz introduces the idea of pragmatic conflict, and distinguishes that type of conflict from normative conflict. Raz argues that

> [n]ormative conflict exists when two valid requirements cannot both be complied with. Pragmatic conflict is a wider concept. Laws conflict pragmatically if one is designed to promote or sustain a state of affairs which cannot coexist with that which the other is designed to promote or sustain. A law sustains or promotes a state of affairs not only through compliance with its requirements but also through actions using rights, powers, or permissions it grants and through the social and economic consequences of such behaviour. Partial reform does not involve normative conflict but it invariably introduces pragmatic conflict into the law.[9]

Raz also states that there are pragmatic conflicts '[w]hen rules P1 and P2 promote conflicting social goals',[10] and he endorses the notion of pragmatic conflict in subsequent essays.[11]

[8] Joseph Raz, *The Authority of Law: Essays in Law and Morality* (2nd edn, OUP 2009) 201.

[9] Ibid.

[10] Ibid 205.

In particular, Raz draws attention to the 'social and economic consequences' of law, and states that law 'sustains or promotes a state of affairs … also … through the social and economic consequences' of the conduct it requires or permits. This can lead to *pragmatic* conflicts (as Raz terms them) where the social and economic consequences which one law seeks to promote cannot coexist with those which another law seeks to promote.

What is interesting about the extracted passage above is that, in the final sentence, Raz appears to suggest that two legal rules can be pragmatically conflicting, but not normatively conflicting. This raises precisely the issue of whether two legal rules can conflict even if subjects are fully capable of realising (or complying with) them. Put another way, the two laws conflict despite, or even in virtue of, the subjects' compliance.

In this study, however, I am only concerned legal *norms* – hence I will only explore the problem of *norm*-conflicts. I will leave analysis of the possibility that laws may conflict 'pragmatically' (to use Raz's terminology) for another time.

5.C.ii. Knowing what a rule requires

A second matter needs to be clarified. In order to know whether two rules conflict, we must first know what they require. It is here that a complication may arise. When examples of conflict-situations (real or hypothetical) are discussed, it is always open to a reader to doubt that a conflict really is present on the basis of a different perception of what the two rules require.

I wish to foreclose such possibilities because they distract us from our main focus. They go to the problem of determining what the rules require, rather than engaging with the

[11] See further Joseph Raz, 'The Relevance of Coherence', in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995) 300-303; and ibid, 'On the Autonomy of Legal Reasoning', 315; and ibid, 'The Inner Logic of the Law', 240-241.

question whether the rules are conflicting. Thus, in the examples which I will discuss in this chapter, I will *stipulate* what each rule requires in order to avoid argument on that issue.

5.D. The idea of accidental conflicts

Let us turn now to consider the idea of accidental conflicts in more detail. This requires that we work through a number of steps.

5.D.i. Introducing accidental actions

We talk about what a law requires. By this, we mean the action that a law requires. For instance, the legal prohibition of murder requires that we do not commit murder. There are legal obligations which require the employed to pay taxes, and motorists to observe speed limits on the roads.

A law can also generate actions which are beyond what it requires. Imagine that there are reforms to the English law on homicide. The two-tier structure of murder and manslaughter is replaced with a three-tier structure of first degree murder, second degree murder, and manslaughter. And suppose that one consequence is that writers of crime fiction modify the content of their fiction in order to comport with the new law and make their writing more realistic. It would be fair to say that this action was not an action which the law required.[12]

At this stage, we might distinguish between required actions and non-required actions. An action which is required by a rule is a required action. To return to the example mentioned at the outset of the chapter, imagine a rule requiring that I work on my budding

[12] Unless this really was what the law meant, properly interpreted; but this is unlikely. Let us stipulate that the law only required certain actions, these being actions which amounted to first degree murder, second degree murder, or manslaughter.

crime novel every afternoon from 1 pm to 6 pm. My working on my novel every afternoon is an action which is required by the rule – hence it is a required action. (In this sense, I am complying with, or realising, the rule.)

An action which is not required by a rule is a non-required action. Of course, there are many non-required actions in the world. For we perform many actions which are not required by rules. I might watch a horror film this evening, even though no rule requires that I do. However, more significant for the purposes of this chapter is a particular subset of non-required actions – namely, non-required actions which are entailed by performance of required actions. I will describe this subset of non-required actions as 'accidental' actions. For clarity's sake, accidental actions should be illustrated.

Again, staying with the aforementioned example, I am required by the rule to work on my novel every afternoon – and I do perform this (required) action, by working on my novel. But the work is stressful, with the consequence that I eat lots of food to keep me going. My eating lots of food is an action which is not required by the rule, but it is entailed by an action which is required by the rule. It is an accidental action.

Let us briefly summarise. Some actions are non-required actions, meaning actions which are not required by a rule. Accidental actions are a subset of non-required actions. They are also actions which are not required by a rule. But in addition, they are actions which follow from (are entailed by) acting on what a rule *does* require. Accidental actions are non-required actions which are entailed by a subject's acting on the requirement.[13]

[13] To a certain extent, this analysis resonates with Raz's discussion of the indirect social functions of law, which is part of his broader discussion of the social functions of law. See Raz, *Authority of Law*, 167-168, where he states: 'The social functions of the law can profitably be divided into direct and indirect functions. Direct functions are those the fulfilment of which is secured by the law being obeyed and applied. Indirect functions are those the fulfilment of which consists in attitudes, feelings, opinions, and modes of behaviour which are not obedience to laws or the application of laws, but which result … from compliance with and application of laws. The indirect functions which laws actually fulfil are the results of … following and applying them'. See also ibid 176-177, where he explains that the 'indirect social effects of the law are numerous … [t]hey are part of its essential function in any society. Lawyers and legal theorists have paid little attention to the law's indirect functions … There can be little doubt that our understanding of law will remain partial and deficient until the social sciences succeed in tackling more fully the problems involved in assessing the indirect functions of the law'.

5.D.ii. Expanding on accidental conflicts

In light of the above, there are good reasons to think that legal conflicts are not solely about an incompatibility between the actions which are required by two legal rules (that is, required actions). Accidental actions are also relevant to an analysis of how legal rules conflict.

How does such a conflict materialise? A subject of two rules may act on what is required by the first rule, and may act on what is required by the second rule – and, thus far, these (required) actions are consistent.

However, by acting on the second rule, an accidental action follows. (Put another way, a non-required action is entailed by the performance of the required action.) This accidental action is such that the subject cannot perform the action required by the first rule. In other words, this accidental action – entailed by the subject's compliance with the requirement of the second rule – prevents the subject from complying with the requirement of the first rule.

In such cases, I will suggest that the subject is now faced with a legal conflict. And I will describe such cases as accidental conflicts. Accidental conflicts will be illustrated further below.

But before that, one last clarification is necessary. The idea of an accident commonly has the connotation of chance. But accidental conflicts, as I have understood them, need not arise by chance. They can be unexpected, but they need not be. This is vitally important. According to the formulation of accidental conflict stipulated here, it may be entirely predictable – even certain – that two laws have, or would, come into conflict accidentally.[14] I

[14] Equally, when I speak about 'accidental' actions, I do not mean to suggest that the actions are unexpected. They may be, or they may not be. As I have stipulated, accidental actions are simply non-required actions.

claim that a legal conflict is accidental only in the sense that an accidental action, entailed by complying with (or realising) one legal rule, means that the subject cannot comply with (or realise) another legal rule.

5.D.iii. Illustrating accidental conflicts

I introduced the idea of accidental conflicts using an example at the very outset of this chapter (see 5.A above), but a more detailed explanation of that example is now possible. Let us return to that example and consider how an accidental conflict has materialised.

My partner has set down two rules for me. I will stipulate that the first rule requires only that I keep fit; and the second rule requires only that I work on my crime novel every afternoon. And (as has been mentioned) the stressful nature of the work means that I eat lots of food to keep me going.

What the first rule requires – the action of keeping fit – is consistent with what the second rule requires – namely, the action of working on my novel every afternoon. However, complying with the second rule entails a further action. I eat lots of food (because of the work I am doing). This action – eating lots of food – is not required by the second rule, but it is entailed by my compliance with the second rule. It is a side-effect, an accidental action, of my working on the novel. And it means that I fail to comply with the first rule. I can work on my novel as required, but then I cannot keep fit (as required).

In the result, I cannot comply with (or realise) both rules. And this is not because they require actions which are inconsistent. This is an accidental conflict. Such conflicts escape the attentions of the standard model of conflict, however.

5.D.iv. What makes an action accidental?

Earlier I suggested that there are some actions which are not required by a rule. These are non-required actions. Furthermore, I explained that there is a subset of such actions which is important for our purposes – namely, accidental actions. An accidental action is a non-required action which is nonetheless entailed by (consequent to) action in performance of a normative requirement.

The idea of accidental conflict is predicated on the notion of accidental actions. So what makes an action accidental, as opposed to being simply non-required? Put another way, how do we know that an action is non-required *and* entailed by action in performance of a requirement, as opposed to being simply any non-required action in the world?

Non-required actions more broadly seem straightforward. As noted earlier, many actions in the world are not required by a rule. This suggests that, in explaining the subset of accidental actions, the problem is located in the idea of entailment – that a (non-required) action is 'entailed by' another action. Once we have worked out what this means, we will face little trouble in acknowledging that a required action (an action in performance of what a rule requires) can 'entail' a non-required action – this latter action being accidental in the way that I have stipulated.

Demonstrating that one (required) action has entailed a (non-required) action is, I would suggest, a question of causation. While this merely restates the problem, it also clarifies why the problem cannot be fully pursued here. Causation has long troubled philosophers, and this is not the place to renew that debate.

In fact, I would suggest that, for the purposes of this chapter, that debate can largely be circumvented. For we do seem to think that a subject's compliance with a rule can mean (entail) that the subject performs a non-required action. While questions may be raised about precisely which non-required actions are the significant ones (and thus count as 'accidental' actions), the basic premise that one (required) action can entail a (non-required) action is uncontroversial.

Still, one might offer a working test for locating (at least in some cases) these accidental actions – namely, the 'but for' test which is familiar to many lawyers. The 'but for' test faces a host of theoretical problems; I present it here only as a way of making accidental actions more intelligible. An illustration may help. I presented a scenario earlier, where my partner set down a rule that I work on my novel every afternoon. I did so, but with the consequence I ate lots of food to keep me going. We might say I would not have eaten this food *but for* my compliance with the rule – namely, my action of working on the novel. Thus, we might suppose that my eating food was a non-required action which was nonetheless *entailed by* my working on the novel.

5.D.v. Why accidental conflicts belong within a theory of legal conflict

Finally, we should consider why accidental conflicts should be treated *as* legal conflicts. Some may argue that, while accidental conflicts are neglected by the standard model of legal conflict, this is as it should be. For accidental conflicts are simply not legal conflicts at all.

Critics will grant that the situations, which I have called 'accidental conflicts', can and do arise in the law. But they will state that such cases are simply not conflicts in the way that they mean. Rather, they are interested in how legally *required* actions can be incompatible and, for this reason, they stipulate that only *those* cases are legal conflicts. Nothing is lost analytically by such stipulation – or so they will claim.

This criticism is not persuasive. Having expanded on the idea of accidental conflict, and worked through an example, we are now well positioned to explain why accidental conflicts really do belong within a theory of legal conflict. This is because one of the main concerns which animates the existing thinking on legal conflict also applies in the case of accidental conflicts. This concern, which is reflected in the standard model of conflict, also applies to accidental conflicts.

As was discussed in 5.B (above), the standard model of conflict, which is centred on inconsistencies between actions which are required by two legal rules, is understood to be a conflict because of the nature of the choice imposed upon a subject of the two rules. In choosing to act according to one rule, the subject must disobey the other rule.

This consideration applies to accidental conflicts as well. Consider, once again, the scenario where my partner lays down two rules – the first requiring that I keep fit, and the second requiring that I work on my novel every afternoon. (Of course, these are not legal rules, but the analysis here carries over to legal rules; and in any case, an example from the law will be discussed further below). The actions which each of these rules requires are compatible. But there is an accidental action which I perform as a result of complying with the second rule – namely, eating lots of food because working on my novel is stressful. This means that, in complying with the second rule, I must disobey the first rule that I keep fit. Alternatively, I can try to keep fit, but then I should not work on my novel because I am led to indulge myself. So I am forced into a choice. Choose the first rule, and disobey the second rule – and vice versa.

If this is correct, then existing thinking on legal conflict should recognise that laws can conflict accidentally, otherwise they do not fully succeed in the task which they assign themselves. A key consideration which animates such theories in relation to standard cases of conflict – the kind of choice that a subject must make between two rules – also applies in relation to the cases which I describe as accidental conflicts.

In spite of this, however, the idea of accidental conflict has been overlooked by existing thinking. As far as I am aware, there is no writing in which the possibility of accidental conflicts is raised and discussed. Not only that, but the possibility appears to be firmly excluded by the writing that was discussed in 5.B.i above.

5.E. Accidental conflicts in action

The time is ripe to consider evidence for accidental conflicts in the law. The discussion in this Section will focus on one example which is drawn from international law.

In the 1990s, the Yugoslavian federation was dissolving. On 25 September 1991, the United Nations Security Council adopted Resolution 713 (1991), which was binding upon all UN Member States. In order to minimise violence during this period, paragraph 6 of Resolution 713 obligated all UN Member States not to supply arms to any actors within the dissolving federation of Yugoslavia.[15] However, subsequently, Serbia and Montenegro – formerly part of the Yugoslavian federation – was alleged to have pursued a campaign of ethnic cleansing (amongst other things) against Bosnia and Herzegovina, also formerly part of the Yugoslavian federation.

In order to see how an accidental conflict could emerge from this scenario, I will put forward a series of stipulations about the legal rules in play; and, in particular, I will stipulate what these rules require. This is in order to circumvent debate about these matters (as discussed in 5.C.ii above). For clarity's sake, I will also simplify the analysis of the international law aspects, since these are marginal to our main concern – namely, exploring the contours of the accidental conflict itself.

In international law, there is a treaty rule concerning the prevention of genocide.[16] I will stipulate that this rule requires, simply, that states undertake to prevent genocide, and that this may require positive action on the part of states (such as economic or military support). Let us suppose that, on the facts mentioned above, a genocide was being

[15] UNSC Res 713 (25 September 1991) UN Doc S/RES/713. Paragraph 6 stated:

> 6. *Decides*, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and security in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia; …

[16] Article 1 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – known colloquially as the Genocide Convention – which provides: 'The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.

committed by Serbia and Montenegro in Bosnia and Herzegovina. And let us further suppose that other states were required to prevent this genocide.

However, Security Council Resolution 713 imposed an arms embargo – and let us stipulate that it required only that these very same states were not to supply arms to any actors within the dissolving Yugoslavian federation.

Finally, let us suppose that, on account of this arms embargo, Bosnia and Herzegovina was unable to counter, or even stop, the genocide being committed on its territory. And in upholding the arms embargo, other states were violating the requirement that they prevent genocide.

In these circumstances, one may argue that an accidental conflict has emerged. But how? The rule on the prevention of genocide requires the following action: states prevent genocide within Yugoslavia. Resolution 713 requires another action: states do not supply arms within Yugoslavia. Both required actions are compatible. However, given the particular circumstances within Yugoslavia, Resolution 713's required action entails another action: states prevent Bosnia and Herzegovina from countering genocide. As a result of this accidental action, which was entailed by acting according to Resolution 713, we may suppose that the states have disobeyed the requirement to prevent genocide.

Ultimately, the states had been presented with a choice. They could act as required by Resolution 713, but in so doing they would disobey the rule on the prevention on genocide – or vice versa. Of course, critics may object that this scenario presented a conflict according to the standard model, in the sense that the two required actions were inconsistent. But this depends on a different view of what these two rules required. For this reason, I have been careful to stipulate what these rules required. Given these stipulations, we can say that the actions *required* by both rules were consistent. And yet a legal conflict materialised. This legal conflict was accidental.

In fact, the way in which I have constructed the scenario – and stipulated the two legal requirements – is not mere conjecture, or in any sense far-fetched. My presentation of the scenario appears to mirror the way in which it was commonly understood at the time. Hints of this can be seen in some of the reasoning in the International Court of Justice (ICJ), which was called upon to determine a number of questions relating to the situation in Yugoslavia.

The ICJ delivered a judgment on the merits in the 2007 *Bosnia Genocide* case, where it held (among other things) that Serbia and Montenegro had not committed genocide.[17] Of more pressing interest, however, is an earlier phase before the ICJ in 1993 concerning a request for provisional measures. At this time, some states were alleging that Serbia and Montenegro was committing genocide. The ICJ indicated provisional measures on 13 September 1993, and a separate opinion was attached by Judge ad hoc Lauterpacht.

Lauterpacht stated that '[o]n the face of it, Security Council resolution 713 (1991) is a valid prohibition of the supply of arms and military equipment to those involved in the Yugoslav conflict'.[18] Nonetheless, Lauterpacht thought that a legal conflict may have emerged in light of the accidental action entailed by acting according to Resolution 713. His reasoning on this issue may be quoted in full:

> Now, it is not to be contemplated that the Security Council would ever deliberately adopt a resolution clearly and deliberately … requiring a violation of human rights. But the possibility that a Security Council resolution might inadvertently or in an unforeseen manner lead to such a situation cannot be excluded. And that, it appears, is what has happened here. On this basis, the inability of Bosnia-Herzegovina sufficiently strongly to

[17] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43.

[18] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Further Requests for the Indication of Provisional Measures) [1993] ICJ Rep 325, 439 (Separate Opinion of Judge ad hoc Lauterpacht).

> fight back against the Serbs and effectively to prevent the implementation of the Serbian policy of ethnic cleansing is at least in part directly attributable to the fact that Bosnia-Herzegovina's access to weapons and equipment has been severely limited by the embargo. Viewed in this light, the Security Council resolution can be seen as having in effect called on Members of the United Nations, albeit unknowingly and assuredly unwillingly, to … act contrary to [the rule requiring the prevention of genocide].[19]

Of course, Lauterpacht's reasoning is not free from criticism. The case is interesting, for our purposes, because it illustrates one scenario where an accidental conflict may have emerged in the law.

5.F. Concluding remarks

In this chapter I have proposed that, sometimes, laws conflict accidentally. Accidental actions form part of the raw ingredients of legal conflicts, just as required actions do. If this is true, then a persuasive theory of legal conflict should recognise the phenomenon of accidental conflicts.

Given existing thinking about legal conflict, then, there is a risk that the 'impossibility of joint realisation' test, which I defended in the previous chapter, might have been understood as a test concerning incompatible *requirements* (at least in the context of mandatory norms). The aim of this chapter has been to obviate that risk. The 'impossibility of joint realisation' test still stands. Nonetheless, there is another way in which two laws cannot both be realised – and this is where they conflict *accidentally*.

This analysis has implications for conflict-situations beyond the law as well. Accidental conflicts may arise in other domains which contain rules. For example, legal

[19] Ibid 440-441. This should now be read in light of the ICJ's final judgment on the merits in 2007.

rules are only one kind of social rule. To bring the discussion full circle, we saw with our very first example in 5.A – where I am under the thumb of my pushy partner, whose instructions that I jog and work are counterproductive – that ordinary social rules may conflict accidentally. More puzzling, though, are conflicts between moral rules. Can these conflict accidentally, too? Alas, that question is for another day.

Chapter 6. A Typology of Legal Conflict: Commensurability and Seriousness

6.A. Introduction

In Chapter 4, I argued that two laws conflict where they cannot both be realised. I sought to unpack, defend, and elaborate on the formulation in the course of Chapter 4. And this was taken further in Chapter 5, where I suggested that such conflicts can also arise accidentally.

In this chapter, I will construct a typology of legal conflicts (based on our preferred 'impossibility of joint realisation' test). There are two dimensions to legal conflicts on which this typology will be based: first, whether the conflict involves commensurable or incommensurable laws, and second, the seriousness of the conflict. These two dimensions cut across each other. There are more serious conflicts involving incommensurable laws, less serious conflicts involving commensurable laws, and so on. Since this typology operates in two dimensions, I will analyse each dimension in turn. But this is not to deny their interconnectedness.

6.B. Outline of the typology

Typologies of legal conflict may choose to focus on different aspects of the ways in which laws conflict with each other. The typology which I am building in this chapter is directed to the particular concerns of this study – namely, distinguishing between legal conflicts with a view to understanding how these different types bear upon the *consequences* of legal conflicts. For this reason, I focus on two dimensions of legal conflicts which have a bearing upon the consequences of legal conflicts – namely, commensurability and seriousness.[1]

[1] Precisely how commensurability and seriousness bear upon the consequences of legal conflicts is explored in Part IV of the study.

The typology may be illustrated diagrammatically as follows.

	More serious conflicts	Less serious conflicts
Conflicts between commensurables	C1	C2
Conflicts between incommensurables	C3	C4

Figure 6.1 Typology of legal conflict

C1, for instance, indicates a more serious conflict, and a conflict between commensurables. C4 indicates a less serious conflict, and a conflict between incommensurables.

6.C. Commensurability and legal conflict

The consequences of a legal conflict turns, in part, on whether the two laws are commensurable. This dimension yields two types of legal conflict for the purposes of our typology – namely, conflicts between commensurable laws, and conflicts between incommensurable laws.

6.C.i. What are commensurability and incommensurability?

Commensurability is the ability to measure or weigh things against each other. Incommensurability is the opposite of commensurability, and means the lack of a common

measure.[2] As Frederick Schauer states, '[t]hose who argue for commensurability maintain that all values, reasons, options or norms are reducible to some common … metric (perhaps dollars, perhaps some other medium of exchange, perhaps utils, or perhaps something else)'.[3]

Some writers, such as utilitarians or other consequentalists, reject incommensurability.[4] However, this is misguided. For example, it does not accurately capture the way in which we treat and react to certain choices. If Hector was offered the option of receiving a fulfilling job but only if he gave up ten close friends, Hector would rightly have difficulty finding a common measure against which he might weigh the two choices and prefer the 'better' one. We might expect Hector to deny that he could do this, and this would be a sign of incommensurability.[5]

A precise formulation of incommensurability is needed. As Raz suggests, 'A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value'.[6] By way of clarification, this is not a kind of epistemic indeterminacy. Incommensurability is not concerned with our lack of knowledge – i.e., cases where we just do not know, on account of our ignorance, whether one option is better than, or equal to, the other option. Rather, two options are incommensurable where one is not, and cannot, be better than or equal to the other. And as Raz further notes in relation to incommensurability

[2] Eric Oberheim and Paul Hoyningen-Huene, 'The Incommensurability of Scientific Theories' (2009), at <http://plato.stanford.edu/entires/incommensurability/> accessed 6 May 2012. There is disagreement about whether we should distinguish between incommensurability and incomparability, or whether we can use these two notions interchangeably. See the discussion in Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997).

[3] Frederick Schauer, 'Instrumental Commensurability' (1998) 146 University of Pennsylvania Law Review 1215, 1215-1216 (footnotes omitted).

[4] But not only consequentialists. For example, Ronald Dworkin has argued that there is usually one right answer to legal questions – eg Ronald Dworkin, *Law's Empire* (Hart Publishing 1998).

[5] These are the briefest of remarks, and skirt over a host of arguments from proponents and critics of incommensurability. For further analysis, see eg Chang (ed), *Incommensurability, Incomparability, and Practical Reason*.

[6] Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 322.

and weight, '[i]t makes sense to talk of the relative weight of options one can at least in principle choose *between*'.[7]

The above formulation of incommensurability can be further elaborated. Two options may have a range of attributes or features which make them attractive. Option *A* may be more attractive than option *B* in relation to some features, and vice versa, but because these features cannot all be commensurated, there may be no way of measuring the two options on a single scale of attractiveness.[8] Options will often possess a range of features or attributes on which their attractiveness depends, and the incommensurability of some of these features may prevent us from choosing between two options based on their overall attractiveness (as measured on a single scale).

There are complications for the above analysis. For example, Jeremy Waldron thinks that there are two meanings of incommensurability in moral and political philosophy. He calls the first 'strong incommensurability', and the second 'weak incommensurability'.[9] Waldron's notion of strong incommensurability corresponds with Raz's formulation of incommensurability (above). However, Waldron argues that strong incommensurability 'is a radical and disconcerting prospect' because it 'can leave us paralysed, not knowing what to choose … in the face of immiscible values'.[10] Waldron then explains that

> weak incommensurability is usually expressed in terms of a simple and straightforward priority rule. The claim that considerations A and B are incommensurable in this second, weak sense connotes that there is an *ordering* between them, and that instead of balancing them quantitatively

[7] Ibid (emphasis added).

[8] Timothy AO Endicott, *Vagueness in Law* (OUP 2000) 41.

[9] Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1994) 45 Hastings Law Journal 813, 815.

[10] Ibid 815-816.

> against one another, we are to immediately prefer even the slightest showing on the A side to anything, no matter what its weight, on the B side.
>
> The idea of an ordering, as the opposite of utilitarian-style weighing and balancing, can be explicated in at least three ways: trumping, side constraints, and lexical priority.[11]

Waldron's analysis of incommensurability should ultimately be rejected, but it is useful in the truths to which it points. First, Waldron's suggestion that 'strong' incommensurability can result in decision-making paralysis is overstated. In the case of two incommensurable and conflicting reasons for action, we can still choose to act on either reason – for each reason is, and remains, an undefeated reason to act. We are not choosing *between* the reasons, but we are still able to act on reason. In addition, there has been further analysis of how to act when faced with incommensurable reasons for action.[12]

Second, Waldron is mistaken in arguing that his notion of 'weak' incommensurability is different from 'strong' incommensurability. Weak incommensurability, at least in Waldron's formulation, is not a separate kind of incommensurability. To argue otherwise is to conflate the methods of resolving or dealing with incommensurability with the nature of incommensurability itself. Nonetheless, Waldron's analysis of weak incommensurability is useful because it demonstrates that, even when faced with incommensurables, there may be ways of prioritising one over another (e.g., ordinal rankings) which does not involve weighing between them. I will return to this issue later in the study (see Part IV), where I will examine whether there are any rules which assist in choosing between incommensurable and conflicting laws, and not on the basis of the conflicting laws' relative weights.

---

[11] Ibid 816 (emphasis in original).

[12] Eg Robert P George, 'Does the "Incommensurability Thesis" Imperil Common Sense Moral Judgments?' (1992) 37 American Journal of Jurisprudence 185.

6.C.ii. What can be commensurable?

I have consistently referred above to 'incommensurable laws'. But what kinds of things can be commensurable or incommensurable? In the first instance, they must be of a kind which can possess weight or some other unit of measurement, which allows them to be weighed or measured at all.[13] For this reason, there is often talk about the commensurability of values. Values are thought capable of possessing weight (or importance, or strength), and thus they can be weighed or measured against each other.

We often find discussion of the commensurability or incommensurability of 'reasons'. And writers sometimes use the more neutral or broader term 'options'. But in both cases, it is often unclear whether we mean that the reasons or options themselves are directly commensurable or incommensurable, or whether they are commensurable or incommensurable indirectly – i.e., only in so far as they are instantiations of *values* which are themselves directly commensurable or incommensurable. There is discussion of commensurability in other areas, too. Incommensurability is well known to mathematicians (e.g., incommensurability stemming from irrational numbers). And there has increasingly been debate about the incommensurability of scientific theories more broadly.[14]

So can we speak directly about laws being commensurable or incommensurable? It is sometimes thought that we cannot. At best, laws are the bearers of things which are commensurable – e.g., laws are the bearers of value (with values being commensurable or

[13] Although note Endicott's discussion of immensurability, which (Endicott argues) leads to incommensurability. Immensurability describes the problem of measuring or weighing an option on a scale in the first place. That is, immensurability refers to 'criteria of application that do not correspond to a scale. "Immensurability" is the property that something has if and only if it can be assessed in some respect in which it cannot be measured'. See Endicott, *Vagueness in Law*, 46. Endicott gives the following example: 'if the imaginativeness of any one novelist cannot be quantified, then some novelists will be incommensurable with respect to imaginativeness', ibid.

[14] Oberheim and Hoyningen-Huene, 'The Incommensurability of Scientific Theories' (2009).

incommensurable).[15] But if we can speak of scientific theories being commensurable, why not laws? One response might be that incommensurability is used differently in different contexts. In the case of two scientific theories, we talk of their commensurability (or incommensurability) not in terms of measuring their relative weight or importance as against each other on a single scale, but their basic comparability, which is a different question. We are not saying that we have difficulty determining whether scientific theory *A* is 'better' or 'more important' than scientific theory *B*. Rather, we are concerned with the ability of either theory to 'talk to' the other, such that the two can be accommodated or integrated in a single body of understanding.

Let us grant the above, and say that in the context of legal conflicts, when we speak of incommensurability we are concerned with relative weight or importance (in a way that we may not be vis-à-vis scientific theories). Even in this sense of incommensurability, why can we not talk directly of commensurable or incommensurable laws? After all, we recognise that laws have weights. Legal norms are reasons, and reasons have strengths. In Chapter 2 I characterised *jus cogens* in international law as comprising legal standards of a certain weight. If laws can have weights, then they are surely capable, in principle, of being the kinds of things which can be commensurated.

There is a further argument as to why we should distinguish between the commensurability of laws (or legal reasons), and the commensurability of values. Peter Schaber suggests that if two reasons are incommensurable (assuming that reasons are the kinds of things that *can* be commensurable), this does not necessarily mean that their underlying values are incommensurable. For '[t]here might be an incommensurability of reasons that has nothing to do with the way the values of the relevant options are related to

[15] See <http://plato.stanford.edu/entries/value-incommensurable/> for further analysis of bearers of value.

each other'.[16] This is because reasons are not the same as their underlying values (i.e., the values which the reasons instantiate). This allows for the possibility that the incommensurability of two reasons need not say anything about the relationship between their underlying values. If this is correct, then it is another sign that we should evaluate the incommensurability of laws directly, rather than referring back to their underlying values.

However, there is an objection to all of this. And it may throw some light on the continuing discomfort that we feel if we are to speak directly of laws being commensurable or incommensurable. The mere fact that laws have weights is not enough to make them the kinds of things that might be subject to determinations of commensurability. This is because determining commensurability or incommensurability is commonly tested in the following manner.[17] If A and B are incommensurable, neither is better than the other, nor are they equal in value. Importantly, according to a common test, we can posit that we have 'more' of A. But if having more of A does not change our perception of the relationship between A and B (A is not better than B, nor equal in value to B), then A and B are incommensurable. It might be, then, that determining commensurability involves the ability to have more, or less, of something. And while we might be able to speak about having more of a value, it makes little sense to speak about having more of a law. This would suggest that values are the kinds of things which can be commensurable, while laws are not.

A further objection is that the weight of laws is metaphorical. Laws are not literally weighty; they are not literally heavy or light. That said, neither are reasons. Yet as noted above we often talk, for example, about the strength or weight of reasons. And while these are strictly metaphors, this does not prevent some from saying that reasons can be

[16] Peter Schaber, 'Are There Insolvable Moral Conflicts?', in Chang (ed), *Incommensurability, Incomparability, and Practical Reasoning*, 279 at 292.

[17] This test is discussed in further detail below when I discuss how we identify incommensurability (and the 'mark' of incommensurability).

commensurated.[18] However, it may be that such a position is better understood as a shorthand for the view that reasons are the bearers of value, and only values (strictly) can be commensurated.

This brief excursion is important, because incommensurability is a significant element of legal conflicts and one which I will return to frequently in the course of the study. Nonetheless, for the remainder of this chapter and the study as a whole, I will refer directly to laws which are commensurable or incommensurable. Sometimes I will also refer to legal choices which are commensurable or incommensurable. In either case, I do not wish to downplay or ignore the important questions about what precisely can be commensurable or incommensurable.

Finally, it is worth noting that some writers have at times suggested that laws – or certain kinds of law – are *always* commensurable. For example, in his early writing Dworkin argued that legal principles are different from legal rules in that legal principles possess the dimension of weight, and that legal principles which conflict with each other are weighed against each other in order to determine which prevails.[19] This assumes that all legal principles can always be commensurated against each other. Alexy treats legal principles as optimisation requirements, and also argues along similar lines to Dworkin.[20] These arguments are mistaken in how they characterise the differences between rules and principles, for familiar reasons that are discussed elsewhere.[21] But they are also mistaken in thinking that principles, being a certain kind of legal standard, are always commensurable.

[18] Eg Joseph Raz, *Practical Reason and Norms* (new edn, OUP 1999) 44 on 'commensurable reasons'.

[19] Ronald Dworkin, 'The Model of Rules I', in Ronald Dworkin, *Taking Rights Seriously* (new edn, Gerald Duckworth & Co 1996).

[20] See Robert Alexy, *A Theory of Constitutional Rights* (OUP 2009).

[21] As discussed, for example, in Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823. Curiously, Dworkin's early characterisation of rules and principles is widely seized upon by international lawyers, although in general it is poorly understood in international law writing. One such misunderstanding of Dworkin's distinction between rules and principles can be found, for example, in Vaughan Lowe, *International Law* (Clarendon Press 2007) 101.

Incommensurability afflicts the relations between legal principles just as much as it afflicts the relations between other legal standards.

6.C.iii. How do we identify incommensurability?

How do we know whether two laws, or two options or reasons, are incommensurable? There is no hard and fast rule. Rather, there may only be a *sign* or mark – i.e., an indication – that the two options are incommensurable. And there can be reasonable disagreement about whether incommensurability pertains.

Raz describes the 'mark of incommensurability', namely:

> … a simple way of determining whether two options are incommensurate given that it is known that neither is better than the other. If it is possible for one of them to be improved without thereby becoming better than the other, or if there can be another option which is better than the one but not better than the other, then the two original options are incommensurate.[22]

There are indicia in the way in which people form judgments about choices which point to the notion that some choices are incommensurable or incomparable. As Raz notes:

> … people not only form judgments of the comparative merit of some options but also deny the comparability of others … People are likely to refuse to pronounce on the comparative value of a career in teaching and in dentistry. They deny the comparability of playing a musical instrument and cycling to visit old churches as pastimes, etc. Such judgments of incomparability may be expressed in a variety of different ways. We should not be surprised if as

[22] Raz, *The Morality of Freedom*, 325-326. Although note the caveat, ibid 326, that two options may be incommensurate without displaying the mark of incommensurability. But as Raz notes, this caveat does not diminish its usefulness merely as a *mark* of incommensurability.

> often as saying that such options are incomparable people will simply refuse to compare them, or will say that there is nothing to choose between them, or will express ignorance as to their comparative value, etc.[23]

One important question is whether, in light of the above, options are incommensurable – or can become commensurable – depending on the beliefs of agents. Raz, for example, suggests that incommensurable options can become commensurable on this basis, that is, if agents believe that the options can indeed be compared.[24] So is commensurability entirely subjective? This does not seem to be the case. As Raz further notes:

> … just as the existence of valuable options depends on social forms so, up to a point, their comparative merits depend on social conventions. In practical thought, as we already had occasion to notice, sometimes truth depends on belief. While a person's belief that his goal is valuable does not make it so, the social conventions regarding the relative value of options do in part determine their value. Social conventions are contingent and finite. They are exhaustible, and are bound to leave plenty of room for incommensurability.
>
> But the value of a pursuit or relationship to a person does not depend entirely on abstract value. We saw, for example, that it also depends on the likelihood that that person will be successful in them.[25]

Ultimately, determining that two options are incommensurable is not straightforward, and there can be disagreement about such determinations, including from those who accept incommensurability in principle. Later in the study (in Part III), I will attempt to identify

[23] Raz, *The Morality of Freedom*, 336. Raz is using the terms 'incomparable' and 'incommensurable' interchangeably here. Others, however, draw a distinction between the two. See Frederick Schauer, 'Instrumental Commensurability' (1998) 146 University of Pennsylvania Law Review 1215, 1216.

[24] Raz, *The Morality of Freedom*, 339-340.

[25] Ibid 344.

specific conflict-situations where the two laws are incommensurable, but in light of these observations my attempts will be tentative and provisional.

6.C.iv. What do we do when faced with incommensurables?

If two options are incommensurable, how do we choose between them? Is the choice arbitrary? What if the choice is forced upon us – e.g., a person must ultimately decide whether to pursue a career in teaching or a career in medicine? She has the opportunity to pursue either career, and she enjoys and is equally talented at each. But a choice must be made.

Choosing between incommensurable options need not be arbitrary. The choice *can* be arbitrary if the decision-maker simply decides arbitrarily, of course (e.g., flipping a coin). But the point is that she need not do so. As Raz notes:

> … [t]he ability and willingness to choose [between two options] does not depend on valuing the chosen option more than the rejected one. One is able to choose when the two are of exactly the same value, as well as when they are incommensurate. The fact of the choice does not reveal why it was made. The chooser may even have chosen the less valued option, as in cases of weakness of the will. Nor is the fact that the choice is not arbitrary sufficient to establish that it was done because the chooser values the chosen option over its alternative. The choice is not arbitrary in one or both of two respects. First, it may be based on a reason. Though the reason is incommensurate with the reason for the alternative it shows the value of that option and when that option is chosen it is chosen because of its value. Second, the choice may be in character. The chooser is the kind of person who would choose thus in the

> prevailing circumstances. But far from his non-arbitrary choice necessarily reflecting his valuation, it may even run contrary to it, as it does if he is prone to weakness of the will in certain circumstances.[26]

Raz goes on to note that '[s]aying that two options are incommensurate does not preclude choice. Rational action is action for (what the agent takes to be) an undefeated reason. It is not necessarily action for a reason which defeats all others'.[27]

The question of what to do when faced with incommensurable options has also been discussed by other writers.[28] For example, Timothy Endicott also states:

> The obvious objection to claims of incommensurability is that people do in fact choose between allegedly incommensurable options, and that while they may find such decisions difficult, they do not have the sensation of choosing without a reason. But the fact that a person reasonably chooses A or B does not imply that reason requires A or requires B, even if reason requires that a choice be made. Finnis argues that the phenomenology of choice includes a tendency (presumably not an irrational tendency) to view the choices one has made as choices supported by reason. Raz responds to similar objections to the incommensurability claim at *MF* 335-40.[29]

There is one exception to the situation described above where, when faced with two incommensurable reasons, we are free to act on either reason since each reason is undefeated. As John Gardner and Timothy Macklem explain, the exception arises where the

---

[26] Ibid 338-339 (footnote omitted).

[27] Ibid 339.

[28] See eg the various essays in Chang (ed), *Incommensurability, Incomparability, and Practical Reason*. A clear discussion is provided in John Gardner and Timothy Macklem, 'Reasons', in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 440, 470-472.

[29] Endicott, *Vagueness in Law*, 42.

conflicting reasons which are incommensurable are reasons which exclude each other.[30] Ordinarily, where two exclusionary (second order[31]) reasons conflict, we decide which reason prevails in the normal way – i.e., on the basis of the weightier reason. However, where the two conflicting exclusionary reasons, which exclude each other, are themselves incommensurable, as Gardner and Macklem explain 'neither [reason] defeats the other. Thus neither prevents the other from exerting its exclusionary force. Thus both of the reasons for action are defeated by being excluded. Thus there is no way to act for an undefeated reason'.[32] In such cases, we cannot act rationally.

6.C.v. Multiple laws and commensurability

What happens where there are conflicts between more than two laws? The following analysis is highly provisional; the problem of conflicts involving multiple laws remains under-theorised and requires urgent investigation.

Let us reconsider an example that was discussed in Chapter 4:

> For instance, there are two mandatory norms, one of which enjoins Jones, a bus driver, to drive carefully, while another enjoins him to keep the time-table; moreover, there is a norm permitting Jones to have a break every two hours: each *pair* of norms (we suppose) can be jointly realized but it is impossible to realize all *three* norms jointly.[33]

[30] Gardner and Macklem, 'Reasons', in Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence* 473 (emphasis in original).

[31] For an explanation of the distinction between first order and second order reasons, see Raz, *Practical Reason and Norms*, 15ff. The distinction is not without controversy, but it has become widely accepted.

[32] Gardner and Macklem, 'Reasons', in Coleman and Shapiro (eds), *The Oxford Handbook of Jurisprudence*, 473.

[33] Lars Lindahl, 'Conflicts in Systems of Legal Norms: A Logical Point of View', in Bob Brouwer, et al (eds), *Coherence and Conflict in Law: Proceedings of the 3rd Benelux-Scandinavian Symposium in Legal Theory* (Kluwer Law and Taxation Publishers 1992) 39, 43 (emphases in original).

Let us also suppose that the first two norms may be commensurated, but the third norm (Jones being permitted to have a break every two hours) cannot be commensurated with the first two norms. Here, then, we have a mix of commensurables and incommensurables. How does this affect our classification or typing of the conflict?

The answer may become slightly clearer if we re-construct the conflict-situation as a conflict between two sets of laws. Imagine three laws – A, B, and C. The first set contains laws A and B, and the second set contains law C. The second set (law C) limits the realisation of the first set (laws A and B). Laws B and C may be commensurated (as against each other), but law A cannot be commensurated with law B or law C.

We must make a choice between the first set and the second set. But is this a choice between incommensurables? The first set contains one law (A) which is incommensurable with the law (C) in the second set. But the first set also contains one law (B) which is commensurable with the law (C) in the second set. There is a mix of commensurability and incommensurability in the first set. If we treat the first set as a single unit, then it seems that the presence of incommensurability in part of the set is sufficient to make the entire set incommensurable (as against the second set). It is not clear how the two sets could be commensurated when one of the laws involved (A) is incommensurable as against the law (C) in the second set.

There is, however, an arrangement where the presence of incommensurability need not entail that the conflict is between incommensurables. In the same scenario, imagine that the first set contains two laws (A and B), and these two laws cannot be commensurated. However, A and B *can* be commensurated with law C, which is in the second set. Here, I would suggest that the conflict is between commensurables.[34]

---

[34] This point demonstrates that there is some significance in determining how we arrange the two sets. This was considered further in Chapter 4.

These examples indicate that, in the case of multiple laws, incommensurability becomes significant only where there is an incommensurability that *cuts across* the two sets. This can be framed in another way. There is a conflict between incommensurables when the legal *choices* (reflecting the two sets) that are presented are in some way incommensurable, and this is only possible where there is incommensurability *as between* the legal choices (rather than *within* a legal choice – or within a set).

This matter is not of purely theoretical interest. As we shall see in Parts III and IV of the study, it can be significant in explaining certain conflicts between *jus cogens* rules and rules of ordinary international law.[35] But for simplicity's sake, I will only discuss conflicts between two laws in the remainder of this chapter.

6.C.vi. Accidental conflicts and commensurability

One last issue should be clarified. Where law A and law B cannot both be realised, this is often because (in the case of mandatory norms) what law A and law B both *require* cannot be jointly realised. However, there are some cases where the accidental (non-required) consequences of law A bring it into conflict with law B. In the previous chapter, this latter situation was described as an accidental conflict.

An accidental conflict is still a legal conflict. But how does commensurability fit in here, if the legal conflict is not located in the conflicting requirements of both of the conflicting laws? The answer is that we evaluate the commensurability of the laws in the normal way. Even though the laws are brought into conflict on the basis of the accidental consequences of one of the laws, when it comes to commensurability we are still trying to determine whether the conflicting laws are commensurable as against each other.

[35] In particular, conflicts between immunity rules and *jus cogens* crimes in international law.

6.D. The seriousness of the legal conflict

Thus far, I have discussed one dimension of the typology of legal conflict which I am defending in this chapter – namely, the commensurability of the laws. The second dimension of that typology concerns the seriousness of the conflict. According to our preferred formulation of legal conflict, there is a conflict where two laws cannot both be realised. What does it mean to say that any such conflict is more or less serious?

Although we often recognise that a conflict can be more or less serious, the notion of 'seriousness' is an empty vessel. In what follows, I will attempt to substantiate that notion by discussing various indicia of seriousness. These indicia are not exhaustive, nor is the presence of one or more of these indicia conclusive of the seriousness of the conflict. The indicia are signs – albeit *only* signs – that a legal conflict is more, or less, serious.

The basis of these indicia is the degree to which one law limits the realisation of the other law – such that both laws cannot be realised. The indicia relate, in one way or another, to the intensity of any such limitation.

6.D.i. The typology of seriousness

Seriousness exists in degrees, and is a relative measurement. The notion of seriousness only makes sense in the context of a relation or comparison, explicit or otherwise. We say that a situation is 'very serious', but this only makes sense in the comparison that we draw with other situations, some of which are even more serious and some less so.

For convenience, the typology in this chapter – and as it is applied later in this study – will generally refer to conflicts which are more serious, and conflicts which are less

serious. I do not wish to over-complicate the analysis by constructing a scale of seriousness from (say) one to ten. In any case, it is not useful to seek to quantify seriousness precisely. But none of this is meant to obscure the fact that seriousness is a scalar notion.

6.D.ii. Seriousness in other contexts

There is analysis of seriousness (including possible indicia of seriousness) in other contexts. For instance, we see analysis of indicia of seriousness in the context of sentencing of criminal offenders. In English law, s 143(1) of the Criminal Justice Act 2003 provides:

> In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence caused and any harm which the offence caused, was intended to cause or might foreseeably have caused.[36]

Of course, the above provision concerns the seriousness of *acts* which violate criminal laws, rather seriousness in the sense of conflicts *between* laws.

But there are larger problems in explaining how legal conflicts can be more or less serious, with or without the assistance or experience of seriousness in other contexts. The main problem is whether we can generalise about the seriousness of legal conflicts. The variety of laws, and the variety of conflicts between them (as indicated in Chapters 4-5), makes it difficult to provide indicia or criteria of seriousness which are applicable across all these cases *and* which are detailed and analytically worthwhile.

In spite of this problem, some general indicia of seriousness can be proposed. But these indicia are not exhaustive of the dimension of seriousness, which will also depend on contingent considerations which are specific to the conflict-situation in question.

---

[36] And see the guidelines provided by the Sentencing Council for England and Wales at <http://sentencingcouncil.judiciary.gov.uk/> accessed 8 January 2012.

In what follows below, I will discuss two possible indicia of seriousness which are in fact false positives. These are not relevant indicia of seriousness for the purposes of the typology in this chapter and the broader scheme of this study, and too much is obscured analytically by treating them as such. I will then discuss a more plausible set of indicia of seriousness.

6.D.iii. Incommensurability and seriousness

Let us begin with the first false positive. One may think that the mere presence of incommensurability is a sign that the legal conflict is more serious. One reason for thinking that the conflict is more serious is that a conflict between incommensurable laws may seem more difficult to resolve. And this does seem more likely (although it need not always be the case). After all, we cannot weigh or balance the two conflicting laws against each other, as we might in the case of conflicts between commensurable laws.[37]

So in this sense, seriousness is concerned with the difficulty of resolving the conflict. Furthermore, if we treat incommensurability as a sign of seriousness, then we can collapse the two dimensions of the typology – seriousness and commensurability – into one.

However, this argument leads to confusion and should be rejected. It is true that, in one sense, we can talk about how serious a conflict is in terms of how difficult it is to resolve. But this is seriousness in a different sense from that with which the typology in this chapter is properly concerned, because it conflates the actual conflict itself – namely, the *character* of that conflict – with the separate question of the consequences of the conflict (and *their* character).

[37] Of course, one can still act on either one of the laws, each of which remains undefeated. The difficulty is not that one cannot ultimately take action. The difficulty lies in the fact that the conflict itself remains unresolved (unless there is some non-weight-based priority that we may call upon to order or rank the two laws).

The reason why these two issues must be kept separate is found in the framework of this study. This study attempts to construct a typology of conflict, which has bearings on how we understand the consequences of conflicts. One leads to the other, but the two are not the same. Thus, to allow considerations relating to the resolution of conflicts (and, above all, their character – as more serious or less serious cases) to infiltrate the analysis of the character of the actual conflict itself pollutes the very means by which we will seek to understand conflict-resolution.

Indeed, aside from incommensurability, there may be further considerations which determine or influence whether the conflict is more difficult to resolve. For example, there may be a lack or absence of conflict-resolution rules (including ranking rules) in one legal order – as compared with a more detailed set of conflict-resolution rules in another legal order. But any such considerations are not properly included in the typology in this chapter, which addresses the character of the conflict itself.

Ultimately, as noted at the outset, the basis of our understanding of seriousness – for the purposes of the typology in this chapter – is the degree to which one law limits the realisation of another law, such that the two laws cannot both be realised. Considerations relating to the consequences of conflicts do not touch upon this issue. Thus, the typology in this chapter (as outlined in Figure 5.1 above) still holds. We can speak more serious conflicts between incommensurable laws, less serious conflicts between incommensurable laws, and so on.

6.D.iv. The importance of the laws and seriousness

Another false positive deserves mention. One may think that the seriousness of the conflict depends on how important the conflicting laws themselves are. Importance here refers to the

weightiness of the laws in question. If one or both of the conflicting laws are important (legally, morally, or otherwise), then this may be a sign that the conflict is serious. The laws are important, and the ends they seek to realise are important, so limits on their realisation are more troubling.

For example, one might think that a conflict between two constitutional laws is a sign that the conflict is more serious than a conflict between two ordinary laws. The constitutional laws may concern the very ordering of the state or government – as opposed, say, to a conflict in ordinary traffic laws.[38]

In one sense, it is true that a conflict between important laws may seem more serious than a conflict between less important laws. But this dimension of seriousness is not our concern. Our concern is more precise, since it focuses only on the degree or intensity of the limitation on the realisation of one law by another. The conflicting laws in question may be less important procedural rules (such as rules on time limits for bringing claims), or more important substantive prohibitions (such as the prohibition of genocide). The typology of conflict is agnostic as to these issues. It seeks only to identify conflicts which are more or less serious – irrespective of whether the laws themselves are important or otherwise. There can be serious conflicts between less important laws, and this should not be obscured.

We turn now to more plausible indicia or signs that the legal conflict in question is more serious.

6.D.v. Accidental conflicts

I argued in Chapter 5 that some conflict-situations were accidental conflicts. Arguably, an accidental conflict between two laws is a sign that the conflict is less serious than a conflict

[38] Of course, there is no obstacle to constitutional law being trivial in context – e.g., a constitutional rule concerning the salaries of, or maximum allowable vacation time for, certain public officials.

between the *requirements* of two laws (where those laws are mandatory norms). This is a tentative claim, but it may hold some water because the intensity of the limitation of a law will (I suggest) frequently be less severe where the conflict is accidental, rather than directly emerging between the requirements of the laws. But as is the case with all these indicia, the seriousness of the conflict is a matter to be judged with the benefit of the full context.

6.D.vi. Occasional conflicts

In Chapter 4, it was noted that laws may only conflict on certain occasions. I described these as occasional conflicts, but elsewhere they have sometimes been called partial conflicts. Occasional conflicts may be distinguished from full conflicts, where two laws conflict on every occasion.

Occasional conflicts tend to be less serious conflicts than full conflicts. This is because occasional conflicts generate fewer conflict-situations than full conflicts; in the case of two laws which conflict occasionally, there are only conflicts on certain occasions or in certain circumstances.

And within the category of occasional conflicts, the number of occasions of conflict may itself be an indicator of seriousness – e.g., an occasional conflict in which conflict-situations only arise extremely rarely, as against an occasional conflict where conflict-situations arise regularly (but not always).

Once again, I should clarify that occasional conflicts need not always be less serious than full conflicts. This is because the seriousness of a conflict does not depend solely on the number of conflicts that are generated or avoided. This is only a sign of the seriousness of conflicts, and there are other such signs (as discussed in this chapter).

6.D.vii. Laws of limited applicability

Another possible indication of seriousness can be drawn out of a clarification offered by Elhag et al concerning the relevance of 'world knowledge' for conflicts.[39] This clarification is, in some respects, an elaboration on the passage discussing occasional conflicts (above).

Imagine the following two rules: (1) you are obligated to drive on the left side of the road, and (2) you are obligated to drive on the right side of the road. These two rules clearly conflict. Nonetheless, these two rules conflict only for those subjects who are *drivers* (or who wish to drive). The rules are thus of limited applicability, in that they apply only to drivers.

By contrast, take the following two rules: (1) you are obligated to kill, and (2) you are prohibited from killing. In this case, the two rules conflict for every subject. It is not possible to avoid the conflict simply by being a particular class or category of subject (e.g., a driver or a non-driver). The rules apply to all subjects.

This indicates another possible way in which a legal conflict may be more or less serious. Where the laws in question are of limited applicability – e.g., they only apply to certain subjects, or to certain subjects who wish to act in a certain way – then the conflict may be deemed less serious.

6.D.viii. Laws with multiple requirements

This final mark of seriousness is, again, an elaboration on the notion of occasional conflicts. Our concern here is conflicts involving the requirements of laws. Whether a conflicting law

[39] Abdullatif AO Elhag, Joost APJ Breuker and Bob W Brouwer, 'On the Formal Analysis of Normative Conflicts' (JURIX 1999) 35, 41-43.

has various requirements, or whether its sole purpose is to limit the law with which it conflicts, is a sign of the seriousness of the conflict.

As noted, in one sense, this is an elaboration on the notion of occasional conflicts. It is one *reason* why there can be conflicts on certain occasions. Law *A* and law *B* may have multiple requirements, and two of these requirements may occasionally intersect; this might be the reason why there is, in relation to these two laws, a conflict on certain occasions.

6.E. Concluding remarks

In this chapter, I have constructed a typology of legal conflict which will be analytically useful for the remainder of this study. (But this is not to deny that other typologies of legal conflict will be useful for other purposes.)

There are two dimensions to my proposed typology. There can be conflicts between commensurable or incommensurable laws, and these conflicts can be more or less serious. This yields an analytical framework which will be applied in the remainder of the study. In Part III of the study, I will identify conflicts between rules of ordinary international law and *jus cogens* rules which involve commensurable or incommensurable laws, and which are more or less serious. In Part IV of the study, I will discuss the consequences of such conflicts, and it will be seen that these consequences can depend in part on the type of conflict with which we are dealing.[40]

[40] Arguably, the first dimension of the typology – commensurability or incommensurability – is, for our purposes, the more analytically significant. This will be reflected in the chapter organisation of Part III, and will also be seen in the consequences of identified conflicts (as analysed in Part IV).

Chapter 7. Conflicts Between Incommensurable Laws: *Jus Cogens* and Ordinary Custom

In Part I of the study, I criticised existing explanations of *jus cogens* in international law, and provided an alternative way to understand the nature of *jus cogens*. In Part II, I considered how laws (by which I mean legal rules) conflict with each other, and provided a typology of legal conflict.

All these elements will be brought together in the remainder of this study. In this chapter and the next chapter, I will rely upon the analysis of legal conflict in Part II to identify conflicts with *jus cogens*, and to classify these conflicts according to certain types – namely, whether the conflicts so identified involve commensurable or incommensurable laws, and whether they are more or less serious.

Conflicts with *jus cogens* may arise in many different areas of international law. In these next two chapters, however, I focus on selected areas of international law. These have been chosen partly because space is limited, but mostly because they are instructive. Focusing on conflict-situations in these areas allows us to see the typology of legal conflict advanced in Chapter 6 in action. Furthermore, the analysis in these areas invites us to reflect on the very character of *jus cogens* in international law.[1] In other words, the analysis is not confined simply to identifying and clarifying certain conflict-situations involving *jus cogens*. It also improves our understanding of *jus cogens* itself. This will be a persistent theme in the remainder of this study.

This chapter focuses on conflicts between certain customary immunity rules (in ordinary international law) and *jus cogens* crimes. This is one part of a broader issue in

[1] This is explored further in Part IV of the study – and, especially, Chapter 11, concerning the defeasiblity of *jus cogens*.

international law – namely, the judicial enforcement of *jus cogens* in national courts. The next chapter examines conflicts between treaties and *jus cogens* rules.

7.A. The immunity of State officials from the criminal jurisdiction of foreign States

In this chapter, my analysis of conflicts between *jus cogens* and customary immunity rules falls within the broad topic of the judicial enforcement of *jus cogens* in national courts. Various questions within that topic may be analysed. For instance, we might consider the question of civil claims against the State, or State officials, for alleged violations of *jus cogens* rules. That question has often come before national[2] and international[3] courts.

However, for reasons of space, I will focus on a specific question: whether there are conflicts between *jus cogens* crimes and customary rules granting immunity to certain State officials from criminal prosecution in the criminal courts of foreign States.[4]

I will assume for the purposes of the argument that the foreign State may lawfully exercise criminal jurisdiction over the conduct in question (and this will be explained below). Where a *jus cogens* crime is alleged to have been committed, the question is whether an official's claim of immunity from criminal prosecution in a foreign State results in a legal conflict between the immunity rule and the *jus cogens* crime – and if so, under what circumstances. I will argue that there can be conflicts in such cases.

---

[2] Eg *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26.

[3] Eg *Al-Adsani v United Kingdom* (2002) 34 EHRR 273.

[4] Analysis of possible conflict-situations involving other customary immunity rules (such as rules concerning immunity from civil claims) must wait for another time. It is worth noting, however, that no quick assumptions can be made about legal conflicts do indeed arise in these other areas. Each situation should be assessed on its own terms.

We must begin by explaining explain how, as a matter of customary international law, certain State officials enjoy immunity from criminal prosecution in foreign States. This requires that I sketch the rules on jurisdiction and immunity in international law.

7.A.i. An introduction to jurisdiction

Jurisdiction refers to the legal power or competence of an authority to make, apply or enforce the law. In this chapter I am concerned with the jurisdiction of States – i.e., the power of States (through their organs) to make or apply law.

The jurisdiction of States in international law is frequently divided into two, and sometimes three, types of jurisdiction. First, a State possesses prescriptive jurisdiction. This refers to the power of a State to prescribe laws regulating conduct – or, put another way, to make law which purports to regulate certain conduct. For example, as a matter of international law, a State has the power to make law which regulates conduct on its territory. Utopia may enact a law which provides that all persons on its territory are prohibited from committing murder. This exercise of prescriptive jurisdiction on the State's own territory is lawful under international law because territoriality is recognised as an accepted basis of prescriptive jurisdiction. There are several accepted bases of prescriptive jurisdiction in international law – e.g., the territoriality principle, or the nationality principle.

Second, a State possesses enforcement jurisdiction. This refers to the power of a State to enforce the laws which it has prescribed. This may be achieved through the State's police forces, its courts, other administrative bodies, and so on. In international law, a State is entitled to exercise enforcement jurisdiction in its own territory, but is not entitled to exercise enforcement jurisdiction in the territory of another State without that State's consent. Staying with the above example concerning the legal prohibition of murder, we

noted earlier that as a matter of prescriptive jurisdiction Utopia has the power to make a law prohibiting murder on its territory. Under international law, Utopia also has the power to *enforce* that prohibition of murder on its own territory – e.g., by punishing anyone on Utopian territory who commits murder within Utopian territory.

International lawyers sometimes refer to a third head of jurisdiction called adjudicative jurisdiction. This describes the power of a State to adjudicate on disputes in its courts. Sometimes this is treated as part of the enforcement jurisdiction of the State, and sometimes this is treated as a separate head of jurisdiction distinct from enforcement (or prescriptive) jurisdiction. For the purposes of this chapter, I will not treat adjudicative jurisdiction as a separate head of jurisdiction.

The jurisdiction of States, whether prescriptive or enforcement jurisdiction, can be further divided into two types: criminal jurisdiction and civil jurisdiction. Criminal jurisdiction refers to the power of a State to prescribe (per its prescriptive jurisdiction) or enforce (per its enforcement jurisdiction) *criminal* law – in other words, the power to criminalise conduct (prescriptive jurisdiction), and to punish criminal conduct (enforcement jurisdiction). By contrast, civil jurisdiction refers to the power of a State to prescribe or enforce civil (in the sense of non-criminal) law. As mentioned in 7.A, I will be focusing on the criminal jurisdiction of States (in terms of both prescriptive and enforcement jurisdiction) in what follows below.

7.A.ii. An introduction to immunity from jurisdiction

Although a State has the power to make (under prescriptive jurisdiction) and enforce (under enforcement jurisdiction) law under certain circumstances, these are subject to various limitations in international law. I am concerned here with one kind of limitation – namely,

immunity rules in international law. These are principally rules of customary international law, although there is also some treaty regulation.[5]

In international law, a State and its officials enjoy immunities from the jurisdiction of foreign States. These immunities are properly understood as immunities from the enforcement jurisdiction of foreign States. This area of law is complex, and various distinctions need to be drawn.

We turn first to State immunity. A State enjoys immunity in customary international law from the enforcement jurisdiction of foreign States in civil matters. Imagine that civil proceedings are brought against State Utopia in the civil courts of a State Dystopia. Let us assume that State Dystopia is lawfully able to exercise prescriptive jurisdiction over the conduct in question. However, Utopia can claim State immunity from those civil proceedings, according to international law. Since States cannot commit crimes in international law, criminal proceedings cannot be brought against a State in the criminal courts of foreign States.

But States also act through individuals – including their officials. The officials of States also enjoy immunity from the enforcement jurisdiction of foreign States, both in civil *and* in criminal matters. (Unlike States, individuals can commit international crimes according to international law.) We must distinguish between two rules of customary international law which grant immunity to State officials: first, immunity *ratione personae* (or personal immunity), and second, immunity *ratione materiae* (or official act immunity).

Immunity *ratione personae*, or personal immunity, protects a small class of incumbent State officials.[6] Personal immunity attaches to the status or office of the

[5] Eg the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property. I will focus on the customary law on immunity, and I will not deal with the relationship (eg similarities or differences) between the treaty and customary law on immunity.

[6] Note that Akande and Shah contend that there are in fact two types of personal immunity – the personal immunity attaching to incumbent, senior State officials, and the personal immunity of State officials on special missions to other States. This question need not detain us, however. See Dapo Akande and Sangeeta Shah,

individual concerned.[7] It protects the official from criminal or civil proceedings in foreign State courts for the duration of her stay in office,[8] but it is lifted on the official's departure from office. The officials who enjoy personal immunity in international law must be very senior. The reason for personal immunity is 'its value in facilitating international relations'.[9] This explains why the rule protects only the most senior State officials who represent their State on the international plane and are responsible for conducting international relations. The least controversial example of such an official is the Head of State. Other officials are also thought to enjoy personal immunity – e.g., the Head of Government or the Foreign Minister. Other senior (but lower-ranked) officials, such as Defence Ministers, are more controversial cases because it is unclear precisely who is protected by personal immunity, and where the limit is to be drawn. In recent times, the rule has been interpreted in light of the purpose(s) that personal immunity serves, as well as the changing context of modern international relations whereby a wider range of senior State officials may be involved in international relations on behalf of their respective States.

In addition to disagreement about who is protected by personal immunity, there is also disagreement about the precise breadth of its protection. It is unclear whether personal immunity protects the official as regards her official conduct only.[10] However, the present consensus is that personal immunity is a full shield – i.e., the immunity shields all conduct,

---

'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 European Journal of International Law 815, 817.

[7] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits) [2002] ICJ Rep 3, paras 52-3.

[8] Ibid para 51.

[9] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (2nd edn CUP 2010) 537 (footnotes omitted).

[10] See eg Belgium's written submissions to the ICJ in the *Arrest Warrant* case: Counter Memorial of the Kindgom of Belgium (merits phase), 28 September 2001, paragraph 0.26(c). Belgium stated that

> while Ministers for Foreign Affairs in office are in general immune from suit before the courts of a foreign State, such immunity applies only in respect of their official conduct for purposes of enabling them to carry out their official functions. It does not avail such persons in their private capacity or when they are acting other than in the performance of their official functions.

both official and non-official, as well as conduct prior to the official's assumption of office; but immunity for non-official acts only subsists so long as the person continues to remain in office. As Cryer et al suggest, personal immunity 'is not limited to any particular conduct; it provides complete immunity of the *person* of certain office-holders while they carry out important representative functions'.[11]

Immunity *ratione materiae*, or official act immunity, protects any State official, whether incumbent or former, and no matter how senior or low-ranking, in respect of acts which that official carried out in performance of her official duties. These acts – being 'official' acts – are treated as imputable to the State, rather than to the individual concerned. As Cryer et al explain, official act immunity

> … protects *conduct* carried out on behalf of a State. It is linked to the maxim that a State may not sit in judgment on the policies and actions of another State, since they are both sovereign and equal. If a State could bring criminal proceedings against the individual officials who carried out official functions of another State, the State would be doing indirectly what it cannot do directly, namely, acting as the arbiter of the conduct of another State.[12]

For this reason, unlike personal immunity (which attaches simply to the office, and thus protects the current office-holder only), official act immunity persists in protecting an official even after the official has left office.

Personal immunity and official act immunity can overlap. This arises in the case of incumbent senior State officials, such as Heads of State. These officials enjoy personal immunity on account of their office, but they also, simultaneously, enjoy official act

[11] Cryer, et al, *An Introduction to International Criminal Law and Procedure*, 533 (emphasis in original).

[12] Ibid (emphasis in original).

immunity in relation to those acts which they carry out during their stay in office and which, as official acts, are imputable to the State.

All these immunity rules can be waived by the official's State. As Cryer et al explain, in relation to personal immunity and official act immunity, 'the purpose is not to benefit the individual, but to protect official acts [in the case of official act immunity] or to facilitate international relations [in the case of personal immunity]. It is the State which is the real beneficiary of the immunity, and it is the State which may waive it, irrespective of the wishes of the person claiming the immunity'.[13]

In addition, there are further immunity rules in international law – e.g., immunity from execution. But these will be left to one side. In the following analysis, my focus is on the immunities of State officials – i.e., personal immunity and official act immunity.

7.A.iii. Immunity rules conflict with the rules on jurisdiction

Finally, we should note that immunity rules conflict with the rule on enforcement jurisdiction. These are separate rules. The rule concerning the enforcement jurisdiction of States delineates the circumstances in which States can lawfully exercise enforcement jurisdiction over a particular question. The rule allows States to enforce its law on its territory (or in the territory of another State with the consent of that State). However, the rules on the immunities of State officials, being separate rules, limit the realisation of the rule on enforcement jurisdiction. That is, the immunities limit the realisation of the rule on enforcement jurisdiction, which purports to encompass all actors within the given State's territory, by carving out a protected space for certain individuals.

[13] Ibid 534.

There is sometimes a debate as to whether immunity rules are properly understood as 'exceptions' to the rules on jurisdiction.[14] But this debate, for our purposes at least, somewhat misses the point. As noted in Chapter 4, rules which are exceptions to other rules are – as a theoretical matter – in conflict with those rules. In fact, whether we classify the rules as exceptions is not relevant for our purposes. We must simply ask whether the rules conflict, and we do so on the basis of analysis of legal conflict provided in Chapter 4. According to that analysis, there is a conflict between the rule on the enforcement jurisdiction of States and the rules granting immunities to State officials. This maps on to the discussion of Hohfeldian immunities and powers in Chapter 4, where we clarified that Hohfeldian immunities and powers conflict (4.H.v). The enforcement jurisdiction of the State may be understood as the Hohfeldian power of the State to enforce the laws which it has prescribed – say, by punishing Octavian for committing a crime.[15] The exercise of the Hohfeldian power changes Octavian's normative situation. And if Octavian is protected against such punishment by a customary immunity rule, this constitutes a Hohfeldian immunity which conflicts with the Hohfeldian power.

7.B. International crimes

Let us remind ourselves of our main focus in this chapter – namely, the immunities of State officials from the criminal (enforcement) jurisdiction of foreign States, and whether they persist where a *jus cogens* crime has been alleged. Most of these aspects have been unpacked. However, one further issue needs to be discussed as a preliminary matter.

[14] Eg Hazel Fox, *The Law of State Immunity* (2nd edn, OUP 2008) 13ff.

[15] However, note that, in some cases, it is possible that the State has a duty to enforce under international law, and not merely a power (which may be exercised or not).

This issue concerns international crimes, and *jus cogens* crimes. We must consider what it means to say that a certain kind of conduct in international law is not merely prohibited, but *criminally* prohibited. This is further necessary groundwork before we can understand whether there are conflicts between *jus cogens* crimes and the immunities of State officials – and, if so, conflicts of which type.

7.B.i. International criminal law and *jus cogens*

International criminal law is concerned with the conduct[16] of individuals which is deemed to be criminal on the international plane. Attention should be drawn to particular subset of international criminal law – namely, 'pure' international crimes. Pure international crimes emerge through international law-making processes; in other words, they are crimes which are directly created in international law.[17] A further key feature of pure international crimes is that they directly criminalise conduct as a matter of international law.[18]

The prosecution of such crimes may occur either at the international level (e.g., in the International Criminal Court), or at the national level in the form of national prosecutions of international crimes. Examples of pure international crimes include aggression, genocide, war crimes, and crimes against humanity.

How is this notion of pure international crimes helpful? I am interested, after all, in those international crimes which enjoy *jus cogens* status – i.e., *jus cogens* crimes.[19] First, *jus*

[16] This term is loose, since international criminal law may also apply (for example) to mental states such as what we intend to do, or to situations where we fail to do what we intend to do.

[17] Cryer et al, *An Introduction to International Criminal Law and Procedure*, 8.

[18] Robert Cryer, 'The Doctrinal Foundations of International Criminalization', in M Cherif Bassiouni (ed), *International Criminal Law: Volume I: Sources, Subjects, and Contents* (3rd edn, Martinus Nijhoff Publishers 2008) 107, 108.

[19] It has sometimes been suggested *jus cogens* only comprises international crimes, and that a violation of *jus cogens* is automatically an international crime – see eg the discussion in Nina HB Jørgensen, *The Responsibility of States for International Crimes* (OUP 2003) 85ff. But this view is mistaken, since rules which

cogens crimes tend to be pure international crime. Aggression, genocide, war crimes, and crimes against humanity are generally accepted as *jus cogens* crimes. But why *these* crimes? The reason why these (pure) international crimes enjoy *jus cogens* status can be better understood by referring back to Chapter 2, in which I argued that a rule of international law becomes *jus cogens* because it is regarded as morally paramount by international legal officials. This applies also to rules of international criminal law. The pure international crimes – aggression, genocide, and so on – are believed by legal officials to be morally paramount, and on this basis they acquire *jus cogens* status and become *jus cogens* crimes.

I should add that I am not concerned to analyse precisely which international crimes might possess *jus cogens* status, and which might not. Rather, for the purposes of this study, I will assume that the (pure) international crimes of aggression, genocide, war crimes and crimes against humanity enjoy *jus cogens* status. These are safe assumptions, since there is consensus about the *jus cogens* status of these crimes.

Finally, as a matter of present day international law, the *jus cogens* crimes with which I am concerned relate to acts committed by individuals.[20] In particular, it is thought that States cannot commit such crimes, although this has been disputed in the past.[21]

7.B.ii. Criminalisation

---

are *jus cogens* are not automatically crimes. For example, the right of self-determination (which is alternatively framed as the obligation to respect the right of self-determination) is often claimed to possess *jus cogens* status in international law, but there is no international crime of failing to respect the right of self-determination.

[20] See further Cryer, 'The Doctrinal Foundations of International Criminalization', in Bassiouni (ed), *International Criminal Law: Volume I*, 121-122. And in particular, see M Cherif Bassiouni, 'The Subjects of International Criminal Law: *Ratione Personae*', ibid 41.

[21] In an earlier set of draft articles on State responsibility, the International Law Commission proposed in draft Article 19 that States could commit international crimes, and that its articles should address the criminal responsibility of States in international law. Draft Article 19 stated that an international crime was '[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole'. Draft Article 19 was contentious, and was dropped by the ILC in its final 2001 Articles on State Responsibility.

We must also consider the implications of criminalisation. What does it even mean to *criminalise*? Thinking about criminalisation is useful because the main legal conflicts which I will be examining below are conflicts involving *jus cogens* crimes. And although we should proceed with caution, it *may* be possible to draw upon the philosophy of criminal law more generally where this can illuminate international criminal law – and, in particular, those international crimes which are *jus cogens* crimes.[22] In what follows, I will sketch some of the theoretical landscape concerning criminalisation – i.e., the qualities which make a legal rule a *crime*. I should emphasise, however, that determining these qualities is a fraught exercise; the theoretical literature is vast, and the debate is ongoing. Accordingly, the analysis below is highly provisional.

John Gardner explains that criminal law is about wrongs of a certain kind. All crimes are wrongs under the law, although not all legal wrongs are crimes (e.g., there are civil wrongs such as breaches of contract).[23] Criminal law does not merely prohibit conduct – i.e., treat the conduct as a wrong. Criminal law is also concerned with the *repression* of conduct in a broader sense.

This idea of repression or discouragement was discussed by H.L.A. Hart, who asked:

> Why are certain kinds of action forbidden by law and so made crimes or offences? The answer is: To announce to society that these actions are not to be done and to secure that fewer of them are done. These are the common immediate aims of making any conduct a criminal offence and until we have

[22] There may be disagreement about whether international crimes are, as a theoretical matter, entirely autonomous from crimes in national law. See, for example, the discussion in Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008) 276. However, an international crime is, nonetheless, a *crime* first and foremost. Therefore, there is value in engaging with theoretical writing on the qualities of a crime.

[23] John Gardner, 'Reply to Critics', in John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007) 239.

> laws made with these primary aims we shall lack the notion of a 'crime' and so of a 'criminal'. Without recourse to the simple idea that the criminal law sets up, in its rules, standards of behaviour to encourage certain types of conduct and discourage others we cannot distinguish a punishment in the form of a fine from a tax on a course of conduct.[24]

However, mere discouragement or repression is still too inclusive a quality. That is, it accommodates many rules which we would not regard as criminal, as Hart himself noticed:

> Taxes may be imposed to discourage the activities taxed through the law does not announce this as it does when it makes them criminal. Conversely fines payable for some criminal offences because of a depreciation of currency become so small that they are cheerfully paid and offences are frequent. They are then felt to be mere taxes because the sense is lost that the rule is meant to be taken seriously as a standard of behaviour.[25]

Repression of conduct is a starting point, but no more. We might therefore suggest that the criminal law's aim of repressing conduct is linked to (at least) two further, and related, criteria. The first is the idea that *criminal* wrongs are subject to certain distinctive consequences – namely, prosecution and punishment. The second is the idea that criminal law seeks not just to prohibit the conduct in question, or to impose particular consequences for violations, but also to *condemn* the offender. Thus, as Antony Duff explains, the 'central purpose' of criminal law

> … as a distinctive kind of law marked out from … other kinds and aspects of law … , is to define, and to declare the wrongfulness of, certain kinds of wrongdoing, in order *not only* to dissuade citizens from committing such

[24] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, OUP 2008) 6-7.

[25] Ibid.

> wrongs, but also to provide the appropriate responses to those who commit, or are alleged to have committed, such wrongs. In defining conduct as criminal, the law identifies it as conduct from which we have good reason to refrain, and thus also as conduct for which we will be called to public account, and *condemned* and *punished*, if we engage in it. To ask whether we should have a system of criminal law is therefore to ask whether there are kinds of wrongdoing that the state should identify and respond to in such a way – kinds of wrongdoing that the state should take seriously as wrongdoing, and expect its citizens to take similarly seriously.[26]

I will take these two further criteria – the particular consequences which follow from criminal wrongdoing, and the condemnation that is associated with criminal wrongdoing – in turn. First, in relation to the distinctive consequences of *criminal* wrongdoing, Duff notes:

> … most legal systems distinguish criminal from civil wrongs: wrongs that ground a criminal prosecution, from those that ground a civil case for damages brought by the injured party. *We can clarify the concept of crime by focusing on this distinction*.[27]

This is especially so, Duff thinks, in cases where

> [t]he same conduct … constitutes both a criminal and civil wrong, as is shown most dramatically when, after a failed prosecution or a decision not to prosecute, the victim or her family bring a civil case for damages against the alleged wrongdoer: but we can still usefully ask what the difference is

[26] Antony Duff, 'Theories of Criminal Law' at <http://plato.stanford.edu/entries/criminal-law/> accessed 14 March 2012 (emphasis added). There are certain additional qualities to which Duff draws attention, but these will not be considered here. For example, in the above passage, Duff suggests that criminal conduct is treated by the law as conduct 'from which we have *good reason* to refrain' (emphasis added). By this, he means that the law treats crimes as *moral* wrongs. Whether they are indeed moral wrongs is a separate matter, but this is how the law portrays them.

[27] Ibid (emphasis added). There can of course be civil remedies other than damages.

between defining and treating conduct as a criminal wrong and defining and treating it as a civil wrong …[28]

And as Jeremy Horder suggests, according to orthodox understandings (which may or may not be persuasive), laws are criminal in character simply 'when persons who violate them are subject to punishment'.[29] This is also supported by Douglas Husak, who states that '[t]he single feature that is most helpful to identify the nature of the criminal law is that laws are criminal when they subject persons who violate them to state punishment'.[30] Husak describes this as the 'orthodox position', which 'identifies criminal laws by reference to the sanction that may be imposed on persons who violate them'.[31]

I have emphasised that there is ongoing debate about the qualities which are essential to, or distinctive, of criminal law – the qualities which make criminal law what it is. For example, contrary to some of the suggestions immediately above, there have been attempts to separate the theory of criminal law from the theory of punishment.[32] But if Duff is right about prosecution being one such distinguishing criterion, then this suggests that the consequences attached to the wrongdoing – in the case of *criminal* wrongdoing, the criminal prosecution and punishment that follow – constitute a useful way of distinguishing criminal wrongdoing from civil wrongdoing.

In other words, to criminalise wrongdoing is to assume – among other things – that certain kinds of consequences attend upon the wrongdoing in question. If this is correct, arguably there is little reason to assume that international crimes, including *jus cogens*

---

[28] Ibid.

[29] Jeremy Horder, 'Criminal Law', in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003) 226, 243.

[30] Douglas Husak, 'Criminal Law Theory', in Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005) 107, 110-111.

[31] Ibid 111.

[32] See eg Gardner, *Offences and Defences*.

crimes, are different in this regard. At the very least, reasons must be presented as to why criminalisation on the international plane does not involve this same consideration – i.e., the expectation of certain consequences (prosecution and punishment) which give the rule its criminal character.

Furthermore, this criterion (concerning the consequences of criminal wrongdoing) draws attention to the non-optional character of those consequences, as distinct from the consequences of civil wrongdoing. In the case of civil wrongs, the claimant can choose not to bring civil proceedings. But in the case of a crime, this is generally not thought to be possible. The victim is not in control of the proceedings. There is an *expectation* of certain consequences (prosecution and punishment) on the part of the authorities – at least in national criminal law. And again, this may be relevant to *jus cogens* crimes on the international plane. The very character of these *jus cogens* rules – as crimes – may involve similar expectations. And the lack of enforcement of *jus cogens* crimes – which is, for many, a continuing disappointment – would simply represent a failure to live up to expectations.

A second quality of criminal law, mentioned above, is that it involves condemnation. To be convicted of a crime is to face condemnation. Hart was worried about distinguishing crimes from other wrongs which result in fines or penalties. As Duff suggests, condemnation may be one such distinguishing criterion. For mere fines or penalties are not condemnatory in the way that criminal law is.

It is difficult to argue that international criminal law and national criminal law are too different in terms of these qualities. Indeed, the relationship between the two closes even further when we note that, in the context of national prosecutions for international crimes, international criminal law is ultimately transposed into the national criminal law of States (e.g., via national legislation). The former *becomes* the latter – and so the theoretical considerations applicable to both also intertwine.

7.B.iii. International law writing on the qualities of a crime

I have tentatively suggested that the qualities discussed above, concerning what it means for a wrong to be a *criminal* wrong, are relevant to international criminal law. These qualities have also been acknowledged in the writing on international criminal law itself.

For example, Robert Cryer draws attention to the role of international criminal law in discouraging conduct, and suggests that concerns regarding 'whether or not crime is the only, or best, way of discouraging [certain] conduct' are relevant at the international level, as they are at the national level.[33] Cryer then notes that '[c]riminal law is one of the most coercive forms of authority any society has, and it should not be resorted to lightly'.[34] This precisely draws attention to the particular consequences which follow from criminalisation – particular *coercive* consequences which serve to distinguish criminal wrongdoing from other forms of wrongdoing.

Further, as M. Cherif Bassiouni explains, '[i]nternational criminal law conventions rely on the indirect enforcement system. That system is predicated on the assumption that each state party to an international criminal convention will enforce its provisions through its national criminal laws and will cooperate in the prosecution and punishment of offenders'.[35] The focus on national prosecutions of international crimes is reflected in international legal instruments, including in particular the provisions of the Statute of the International Criminal Court enshrining the principle of complementarity (the principle that ICC jurisdiction complements, rather than replaces, national criminal prosecutions). Elsewhere, it has been

[33] Cryer, 'The Doctrinal Foundations of International Criminalization', in Bassiouni (ed), *International Criminal Law: Volume I*, 128.

[34] Ibid.

[35] M Cherif Bassiouni, 'International Crimes: The *Ratione Materiae* of International Criminal Law', in Bassiouni (ed), *International Criminal Law: Volume I*, 157-158 (footnote omitted).

stated that '[i]nternational crimes are primarily intended to be prosecuted at the domestic level'.[36]

I do not wish to deny that there may be specific qualities of international criminalisation which separate it from national criminal law. These might, for example, derive from the distinctive purposes that international criminal law serves. For example, Jean Galbraith argues that there are three different purposes of international criminal justice: '(1) bringing perpetrators to justice and providing retribution for victims – or domestic-criminal-law-styled aims, (2) creating a historical record of mass atrocities, and (3) helping transitioning societies achieve peace and reconciliation'.[37] The third purpose, for instance, might distinguish international from national criminal law.

Nonetheless, there is arguably a common *core* concerning what a crime is – whether nationally or internationally. And this is reflected in Galbraith's articulation of the first purpose of international criminal law – itself comprising a cluster of 'objectives [resembling] those of classic domestic criminal law: bringing perpetrators to justice, interrupting crimes and deterring future ones, and providing retribution for the victims'.[38]

7.B.iv. Concluding remarks on *jus cogens* crimes

The criminalisation of conduct is significant. An ordinary (non-criminal) prohibition of conduct, such as a rule stating 'No vehicles in the park', seeks to repress certain behaviour. The criminalisation of this behaviour – i.e., making the rule a crime – adds something to the

[36] Cryer et al, *An Introduction to International Criminal Law and Procedure*, 64.

[37] Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 Michigan Journal of International Law 79, 83. Note that Galbraith is mainly discussing international criminal trials in international (or internationalised) courts and tribunals, rather than the enforcement of international criminal law in the national courts of States.

[38] Ibid 85.

character of the rule, and changes how the rule should be understood. If criminalisation did not entail such additional qualities, then why not criminalise everything? (For the purposes of this argument, I am leaving to one side other rules, such as rules on penalties, which are triggered in the case of *crimes*, but not in the case of non-criminal conduct. I am instead focusing on the character of the substantive criminal rule itself itself.)

These arguments have been reflected, to some extent, in the theoretical debates about whether States can commit international crimes – and particularly in the thought that State criminality should only refer to certain State wrongs, and that these wrongs entail sanctions or penal consequences. Many examples are available in the literature.[39]

Overall, I have argued that *jus cogens* crimes, being crimes, possess certain qualities which distinguish them from other legal rules. This has important implications for the way in which we understand conflicts between *jus cogens* crimes and immunity rules, and it is to this issue which we now turn.

7.C. Legal conflicts between *jus cogens* crimes and the immunities of State officials

The preceding discussion was necessary groundwork for the analysis that follows. For there are several questions which we need to address when identifying legal conflicts: knowing what the two rules before us require, and then, given what the two rules require, deciding whether they conflict on the basis of our theory of legal conflict. The preceding discussion examined the first question. But we can now address the question whether there are conflicts

[39] For instance, as regards sanctions, Hazel Fox states: 'Whether the State has capacity in international law to commit a crime and the nature of the sanctions for such conduct; whether they amount to anything more than a decision and adoption of measures by the UN Security Council under Chapter VII of the Charter: these matters have provoked a great deal of discussion and controversy among international jurists'. See Fox, *The Law of State Immunity*, 88. It is clear from this passage that there is a close connection between the idea of crime and the question of sanctions or consequences.

between *jus cogens* crimes and the immunities of State officials from the criminal jurisdiction of foreign States. I will argue that conflicts can arise between these rules.

In what follows below, when I mention an 'immunity rule', I am referring interchangeably to either personal immunity or official act immunity.

7.C.i. Three options

In Part II of this study, I defended the claim that two laws conflict where they cannot both be realised. Bearing that analysis in mind, there are three ways to explain the legal conflicts that arise in this area of international law. All three options will be discussed in detail.

The first option is that there is a legal conflict between two rules – the *jus cogens* crime and the immunity rule.[40]

The second option is that there is a legal conflict between two *sets* of rules – set A and set B. Set A contains the *jus cogens* crime and also the rule on State jurisdiction. (The jurisdictional rule is not *jus cogens*.) Set B contains the immunity rule. In explaining this second option, I will be relying on the analysis in Chapter 4 concerning conflicts between sets of rules. In that analysis, I suggested that a legal conflict may arise not simply between two laws, but also between two sets of laws – and that a set can contain more than one law.

The third option is a modification to the first option. According to the third option, there is an *accidental* conflict between the bare *jus cogens* crime and the immunity rule. Accidental conflicts between legal rules were discussed in Chapter 5.

It is not entirely certain which of the three options should be preferred. Indeed, it may be that we are entitled to remain agnostic on this issue because the options are similar in

[40] But even here, we are already dealing with a set in the case of the *jus cogens* crime. This is because the *jus cogens* crime actually describes a cluster of legal standards which constitute the crime itself. This will be discussed in further detail below.

their plausibility. This is part-and-parcel of the difficulties of explaining legal conflicts in theoretical terms. My provisional view is that the third option is the most persuasive for the reasons set out below. Nonetheless, I now turn to consider each option.

7.C.i.1. The first option

According to the first option, there is a legal conflict between two rules – the *jus cogens* crime and the immunity rule. The immunity rule and the *jus cogens* crime cannot both be realised, because what they both require is incompatible.

In fact, the way in which I have formulated this (possible) legal conflict is somewhat misleading. This is because an international crime, and thus a *jus cogens* crime is not (necessarily) a single rule, but actually a shorthand description of a cluster of rules. For example, the international crime of aggression encapsulates separate rules on the prohibition of the use of force, the right of self-defence, necessity and proportionality, gravity, the mental element (or *mens rea*) of the crime, and so on. Accordingly, this cluster of rules might be better represented by way of a set. We would therefore have a conflict between two sets of rules – set A containing multiple rules (these various rules defining the crime which enjoys *jus cogens* status), and set B containing one rule (the immunity rule). However, in order to keep matters simple, I will treat this first option as a conflict between two rules – the *jus cogens* crime and the immunity rule.

How is it that the immunity rule and the *jus cogens* crime cannot both be realised? This may be illustrated using a hypothetical example. The example involves the personal immunity of an incumbent Head of State, and the *jus cogens* crime of genocide. But the analysis is not restricted to this case; it also applies to other *jus cogens* crimes, and (with some modifications) to official act immunity as well.

Genocide is an international crime, and also a *jus cogens* crime. Imagine that there is an individual who was targeted by a programme of genocide in State Dystopia. Dystopia's Head of State was one of the authors of the genocide. The victim is now a refugee in State Utopia.[41] The Head of State of Dystopia is visiting Utopia and the victim wishes to see a prosecution brought against the Head of State of Dystopia in the criminal courts of Utopia for committing the international crime of genocide. I will assume that Utopia has prescriptive jurisdiction over the alleged conduct (i.e., the genocide committed in Dystopia).[42] Yet according to customary international law, the Head of State of Dystopia enjoys personal immunity from the enforcement jurisdiction of Utopia.

This is an example of a conflict between the *jus cogens* crime of genocide and the customary rule of personal immunity. The immunity rule prevents or limits the realisation of the *jus cogens* crime, which, being a crime, is plausibly understood as requiring the repression of genocide. (As discussed earlier, this repression involves the expectation of punishment, and the condemnation, of the offender.) The repression of genocide, including the expectation of punishment, might be further realised if the Head of State of Dystopia could be prosecuted for genocide in Utopia's criminal courts. One possible forum for further realising the criminal prohibition of genocide is made unavailable – this being, by definition, a limit or constraint. Thus the immunity rule and the *jus cogens* crime cannot both be realised.

Some may deny that there is a legal conflict in the above scenario. However, modifying the facts makes the legal conflict even more salient. Imagine now that the genocide in Dystopia, under the direction of its Head of State, is ongoing. The Head of State

[41] For these purposes, the victim's nationality does not matter.

[42] This is not controversial. In particular, it is accepted under international law that States are entitled to exercise universal prescriptive jurisdiction over the international crime of genocide – ie wherever it occurs in the world. Enforcement jurisdiction, of course, is restricted to the territory of the State (unless it has the consent of another State).

of Dystopia then decides to visit Utopia in order to assist with that commission of genocide (e.g., by raising funds, or seeking other kinds of support, from various unsavoury organisations in Utopia).[43] On these modified facts, the prosecution of the Head of State of Dystopia in the criminal courts of Utopia would be a way of *interrupting* or undermining the very commission of genocide. Yet the Head of State will claim immunity from prosecution. This is another kind of limit on the realisation of the criminal prohibition of genocide.

Both fact-situations are conflict-situations. In each situation, recognising personal immunity limits the realisation of the *jus cogens* crime. In the first situation, personal immunity limits the repression (including the expectation of punishment, and the condemnation) of the crime. This is also the case in the second situation, where in addition personal immunity prevents the very commission of the crime from being interrupted or undermined – e.g., by inhibiting the free movement and fund-raising of the Dystopian Head of State within Utopia.

To clarify still further, let us imagine a final, and rather extreme, hypothetical scenario. Genocide is an international crime, and indeed a *jus cogens* crime. The crime attracts individual criminal responsibility, and its scope of operation is substantiated by further rules of international criminal law (e.g., rules of joint criminal enterprise which expand liability). But in addition, there is an immunity rule according to which *every individual* in the world enjoys immunity from prosecution for the crime of genocide in the criminal courts of foreign States – and, moreover, in any international (or internationalised) criminal courts as well. This immunity lasts for life, unless the protected individual chooses to waive her protection. In this world, the view that there is no conflict at all between the *jus cogens* crime of genocide and this all-encompassing immunity rule becomes very difficult to sustain. This gives shape to the thought that immunity rules and bare *jus cogens* crimes *can*

[43] The situation could be even more extreme. Imagine that the Head of State of Dystopia's genocide cannot proceed without the requisite assistance from certain groups within Utopia.

conflict. In the case of personal immunity, or official act immunity, the conflict is more modest[44] – but the underlying tension is the same one.

7.C.i.2. The second option

The second option is that there is a legal conflict between two sets of rules – set A and set B. Set A contains the *jus cogens* crime *and* the rule on enforcement jurisdiction (which is not *jus cogens*).[45] Set B contains the immunity rule. The difference between the first option and the second option is that, in the latter, the rule on enforcement jurisdiction is added directly into the mix.

Jurisdictional rules have always been present in our hypothetical example. For immunity rules only become relevant when jurisdiction is available. That is, we cannot talk about the immunity of State officials *from* the criminal jurisdiction of a foreign State, unless that foreign State can lawfully exercise prescriptive and enforcement jurisdiction over the legal question in the first instance. When discussing the first option, I assumed that Utopia had prescriptive jurisdiction over the conduct; and since the Dystopian Head of State was present on Utopia territory, Utopia also had enforcement jurisdiction (in principle). The issue, however, was that the Dystopian Head of State could claim personal immunity, and thus block Utopia's exercise of enforcement jurisdiction (in the form of a criminal prosecution in Utopian courts).

The addition of the jurisdictional rule directly into the mix is significant in explaining the legal conflict. According to the first option, there was a conflict between the immunity rule and the *jus cogens* crime; and the jurisdictional rules, while assumed, remained in the

[44] The seriousness of the conflict is addressed further below.

[45] I will leave to one side the question whether there are jurisdictional rules which are *jus cogens* – eg a right, or an obligation, to prosecute certain *jus cogens* crimes which is itself *jus cogens*.

background. According to the second option, however, the conflict arises between the immunity rule on the one hand (in set B), and *both* the *jus cogens* crime *and* the rule on enforcement jurisdiction on the other hand (in set A).

First, the immunity rule in set B conflicts with (limits the realisation of) the rule on enforcement jurisdiction in set A. The conflict between jurisdictional rules and immunity rules cannot, as a theoretical matter, be doubted.[46] This in itself establishes a conflict between the two sets – A and B. Second, the immunity rule (in set B) also conflicts with the *jus cogens* crime (also in set A). The reasons for this were discussed above in relation to the first option.

To summarise, the immunity rule implicates both rules in set A. The immunity rule is an immunity from jurisdiction, which implicates the rule on enforcement jurisdiction in set A. It is also in conflict with the *jus cogens* crime in set A.

7.C.i.3. The third option

The third option is a modification to the first option. According to the third option, there is an *accidental* conflict between the bare *jus cogens* crime and the immunity rule. The accidental action entailed by applying the immunity rule is that the immunity rule is brought into conflict with the *jus cogens* crime – and thus both cannot be realised.

If we take this approach, then we are free to acknowledge that the actions required by both the immunity rule and the *jus cogens* crime do not conflict. What each rule requires is compatible. The immunity rule only requires that a State official is protected against the enforcement jurisdiction of a foreign State – and this just does not conflict with what the *jus cogens* crime requires. However, there are certain accidental (non-required) actions which

[46] See the discussion concerning conflicts between jurisdictional rules and immunity rules above (at 7.A.iii).

are entailed by the application of the immunity rule, and these can limit the realisation of the *jus cogens* crime. These accidental actions may vary depending on the case. Take the *jus cogens* crime of genocide, and suppose that the official has participated in genocide. The accidental (non-required) action entailed by acting on the immunity rule is that the official in question is not prosecuted by a foreign state (in these circumstances) for the *jus cogens* crime of genocide – and this means that the state is disobeying what the *jus cogens* crime requires, namely, the repression and *punishment* of genocide. The accidental action entailed by acting on the immunity rule brings that rule into conflict with the requirement of the *jus cogens* crime, and hence the two rules conflict (because both cannot be realised).

This analysis bears similarities to the discussion of the legal conflict under the first option. The only difference is that here, we are treating the actions entailed by applying the immunity rule as *accidental* (or non-required) consequences – whereas, according to the first option, those very same actions were required by the immunity rule.

In light of this, perhaps one might criticise the idea of accidental conflicts, which I advanced earlier in the study, as being theoretically unproven. A critic may suggest that I have not done enough to demarcate what an accidental conflict is, which has led me into precisely these kinds of speculations. Faced with the same legal rules and the same sets of facts, I am not able to state firmly whether the ensuing legal conflict is accidental or not.

This criticism, however, should be rejected. The above analysis is tentative, but this is not on account of any particular failings in our theory of accidental conflicts. Rather, the fault-line – knowing how to classify this and other conflict-situations – is unavoidable, born out of a separate problem concerning the different (and plausible) ways of interpreting legal rules. In this case, we are simply seeing different interpretations of what the immunity rule requires.[47] The interpretation of what the immunity rule requires is broader under the first

[47] This problem was discussed in Chapter 5 – see especially 5.C.ii.

option, hence a conflict emerges between what the immunity rule requires and what the *jus cogens* crime requires. According to this third option, what the immunity rule requires is understood more narrowly, hence its accidental (or non-required) consequences assume greater significance.

7.C.ii. Summarising the three options

So we have three ways of explaining legal conflicts between the immunities of State officials and *jus cogens* crimes. The following is a brief summary of each option.

The first option clarifies that there can be a legal conflict between an immunity rule and a *jus cogens* crime. What each rule requires is incompatible. According to this first option, the criminal character of the wrong means that it requires to be repressed (in the form of an expectation of punishment, as well as condemnation, of the offender). In other words, the crime – being a crime – requires to be enforced in certain ways. The immunity rule limits the realisation of this enforcement.

The second option introduces a jurisdictional rule (specifically, the rule concerning the enforcement jurisdiction of States) directly into the conflict. In the first option, the jurisdictional rule was merely in the background. This second option, which brings the jurisdictional rule front and centre, helps us to understand a key difference between the prosecution of crimes by State authorities in national law or international law. In international law, there are specific rules concerning the jurisdiction of States which need to be satisfied in the first instance before a prosecution can proceed. According to the second option, the jurisdictional rule is part of the conflict itself.

The third option is similar to the first option in that it contends that a conflict emerges between the immunity rule and the bare *jus cogens* crime. However, the conflict is

accidental – namely, the accidental action which ensues when the immunity rule is applied is such that this limits the realisation of the *jus cogens* crime.

As I suggested earlier, my provisional view is that the third option – the accidental conflict between the immunity rule and the *jus cogens* crime – is the most persuasive. I should note, however, that it is possible that some of these options overlap. In particular, the first and the third options may overlap. I presented these two options as mutually exclusive in the above analysis; I said that according to the first option, the requirements (i.e., required actions) of the two rules are incompatible, whereas according to the third option, the requirements are compatible but an accidental conflict nonetheless emerges. However, in practice, the two rules can conflict in terms of incompatible requirements *and* accidentally. In such circumstances, what the immunity rule and the *jus cogens* crime each require can be incompatible, and in addition the accidental actions entailed by the immunity rule are such that the immunity rule is brought into conflict with the *jus cogens* crime.

7.C.iii. Commensurability and seriousness

Let us return to the typology of legal conflict that was advanced earlier in the study. This typology consisted of two dimensions – commensurability, and seriousness. Are legal conflicts between the immunities of State officials and *jus cogens* crimes conflicts between commensurable or incommensurable legal choices? And are they more or less serious conflicts?

Turning to commensurability, arguably all three options represent conflicts between incommensurable legal choices. In the case of the first *and* the third option, we are dealing with a conflict between a *jus cogens* crime and an immunity rule (whether personal immunity or official act immunity). Each choice is incommensurable because they cannot

both be measured or weighed on the same scale. The *jus cogens* crime seeks to repress and condemn conduct. By contrast, personal immunity is a limit on State jurisdiction which seeks to ensure and maintain the lubrication of international relations (among other things). Official act immunity, also a limit on State jurisdiction, seeks to ensure that the one State does not sit in judgment of another State (among other things).[48]

In the case of the second option, we are again dealing with two legal choices which are incommensurable. The matter is less straightforward, however, because we are dealing with a conflict between two sets. Set A contains the *jus cogens* crime and the jurisdictional rule (the rule on enforcement jurisdiction). Set B contains the immunity rule. In the case of set A, are we evaluating the commensurability (as against set B) of *both* the set A rules together? Or might we evaluate the set A rules individually, such that (for example) the jurisdictional rule is commensurable as against the immunity rule in set B, whereas the *jus cogens* crime is (for the reasons discussed above) incommensurable as against the immunity rule in set B? The matter is not entirely clear. However, since the *jus cogens* crime in set A is incommensurable as against the immunity rule in set B, this is sufficient to ensure that the legal choice (between set A and set B) is a choice between incommensurables. Whether the jurisdictional rule in set A is commensurable as against the immunity rule in set B is not sufficient to cure the overall incommensurability of set A as against set B.[49]

Turning to seriousness, arguably, all three options present less serious cases of legal conflict. In the case of all three options, the conflicts between the immunity rules and *jus cogens* crimes will only arise on certain occasions. In this sense, they are occasional or partial conflicts.[50] The immunity rules apply without issue in a range of situations; likewise

[48] See the discussion above (at 7.A.ii) for further analysis as to the main reasons why these two rules on immunity exist.

[49] These brief remarks are not intended to suppress the complicated character of these questions. The argument that I have provided is provisional.

[50] Or in Alf Ross' terms, 'partial-partial' conflicts; see Chapter 4.

with *jus cogens* crimes. Only on those occasions where a *jus cogens* crime has allegedly been committed by an incumbent or former State official does a conflict between *jus cogens* crimes and immunity rules arise.

7.D. Examples of conflicts between immunity rules and *jus cogens* crimes

It would be helpful at this point to illustrate the preceding analysis with some concrete examples. In what follows below, I will discuss two examples of conflicts between immunity rules and *jus cogens* crimes. The first example, the *Arrest Warrant* case, concerns a conflict between personal immunity and *jus cogens* crimes. The second example, the *Pinochet* case, concerns a conflict between official act immunity and *jus cogens* crimes.

7.D.i. The *Arrest Warrant* case: personal immunity and *jus cogens* crimes

The *Arrest Warrant* case, which came before the International Court of Justice, provides a well-known illustration of the problems under consideration in this chapter. The *Arrest Warrant* case concerned the lawfulness of an international arrest warrant issued by an investigating judge in Belgium on 11 April 2000 in respect of the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo, Mr Abdulaye Yerodia Ndombasi. The Congolese Foreign Minister was accused of committing, as perpetrator or co-perpetrator, war crimes ('crimes constituting grave breaches of the Geneva Conventions of 1949 and the additional protocols to these conventions'[51]), and crimes against humanity, in the Democratic Republic of the Congo.[52] There was no allegation that the victims were

---

[51] Counter Memorial of the Kingdom of Belgium (merits phase), 28 September 2001, paragraph 1.5.

[52] *Arrest Warrant* [2002] ICJ Rep 3, para 13.

Belgian, or that the alleged acts 'constituted violations of the security or dignity of Belgium'.[53]

The Democratic Republic of the Congo argued (*inter alia*) that by issuing the arrest warrant, Belgian violated 'the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States'.[54] As the ICJ noted, this argument – the violation of personal immunity – was the sole focus of the Democratic Republic of the Congo's written submissions in its Memorial and its final oral submissions.[55]

By contrast, in its written submissions to the ICJ, Belgium argued that 'immunity does not … avail Ministers for Foreign Affairs in office alleged to have committed war crimes or crimes against humanity'.[56]

In its judgment, the ICJ held that

> … it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.[57]

---

[53] Counter Memorial of the Kingdom of Belgium (merits phase), 28 September 2001, paragraph 0.18.

[54] *Arrest Warrant* [2002] ICJ Rep 3, para 12.

[55] *Arrest Warrant* [2002] ICJ Rep 3, para 45.

[56] Counter Memorial of the Kingdom of Belgium (merits phase), 28 September 2001, paragraph 0.26(d). Note, however, that Belgium also pointed out that its 'arrest warrant explicitly recognises that had Mr Yerodia Ndombasi, in his role as DRC Foreign Minister, visited Belgium on the basis of an invitation and in his official capacity, he could not have been arrested': Counter Memorial of the Kingdom of Belgium (merits phase), 28 September 2001, paragraph 0.28(e). And this was reflected in the formulation of the Belgian arrest warrant itself; see Counter Memorial of the Kingdom of Belgium (merits phase), 28 September 2001, paragraph 1.11 (this is an extract from the Belgian arrest warrant).

[57] *Arrest Warrant* [2002] ICJ Rep 3, para 51.

Two dissenting judges in the *Arrest Warrant* case – Judge *ad hoc* van den Wyngaert[58] and Judge Al-Khasawneh[59] – argued that customary immunity rules come into conflict with, and yield in the face of, international crimes of *jus cogens* status. For example, Judge Al-Khasawneh argued that when *jus cogens* 'comes into conflict with the rules on immunity, it should prevail'.[60] In these dissenting judgments, there is little explanation of precisely how and why a conflict arises. (I shall postpone the question of the consequences of a possible conflict until Part IV of the study.)

In my view, there is a conflict between personal immunity and *jus cogens* crimes in the *Arrest Warrant* case. The conflict can be understood in terms of any of the three options discussed above, with the third option (an accidental conflict between personal immunity and *jus cogens*) being the most convincing in my view.

We can find evidence of the conflict in the reasoning of the ICJ majority in the *Arrest Warrant* case. In particular, this is implicit in the ICJ's claim that upholding personal immunity did not lead to impunity. This very claim is a sign of the (accidental) conflict – an indication there is a tension in this area between personal immunity and *jus cogens* crimes, and that the accidental action entailed by upholding personal immunity may be such as to undermine the criminal prohibitions which require that certain conduct be repressed and punished. If the two were entirely distinct rules, which had nothing to do with each other, then there would be little reason to discuss how personal immunity does not lead to impunity because it would simply be a statement of the obvious. The ICJ's statement is an implicit recognition of an interaction or overlap between the two, the implications of which need to be addressed. This makes sense; as was suggested earlier, to criminalise conduct is to expect

[58] Dissenting Opinion, para 28.

[59] Dissenting Opinion, para 7.

[60] Ibid.

that alleged offenders will face prosecution. Limits to prosecution therefore require explanation.

7.D.ii. The *Pinochet* case: official act immunity and *jus cogens* crimes

There are also conflicts between official act immunity and *jus cogens* crimes, and this is illustrated by the *Pinochet* case in the English courts.

The *Pinochet* case in the English courts concerned the availability of official act immunity (or immunity *ratione materiae*) for a former State official who is accused of committing a *jus cogens* crime.[61] In *Pinochet (No.3)*,[62] the House of Lords held that General Augusto Pinochet, a former Head of State of Chile, did not enjoy official act immunity in relation to either acts of torture or conspiracy to commit such acts, where these were international crimes and were committed after 8 December 1998 (when the UK ratified the 1984 UN Convention on Torture), in the context of extradition or criminal proceedings brought in the UK.[63] Fox claims that '[t]he decision can be applauded as steering a skilful course between the wholesale prosecution of torturers and the blanket protection of wrongdoers holding high State office'.[64]

Legal conflicts may arise between official act immunity and *jus cogens* crimes. In a nutshell, the conflict arises where a former State official is alleged to have committed *jus cogens* crimes as part of her official duties on behalf of her State, and there is an attempt to

[61] Note also that official act immunity also protects incumbent State officials who are not senior enough to enjoy personal immunity. And, of course, these non-senior State officials will continue to enjoy official act immunity once they leave office.

[62] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No.3)* (1999) 2 All ER 97.

[63] Hazel Fox, 'The Pinochet Case No.3' (1999) 8 International and Comparative Law Quarterly 687, 689.

[64] Ibid.

rely on official act immunity to block the prosecution. In such circumstances, the upholding of official act immunity limits the realisation of the *jus cogens* crime; the two rules cannot both be realised. Treating this as an *accidental* conflict may, in my view, be the most persuasive of the three options discussed earlier.

But this is not the only way to explain the outcome in the case. There is another leading interpretation of the *Pinochet* judgment, which focuses on the provisions of the 1984 Torture Convention. It has been noted that this is the most cautious interpretation of *Pinochet*.[65] Under the 1984 Convention, the very definition of the crime of torture requires the involvement of State officials. That is, torture cannot be committed by private persons, but only by officials. On this interpretation, 'there cannot be immunity by reason of official involvement [i.e., official act immunity]; otherwise the crime would be vacated of content'.[66] A number of judges favoured this argument, including Lords Millett, Browne-Wilkinson, Saville and Philips. Lord Millett stated:

> The offence is one which could only be committed in circumstances which would normally give rise to the immunity … International law cannot be supposed to have established a crime having the character of *ius cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.[67]

There is also academic commentary in support of this interpretation of the *Pinochet* case.[68]

However, even this cautious interpretation of the *Pinochet* case is in fact a claim that there is a legal conflict between official act immunity and the international crime of torture.

---

[65] Cryer et al, *An Introduction to International Criminal Law and Procedure*, 540.

[66] Ibid.

[67] *Pinochet (No 3)*, 179.

[68] See Cryer et al, *An Introduction to International Criminal Law and Procedure*, 540fn56, which provides a list of references to the international law commentary which seems to support this interpretation of Pinochet (including writers such as Rosanne van Alebeek, Dapo Akande and J Craig Barker).

The interpretation argues that official act immunity undermines the very substance of the crime of torture, which requires official involvement. The suggestion here, perhaps, is that what each rule requires is incompatible – and this would accord better with the first option (considered above), according to which the very requirements of the immunity rule are incompatible with the requirements of the *jus cogens* crime. There may additionally be overlap, in that an accidental conflict (per the third option) could emerge here as well.

7.D.iii. Concluding remarks

There are conflicts between *jus cogens* crimes and immunity rules – whether personal immunity or official act immunity. There are several options at our disposal for explaining these conflicts, but on any such approach these are conflicts between incommensurable legal choices, as well as less serious conflicts (mainly because they are occasional conflicts).

I have suggested that we can find evidence of the conflicts in this area in the courts' reasoning (both in *Arrest Warrant* and *Pinochet*), even if ultimately the courts do not expressly admit that conflicts are present. We can also find evidence in the academic literature – and, again, even if the writers in question have not fully come to terms with this. For example, Cryer et al admit that '[w]hile immunities are valuable in preventing interference with representatives, and thereby maintaining the conduct of international relations, they can also frustrate prosecutions for very serious crimes'.[69] *Jus cogens* crimes, being crimes, call for the repression (including the punishment and condemnation) of conduct. Rules which frustrate prosecutions limit the realisation of these criminal prohibitions.

[69] Cryer et al, *An Introduction to International Criminal Law and Procedure*, 531 (emphases in original).

7.E. Objections

I will now discuss various objections to the argument that can be legal conflicts between *jus cogens* crimes on the one hand, and personal immunity or official act immunity on the other.

7.E.i. The first objection: substance and enforcement

I have argued that there are conflicts between customary immunity rules and *jus cogens* crimes. But according to one oft-cited objection, the mere existence of a *jus cogens* crime does not imply its enforcement (or, at least, not its judicial enforcement).[70] The substance of a rule, and its enforcement, are wholly separate questions.

The writers who favour this objection often state that the two questions are simply 'separate' or 'distinct'. But this is does not quite capture what the writers really mean. Two questions can be separate or distinct, but still related. There may be analytical value in separating them out, but this would not be to deny their relatedness. What the writers really mean is that the two questions – the substance of a rule, and the enforcement of a rule – are *wholly* separate, in the sense that they do not intersect at all. The one question has absolutely no relation to or connection with the other.

There is plentiful evidence of this argument in international law writing. For example, Andreas Zimmermann has argued that the law on immunities and *jus cogens* do not overlap.[71] He suggests that *jus cogens* norms are concerned with the prohibition of conduct, whereas immunity rules deal with distinct issues of enforcement. Jasper Finke argues that

[70] Eg Andreas Zimmermann, 'Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters', in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Martinus Nijhoff 2006) 335.

[71] Andreas Zimmermann, 'Sovereign Immunity and the Violations of International *Jus Cogens*: Some Critical Remarks' (1995) 16 Michigan Journal of International Law 433, 438.

'[i]t is one of the truisms of international law that the existence of a rule and its enforcement are two different sets of problems', citing Zimmermann in a footnote.[72]

There are other examples in the literature. For example, Cryer et al state: 'As was recently observed by the [then] House of Lords in the *Jones* case, the argument depends on a false conflict – *ius cogens* prohibits *committing* the crimes; it does not mean that all international laws regarding *prosecution* cease to apply'.[73] The judicial enforcement of the rule, in the form of criminal *prosecution*, is treated as a wholly separate question.[74]

Evidence of these arguments may also be found in Lord Hoffmann's speech in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia*,[75] where he draws a distinction between the substance and enforcement of *jus cogens*.[76]

Such arguments are mistaken, at least in the context of *jus cogens* crimes.[77] They overlook the qualities attendant upon criminalisation, and their implications for how we understand conflicts involving such crimes. As I have argued above, a crime is not a mere prohibition against the commission of conduct and nothing more. It is condemnatory, and it

---

[72] Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2011) 21 European Journal of International Law 853. One might ask, for now, how this is a truism of international law. It is a useful analytical distinction, but the same can be said about rules and rule-enforcement in any legal order. For example, we might draw a useful analytical distinction between rules on personal taxation, and the enforcement of these rules, in national legal orders. International law is not special or different in this regard.

[73] Cryer et al, *An Introduction to International Criminal Law and Procedure*, 532 (emphases in original, footnotes omitted).

[74] One problem with the position of Cryer et al is that it concludes that, should there be a conflict, all laws regarding prosecution cease to apply. But this argument slides from one question (determining whether there is a conflict in the first instance) to another question (namely, what the consequences of a conflict should be). It may well be that we deem that there is a conflict, and yet still conclude that certain – or indeed all – rules regarding prosecution continue to apply.

[75] [2006] UKHL 26, paras 44-45.

[76] See also the argument of Judge ad hoc Kreca in his Dissenting Opinion in the *Bosnia Genocide* case, where he drew a distinction between the legal nature of a norm and its enforcement; see *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, 658. There is also a hint of this in *Arrest Warrant* [2002] ICJ Rep 3, para 60.

[77] For the purposes of this chapter, and as stated previously, I will not explore other possible conflict-situations between *jus cogens* and immunity rules. In any such case, a series of issues would need to be unpacked, and this task must be left for another time.

aims to discourage and repress conduct in certain ways. The expectation of punishment, in particular, is a key distinguishing form of repression available to the criminal law. This is part of the very character of substantive criminal prohibitions.

Although this matter has been dealt with above, thinking about some hypothetical scenarios will help to clarify these points further. Imagine a national legal system whose criminal law contains a statutory rule prohibiting homicide. Now imagine a second statutory rule which declares that every person in the land will enjoy immunity from prosecution in perpetuity. International lawyers may argue that there is no conflict between the two rules, on the basis that the second rule only goes to the question of enforcement. But this would be a surprising position. It would mean that there should be no reason at all why the national legislature should not enact such an immunity rule. Nor should we expect the legislature to be criticised for enacting two such statutory rules – a criminal prohibition on homicide, and a blanket immunity rule in relation to that crime.

We can modify this hypothetical scenario for the international law context, by imagining that there is a customary immunity rule which grants every person in the world immunity from prosecution for any international crime in the national courts of any State. It is difficult to deny that international criminal law would be frustrated by such an immunity rule. In such circumstances, we would ask ourselves why we even have international criminal law.

These examples of blanket immunity rules cement the implausibility of suggesting that the criminalisation of conduct has nothing to do with enforcement, and that the two are wholly distinct matters. Criminal law is not merely hortatory in nature, and a proper interpretation of what it requires should reflect this. The purposes of a crime – in seeking, for example, to repress, condemn, and punish certain conduct – can be frustrated by immunity

rules which, in limiting the realisation of those purposes, conflict with what the crime requires.

In fact, these very same arguments are already being made elsewhere in international law. In particular, international lawyers have offered theories as to why official act immunity is not available for international crimes, and one such theory – indeed, the most cautious theory – betrays an approach to conflicts between crimes and immunity rules which is similar to the one that I have outlined above. Discussing the *Pinochet* case, Cryer et al explain:

> The most cautious interpretation, restricted to the terms of the 1984 Torture Convention, is that, where official involvement is a necessary element of a crime, there cannot be immunity by reason of official involvement; *otherwise the crime would be vacated of content*. As noted by Lord Millett, '[t]he offence is one which could only be committed in circumstances which would normally give rise to the immunity … International law cannot be supposed to have provided an immunity which is co-extensive with the obligation it seeks to impose.' Support for this reading can be found in the opinions of Lords Browne-Wilkinson, Saville and Phillips.[78]

If the existence of a crime, and its enforcement, were two wholly separate questions, then the 'most cautious' interpretation of the *Pinochet* case (in the above passage) is mistaken. The idea is that a crime simply prohibits the commission of certain conduct, and says nothing about its enforcement. Yet in *Pinochet*, the cautious interpretation holds that a crime – in this case, torture (which requires official acts or official involvement) – is undermined ('vacated of content') by an immunity rule which protects individuals precisely on the basis that their acts are official and thus imputable to the State. That immunity rule goes to the question of

[78] Cryer et al, *An Introduction to International Criminal Law and Procedure*, 540 (emphasis added; footnotes omitted).

enforcement. In other words, in the above passage, it is being argued that there is a conflict between a substantive crime and an immunity rule – and that the character of the crime does say something about its enforcement. This interpretation of the relationship between official act immunity and international crimes is endorsed by many international lawyers – many of whom also argue, somewhat surprisingly, that the mere existence of a *jus cogens* crime says nothing about its enforcement.[79]

Other writers may offer a slight modification to the argument quoted in the above passage, and thus seek to avoid my criticism. Akande argues that official act immunity is not available for international crimes

> to the extent that international law has subsequently developed rules permitting domestic courts to exercise universal jurisdiction over certain international crimes and to the extent that those rules contemplate prosecution of crimes committed in an official capacity ... In those circumstances, [official act immunity] cannot logically coexist with such a grant of jurisdiction. Indeed, to apply in such cases, the prior rule according immunity would serve to deprive the subsequent jurisdictional rule of practically all meaning. This constitutes the best explanation for the decision of the English House of Lords in the *Pinochet* case (No. 3). Most of the judges in that case held that since the Torture Convention limited the offense of torture to acts committed in the exercise of official capacity, the granting of [official act immunity] would necessarily have been inconsistent with the provisions of the Convention that accord universal jurisdiction over the offense.[80]

[79] These writers include Warbrick, Salgado, Goodwin, Barker, Denza, van Alebeek and Akande.

[80] Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 American Journal of International Law 407, 415.

In other words, Akande argues that there is only a conflict between the rule on immunity and the rule on jurisdiction, which are both 'enforcement' rules. On this approach, Akande may resist my argument above, and instead maintain that there is proper distinction between a *jus cogens* crime and its enforcement.

But there is a straightforward problem with Akande's analysis. It is not the rule on universal criminal jurisdiction which contemplates or requires official involvement in certain international crimes. This is to be found in the substantive crimes themselves. So in the case of official act immunity, it detracts not from any bare principle of jurisdiction, but rather from the requirement of official involvement that is only to be found in the substantive content of certain international crimes. Once again, even in Akande's argument, the conflict must be between an enforcement rule (official act immunity) and a substantive crime. The objection – that the mere existence of a rule and its enforcement are wholly separate questions – appears to have been cast aside here.

It seems, then, that international law writing is willing to acknowledge conflicts between immunity rules (i.e., rules going to enforcement) and substantive crimes, but refuses to carry the reasoning through in relation to the *jus cogens* context and *jus cogens* crimes. This leads to inconsistency in the positions which international lawyers adopt.

7.E.ii. The second objection: substance and procedure

There is another argument, made prominent by Hazel Fox, which has been widely received by international lawyers (see, e.g., express endorsement from Akande and Shah)[81] and judges (e.g., Lord Hoffmann in *Jones v Saudi Arabia*, and also the ICJ in *Germany v Italy*).[82]

[81] Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 834.

[82] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits) [2012], Judgment of 3 February 2012, para 93. Here, the ICJ stated:

According to this argument, there is a distinction between 'procedural' rules and 'substantive' rules in international law. Immunity rules are procedural rules and existing *jus cogens* crimes are substantive rules. There can be no conflict between the two, simply because substantive rules and procedural rules cannot conflict. As Fox states:

> State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite …[83]

I will deal with the idea of diverting to a different method of settlement below. For now, I wish to focus on the argument that there is a useful distinction to be drawn between substantive and procedural rules, and that it is significant in the context of legal conflicts.

This argument is not persuasive for at least three reasons. First, it is unsubstantiated. Although the distinction is familiar to lawyers, without further elaboration it remains unclear what makes a rule 'procedural', and what makes a rule 'substantive'. Contrary to Fox's claim, one might well assert that immunity rules are in fact *substantive* rules because they protect real, substantive concerns – e.g., a need to ensure the continued stability and facilitation of international relations, or to ensure the non-interference in the affairs of

---

> This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the 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 are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.

[83] Fox, *The Law of State Immunity,* 151. Although Fox is discussing State immunity, her argument is relevant to the interaction between *jus cogens* and immunity rules more broadly.

sovereign States. Accordingly, one could conclude that there can be conflicts between *jus cogens* and immunity rules because both are substantive rules. Fox's argument requires that she explain the distinction between procedural law and substantive law, and why (all?) customary immunity rules fall under the former category whereas *jus cogens* rules fall under the latter. (Indeed, it is entirely possible for 'procedural' rules, however these are defined, to become *jus cogens* themselves.)

Even if we elaborate on the distinction between substantive and procedural rules, the key question concerns what the implications of that distinction really are in the context of legal conflict. This leads to the second problem. The distinction is puzzling for a theory of legal conflict. It requires that we classify rules into those which are procedural and those which are substantive – assuming that the two categories are mutually exclusive. It claims that procedural rules can never come into conflict with substantive rules – only (one assumes) with other procedural rules. Likewise, substantive rules can only ever conflict with other substantive rules. These are bold theoretical statements about how legal rules conflict. And yet Fox provides no explanation as to why the theory is persuasive. We are missing a theoretical exploration of how legal rules conflict, and why certain rules can never conflict on account of their type.

Third, Fox's argument is similar to the first objection considered above – that the existence of a rule and its enforcement are wholly separate questions. Consequently, Fox's distinction between procedure and substance also suffers from many of the problems faced by the first objection.

Both the first and second objections are unhelpful in similar ways. Not only do they fail to advance our understanding, they further obfuscate matters by raising more questions than they answer. Rather than introducing such problematic distinctions (between substance and enforcement, or between substance and procedure), we should instead refocus on the

basic question: simply, whether there is a conflict between the two rules. According to the analysis of legal conflict offered in Chapter 4, we should ask whether the rules cannot both be realised.

A final point. The argument concerning the distinction between procedural and substantive rules, and its implications for conflicts with *jus cogens*, has been picked up by national and international courts. As noted above, references to this argument can be found, for example, in the English case of *Jones v Saudi Arabia* and in the ICJ case of *Germany v Italy*. These arguments are not persuasive for the reasons given above. However, on a more charitable reading, the courts' positions in these cases are not to be taken literally or at face value. The courts are not reasoning that the procedural rules never conflict with substantive rules, with the consequence that there is no conflict between *jus cogens* and immunity rules. Rather, the judgments are better understood as representing the *deliberative outcome* of the courts' reasoning. In other words, in these cases, the distinction between procedure and substance is a conclusion – a neat (albeit problematic) summary – of the court's reasoning.[84]

7.E.iii. The third objection: redirection to another forum

In the extract discussed under the second objection (above), Fox also suggests that State immunity 'does not contradict a prohibition contained in a *jus cogens* norm *but merely diverts any breach of it to a different method of settlement*'.[85] The highlighted part of this statement is also not persuasive. In fact, it affirms that there is indeed a conflict between immunity rules and *jus cogens* crimes.

[84] For further discussion of the problems with this distinction, see Kimberley N Trapp and Alex Mills, 'Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of Germany v Italy' (2012) 1 Cambridge Journal of International and Comparative Law 153.

[85] Fox, *The Law of State Immunity*, 151 (emphasis added). Again, although Fox is discussing State immunity, the argument is relevant to immunity rules more generally.

The ('mere') closing off of one option of further realising a law is a limit on the realisation of that law, and therefore gives rise to a legal conflict. Even if there are other available fora, and even if these fora are more viable, that limitation remains – although it may be a less serious limitation (and thus a less serious conflict) than in the case where the blocked forum *is* an important, or even the only, viable means of realising the law in question. In the case of a *jus cogens* crime, enforcement in the form of prosecution (and conviction, and sentencing) is a key means of realising the criminal prohibition. And national courts are the main and most important fora for such enforcement.

This third objection is also undermined when we return to Raz's persuasive analysis of partial conflicts between reasons (as discussed in Chapter 4). In relation to the 'second type' of partial conflict, Raz states:

> A reason for performing A partially conflicts with a reason for performing B if some ways of doing B, though not incompatible with doing A, are incompatible with some ways of doing A. In other words if there is an act B1 by which B can be done and which is incompatible with the doing of A1 which is a way of doing A. To the extent that a reason for an act is also a reason for any act by which it can be done, the second type of partial conflict can also be characterized in terms of diametrical conflict….[86]

This indicates how rules granting immunity to State officials from criminal prosecution in foreign States can be incompatible with some ways of realising those criminal prohibitions which are *jus cogens* – namely, by blocking the prosecution and punishment of alleged offenders. This is because a *jus cogens* crime, being a crime, is concerned with the condemnation, suppression and punishment of the proscribed conduct.

[86] Joseph Raz, 'Comment: Reasons, Requirements and Practical Conflicts', in Stephen Körner (ed), *Practical Reason* (Yale University Press 1974) 22, 26.

Finally, considering this third objection has allowed us to reflect on the variety of reasons why a legal conflict between the immunities of State officials and *jus cogens* crimes might arise. Analysing the third objection has yielded another possible explanation (or perhaps an elaboration on the main explanations which I offered above) – namely, that these immunities are incompatible with certain *ways* of realising criminal prohibitions which enjoy *jus cogens* status.

7.E.iv. The fourth objection: the jurisdiction of international courts

I have suggested that the very criminalisation of conduct is significant. It meant that the crime, being a *crime*, expects to be enforced in certain ways – including, in particular, an expectation of punishment. An immunity rule may limit (even in one instance) the circumstances in which the criminal prohibition would otherwise be realised. Thus, the immunity rule may come into conflict with the criminal prohibition.[87]

However, if this approach is taken, we might ask whether there can, equally, be legal conflicts between *jus cogens* crimes and the rules defining the jurisdiction of *in*ternational courts. Among the two most prominent standing courts on the international plane are the International Court of Justice and the International Criminal Court, and both operate according to rules which regulate their jurisdiction to hear cases.

First, a word on the International Court of Justice. The ICJ cannot adjudicate on the criminal responsibility of individuals. Accordingly, the ICJ and its jurisdictional rules are not directly relevant to the analysis. Some may point out that international crimes can be enforced not simply through prosecutions, but also 'civil' claims and remedies – whether in

[87] This was true in relation to both options, although in the case of the second option, the jurisdictional rule was *also* expressly in play.

national courts, or international courts such as the ICJ. But for reasons of space, I will leave to one side this question concerning the civil enforcement of international crimes.

The International Criminal Court, however, is more relevant to the analysis, since it is a forum in which individuals can be prosecuted for certain core crimes (which are simultaneously regarded as *jus cogens* crimes). Here, it may well be thought that the rules defining the jurisdiction of the ICC limit the realisation of those *jus cogens* crimes, and therefore come into conflict with them.

A clue has already been given as to why this approach is problematic. When examining conflicts between *jus cogens* crimes and immunity rules, I assumed that the State had jurisdiction over the conduct in question.[88] If we were to say that the rules defining the jurisdiction of the ICC could conflict with *jus cogens* crimes, we would also be committed to the view that the rules on *State* jurisdiction could conflict in the same way. This idea – that jurisdictional rules can conflict with *jus cogens* crimes – is mistaken for one reason above all. Rules on jurisdiction define the very power of the actor (or institution, such as a court) to perform certain functions in the first place. A restrictive rule on jurisdiction is not a limit on the realisation of a *jus cogens* crime (which, admittedly, expects to be enforced); rather, it defines the very way in which that criminal prohibition can be realised in the first place.

In the case of the ICC, its jurisdictional rules establish the power of that court to adjudicate on certain disputes in the first instance. By contrast, immunity rules – being distinct rules which block jurisdiction which was *otherwise available* – can indeed come into conflict with *jus cogens* crimes. In these latter cases, we are saying that normally jurisdiction is available, but then it is circumscribed or constrained by a separate rule – and thus a

[88] And in the case of the second option, the rule on enforcement jurisdiction of States was expressly included in the conflict.

conflicting rule. The distinction is between a jurisdictional rule on the one hand, and a constraint on jurisdiction on the other.[89]

Suppose that, in a national legal system, a specialised administrative court is set up to deal with certain administrative disputes. Its jurisdictional rules are restrictive so as to ensure that it only hears certain cases in administrative law. It would be odd to think that the administrative court's jurisdictional rules conflict with most other rules in the system – especially its criminal law, since the criminal prohibitions expect enforcement. Such specialised courts do not even have the power to hear criminal law cases in the first place – in just the same way that I have no power to hear a criminal law case, nor does the tree outside my window. We might say that a certain actor *should* have such a power. But now we are straying into a different question – namely, a normative question about setting up a(nother) criminal court. That is not the same as a legal conflict.

This fourth objection is not persuasive. Underlying this objection is a worry that, if we recognise conflicts between *jus cogens* crimes and immunity rules, the analysis will spill over into other areas in surprising, even alarming, ways. I have sought to demonstrate that, in the case of international courts, there is reason to think that their jurisdictional rules (at least, those defining the very power of the courts to adjudicate in the first instance) do not necessarily conflict with *jus cogens* crimes.

7.F. Concluding remarks

In this chapter, I have argued that there are conflicts between *jus cogens* crimes on the one hand, and, on the other hand, the rules granting immunities to State officials from the criminal jurisdiction of foreign States. I suggested that there were three ways of explaining

[89] I accept that, in some cases, this distinction may be difficult to draw.

these conflicts theoretically, and that while all three options were available, in my view the third option was perhaps the most persuasive. A number of objections to the argument were then considered and rejected.

Nothing in the argument prejudges the question whether and how *jus cogens* comes into conflict with *other* immunity rules (such as the rules on State immunity). Although some of the analysis in this chapter may be relevant and useful, each alleged conflict-situation needs to be assessed on its own terms.

Chapter 8. Conflicts Between Commensurable Laws: *Jus Cogens* and Treaties

In the previous chapter, we examined conflicts between *jus cogens* rules and ordinary rules of customary international law. We found that there were conflicts between *jus cogens* crimes and customary immunity rules protecting State officials from the criminal jurisdiction of foreign States. And, in particular, we saw that these were conflicts between incommensurable laws.

In this chapter, I will examine conflicts between *jus cogens* rules and treaties (or treaty provisions). As I will suggest, the conflicts identified below are conflicts between commensurable laws. This is not to suggest, of course, that all conflicts between *jus cogens* rules and treaty rules are conflicts between commensurables – or indeed that all conflicts between *jus cogens* rules and ordinary customary rules are conflicts between incommensurables (per the previous chapter). Rather, in this chapter I wish to discuss on conflicts between commensurable laws, and in addition I simply take the opportunity to look more closely at conflicts involving treaty rules.

Finally, as with the previous chapter, reasons of space preclude consideration of a breadth of material. In order to achieve sufficient depth, the analysis will therefore focus on a select group of possible conflict-situations – namely, possible conflicts between certain provisions of 'friendship treaties' and the *jus cogens* prohibition of the unlawful use of force.

8.A. An initial problem: supposed evidential limitations

Let us turn, however, to an early problem in thinking about conflicts between *jus cogens* rules and treaty rules. The international legal practice on which we can draw, in our hunt for such conflicts, can be somewhat limited. At least, more *clear-cut* conflict-situations are hard to come by.

As Hannikainen notes, '[a]n assessment of *treaties* indicates that States evidently try to avoid concluding treaties which have a manifestly unlawful content. If States desire to commit unlawful acts, they prefer not to spell that out in a treaty which is made public'.[1] As a consequence, Hannikainen explains that '[i]n order to examine thoroughly the peremptory status of alleged peremptory in terms of … treaties conflicting with those norms, one is led to hypothetize [sic] *imaginary* treaties conflicting with those alleged peremptory norms'.[2]

This approach – thinking about hypothetical conflict-situations involving *jus cogens* rules and treaty rules – is apparent elsewhere in the academic literature. For example, in his work on the law of treaties, Sinclair states:

> Let me take another example. Would it be possible for State A and B, by treaty, to agree to commit an act of aggression on a specified date against State C? The answer is self-evidently in the negative; the stipulation is a nullity, since its execution would involve a criminal act, the planning, preparation, initiation or waging of a war of aggression having been declared to be an international crime against the peace.
>
> Here we come close to the heart of the matter, since acceptance of the view that there are certain norms of international law of so fundamental a character that it is legally impermissible to derogate from them by treaty involves acceptance in principle of the operation of *jus cogens* in international law.[3]

---

[1] Lauri Hannikainen, *Peremptory Norms (*Jus Cogens*) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company 1988) 304 (emphasis in original).

[2] Ibid 305 (emphasis in original).

[3] Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 207 (footnote omitted). See also Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 276; Yoram Dinstein, *War, Aggression and Self-Defence* (3rd edn, CUP 2001) 94-96 (concerning a hypothetical pact of aggression concluded between Arcadia and Numidia against Utopia).

A similarly speculative approach was adopted in the drafting history of the VCLT 1969. For example, Fitzmaurice, as ILC Special Rapporteur, speculated about treaties which were contrary to *jus cogens* in his 1958 commentary to (what was then) draft Article 17. He stated:

> … if two countries were to agree that, in any future hostilities between them, neither side would be bound to take any prisoners of war, and all captured personnel would be liable to execution, it is clear that … such an arrangement would be illegal and void … A different type of case – on the basis that the planning of wars of aggression is illegal – would be if two countries were to agree to attack a third in circumstances constituting aggression … such an arrangement … would be illegal *in se* and void. [4]

Fitzmaurice expressly stated that these hypothetical treaties would be invalid because they would fall foul of 'rules of international law that have the character of *jus cogens*'.[5] And in its commentary to the 1966 Draft Articles on the Law of Treaties, the ILC elaborated on (what was then) Draft Article 50 concerning *jus cogens*:

> Some members of the Commission felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested included (a) a treaty *contemplating* an unlawful use of force contrary to the principles of the Charter, (b) a treaty *contemplating* the performance of any other act criminal under international law, and (c) a treaty *contemplating* or *conniving*

[4] (1958) YILC II 40 (footnotes omitted).

[5] Ibid 40-41.

> *at* the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate.[6]

With all this being said, we should not be entirely taken in by the worry about a lack of international legal practice. After all, determining when treaty rules conflict with *jus cogens* depends on our theory of legal conflict. Clear-cut conflicts – the kinds of conflicts about which the above writers speculate, such as a treaty in which two States agree to attack a third State – may well be rare. But as we have seen already in this study, legal conflicts take many different forms.

8.B. An initial puzzle

The above discussion, however, leads into a puzzle. The puzzle concerns precisely why a treaty in which (for example) two States agree to attack a third State conflicts with *jus cogens*.

To understand this puzzle, we must briefly revisit some of the analysis the previous chapter. In that chapter, we examined a certain objection to the claim that *jus cogens* rules and immunity rules can conflict. According to this objection, *jus cogens* rules such as the prohibition of the unlawful use of force were only concerned with prohibiting conduct of a certain kind – hence no conflict arose with immunity rules.

For example, in a recent article Akande and Shah deny that there is a conflict between *jus cogens* prohibitions and the immunities of State officials. They state:

> … it is difficult to see how the rules concerning … immunity come into conflict with norms of *jus cogens*. The main purpose and effect of such immunities is to prevent adjudication of [*jus cogens*] violations in the domestic courts of other states. For the granting of immunity to come into

[6] (1966) YILC II 248 (emphases added).

> proper conflict with those *jus cogens* norms prohibiting certain international crimes, it would have to be argued that (i) there is an *obligation* on third states (i.e., states other than that responsible for the violation) to prosecute the crime in their domestic courts … and (ii) that this obligation itself is a rule of *jus cogens*. Each step of the argument is tenuous and fraught with difficulties.[7]

They question whether such a self-standing *jus cogens* obligation to prosecute exists, and claim:

> … even in the minority of cases [involving international crimes] where there is an *obligation* to prosecute [said crimes], it would be erroneous to suggest that the obligation is peremptory … The *jus cogens* obligation is the rule *prohibiting* the act and not the rule requiring a prosecution by third states. It is the state which has committed the act that is in violation of a norm of *jus cogens*, and not the state which has failed to prosecute…[8]

Furthermore, as mentioned in the previous chapter, Cryer et al also doubt the argument that there are conflicts between *jus cogens* and immunity rules. They state: 'As was recently observed by the [then] House of Lords in the *Jones* case, the argument depends on a false conflict – *ius cogens* prohibits *committing* the crimes; it does not mean that all international laws regarding *prosecution* cease to apply'.[9] They then cite to a number of writers - Hazel Fox, Lee Caplan and Andrea Gattini – by way of support for the objection.[10]

The objection itself was discussed at greater length in Chapter 7 and was found wanting. Here, though, we are concerned with a slightly different feature of the objection.

---

[7] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 European Journal of International Law 815, 834 (emphasis in original).

[8] Ibid 835-836 (emphases in original).

[9] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (2nd edn, CUP 2010) 532 (emphases in original; footnotes omitted).

[10] Ibid 532fn8.

Take the *jus cogens* prohibition of genocide. According to the objection, the *jus cogens* rule prohibiting genocide is prohibiting only the *commission* of genocide – i.e., prohibiting only the *act* of genocide. This view is clearly expressed in the above passages. And it is the main basis for claiming that no conflict arises between the *jus cogens* prohibition of genocide and immunity rules.

The puzzle arises because this approach – that *jus cogens* prohibitions are merely prohibiting certain acts, and nothing more – is abandoned when it comes to conflicts between *jus cogens* prohibitions and treaties. Consider a treaty in which two States agree to commit genocide. In international law writing, it is wholly uncontroversial that this treaty conflicts with the *jus cogens* prohibition of genocide. But the treaty itself is not a genocide. It is just a treaty – a written instrument containing various provisions.

If the *jus cogens* prohibition of genocide only prohibited genocidal conduct – i.e., the very *commission* of genocide – then it cannot conflict with treaties which merely prepare or plan for, or contemplate, genocide. [11] Yet for decades it has been undisputed that such treaties will conflict with the *jus cogens* prohibition. Indeed, that is what the Article 53 VCLT regime is all about – conflicts between treaties and *jus cogens* rules.[12]

So there is an inconsistency in international law thinking about conflicts with *jus cogens*. Jus cogens prohibitions have always been about more than merely prohibiting the very commission of certain acts. But this is quickly forgotten when it comes to immunity

[11] To press the point further, imagine a rule in a national legal system prohibiting murder. We might say that this rule only prohibits the act of murder. Now suppose that I write down a rule on a piece of paper, which provides: 'Sometimes revenge is justified; sometimes we should take another person's life as retribution for what he or she has done'. I frame the rule and place it inside the front door of my house. Have I acted contrary to the legal rule prohibiting murder? Hardly – that is, assuming that the legal rule simply prohibits the *act* of murder. For I have not committed murder. All I have done is make a rule (which happens to contemplate murder in certain circumstances); it is just a rule.

[12] And note also the asymmetrical wording in Article 53 VCLT. It initially refers to treaties which 'conflict' with *jus cogens* rules, but then formulates a *jus cogens* rule as a rule from which no 'derogation' is permitted (as opposed to a rule with which no 'conflict' is permitted). Regardless, it is clear that Article 53 VCLT is concerned with interactions between *rules*.

rules. Returning to Chapter 7, this is another reason to question some of the literature which claims that *jus cogens* crimes and the immunity of State officials do not conflict.[13]

Perhaps the next question is an obvious one: in light of the above, what exactly do *jus cogens* rules require? Arguably a more persuasive response to the above analysis would be to suggest that these rules which have achieved *jus cogens* status, such as the prohibition of genocide, have been and should be interpreted more broadly as requiring the *repression* of such acts in general. Repression goes further than merely prohibiting certain acts.

I do not wish to push this as the only, or indeed the best, approach. How best to understand what *jus cogens* rules require is a more involved question, since it calls for the interpretation of various *jus cogens* rules – and that is best left for another time. However, the general idea still stands – namely, that *jus cogens* rules require more than just the prohibition of certain acts. Importantly, if we accept that idea, we are more likely to admit the possibility of conflicts between, say, *jus cogens* rules and immunity rules (as discussed in the previous chapter). But it also allows us to understand the kinds of conflicts between *jus cogens* rules and treaties with which the analysis below is concerned. It is to that analysis that I now turn.

8.C. Conflicts between treaties and *jus cogens*

The discussion thus far has sought to clarify some of the theoretical foundations on which the assessment of conflicts involving treaties can be based. At this point, we may distinguish between two such types of conflict. There might be conflicts between a treaty as a whole and a *jus cogens* rule. The design of the treaty might be such that the treaty as a whole, and not

[13] Just to expand on this, there are two main questions which arise when we are thinking about conflicts with *jus cogens*. The first concerns our theory of legal conflict; in what ways can two rules come into conflict with each other? And according to the second question, we must work out what the two rules actually require or call for; for only then can we know whether they conflict (on the basis of our theory of legal conflict). In this study, I have suggested that international law writing is generally unpersuasive in relation to both questions – and some further problems with the *second* question can be seen here.

merely an isolated provision, would conflict with *jus cogens*. There can also be conflicts between individual treaty provisions and a *jus cogens* rule; here, an isolated treaty provision, but perhaps not the treaty as a whole, conflicts with *jus cogens*.[14]

8.C.i. Conflicts between the treaty as a whole and *jus cogens*

In relation to conflicts between the treaty as a whole and *jus cogens*, we have seen earlier in the chapter that writers have tended to consider hypothetical examples. Real cases of such conflicts can often be difficult to find, at least in modern international law.

Nonetheless, we should note that these hypothetical conflicts – involving, for example, an aggression pact, or a treaty contemplating or preparing for genocide – are conflicts between commensurables. And they are also more serious conflicts.

That these are conflicts between commensurables is fairly straightforward. For instance, a treaty preparing for genocide can be compared against the *jus cogens* prohibition of genocide; they are both addressed to the same issue, with the treaty providing that genocide is to be pursued and the *jus cogens* prohibition outlawing any such pursuit.

These conflicts are also more serious conflicts (relative to other possible conflict-situations). The conflicts are not occasional conflicts, or accidental conflicts. Rather, the very design of the treaty – what the treaty as a whole requires – goes against the *jus cogens* prohibition of genocide. The intensity of the limitation is therefore greater, hence the conflict is more serious.

8.C.ii. Conflicts between individual treaty provisions and *jus cogens* rules

[14] And there are perhaps further possible types of conflict – eg conflicts between a reservation to a treaty and *jus cogens*; or conflicts between a 'treaty-based' instrument (such as the resolution of an international organization) and *jus cogens*. Regrettably, for reasons of space these types can only be explored in future work.

We now turn to some possible conflict-situations involving individual treaty provisions and *jus cogens*.[15] I will discuss two cases, both of which came before the ICJ, in which individual treaty provisions came into conflict with *jus cogens* rules. The first is the *Oil Platforms* case, and the second is the *Nicaragua* case.

8.C.ii.1. The *Oil Platforms* case

In the *Oil Platforms* case before the ICJ, questions arose regarding the compatibility of a treaty with the *jus cogens* prohibition of aggression.[16]

The background to the case is as follows. On 15th August 1955, Iran and the US signed a Treaty of Amity, Economic Relations and Consular Rights (hereafter the 1955 Treaty), which was a bilateral friendship, commerce and navigation treaty. The 1955 Treaty entered into force on 16th June 1957.

On 22nd September 1980, the Iran-Iraq war began. During the war, Iran alleged that the US was supporting Iraq. On 19th October 1987 and 18th April 1988, the US attacked and destroyed a number of Iranian oil platforms, allegedly in response to attacks on the Kuwaiti tanker *Sea Isle City* (reflagged to the US) and a US warship *Samuel B. Roberts*, both of which the US had attributed to Iran. On 2nd November 1992, Iran brought an application against the US before the ICJ, alleging that the US attacks on the Iranian oil platforms violated the 1955 Treaty.

---

[15] In certain ways, these cases are less straightforward – particularly as regards the *consequences* of any such conflict. These consequences will be analysed in Part IV of the study; in this chapter, I am only concerned with identifying the very existence of conflicts. Still, we might note that, on a flat reading of Article 53 VCLT, in conjunction with Article 44(5) VCLT, the entire treaty is invalidated. (Article 44 VCLT concerns the separability of treaty provisions, and Article 44(5) VCLT provides: 'In cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted'.) However, there continues to be some disquiet about this position, as we shall see briefly in Part IV (especially Chapter 10).

[16] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161.

One issue in the case was as follows. The US sought to defend its attacks on the oil platforms by referring to Article XX(1)(d) of the 1955 Treaty, which provides:

> 1. The present Treaty shall not preclude the application of measures:
>
> …
>
> (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

On the basis of this provision, the US claimed that its actions were necessary to protect its essential security interests.[17]

Iran argued in its written submissions that Article XX(1)(d) must be construed in a way that is compatible with Article 2(4) of the UN Charter (prohibiting the use of force) because Article 2(4) was *jus cogens*.[18]

In further written submissions, Iran briefly discussed the possibility of a conflict between Article XX(1)(d) and *jus cogens*.[19] Iran stated:

> 7.75 Under these circumstances, it is not necessary to consider what the position would be if a bilateral treaty provision did expressly purport to authorize a breach of a *jus cogens* nom, such as that contained in Article 2(4) of the United Nations Charter. Under Article 53 of the Vienna Convention on the Law of Treaties, a provision of a treaty which conflicts with a nom of *jus cogens* is void, and under Article 44(5), no separability of such treaty provisions is permitted. That is to Say, the treaty as a whole is void. These rigorous provisions must in turn generate a stringent principle of interpretation, so that any provision of a treaty is to be interpreted, if at all

[17] *Oil Platforms* [2003] ICJ Rep 161, para 32.

[18] Memorial, submitted by the Islamic Republic of Iran, Volume I, 8 June 1993, paragraphs 4.04-4.07.

[19] Reply and Defence to Counter-Claim, submitted by the Islamic Republic of Iran, Volume I, 10 March 1999, paragraphs 7.75-7.76.

possible, so as not to conflict with such a rule. The principle that a treaty is to be interpreted to be consistent with international law combines here with the principle of the effectiveness of the treaty as a whole (*ut res magis valeat quam pereat*). The Treaty should be interpreted so as to be valid; and Article XX(1)(d) should be interpreted consistently with general international law, and in particular with the standard rules for amity and friendly relations between States which inspire its Article I. In the present case, there is no question that the terms of Article XX(1)(d) allow ample scope for the interpretation and application of the proviso in ways which are consistent with the peremptory norms of international law. Among such peremptory norms, those relating to the use of force provide the clearest case….

7.76 … Article XX(1)(d) cannot be interpreted so as to create a defence or justification in relation to a use of force unlawful under the Charter because it plainly, indeed flagrantly, exceeds the requirements of self-defence.

Similar points were made in Iran's oral submissions to the ICJ:

7. … The Treaty of Amity cannot have authorized or legitimized, as between the United States and Iran, conduct violative of a peremptory norm, such as that prohibiting the use of force in international relations except as permitted by the Charter. But there is no reason to posit a contradiction between the Treaty of Amity and the United Nations Charter, and in particular between paragraph 1 *(d)* of the Treaty of Amity and Article 2, paragraph 4, of the Charter. Paragraph 1 *(d)* can be interpreted consistently with the Charter, and no problem of inconsistency therefore arises.

> 8. I would summarize the relations between the Treaty and general international law for the purposes of this case in the following three propositions.
>
> …
>
> (3) There is a strong presumption – we would say, an irrebuttable presumption – that possible defences under the Treaty do not authorize or legitimize conduct contrary to peremptory rules of general international law, such as that prohibiting force contrary to the United Nations Charter. Article XX, paragraph 1 *(d)*, should be interpreted accordingly.[20]

Arguably, there was a legal conflict between the treaty provision – Article XX(1)(d) – and the *jus cogens* prohibition of the unlawful use of force. The treaty provision may be read to permit uses of force which would be contrary to the *jus cogens* prohibition of the unlawful use of force. In other words, this can be theorised as a conflict between a permissive rule and a mandatory rule (and the possibility of such conflicts was fully explored in Chapter 4). Furthermore, the conflict was a partial or occasional conflict (as discussed in Chapter 4) – i.e., the conflict would arise only on certain occasions, namely, occasions where measures 'necessary to protect [the] essential security interests' of a High Contracting Party involved the unlawful use of force. There could certainly be other occasions where such measures did not involve the unlawful use of force, hence the conflict was partial.

Recognition (even if implicit) of the legal conflict can arguably be seen in the ICJ's judgment. The ICJ delivered its judgment on the merits of the dispute on 6th November 2003,[21] and stated:

[20] CR 2003/16, oral proceedings held on Monday 3 March 2003, paras 7-8.

[21] *Oil Platforms* [2003] ICJ Rep 161.

> The Court cannot accept that Article XX, paragraph 1 *(d)*, of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force.[22]

This suggests that, in the ICJ's view, there was an inconsistency between the rules on the use of force and the treaty provision. In his separate opinion, Judge Simma argued that interpreting Article XX(1)(d) to allow for measures which are not lawful uses of force

> … would be both absurd and destructive: absurd, because our provision could then be read to mean that the parties to treaties of … "amity" could be allowed to contract out of the most fundamental of all obligations under present international law, namely, the prohibition on the threat or use of force … [and] destructive because it would allow a mutual "emancipation" from some of the most cogent of all rules of international law.[23]

And in his dissenting opinion, Judge Al-Khasawneh noted that he did 'not feel … that the concept of *lex specialis* (assuming that the 1955 Treaty was one) would operate to exclude the operation of rules of international law that have a peremptory character'.[24] This suggested that, in Al-Khasawneh's view, the two rules were inconsistent.

8.C.ii.2. The *Nicaragua* case

The *Nicaragua* case came before the ICJ at an earlier stage. There are parallels between the ICJ's reasoning on the merits in *Nicaragua*, and its reasoning in the subsequent *Oil*

[22] Ibid para 41.

[23] Separate Opinion, para 10.

[24] Dissenting Opinion, para 9.

Platforms case (as discussed above).[25] Indeed, in its written submissions to the ICJ in the *Oil Platforms* case, Iran referred to analysis in the earlier *Nicaragua* case.[26]

Let us turn to the *Nicaragua* case itself. On 21 January 1956, the US and Nicaragua signed a Treaty of Friendship, Commerce and Navigation. Article XXI of the 1956 US-Nicaragua Treaty mirrors Article XX(1)(d) of the 1955 US-Iran Treaty. It was made clear to the ICJ during that case (including both the jurisdiction and merits phases) that the law regulating the use of force was *jus cogens*. In their dissenting opinions, Judges Jennings and Oda argued that Article XXI of the 1956 US-Nicaragua Treaty should be interpreted so as to be consistent with general international law regulating the use of force (and, in particular, self-defence).[27] For example, Judge Jennings stated that '[a]lthough not without some remaining doubts, I have come to the conclusion that Article XXI [of the 1956 US-Nicaragua Treaty] cannot have contemplated a measure which cannot, under general international law, be justified even as being part of an operation in legitimate self-defence'.[28] Once again, this is indicative of a conflict between the treaty provision – Article XXI of the 1956 Treaty – and *jus cogens*.

8.C.ii.3. Commensurability and seriousness

I suggested at the outset of this chapter that the conflicts identified herein are conflicts between commensurables. In other words I am suggesting that, in both *Nicaragua* and *Oil Platforms*, the relevant treaty provision and *jus cogens* rule are commensurable.

---

[25] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.

[26] Memorial submitted by the Islamic Republic of Iran, Volume I, 8 June 1993, paras 4.04-4.07 (see footnotes 228-230).

[27] Dissenting Opinion of Judge Jennings, *Nicaragua* [1986] ICJ Rep 541; Dissenting Opinion of Judge Oda, ibid 253.

[28] Dissenting Opinion of Judge Jennings, ibid 541.

As we know, determining commensurability is (or can be) a fraught task. However, in these instances, arguably the relevant treaty provisions are seeking ends which can be compared with the rules concerning the use of force. Those rules concerning the use of force address the proper balance that is to be struck in the maintenance of international peace and security. Equally, the treaty provisions are addressed to similar issues – and this can be seen if we remind ourselves of their content. Article XX(1)(d) of the 1955 Treaty provides:

> 1. The present Treaty shall not preclude the application of measures:
>
> …
>
> (d) necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests.

And this is mirrored in Article XX of the 1956 Treaty.

Finally, as regards the seriousness of the legal conflict, as we saw in Chapter 6, the fact that the conflict is partial or occasional is a sign that it is less serious.

8.D. Concluding remarks

In this chapter we have focused on conflicts between treaty rules and *jus cogens* rules, and we have identified several candidate conflict-situations. In Part IV of the study, we will consider the possible consequences of these conflicts.

Chapter 9. Conflict-Resolution Methods in International Law

Part II of this study analysed how laws conflict with each other, and offered a typology of legal conflict which would be useful for the purposes of this study. In Part III, I applied this analysis – including the typology – to specific instances of conflict between *jus cogens* and ordinary rules of international law.

Now, in Part IV, I will examine the consequences of legal conflicts with *jus cogens*. Part IV contains two chapters. This chapter (Chapter 9) discusses the problem of conflict-resolution methods which are applicable in the *jus cogens* context. I will then rely upon this analysis in Chapter 10, where I will return to the specific instances of conflict with *jus cogens* as identified earlier, the purpose being to consider the possible consequences of those conflicts.

This chapter focuses on conflict-resolution methods. I will generally refrain from examining conflict-resolution methods in law in the abstract, because it is unclear how helpful such an analysis would be. This is because there are different rules of conflict-resolution in different legal orders – or even in different regimes within the same legal order. Accordingly, this chapter focuses on conflict-resolution methods which are relevant to the *jus cogens* context in international law.

9.A. Outline of the chapter

The outline of this chapter is as follows. The chapter will analyse various methods of conflict-resolution in international law which are applicable to the *jus cogens* context – in particular, interpretation and disapplication. A third method is invalidation, but some will treat this as an anomaly; for, as we shall see in the analysis below, it is uncertain whether invalidation should be understood as a conflict-resolution method at all.

This chapter assumes that there are different consequences of conflicts with *jus cogens*, and it is this assumption which should first be tested. Critics may point to Article 53 VCLT, which provides that a treaty which conflicts with *jus cogens* is void. As I have just suggested, it is not uncertain whether that is theoretically accurate – i.e., whether invalidation can properly be understood as a conflict-resolution method. Nonetheless, putting that concern to one side for the moment, critics may argue that *jus cogens* only has the power to invalidate – certainly when we are dealing with treaties (per Article 53 VCLT), and possibly in relation to other kinds of international legal rule as well. However, as I will indicate below, this criticism is misguided. There are reasons to indicate that *jus cogens* generates varied consequences in international law.[1]

9.B. Are there different consequences of conflicts with *jus cogens*?

Let us assume for the moment that we can properly treat invalidation as a conflict-resolution method (although, as mentioned above, this is problematised further below). Consider a conflict between a rule of ordinary international law and a *jus cogens* rule. Assuming that the *jus cogens* rule prevails, it may be thought that this inevitably leads to the invalidation of the defeated rule. The basis for this view is usually taken to be Article 53 VCLT, which states that a treaty which conflicts with *jus cogens* is void. One may think that invalidity is the sole consequence of a conflict with *jus cogens* – at least in relation to treaties, if not other kinds of international law. This view is mistaken for (at least) two reasons.

9.B.i. The example of customary immunity rules

[1] In the next chapter (Chapter 10), I will explain *when* this variation occurs. Briefly, I will argue in Chapter 10 that the variation is connected to the two types of conflict identified in Chapter 6 – namely, whether the conflict involves commensurable or incommensurable laws (in particular), and also whether the conflict is more or less serious.

First, let us consider customary immunity rules. There are debates concerning whether and when customary immunity rules and *jus cogens* conflict. This problem was analysed in Chapter 7. It is noteworthy, however, that all those who are involved in the debate (including national and international courts) appear to think that the invalidity need not follow. If a conflict between a customary immunity rule and *jus cogens* were indeed to arise, and the latter prevailed, the general thinking is that the former is not invalidated. Rather, the customary immunity rule would simply be disapplied in the instant case (and remain valid). This suggests that there is already widespread recognition in international law that the consequences of conflicts with *jus cogens* can vary.

There is a further reason why the argument that *jus cogens* only invalidates conflicting rules is mistaken. To the extent that this argument relies upon Article 53 VCLT, such reliance is misplaced. As we saw in Chapter 1, Article 53 VCLT is not an exhaustive statement of *jus cogens* in international law. This is equally true as regards what Article 53 VCLT says about the consequences of a conflict with *jus cogens*. Article 53 VCLT should not be taken to mean that invalidity is the only consequence of a conflict with *jus cogens*. Rather, that provision should be properly confined.

For instance, the drafting history of Article 53 VCLT demonstrates the kinds of conflict-situations with which the ILC, and States (at the UN conferences in Vienna), were concerned. We find that the kinds of treaty-conflicts that the drafters had in mind were more serious conflicts with *jus cogens*. For instance, in its commentary to the 1966 Draft Articles on the Law of Treaties, the ILC discussed some examples of treaties which would conflict with *jus cogens*, and these were all serious conflicts.[2] This can also be seen in the earlier ILC

[2] (1966) YILC II 248. Here, the ILC provided a list of examples which were suggested by some of its members: '(*a*) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (*b*) a treaty contemplating the performance of any other act criminal under international law, and (*c*) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate'.

reports – e.g., those of Fitzmaurice[3] and Waldock.[4] The examples given are treaties whose sole purpose is contrary to *jus cogens*, rather than cases where, say, the conflict is only partial and thus potentially less serious.

We are not enslaved to the drafting history when interpreting Article 53 VCLT. Still, the preparatory work is useful in illuminating the history of and reasons for the formulation that came to be adopted. In my view, Article 53 VCLT only envisions, and speaks to, certain kinds of conflicts with *jus cogens* rules. It does not provide a full picture of the landscape.

9.B.ii. Articles 64 and 71 VCLT

The fact that there are different consequences of conflicts with *jus cogens* is also reaffirmed by Articles 64 and 71 VCLT. Article 64 provides:

> Article 64 Emergence of a new peremptory norm of general international law (*jus cogens*)
>
> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

And Article 71 VCLT provides:

> Article 71 Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law
>
> 1. In the case of a treaty which is void under article 53 the parties shall:

[3] (1958) YILC II 40. Fitzmaurice referred, for example, to a case where 'two countries were to agree to attack a third in circumstances constituting aggression'.

[4] (1963) YILC II 52. Waldock describes a treaty which is 'void if its object or execution involves … (*a*) the use or threat of force in contravention of the principles of the Charter of the United Nations; (*b*) any act or omission characterized by international law as an international crime …'. In fact, Waldock also expressly contemplated that there might be cases of more minor inconsistency with *jus cogens*, in which case the offending treaty provision may be severed and invalidated; ibid., 53. This precisely indicates that, in relation to the earlier cases, Waldock had in mind serious inconsistencies between a treaty and *jus cogens*.

(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and

(b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

(a) releases the parties from any obligation further to perform the treaty;

(b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

We see in these provisions the different consequences of conflicts with *jus cogens*. In the case of a treaty which (at the time of its conclusion) conflicts with a pre-existing *jus cogens* rule, the treaty is void from the outset in accordance with Articles 53 and 71(1) VCLT.

But as Article 64 VCLT provides, a new *jus cogens* rule may emerge which conflicts with a pre-existing (and hitherto valid) treaty. In such cases, Article 71(2) VCLT provides for a different set of consequences. Sound legal policy is likely to be among the reasons for these different consequences. If the treaty were taken to void from the outset in these cases, then this would require that we unwind all the actions undertaken in furtherance of the treaty. Underlying Article 71(2) VLCT is the thought that this would be too drastic.

9.C. Introducing the various methods of conflict-resolution in the *jus cogens* context

A variety of conflict-resolution methods are relevant in the *jus cogens* context. In what follows below, I will analyse three such methods. These are interpretation, disapplication, and invalidation, and I will discuss each of them in turn.

Some qualifications are necessary, however. I stated at the outset of this chapter that I do not intend to provide an overview of conflict-resolution methods in law generally, or in international law generally. The focus is on conflict-resolution methods which may be relevant for *jus cogens* purposes.

Moreover, even within the context of *jus cogens*, the chapter does not seek to provide an exhaustive treatment of all relevant conflict-resolution methods. This is mainly because the range of conflict-situations involving *jus cogens* is potentially very large, and different considerations may apply to these various situations. Take, for example, the problem of reservations to treaties. There is a vexed question in international law concerning the consequences of an impermissible reservation to a treaty. Accordingly, any attempt to discuss the consequences of conflicts between treaty reservations and *jus cogens*, which result in the reservation being impermissible, would need to engage with that wider question. This leads us away from our main focus in this study, because it will be necessary to examine the problem of reservations in detail.

For this reason, I tend not to focus on conflict-situations involving *jus cogens* which require significant analysis of yet further areas of international law. The main objective of this chapter is to draw attention to some conflict-resolution methods which are important and commonly applicable in *jus cogens* context. This lays the foundations for the analysis in Chapter 10, in which I discuss how specific instances of conflict with *jus cogens* may be resolved.

9.D. Interpretation

Interpretation is a means of resolving legal conflicts. It is perhaps the most common means of resolving legal conflicts, in the sense that it is used the most frequently. I will begin by addressing some persistent doubts about the very characterisation of interpretation as a conflict-resolution method. Exploring these doubts helps us to better understand how interpretation may be used to resolve conflicts.

9.D.i. Doubts about whether interpretation is a conflict-resolution method

One criticism of the proposition that interpretation is a means of resolving legal conflicts is provided by Carlos González.[5] González distinguishes between potential legal conflicts and true legal conflicts. In the case of true legal conflicts, 'two legal norms, as interpreted, require, allow or prohibit mutually exclusive outcomes. Both norms, as interpreted, cannot simultaneously be enforced or applied to their fullest extent, and therefore we must privilege one norm over another'.[6] By contrast, in the case of potential legal conflicts, 'by interpreting one or both norms narrowly, a court avoids finding that the norms in question demand mutually exclusive outcomes'.[7]

González acknowledges that 'one might infer that instances of what [he has] labelled potential legal conflict represent not so much avoidance of true legal conflict via narrow norm interpretation, but rather *resolution* of true legal conflict via narrow norm interpretation'.[8] However, he maintains that there is a credible conceptual distinction between potential and true legal conflicts. He states:

[5] Carlos E González, 'The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms' (2001) 80 Oregon Law Review 447, 467-474.

[6] Ibid 464.

[7] Ibid.

[8] Ibid 469 (emphasis added).

> … we cannot always know a priori whether norms stand in a posture of true or potential legal conflict. Only after a court has interpreted the norms in question, and found them either irreconcilable or reconcilable, can we say that those norms stand in a posture of true or potential legal conflict. … More specifically, it does not mean that a court which interprets norms narrowly in order to avoid true legal conflict has "resolved" an instance where norms demand mutually exclusive outcomes. Quite to the contrary, a court engaging in such a strategy quite bluntly finds that the norms in question demand mutually satisfiable outcomes. As such, a court engaging in this strategy avoids, rather than resolves, true legal conflict.[9]

A similar approach to interpretation has been adopted elsewhere – including, in particular, in international law writing. International lawyers have also tended to distinguish between conflict-avoidance and conflict-resolution, and also between apparent conflicts and genuine conflicts. In this vein, Marko Milanović claims:

> A … distinction must be made between apparent and genuine norm conflicts, and consequently between conflict avoidance on the one hand, and conflict resolution on the other. An apparent conflict is one where the content of the two norms is at first glance contradictory, yet the conflict can be avoided, most often by interpretative means. In instances in which all techniques of conflict avoidance fail, a genuine, as opposed to an apparent, conflict will emerge. These true norm conflicts are those that cannot be avoided, but which it might be possible to resolve. Unlike avoidance, which interprets away any incompatibility, norm conflict resolution requires one conflicting norm to prevail, or have priority over, the other.[10]

[9] Ibid 469-470.

[10] Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 Journal of Conflict and Security Law 459, 465 (footnotes omitted).

This approach is shared by many other international lawyers.[11] Joost Pauwelyn argues that an apparent conflict is 'a situation where there is no real conflict since the divergence can, for example, be "interpreted away". A genuine conflict will then arise only in case all of the conflict-avoidance techniques [which Pauwelyn discusses in a subsequent chapter of his monograph] have proven to be unsuccessful'.[12] A similar approach is adopted by Antonios Tzanakopoulos.[13] Tzanakopoulos thinks that the successful application of conflict-avoidance techniques – especially interpretative techniques which bring the two rules into harmony[14] – means that there was never a (genuine) conflict in the first place. And in his commentary to the ILC's 2001 Articles on State Responsibility, James Crawford argues that *jus cogens* norms 'generate strong interpretative principles which will resolve all or most apparent conflicts'.[15]

9.D.ii. The failure of the criticisms: interpretation can be a conflict-resolution method

The above criticisms of interpretation as a conflict-resolution method are not plausible. But they are not entirely meritless, either. A proper understanding of interpretation (and its role in resolving conflicts) requires that we put the above criticisms in their proper place.

---

[11] But not just international lawyers. See eg Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2007) 74-75, where he states that '[a] "real" contradiction among rules exists only at the end of the interpretive process. Before that stage, the contradiction may be "imaginary." With the help of interpretive rules – including the presumption against the existence of a contradiction – the court generally manages to resolve the contradiction. We witness a real contradiction only after exhausting every interpretive possibility of solving it. Of course, a given legal system can treat the rules for resolving a "real" contradiction as interpretive rules. However, we should distinguish between an (interpretive) process that determines the validity of each norm and a different process that determines the (normative) relationship between norms embedded in separate texts as non-interpretive rules.'

[12] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003) 178.

[13] Antonios Tzanakopoulos, 'Human Rights and United Nations Security Council Measures', in Erika de Wet and Jure Vidmar (eds), *Norm Conflicts in Public International Law: The Place of Human Rights* (forthcoming) <http://ssrn.com/abstract=1677477> 8-9.

[14] Ibid 12-14.

[15] (2001) YILC II Pt.2 85, para 3.

Where interpretation is used to resolve a legal conflict, two stages must be separated out. At the first stage, we appreciate or cognise the laws in question; we have an initial understanding as to what these laws require. Some may treat this first stage as an exercise in interpretation. They will say that knowing what a law requires always involves interpretation of that law. Others believe that we only resort to interpretation on certain occasions, not every occasion. This disagreement should not detain us; as long as we are clear about what we mean, the philosophical problem of interpretation (i.e., when we interpret, and when we do not) can be put to one side.[16] For reasons of convenience, I will treat this first stage as an exercise in interpretation. In this first stage, we have come face to face with two laws and we appreciate, on the basis of our initial cognisance, that they are conflicting with each other.

At the second stage, we engage in (further) interpretation or re-interpretation of the laws, in the hope that we may bring the two laws into harmony. At this second stage, we are now engaging in interpretation to *resolve* the conflict that presented itself at the first stage.

It is understandable why many writers elide these two stages into one. The intellectual process is usually not separated into two stages – or so it seems in our own minds. But the two stages are analytically distinct, and we lose clarity by conflating them.

I should also add that, sometimes, there really is no conflict. We are faced two laws, and at the first stage we have an initial understanding of what they require. But no conflict presents itself at this first stage. The two laws stand together in harmony.

9.D.iii. Justifying the two stages

[16] Thus, whether any knowledge of an object is an exercise in interpretation is a separate philosophical problem which I will not deal with here. There is disagreement amongst philosophers as to whether we always need to interpret an object in order to know it. In part, this depends on how we understand 'interpretation' itself. Timothy Endicott, for example, distinguishes between intellection and interpretation; see further Timothy Endicott, 'Legal Interpretation', in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012) 109. See also Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Hart Publishing 2005); Marmor challenges the notion that we must always interpret in order to know the meaning of objects.

We need some explanation of why we should prefer the two-stage approach, according to which interpretation can be a conflict-resolution method. This approach has some intuitive appeal. But this is not sufficient, nor is the bare claim that it improves analytical clarity. For the approach may simply be untrue.

In what follows, I defend the claim that we use interpretation to resolve legal conflicts, but the analysis is tentative. In a nutshell, when we are interpreting two rules so as to bring them into harmony, we are effecting a change to the normative situation. The social facts, which go to the content of the legal rules, are changed by being re-interpreted.[17] The rules – the normative requirements – change. This is a form of law-making. And we are making law here precisely because we are engaging in conflict-*resolution*.

An alternative view is that *whenever* interpreting (including radical or dramatic re-interpretations of two rules), we are simply working out what the rules really meant. In fact, what we are saying here is that we are working out what the rules *always* meant. The two rules really were – always were – in harmony. The conflict was only apparent, and we used interpretation to 'avoid' the conflict.

This is the basis of the view which denies that interpretation can (ever) operate as a conflict-resolution method. Once we come to terms with this underlying assumption, we realise that it yields an unattractive view of interpretation. It pushes towards the view that interpretation can never be used to make law. But this is false.

In legal philosophy, this problem has been discussed at length in the disagreements about how judges decide cases. Those who work in the tradition of legal positivism think that, sometimes, a judge must make law in order to render a decision in the case before her. Often this is masked by judicial rhetoric. And when reading the judge's speech, the various analytical stages of the process – interpreting the existing, settled law, and making new law

[17] For simplicity's sake, I will assume that the content of the two rules is based on social facts.

through interpretation – may appear to merge into one. But this should not disguise the law-making that is sometimes taking place – and sometimes via interpretative means.

By way of illustration, imagine a legal rule which provides: 'No vehicles allowed in the park.[18] There will be many cases where a judge can interpret and apply the rule straightforwardly; in reaching a decision she will be applying the (settled) law. I cannot enter the park in my Italian sports car. But there will also be less straightforward cases – novel cases, even. Is a horse-and-carriage prohibited under the rule? A bicycle? A skateboard? Rollerblades? A child's remote-controlled toy car? The rule has run out; we have reached the limits of its settled meaning (which is determined by social facts). It is not clear whether the rule applies or not. We just do not know what the law is. In such cases, the judge will continue to work with the rule. She will be interpreting what the rule requires, and in applying the rule to these novel fact-situations and reaching decisions, she will necessarily be *making* new law. Here, we see interpretation put to a creative – indeed, law-making – role.

A competing account is offered by anti-positivists such as Ronald Dworkin. On this view, judges do not make law, and the above cases are not instances of law-making.[19] Rather, judges are working out what the law actually requires. In doing so, they are interpreting, but their interpretations are going to the question of what the law *is*.

This is not the place to revisit these central debates in legal philosophy about whether judges sometimes make law when deciding cases, and the role of interpretation in adjudication (and legal reasoning) more generally. But these points are useful in drawing attention to certain underlying assumptions of the debate about the role of interpretation in legal conflict.

[18] This example has been used before by Hart and others.

[19] This is something of a simplification, but necessary for reasons of clarity.

Those who propose that interpretation is a means of conflict-*avoidance*, not conflict-resolution, are revealing their anti-positivist dispositions. Such dispositions are not, in my view, theoretically persuasive. The better view is that cases of legal conflict are sometimes *resolved* by interpretation, and this is because interpretation sometimes has a law-making role. Two legal rules may be in an initial stance of conflict (at the first stage), and an interpreter engages in law-making (at the second stage) in order to resolve the conflict. The consequence is that the requirements of one of the rules is now different from what it once was – an indication of the law-making that has taken place, and of the way in which the conflict has been resolved by a change in the normative situation. This is effected by interpretation.

9.D.iv. The practice of adjudication

The above argument is reflected, to some extent, in the phenomenology of adjudication. There are many cases where the court is expressly presented with an argument from one of the parties that two legal rules are conflicting. Courts often try to avoid deciding the point, but sometimes they have no choice. In these circumstances, judges strive to read the two legal rules harmoniously, in the face of arguments by counsel that they are conflicting. Judges will sometimes read words into legal provisions, or even interpret existing words in ways that may appear surprising or strained. Nonetheless, this practice demonstrates how judges regularly *go to* interpretation in attempt to resolve a disharmony that they have already grasped – or been presented with – at an initial (or first) stage.

Of course, if the interpretation is successful at resolving the conflict, judges will often go on to indicate that there was never really any legal conflict to begin with. This part of the practice of adjudication should not necessarily be taken at face value. In just the same

way, judges often deny that they are making law in cases, but legal positivist theories will not necessarily take this rhetoric at face value.

9.D.v. The distinction between the existence of a conflict, and conflict-resolution

One of the undercurrents in the above analysis is that we need to be upfront about the existence of legal conflicts. A persuasive theory of legal conflict must be able to separate out two questions – first, whether a conflict has emerged, and second, whether it has been or may be resolved.

We see a commitment to this approach, at least in principle, among some international lawyers. For example, in his writing on conflict, Pauwelyn frequently emphasises that he is seeking to distinguish 'between the *definition* of conflict and *how to solve* an alleged conflict'.[20] He argues, rightly, that we should not prejudge the question how to resolve a conflict through our very theory of conflict. It is vital to separate the primary question of whether there is a conflict from the secondary question of how the conflict (now properly identified) may be resolved.

For those who are sympathetic to this approach, the claim that interpretation is a technique of 'conflict-avoidance' should immediately raise suspicions. The claim is asking us to juggle a new idea. And that idea is peculiar in its structure. To speak of conflict-avoidance seems to assume, in the first instance, that there is a conflict – namely, the conflict *to be avoided*. But it also assumes that the conflict is indeed ultimately avoided, in the sense that the conflict never really existed in the first place. This has the air of paradox. And this is precisely because it seems to conflate the existence of a conflict with the means by which a conflict is resolved.

[20] Pauwelyn, *Conflict of Norms in Public International Law*, 170 (emphasis in original).

It is therefore surprising that Pauwelyn, who is keen to avoid such a conflation, does nonetheless endorse the idea of conflict-avoidance. According to that idea (which we have already encountered above), conflicts which can be interpreted away are avoidable conflicts, and this is to be contrasted with unavoidable (or genuine) conflicts where the two rules really cannot be brought into harmony through interpretative means. In other words, conflicts arise only when they are 'unavoidable'.

But this approach is misguided, for the reasons given above. Interpreting two rules so as to bring them into harmony is in fact a method of conflict-resolution; it assumes the existence of a prior conflict. Otherwise, one might ask why we even reach the stage of seeking to interpret the two rules harmoniously. We reach this (second) stage because we recognise (at the first stage) the existence of a conflict. The very notion of 'conflict-avoidance' assumes that there is a conflict in the first place (which needs to be avoided).

This is also true of the notion of a 'presumption against conflict', a presumption which is thought by some writers to exist in international law.[21] Again, according to that notion, it must be determined that there is a conflict in the first instance, before techniques (or presumptions) can be brought to bear to resolve it.

To summarise, interpretation may be relevant to legal conflict at two stages. At the first stage, we must know what the laws in question require of us (or permit us to do), otherwise we cannot know whether there is a conflict between them. And knowing what the

[21] See Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011) 57fn32, where Tzanakopoulos cites to a range of writing which endorses the 'existence of a general presumption against conflict' (namely, Jenks, Pauwelyn, Koskenniemi, Akehurst, and so on).

Martti Koskenniemi himself states that '[i]n international law, there is a strong presumption against … conflict'; see Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the ILC (2006) A/CN.4/L.682, 25 (para 37).

And in the *Right of Passage* case, the ICJ stated that 'it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it'; see *Case Concerning the Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections) [1957] ICJ Rep 125, 142.

laws require of us (or permit us to do) may depend, at this first stage, on interpretation.[22] At the second stage, we know what the two laws require, and we grasp that they conflict. We may now turn to interpretation once again, or another method, in an attempt to resolve the conflict.

9.D.vi. Priority

When a conflict between two rules is resolved, one rule is given priority over another. This dynamic is most obvious in situations where the losing rule is simply disapplied (see below). But it is also present in situations where interpretation is used to resolve the conflict.

In these latter situations, the rule which is interpreted differently is the losing rule. Here, a judge (for example) has exercised her law-making power to change the rule, because the successful rule has taken priority over the losing rule. The content of the losing rule will be changed in order to make it fit with the successful rule.

Sometimes, however, knowing which rule has prevailed, and which rule has given way, is less straightforward. There can be situations where *both* rules are interpreted differently in order to resolve the conflict. Can we tell which rule has prevailed? For instance, provision *A* may have words read in, and provision *B* may have words read out. It is conceivable that no judgment can be made as to which rule has prevailed. Such cases are interesting, but their rarity means that they are of marginal importance. It will often be possible to decide which rule has prevailed.

And this is important because, for the rule which takes priority, its weight increases (relative to the losing rule). As we have seen in Part I of this study, the weight of rules is

[22] I will assume, for simplicity's sake, that we must always 'interpret' (in one sense) in order to know the meaning of objects.

based on social facts, and conflict-situations are one site in which the relative weights of rules is established (and renegotiated).[23]

9.D.vii. Remaining questions

There are a number of remaining questions which need to be addressed. In some cases, when we are initially faced with two laws, we think that they do not conflict. But what happens if one interpreter, faced with these laws, sees a conflict (given her initial appreciation of the respective content of the two laws) – whereas another interpreter does not? In such a case, why would we choose an initial interpretation of the two laws which produces a conflict between them, rather than an interpretation which do not?

This is the familiar sight of interpretative disagreement – and the disagreement is more acute when there are several competing interpretations on the menu, all of which are good. A first response is that we cannot always predict in advance what every conceivable conflict-situation might be. Nor are we perfect interpreters. These frailties mean that the interpretations that we adopt or find plausible at an initial stage may push us into recognising conflicts on the basis of those interpretations. And even when we seek to resolve a conflict using interpretation (at the second stage), the meanings we adopt may lead to conflicts in other circumstances – including those which we did not envisage.

Second, there are many considerations which bear upon our interpretative choices – i.e., which interpretations to prefer. These are often just the various considerations about what counts as a good interpretation. And as noted earlier, some interpretative choices will entail law-making; this may require a judgment as to whether such choices are necessary or prudent.

[23] See further Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823; Joseph Raz, *The Authority of Law: Essays in Law and Morality* (2nd edn, OUP 2009) 74-75, concerning conflicts and legal gaps.

A good illustration of the various considerations which feed into interpretation can be found in the treatment by English courts of their responsibilities under the UK Human Rights Act 1998. Section 3 of the 1998 Act imposes an interpretative obligation on the courts. Section 3(1) states that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. This is a reference to provisions in the European Convention on Human Rights. However, section 4 of the 1998 Act allows the English courts to issue a declaration of incompatibility, whereby a court can state that primary or subordinate legislation is incompatible with a Convention rights. According to section 4(6), a declaration of incompatibility 'does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given'. Nonetheless, in the event of a declaration being issued, the matter is thrown back into the political arena for settlement, if such a settlement is desired (e.g., by way of repeal or amendment of the incompatible legislation).

There have been many English cases in which the courts have resorted to the interpretative obligation in section 3 of the 1998 Act, and a number of cases in which the courts have issued a declaration of incompatibility under section 4. But for our purposes, the interesting question (which is discussed in the academic literature) is whether and when the courts *should*, as a matter of judicial policy and for other reasons, strive to interpret legislation compatibly *or* declare that the legislation is incompatible. This debate precisely captures the role of various considerations in choosing how (and when) to interpret.[24]

9.E. Disapplication

[24] Indeed, this example is also useful as an indication of how interpretation is a means of conflict-resolution, in the form of the two-stage analytical exercise of interpretation discussed earlier. Under the UK Human Rights Act 1998, the English courts will be faced with laws whose meanings are inconsistent. They will be presented with arguments by counsel that they should engage in interpretation (per section 3 of the 1998 Act) in order to bring the laws into harmony. And the courts will take such arguments seriously; they will consider to what extent they can interpret the laws in such a way that the conflict, which they were presented with at an initial stage, can in fact be resolved by interpretative means.

A second method of conflict-resolution is disapplication. This is sometimes referred to as trumping, displacement, or suspension. In a conflict between two laws, the defeated law is disapplied in the instant case. In other words, it is set aside, and ceases to govern or apply to the case. But although it has been defeated and set aside, the law remains valid. This may mean that, while the law is not applied in the instant case, or in a set of cases, it continues to apply in other cases. Or it may even mean that the law is suspended generally (for all cases), although it remains valid despite its suspended status. This is to be contrasted with invalidation (discussed further below), whereby the law ceases to exist.

Disapplication also differs from interpretation. Some may think otherwise – in particular, by suggesting that interpretation is just a form of disapplication. Suppose that rule A and rule B conflict, and interpretation is used to resolve the conflict; rule B is re-interpreted, and no longer applies to the case. It may be thought that this is a form of disapplication of rule B, precisely because rule B no longer applies to the case. But this is a mistake. Rule B does not apply to the case, and this is different from rule B being *dis*applied. For in the former situation, rule B is re-interpreted in such a way that it no longer regulates the case. But in latter situation, rule B does continue to apply to or regulate the case – only, it has now been actively disapplied or set aside. Juxtaposing disapplication and interpretation in this way helps to sharpen our understanding of how the two methods operate.

The above analysis raises the question of when interpretation fails as a method of conflict-resolution. Why, for example, would we turn to disapplication? How do we choose which method to use? This question will be analysed more closely in the next chapter, but in a nutshell the choice is governed to a large extent by considerations of policy.

Finally, it should be noted that disapplication does not appear solely in the *jus cogens* context. As with interpretation, disapplication is used as a means of conflict-resolution throughout the law – namely, whenever one rule is disapplied in favour of another

(conflicting) rule. The most obvious examples of this occur in the context of rule-exception relationships, where one rule is set aside by another rule which is described as its 'exception'.

9.F. Invalidation

We turn now to the question of invalidation. Article 53 VCLT provides a treaty which conflicts with a *jus cogens* rule is void.[25] This simple statement masks a host a theoretical problems. For example, is invalidation properly understood as a conflict-resolution method? Put another way, can invalidity really be a consequence of a legal conflict? Relatedly, does invalidation mean voidness from the outset (*ab initio*) – i.e., the rule never existed in the first place? These questions, and more, will be explored below.

However, although the theoretical problems are involved, the irony is that invalidation appears to be of marginal significance in practice. Two possible reasons present themselves (and there may be more). First, situations in which invalidity is thought to ensue are rare. The circumstances in the *jus cogens* context in which invalidation may ensue are discussed in the next chapter. In the analysis below, I am only addressing the idea of invalidation itself. Second, authoritative determinations of invalidity are lacking in international law, and this inevitably makes findings of invalidity rarer. This second issue will be analysed in the discussion below.

9.F.i. Clarifying invalidity

[25] See also Article 64 VCLT, entitled 'Emergence of a new peremptory norm of general international law (*jus cogens*)', and providing as follows: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. This provision is rather unusual, and will be dealt with further below.

There is a puzzle about treating invalidity as a consequence of legal conflicts, or as a means of conflict-resolution. A legal conflict requires (at least) two laws. However, where the consequence or solution of the supposed legal conflict is the invalidity of one of the conflicting laws, then that law may be said not to exist. And one may therefore wonder whether a legal conflict – namely a conflict between two laws – ever really arose.

Some preliminary clarifications are needed. Invalidity can mean different things. Two broad distinctions may be drawn here: voidness on the one hand, and voidability and on the other. Voidability generally refers to situations where the law in question only becomes invalid on the determination of an authorised actor. Usually the authorised actor is a court to whom an application is made. Voidness, by contrast, is usually thought to mean the automatic invalidity of the law in question as a matter of operation of law, and irrespective of any action by an actor.

Second, we may also distinguish between invalidity from the outset (*ab initio*), or invalidity after a particular point in time. In the case of invalidity from the outset, the invalid law is taken to have never existed at all. But in the case of invalidity after a particular point in time, the invalid law is taken to have existed for a period, before ceasing to exist. This distinction can have practical significance. Imagine that a written constitution, containing rules about the validity of (inferior) legislation, is amended. As a consequence of the constitutional amendment, a great deal of ordinary legislation is rendered invalid. In such circumstances, the legal system may prefer that the ordinary legislation not be rendered invalid from the outset, but only from such time as the amendment came into force – e.g., in order to protect the legitimate expectations of subjects who relied on the ordinary (and now invalid) legislation without any problems for many years. These remarks are necessarily brief. But the main point is that legal systems tend to develop a variety of sophisticated

techniques for managing invalidity – and often in the terms of the discretionary nature of the orders (or 'remedies') available to the courts.[26]

Finally, I should note that the above two distinctions – voidness and voidability, and invalidity from the outset or after a point in time – can cut across each other. In particular, in the case of voidability, a legal rule may be determined by an authorised actor to be invalid, and still the actor may deem that the rule never existed (invalidity from the outset), or that it did exist for a period but then ceased to exist (invalidity after a point in time).

9.F.ii. Doubting whether invalidity is a consequence of legal conflict

Let us return to our initial puzzle. We must consider whether invalidity can be treated as a conflict-resolution technique at all where one 'rule' – the defeated 'rule' – is ultimately deemed not to exist. After all, a legal conflict requires two rules. This problem is most acute in the context of invalidity from the outset – namely, where the rule is deemed *never* to have existed in the legal order.

Many theorists will argue that the operation which results in the invalidity of a law in the above way is different, as an *operation*, from a legal conflict between two laws. For example, this was Kelsen's view, and it has also been shared by other theorists such as Bruno Celano.[27] Suppose that legislation in a bicameral Parliament, in order to be valid,

[26] A good example is found in the EU legal system. According to Article 263 TFEU, the Court of Justice of the EU is empowered to review the legality of a variety of Union acts. Article 264 TFEU concerns Union acts which have been found to be illegal by the Court, and provides in its first paragraph: 'If the action is well founded, the Court of Justice shall declare the act concerned to be void'. However, as regards regulations, the second paragraph of Article 264 TFEU demonstrates the flexibility afforded to the Court: 'In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive'. As Chalmers et al note, '[w]hile the presumption in the first paragraph of Article 264 TFEU is that [the regulation] is void *ab initio*, considerable discretion is given to the Court under the second paragraph of Article 264 TFEU, enabling it to determine the effects of its ruling … Temporal limitations may … be placed upon an annulment, meaning that the legislation will remain in force until new legislation is passed to replace it'; see Damian Chalmers et al, *European Union Law: Cases and Materials* (2nd edn CUP 2010) 438.

[27] Celano states that '… one may grant Kelsen's point that for a norm conflict to exist, it is necessary that both norms be valid'; see Bruno Celano, 'Norm Conflicts: Kelsen's View in the Late Period and a Rejoinder', in

must receive two-thirds of the vote in one chamber, and a simple majority in the other. A bill which only receives a simple majority in each chamber does not become valid law. And it is difficult to construe this as a case of legal conflict. Rather, in this case, a set of facts – facts about the passage of the bill through the chambers of Parliament – is assessed according to the legal rule which provides criteria of validity, and it is found that the facts do not establish that valid legislation has been enacted. There is simply no conflict between two legal rules.

Equally, where the validity of a 'putative' rule is tested and found wanting, such that the rule is deemed never to have existed, many theorists will classify this as an operation whereby a set of social facts was assessed against a rule providing criteria of validity – and not a legal conflict (which assumes two existing legal rules). So it is proper to question the idea that invalidity might be part of a study of legal conflict – namely, by treating invalidity as a method of conflict-resolution, especially where one of the rules is deemed to be invalid from the outset and thus never existed.

In what follows immediately below, I will sketch some of the reasons for and against the inclusion of invalidity in a study of legal conflict. Although there is reason to doubt its inclusion, there are also a number of reasons why such inclusion might not be misplaced – and, in light of the latter considerations, I would tentatively suggest that there is *some* place for invalidity in this study.

9.F.ii.1. Reasons against the inclusion of invalidity in a study of legal conflict

The analysis provided above – the common position that, as a theoretical matter, invalidity does not belong in a study of legal conflict – is not without persuasive value. Where a putative rule, A, is deemed to be invalid *from the outset* by being assessed against rule B, the better way to understand the interaction between A and B is to treat it as a validity operation.

Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998) 343, 350.

Rule B is simply setting conditions on validity against which a set of facts is assessed to determine whether a valid rule did at one point emerge.

If this is correct, then we should doubt the theoretical accuracy of the formulation in Article 53 VCLT, which is entitled 'Treaties conflicting with a peremptory norm', and expressly provides that a 'treaty is void if, at the time of its conclusion, it *conflicts* with a peremptory norm'. In light of this wording, as well as the provisions in Article 71(1) VCLT (which were set out above) elaborating on the implications of voidness under Article 53 VCLT, it seems that Article 53 VCLT is dealing with situations in which a treaty is invalid from the outset. But in theoretical terms it is a mistake to treat such a case as a legal conflict. With this in mind, we should also question the legal thinking, reflected across the case law and academic literature since the adoption of Article 53 VCLT, which has continued to accept uncritically the VCLT formula that there is a legal conflict when a putative rule, set against a *jus cogens*, is deemed to be invalid from the outset.

Of course, the connection that is drawn between legal conflict and validity is not isolated to the VCLT, or indeed to international law. We also see similar references to legal conflicts in, for example, domestic constitutional practice (and the academic writing about that practice) where it is being determined whether a rule is unconstitutional in the sense of invalid from the outset.

9.F.ii.2. Reasons in favour of the inclusion of invalidity in a study of legal conflict

However, there are several reasons why it may be defensible to examine invalidity in this study. First, for those who might question whether invalidity belongs with a study of legal conflict, the different forms of invalidity muddy the waters. As noted above, invalidity from the outset (*ab initio*) is the firmest example of an operation which is simply different from a

legal conflict. Invalidity from the outset means, simply, that the putative rule never existed in the first place. A valid rule was never made.

However, matters are more complicated in the case of a finding that a rule is (or becomes) invalid at a particular moment in time. Such findings are common in legal practice. In the *jus cogens* context, this possibility is expressly provided for in Articles 64 and 71 VCLT. As we have seen, Article 64 VCLT concerns the emergence of a new *jus cogens* rule, and the implications that this has on existing treaties which conflict with the new *jus cogens* rule. Article 64 VCLT provides that the treaty 'becomes void and terminates'. This is unusual language, but it is best understood as referring to circumstances where a valid treaty came into existence, and continued to exist for a period of time, but then became invalid at a particular point in time (namely, when the new *jus cogens* rule emerged). These implications are further elaborated in Article 71(2)(b) VCLT, according to which any previous 'right, obligation or situation' established under the formerly valid treaty (before its termination) do not need to be fully unwound. The situation would likely be different if the treaty had been invalid from the outset.

In such circumstances, the rule (or treaty) in question was indeed valid, but only for a period of time. Would it be mistaken to treat such situations as legal conflicts? It is not clear. It is plausible that a conflict between two valid legal rules emerged – and that conflict was resolved by invalidating one of the rules for the future. If this view has merit, then we can see that certain forms of 'invalidity' may indeed deserve consideration in a study of legal conflict.

This brief analysis takes us back to some earlier remarks about the discretionary nature of judicial orders (or 'remedies') in cases where validity is at stake. The idea that a rule is invalid only at a particular point in time is, in fact, a flexible solution which is often available to courts. And it is worth noting that there are *other* solutions which are made available to courts, as can be seen in many of the cases concerning the constitutionality of

domestic legislation. One example is the 2011 case of *Mvumvu v Minister of Transport* before the Constitutional Court of South Africa.[28] In that case, certain provisions of ordinary legislation in South Africa – namely, the Road Accident Fund Act 56 of 1996 – were found to be contrary to the South African Constitution. According to Justice Jafta:

> 40. The correct approach to the question of remedy in cases where an order of constitutional invalidity is contemplated is the following. If the Court finds the challenged legislative provision to be inconsistent with the Constitution, section 172(1) of the Constitution obliges the Court to declare such provision invalid to the extent of the inconsistency. Thereafter the Court must make an order that is just and equitable which may include limiting the retrospective effect of the invalidity order or its suspension…
>
> 45. Thirdly, section 172(1) of the Constitution enjoins the Court to make a just and equitable order, following a declaration of invalidity. Depending on the circumstances of the case, such order may include an order limiting the retrospective effect of the declaration of invalidity or suspension to allow a competent authority to correct the defect…
>
> 51. In the light of the facts mentioned above, an unlimited retrospective order of invalidity is likely to have a crippling effect on the Fund's operation…
>
> 57. The following order is made:

[28] *Mvumvu and Others v Minister of Transport and Another* (CCT 67/10) [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) (17 January 2011). See <http://www.saflii.org/za/cases/ZACC/2011/1.html> accessed 18 March 2012. At issue in the case were certain provisions of the Road Accident Fund Act 56 of 1996. Section 18 of the Act imposed a cap on the amount of compensation that could be recovered by victims of motoring collisions. The applicants argued (amongst other things) that certain provisions within section 18 of the Act were incompatible with section 9(3) of the Constitution, which prohibited direct or indirect discrimination against certain protected groups.

> 1. It is declared that sections 18(1)(a)(i), 18(1)(b) and 18(2) of the Road Accident Fund Act 56 of 1996, as they read before 1 August 2008, are inconsistent with the Constitution and invalid.
>
> 2. The declaration of invalidity referred to in paragraph 1 above is suspended for 18 months from the date of this order, to enable Parliament to cure the defect.
>
> 3. In the event of the declaration of invalidity coming into force without Parliament having cured the defect, the order of invalidity will not apply to claims in respect of which a final settlement has been reached or a final judgment has been granted, before the date of this order…[29]

This case is unusual. It appears that the ordinary legislative provision is declared to be invalid from the outset. Yet the Court wishes to temper the retrospective effects of the order, and is empowered to do so under the Constitution itself. So the Court's declaration of invalidity is itself suspended, such that the Road Accident Fund is allowed to *continue to operate* according to the (putatively invalid) legislative provision. And Parliament is given time to cure the defect. This precisely demonstrates the different forms of 'invalidity', and the different ways of dealing with it. And it demonstrates that we need to think carefully before discarding all cases or forms of 'invalidity' from a study of legal conflict, including conflict-resolution techniques.

There is a second possible reason why we might think that invalidity is not necessarily out of place in this study. Here, we must return to one of the early distinctions that I drew – namely, the distinction between invalidity as voidness (which may be understood to mean that the putative rule is *automatically* void), and invalidity as voidability (according to which an authorised actor *determines* that the putative rule is invalid). The

[29] See <http://www.saflii.org/za/cases/ZACC/2011/1.html> accessed 18 March 2012 (footnotes omitted).

problem is that some theorists are sceptical of the view that a putative rule can ever be automatically valid; rather, the only form of invalidity that the law knows is voidability. This position was taken by Kelsen, and his remarks are worth quoting in full:

> … a legal norm is always valid, it cannot be nul, but it can be annulled. There are, however, different degrees of annullability. The legal order may authorize a special organ to declare a norm nul, that means, to annul the norm with retroactive force, so that the legal effects, previously produced by the norm, may be abolished. This is usually – but not correctly – characterized by the statement that the norm was void *ab initio* or has been declared "nul and void." The "declaration" in question has, however, not a declaratory but a constitutive character. Without this declaration of the competent organ the norm cannot be considered to be void.[30]

In another work, Kelsen stated:

> It follows … that "nullity" cannot exist in a legal order – that a legal norm belonging to a legal order cannot be null, but only "annullable." But the annullability provided for by the legal order may have different degrees. As a rule, a legal norm is annulled (i.e., repealed) only with effect to the future, so that the legal effects brought about by it are left undisturbed. But, exceptionally, it can also be annulled retroactively, so that all legal effects brought about by it are annulled; such as, for example, the annulment (repeal) of a penal statute with simultaneous annulling of all judicial decisions based on it, or of a civil statute with simultaneous annulling of all legal transactions and civil-court decisions based on *it*. But until its annulment the statute was valid; it was not null from the beginning. It is therefore incorrect if the decision annulling the statute is designated "declaration of nullity" … and if

[30] Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange 2009) 159-160.

> the organ who annuls the statute declares in his decision that the statute was null "from the beginning." His decision has a constitutive, not a merely declarative, character.[31]

There is some attractiveness to the view that voidness (in the sense of automatic invalidity) is not known to the law; rather, there is only voidability, whereby a rule is invalidated (whether for the future, retroactively, and so on) by an authorised actor.[32] This creates the possibility, which Kelsen acknowledges, that supposedly 'invalid' rules – even rules which are deemed to be invalid from the outset – were once valid. In other words, until their annulment was determined by the appropriate actor, they were rules which existed in the legal order for a time. As Kelsen emphasises, the annulment order is *constitutive* of the rules' invalidity. And this may be relevant for legal conflicts. For it suggests that invalidity really is a means of conflict-resolution, in the sense that there really were two valid rules which conflicted, and the annulment order – even if it found that one of the rules was invalid from the outset – was an order which *created* or constituted that new legal position. If this is correct, it is a direct attack on the main reason against the inclusion of invalidity in a study of legal conflict. It is, at least, another reason to be careful about excluding invalidity too quickly.

Finally, I will discuss a third possible reason why there might be some place for invalidity in this study. This third reason is related to the second, although it is perhaps the weakest of the three reasons which I have presented. Some cases of invalidity are reasoned in the same way as legal conflicts. Suppose that there is a constitutional rule prohibiting discrimination, such that ordinary legislation (or putative legislation) which is discriminatory is void. Some theorists will emphasise that the assessment of putative legislation against the

---

[31] Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange 2009) 276-277 (emphasis in original).

[32] Kelsen deals with the problem cases of, say, a patient in an asylum for the mentally ill declaring that he has enacted a statute; Kelsen claims that such 'nullity', if it truly is nullity *ab initio*, is such only because it falls outside the law. See ibid 277-278.

constitutional prohibition is, theoretically, an operation involving the assessment of facts. However, practically, the operation is treated in the similar way to a conflict-situation. We tend to treat the putative legislation as being presumptively valid, and on that basis we ask whether a conflict has emerged with the constitutional rule. The reasoning process by which we determine invalidity matches the reasoning which we use to assess straightforward legal conflicts. In that sense, there is a connection between invalidity cases and legal conflicts, and it is therefore understandable that the two might be considered side by side.

9.F.ii.3. Summing up

The preceding analysis, in which I have discussed various reasons for and against the inclusion of invalidity in a study of legal conflict, is tentative. Nonetheless, on balance I will cautiously suggest that there is some place for invalidity in such a study. For simplicity's sake, I will refer to invalidity as a possible conflict-resolution technique in the remaining analysis in this study. But that should of course be read with the above provisos in mind – in particular, the worry that validity operations (or some of them) are simply not legal conflicts in a strict sense.

9.G. Concluding remarks

In this chapter, we have assessed some of the main conflict-resolution methods which are relevant to the *jus cogens* context. It may be useful to highlight two of the more important arguments.

The first argument is that, contrary to much international law thinking, interpretation can indeed be a method of conflict-resolution.

The second is that, contrary to much international law thinking, there are real doubts about whether invalidation can be properly understood as one such method (although I suggested that there are reasons why it may not be out of place in this study).

In the next chapter, we will see these conflict-resolution methods in action.

Chapter 10. Commensurability and Seriousness

In this chapter, I will examine the consequences of conflicts with *jus cogens*. By consequences, I am referring to the ways in which the conflicts with *jus cogens* are, or can be, resolved. I will return to the conflict-situations identified in Part III of the study (Chapters 7-8), and explain how these conflicts have been resolved as a matter of existing international law – or even how they *may* be resolved, especially in cases where international law is silent or unsettled on the matter. We will return to this distinction between conflicts which have been more or less resolved, and conflicts which remain to some extent unresolved, throughout the chapter.[1]

As regards unresolved conflicts (where an existing solution does not appear to be clearly indicated in international legal practice), my analysis – including any suggestions about how the conflict might be resolved – will be provisional. For this is an area where international law is in development. Nonetheless, that should not deter us from thinking about possible solutions.

10.A. Outline of the argument

The main argument in this chapter is that the consequences of conflicts with *jus cogens* are mediated, and that there is sufficient evidence of this in international legal practice.

A key factor determining how a legal conflict is resolved is whether the conflicting laws are commensurable. Where they are commensurable, the relative weight of the two laws comes into play in resolving the conflict. Where the two laws are incommensurable, however, weight does not assist in resolving the conflict. We cannot choose between them

[1] This somewhat oversimplifies matters. For in the case of 'resolved' conflicts, where existing international law has already taken a position on the conflict, that position can of course change (via law-making). So while it may have been settled law that the conflict is resolved in favour of rule A, in the future that could change such that rule B is favoured.

on the basis that one is weightier or more important than the other, because the two laws cannot be measured on the same scale.

In addition, the seriousness of the conflict *may* have some role to play in the resolution of the conflict. But this claim is much more tentative. This is because the matter is one of legal policy. For example, a legal order may happen to provide that even a 'trivial' (in the sense of less serious) conflict with certain rules leads to rather dramatic consequences for the defeated rule. Or it may not. There are, however, some indications that the seriousness of the conflict can at times be relevant in the *jus cogens* context.

It is clear from the above that I am relying on the typology of legal conflict advanced in Chapter 6 to explain the consequences of legal conflicts. This includes, first of all, the consequences of resolved conflicts (i.e., where conflicts with *jus cogens have* been settled as a matter of existing international law). The typology will better help us to understand how these conflicts have been resolved in the way that they have been. The typology may also provide indications as to how unresolved conflicts with *jus cogens* (i.e., where international law does not provide a settled legal solution) *should* be resolved.

The plan of this chapter is as follows. First, I will offer some more expanded remarks on commensurability and seriousness. I will then discuss conflicts between the immunities of State officials and *jus cogens* crimes. Finally, I will turn to conflicts between treaty rules and *jus cogens*.

10.B. Commensurability and seriousness

In Chapter 6, I introduced a typology of legal conflict. There were two dimensions to this typology – whether the conflict arose between commensurable or incommensurable laws, and whether the conflict was more or less serious. In Chapters 7 and 8 (Part III of the study), I analysed conflicts between *jus cogens* and other rules of international law, and identified

whether these were conflicts between commensurables or incommensurables, and whether they were more or less serious. I turn now to the significance of these two dimensions for the question of conflict-*resolution*.

I will briefly sketch the underlying structure of the argument that follows below. Commensurability goes to the question of how we resolve a legal conflict in one sense. In the case of commensurable laws, we can often (but not always) rely on the relative weight of the laws in deciding *which way* to resolve the conflict – i.e., in favour of law A over law B.

Seriousness may also go to the question of how we resolve the conflict, but in another sense. Seriousness may help us decide *which outcome or consequence* we might favour – invalidation, disapplication, interpretation, and so on. For instance, in favouring law A over law B, the seriousness of the conflict may help us to determine what the outcome or consequence is for law B.

There may of course be additional considerations or factors which influence the consequences of legal conflicts, and which I do not address here.[2] The following analysis is therefore only a rough sketch of how different types of conflict (as indicated by the typology of legal conflict in Chapter 6) bear on the question of conflict-resolution. I will deal with commensurability and seriousness in turn.

10.B.i. Resolving conflicts between commensurable laws

Where the two legal choices are commensurable, the relative weight of the two conflicting laws is an important factor in determining how the conflict is to be resolved – i.e., whether to choose law A over law B. However, the relative weight of the two laws may not

[2] For example, as regards factors concerning *which way* the conflict is resolved, the principles of *lex specialis* and *lex posterior* are considerations which can indicate a preference for law A over law B – ie because law A is more specific than law B, or because it was made at a later time than law B (respectively).

conclusively determine the resolution of the conflict. These remarks may be explained by way of example.

I turn first to cases where the relative weight of the two laws is conclusive. Consider the relationship between the prohibition of killing[3] and the right of self-defence. The two rules conflict, and the legal choices are commensurable. Furthermore, in determining which law to choose, the relative weight of the two laws is conclusive. In this sense, the conflict is a 'resolved' one.[4] A judge needs to do no further work. If conduct falls under the meaning of self-defence, then the rule on self-defence prevails as against the rule prohibiting killing. There may also be borderline cases – i.e., cases where it is unclear whether the conduct in question amounts to self-defence or not. However, these borderline cases do not throw into doubt the relative weight of the two rules as against each other. The question is simply about what the rules require – e.g., what counts as self-defence. If the conduct amounts to self-defence, then the rule on self-defence prevails.

But there are also cases where the relative weight of the two laws does not resolve the conflict, even though the two conflicting laws are commensurable. Even where one rule is weightier than another, this may not be dispositive. This needs to be further clarified.

The weight of a law is source-based – i.e., dependent on social facts. In the case of conflicts between commensurable legal choices, weight may not be dispositive on (at least) two grounds. First, the weight of the two laws – their relative importance to each other – may be indeterminate in light of the facts of the instant case. It is therefore unclear, on *these* given facts, whether law A is more important or weightier than law B. This is a common case of indeterminacy. The indeterminacy leads to judicial discretion, and thus judicial law-making – and this is unavoidable, because the social facts have run out and yet a decision still falls to be made.

[3] Or perhaps more narrowly, the prohibition of intentional killing (or killing that the law deems to be accompanied by the appropriate state of mind).

[4] See Joseph Raz, *The Authority of Law: Essays in Law and Morality* (2nd edn, OUP 2009) 74-75.

Second, judges may have the power to depart from the source-based weights of the laws in the instant case, even though reliance on their relative weights would indeed dispose of the conflict. In other words, the law is settled, but judges may have the power to depart from the settled law n light of various considerations. One consideration may be the interests of justice.[5] As Raz indicates, the judge may consider the overall good or harm that would be done by preferring one law over another in the instant case, and may choose to prefer law A over law B – even though law B is, as a matter of existing social facts, weightier. This is judicial law-making of a second kind.

10.B.ii. Resolving conflicts between incommensurable laws

As mentioned earlier, where the two conflicting laws are incommensurable, the relative weight of each law is no longer a relevant consideration in resolving the conflict. This is because we cannot choose between the two laws by placing them on a common scale and determining which of the two is weightier or more important, relative to the other.

However, this does not mean that choice is impossible. We may still act on reason – i.e., by choosing or acting upon either law, since each law (each legal reason) is undefeated.[6] But we cannot reason that one law should be chosen because it is better (weightier; more important) than the other.

Also, even where there is incommensurability, there can still be other legal rules which bear on the choice and assist in resolving it. We might call these 'closing rules'. One example might be the rule of *lex posterior* – i.e., the later rule applies because it is later in

[5] See further Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823. This discussion is part of an early debate between Dworkin and Raz about legal rules and legal principles.

[6] Although note the exception discussed by Gardner and Macklem – namely, where both reasons are incommensurable, and each reason is exclusionary in the sense that it excludes the other. See John Gardner and Timothy Macklem, 'Reasons', in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 440.

time.[7] Importantly, such a rule does not refer to the importance or weight of one of the (incommensurable) rules.

10.B.iii. The seriousness of the conflict

The preceding analysis concerned the issue of commensurability or incommensurability, which goes to the question whether we choose to prefer law A or law B where the two conflict. In other words, commensurability/incommensurability (in the way that I have understood it) influences our decision about *which way* to resolve the conflict – e.g., in favour of law A over law B.

I will now consider the issue of seriousness of the conflict. As noted earlier, seriousness also goes to the question of how we resolve a legal conflict, but in a different sense. The seriousness of the conflict may impact on *which outcome or consequence* we choose – e.g., interpretation instead of disapplication. For instance, if we do decide to favour law A over law B, the seriousness of the conflict may assist in determining the consequences for law B.

I have been cautious in the role that I have ascribed to seriousness – in particular, by suggesting that it *may* assist in determining which consequence is chosen. It may be attractive to think that the more 'serious' the conflict is (in the way that I stipulated in Chapter 6), the more 'serious' the consequences will tend to be (with 'serious' here meaning, perhaps, how drastic the consequences are for the losing rule). Several consequences were discussed in Chapter 9 – namely, interpretation, disapplication, and (possibly) invalidation –

[7] There is a more general discussion in the theoretical literature concerning priorities which are not based on weight. For instance, John Rawls and Jeremy Waldron have discussed the idea of lexical priorities, according to which words beginning with the letter A must come before words beginning with the letter B in an English dictionary. This is not because words beginning with A are more important (or 'weightier') than words beginning with B. Nonetheless, there is a rule, for dictionaries, which determines the relationship between words beginning with A or B.

and it may be thought that the first of these is the least drastic and the last the most. Still, we must be careful about taking such an approach for several reasons.

First, knowing which consequence is more 'serious' in the sense of more 'drastic' – and unpacking what this even means – is a problem in itself. Take interpretation, which may seem the least drastic consequence because not only does the losing rule survive, it continues to apply (in light of its re-interpreted meaning). This may seem less drastic a consequence than disapplication or invalidation. But what do we mean by 'drastic'? The re-interpretation *can* be highly significant in other ways. The re-interpretation of the losing rule may mean that the law has changed, and the re-interpretation can be lasting and difficult to dislodge. Indeed, the very fact that the losing – and now re-interpreted – rule *survives* means that the re-interpretation can continue to have an impact on many cases into the future.

Second, there is a limited amount that we can say in general about the links between the consequences of conflicts and the seriousness of conflicts (as stipulated in Chapter 6) because the availability of certain conflict-resolution methods in any given legal order – or in respect of any particular law or legal regime within that order – is contingent.

Finally, and perhaps most pressingly, the available consequences of legal conflicts is ultimately just a question of legal policy. It may be *good* policy, one might think, that a legal order provides for more 'drastic' consequences in the case of more 'serious' conflicts. But there are many other considerations that may go to the legal policy concerning the consequences of conflicts across various areas of the law. We cannot presume or generalise too much.

So we should be careful about the view that more serious conflicts lead, or even tend to lead, to more serious consequences. This is not to say that the seriousness of the legal conflict never has any bearing on its consequences. I will suggest some possible links in the analysis of conflicts with *jus cogens* below, when we return to the conflict-situations in Part III. But the analysis should be read with the above provisos in mind.

10.C. Conflicts between customary immunity rules and *jus cogens* crimes

Let us now return to the conflict-situations identified in Part III of the study and consider the possible consequences of these legal conflicts. In Chapter 7, I argued that legal conflicts could arise between the immunity rules protecting State officials from the criminal jurisdiction of foreign States (namely, personal immunity and official act immunity) and *jus cogens* crimes. We must now determine the consequences of these conflicts. Although some may question whether the international law position as regards which rules prevail is entirely settled – particularly in relation to personal immunity – on balance I will suggest there are sufficient indications as to the solutions that international law has chosen. Where there is a conflict between personal immunity and *jus cogens*, the former prevails and the latter is disapplied; but where there is a conflict between official act immunity and *jus cogens*, the latter prevails and the former is disapplied. These conflicts are, I would suggest, resolved conflicts in international law. Our task is to understand how and why they have been resolved in the way that they have.

10.C.i. General comments on the international legal practice

The international legal practice that I will examine includes, in particular, the decisions of both national courts (which constitute State practice) and of international courts. However, we should first note that we need to be selective, because many of the decisions on immunities may have limited bearing upon our specific question of conflicts between *jus cogens* crimes and the immunity of State officials. Many cases before the courts on immunities, including the interaction between immunities and *jus cogens*, are

distinguishable. For example, *Germany v Italy* (in the ICJ),[8] *Al-Adsani v United Kingdom* (in the European Court of Human Rights)[9] and *Prefecture of Voiotia v Federal Republic of Germany* (in the national court of Greece)[10] were concerned, amongst other things, with State immunity in a civil claim. And while these cases may have implications for our question, due care should be exercised. More problematically, the decisions of national courts can often be determined by the particular requirements of their own national legislation and not international law. This can be seen, for example, in the US case of *Princz v Federal Republic of Germany*[11] and the Canadian case of *Bouzari v Islamic Republic of Iran*.[12] In both cases, the courts upheld immunity by applying national legislation.

Bearing the above qualifications in mind, I turn now to the existing materials on the immunities of State officials and *jus cogens* crimes. In the main, these are cases coming before courts (both national and international) where it is alleged that a State official (incumbent or former) has committed an international crime enjoying *jus cogens* status.

As mentioned earlier, the present position in international law seems to be settled. The personal immunity of incumbent, senior State officials is not defeated when it conflicts with *jus cogens* crimes, but rather prevails over *jus cogens* crimes (which are disapplied). By contrast, the official act immunity of (former and incumbent) State officials of any rank is defeated (and disapplied), and the *jus cogens* crime does prevail. There is therefore a difference in outcome depending on which immunity rule is conflicting with the *jus cogens* crime.

---

[8] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits) [2012], Judgment of 3 February 2012.

[9] (2002) 34 EHRR 273.

[10] ILDC 287 (GR 2000).

[11] 26 F 3d 1166 (DC Cir 1994), decided under the Foreign Sovereign Immunities Act 1976.

[12] [2004] 71 OR (3d) 675.

10.C.ii. The solutions adopted by international law

I will deal with official act immunity first, and personal immunity second. In the case of official act immunity, a significant number of cases over the years have indicated that such immunity is not available (i.e., disapplied) where the official is alleged to have committed an international crime – including, necessarily, *jus cogens* crimes. As Akande and Shah note, '[a]ll of these decisions proceed – at least implicitly (and sometimes explicitly) – on the basis of a lack of immunity *ratione materiae* in respect of [international] crimes'.[13] The cases include *Eichmann* in the Israeli Supreme Court,[14] the English case of *Pinochet (No. 3)* in the House of Lords, and also the *Lozano* case before the Italian Corte di Cassazione (Court of Cassation).[15] And there are many other examples.[16] The legal position seems to be settled.

We turn now to personal immunity. There are a number of national court judgments which reject the notion that personal immunity is not available where an international crime (including, by implication, *jus cogens* crimes) has allegedly been committed. For example, in *Fidel Castro*, the Spanish Audencia Nacional held that as a matter of international law, the (incumbent) Cuban Head of State could not be prosecuted in Spain for international crimes (which include *jus cogens* crimes) as long as he remained in office.[17] In *Pinochet (No.3)*,

[13] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 European Journal of International Law 815, 839-840 (footnote omitted).

[14] (1962) 36 ILR 277.

[15] The *Lozano* case is noted in Antonio Cassese, 'The Italian Court of Cassation Misapprehends the Notion of War Crimes: The *Lozano* Case' (2008) 6 Journal of International Criminal Justice 1077. See further Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 839fn116.

[16] Eg the *Klaus Barbie* case in France; see 78 ILR 125 and 100 ILR 331. Or *Wijngaarde et al v Bouterse*, Court of Appeal, Amsterdam (20 November 2000).

[17] Noted in Antonio Cassese, '*When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*' (2002) 13 European Journal of International Law 853, 860-1.

several of their Lordships emphasised the full protection afforded by personal immunity;[18] as Cryer et al note, 'each one of the seven law lords emphasized that had Pinochet been a *current* head of State, he would have received absolute immunity *ratione personae*, even against charges of torture or crimes against humanity'.[19] Various other cases have also indicated that personal immunity does not yield in the face of international crimes – e.g., *Re Sharon and Yaron* in the Belgian Cour de Cassation,[20] *Jiang Zemin*,[21] *Tachiona v Mugabe*,[22] *Re Mofaz*,[23] *Re Bo Xilai*,[24] and attempted prosecutions of President Kagame of Rwanda, Ehud Barak (as Minister of Defence for Israel), and Carmi Gillon (Israeli ambassador to Denmark).[25]

A Spanish investigative judge of the Spanish *Audencia Nacional* issued an indictment on 6 Feburary 2008 which charged '40 current or former high-ranking Rwandan military officials of the Rwandan Defence Forces … and allied military groups with many crimes including genocide, crimes against humanity, war crimes and terrorism, perpetrated against the civilian population, and in particular against members of the Hutu ethnic group, over a period of 12 years, from 1990 to 2002'.[26] In particular, the Spanish court concluded that President Kagame of Rwanda could not be prosecuted by Spain because, as an

[18] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening) (No.3)* (1999) 2 All ER 97

[19] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (2nd edn CUP 2010) 532.

[20] (2003) 42 ILM 596.

[21] 282 F Supp 2d 875 (ND Ill 2003).

[22] 169 F Supp 2d 259 (SDNY 2001).

[23] *Application for Arrest Warrant Against General Shaul Mofaz* (Bow Street Magistrates' Court 2004).

[24] (2005) 128 ILR 713. Albeit the Minister of Commerce for China was deemed to be on a special mission; the personal immunity of officials on special missions may be different from that applying to incumbent, senior State officials.

[25] See further Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 820fns16-17, which refers to a range of national court judgments and other State practice.

[26] Commentator, 'The Spanish Indictment of High-Ranking Rwandan Officials' (2008) 6 Journal of International Criminal Justice 1003.

incumbent Head of State, he enjoyed personal immunity. The Spanish court reached this position by reviewing 'several judicial precedents of the *Audencia Nacional* and the *Tribunal Supremo* (Supreme Tribunal)'.[27] The *Audencia Nacional* had 'adopted the same approach in disputes against the King of Morocco and the President of the Republic of Equatorial Guinea', as well as in the *Fidel Castro* case (discussed above).[28]

As regards international courts and tribunals, in the *Arrest Warrant* case the ICJ held that foreign ministers are entitled to personal immunity from the criminal jurisdiction of foreign States for the duration of their stay in office, even in relation to allegations of international crimes. The ICJ stated that:

> It has been unable to deduce … that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[29]

Legal writing is also more firmly in favour of the view that personal immunity provides total protection (at least in relation to incumbent, senior State officials; the matter may be different as regards the personal immunity of officials on special missions).[30] In the

[27] Ibid 1005-1006.

[28] Ibid 1005fn19.

[29] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Merits) [2002] ICJ Rep 3, para 58.

[30] Eg Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 309-310; Hazel Fox, *The Law of State Immunity* (2nd edn, OUP 2008) 430-3; Hazel Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government' (2002) 51 International and Comparative Law Quarterly 119; Paola Gaeta, 'Official Capacities and Immunities', in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002) 975, 983-989; Akande and Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', 819-820.

2001 Princeton Principles on Universal Jurisdiction,[31] the Commentary to the Principles emphasises that 'procedural immunity' is unqualified.[32]

There is, therefore, significant evidence in the international legal materials that personal immunity is available, and official act immunity is unavailable, in cases where a State official (incumbent or former) is accused of committing an international crime. Of course, some writers claim that *both* immunity rules – personal immunity and official act immunity – are defeated when they come into conflict with *jus cogens* crimes; and they point to some authorities in support of this argument.[33] However, arguably, the preponderance of evidence indicates that only official act immunity is defeated.

10.C.iii. Explaining the solutions

How should we explain the differing solutions that international law has adopted here? To recap briefly, I argued in Chapter 7 that there were legal conflicts between *jus cogens* crimes and the immunities of State officials (both personal immunity and official act immunity). Jus cogens is engaged for the simple reason that some of the international crimes in question enjoy *jus cogens* status. However, the consequences of the legal conflicts – namely, which rule is disapplied (on disapplication, see Chapter 9) – differ depending on the type of immunity at issue.

This raises two questions. First, there must be an explanation of the differing consequences. Second, if it is the case that in some situations *jus cogens* is being defeated

[31] <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf> accessed 11 August 2012.

[32] It should be noted that the Principles are not a binding codification. The Commentary also admits that 'procedural immunities for sitting heads of state ... may be called increasingly into question', and that it does not wish to reach a definitive conclusion on the matter.

[33] For instance, in the *Gaddafi* case both the French Chambre d'accusation (125 ILR 498) and the Cour de Cassation (125 ILR 509) suggested that there were exceptions to the personal immunity of Heads of State in respect of international crimes. The Cour de Cassation reasoned that the crime of terrorism 'did not constitute one of the exceptions to the principle of jurisdictional immunity of foreign Heads of State in office' (125 ILR 509).

(i.e., disapplied), we must consider the implications for the very nature of *jus cogens* itself. I will address the first question immediately below, and return to the second question at the end of this chapter.

10.C.iii.1. Personal immunity

Let us begin by considering how personal immunity, an ordinary rule of international law, is able to prevail over a *jus cogens* crime in a case of conflict, such that the *jus cogens* crime is disapplied. This will be a surprising explanation to many international lawyers. However, this need not be so. The building blocks of the explanation have already been laid out during the course of the previous chapters in this study, and we must return to these below. The following discussion draws, in particular, on some of the literature on practical reasoning[34] that was visited earlier in the study.

I argued in Chapter 2 that a rule which becomes *jus cogens* is a weighty rule.[35] And as I explained in Chapter 7, legal conflicts between immunities (including personal immunity) and *jus cogens* crimes are conflicts between incommensurable legal choices. Where the choices are incommensurable, the relative weight of the laws is no longer a consideration in determining how the conflict is to be resolved. Accordingly, the very fact that the international crime in question is a *jus cogens* crime – its very status as *jus cogens* (meaning its greater weight) – is not a consideration. A judge is thus free to uphold the rule on personal immunity which remains an *undefeated* legal reason. It is undefeated in the sense that it has not been outweighed. Since it is an undefeated reason, it remains a reason on which one can act. This explains why personal immunity is capable of being chosen instead

[34] That is, reasoning about what to do. The literature on practical reasoning explores the way in which reasons operate and interact in our reasoning process about what to do.

[35] And there are of course other weighty rules in international law which are not *jus cogens*. Legal rules in general can be more or less weighty relative to each other.

of a *jus cogens* crime. The *jus cogens* status of the latter rule – the very weightiness of that rule – is no longer significant, because of incommensurability.

Of course, in the above situation, the judge is free to act on the *jus cogens* crime as well (which is itself an undefeated reason, in the sense that it has also not been outweighed). So why do the courts appear to choose personal immunity instead? The answer is that they choose it precisely because it *is* a reason. And we can find evidence of this in the cases. For example, in the *Arrest Warrant* case, the ICJ explained in detail the vital functions and responsibilities of a foreign minister,[36] why this meant that foreign ministers enjoyed personal immunity,[37] and in particular why it was essential to uphold this immunity and avoid the deleterious consequences that would follow if foreign ministers could be 'arrested in another State on a criminal charge'.[38] In these passages, the ICJ is explaining in detail precisely why personal immunity is a reason to be acted upon.

Let us move away from incommensurability and turn to the seriousness of this legal conflict. As suggested in Chapter 7, this conflict may be characterised as being less serious[39] – and this *may* also have implications for the consequences of the legal conflict. That is, the less serious character of the conflict may be one (of several) reasons for the more limited character of the consequences – namely, the fact that the *jus cogens* crime is *disapplied*, and only in the instant case (rather than disapplication in the sense of a more general suspension, or even invalidation). I should emphasise, however, that this is a rather more tentative claim than the analysis immediately above (concerning incommensurability). There may be other,

[36] *Arrest Warrant* [2002] ICJ Rep 3, para 53.

[37] Ibid para 54.

[38] Ibid para 55, with the ICJ stating: 'The consequences of such impediment to the exercise of [the minister's] official functions are equally serious'.

[39] And this characterisation draws on the indicia of seriousness which were discussed in Chapter 6. In particular, the conflict between personal immunity and a *jus cogens* crime is only an occasional conflict. The two rules conflict only on certain occasions – ie where an incumbent senior State official is accused of having committed a *jus cogens* crime. Personal immunity, of course, has a range of applications beyond such cases, as does the *jus cogens* crime.

more significant reasons why this particular conflict-resolution method is chosen which have nothing to do with the seriousness of the legal conflict.

10.C.iii.2. Official act immunity

The preceding analysis, concerning the implications of incommensurability and seriousness for legal conflicts involving personal immunity, also sheds light on why, in the case of legal conflicts between *official act* immunity and a *jus cogens* crime, the former prevails and the latter is displaced.

Once again, the conflict between official act immunity and a *jus cogens* crime is a conflict between incommensurable legal choices – except that now, the *jus cogens* crime (rather than the immunity rule) is the undefeated legal reason which is being acted upon.

And again, the conflict between official act immunity and *jus cogens* is less serious, and again this *may* assist in understanding why disapplication – and only in the instant case, rather than more generally – is the consequence that follows for official act immunity. However, as mentioned earlier, there may be other, more significant reasons at play.

10.C.iv. Wrapping up on immunities

International lawyers have been reluctant to recognise conflicts between *jus cogens* crimes and the immunities of State officials. One reason, of course, is the understanding of legal conflict which they adopt – an understanding which I have challenged as being unpersuasive. But another reason, I would suggest, is the worry that if conflicts between *jus cogens* crimes and immunity rules were admitted, this would mean that both official act immunity *and* personal immunity would be knocked down by the *jus cogens* crime in question. And international lawyers think that this does not accord with existing international legal practice.

Personal immunity, in particular, is being upheld in cases where an international crime (including, necessarily, a *jus cogens* crime) is alleged to have been committed.

But as we have seen above, *jus cogens* rules are not blunt instruments. They are legal rules whose operation in conflict-situations varies. And the consequences of these conflicts with *jus cogens* are mediated. This takes the sting out of the commonplace worry about acknowledging that a conflict with a *jus cogens* rule has arisen. In particular, if the conflict is between two incommensurable laws, the very fact that one of the rules has *jus cogens* status is no longer significant. Its weight – its quality as *jus cogens* – no longer counts in its favour.

10.D. Conflicts between treaty rules and *jus cogens* rules

In Chapter 8, we considered several cases of conflicts between treaty rules and *jus cogens* rules. The first set of cases comprised hypothetical situations where an entire treaty conflicted with a *jus cogens* rule. The second set of cases comprised real situations where an isolated treaty provision conflicted with a *jus cogens* rule. I also suggested that these all happened to be cases of conflict between commensurable legal rules,[40] although the conflicts in the first set of cases were more serious than the conflicts in the second set of cases. I will deal with each set of cases in turn.

10.D.i. Conflicts between the treaty as a whole and a *jus cogens* rule

Various hypothetical situations were considered where an entire treaty conflicted with a *jus cogens* rule. What are the consequences, and how should we explain them?

[40] As I emphasised in Chapter 8, conflicts between treaty rules and *jus cogens* rules can of course be conflicts between incommensurables.

Discussing these hypothetical scenarios, international lawyers have suggested that, as a consequence, the entire treaty would be invalidated from the outset (*ab initio*). It is difficult to disagree with this position, and it accords with Article 53 VCLT.

We should briefly recall the doubts expressed in Chapter 9 concerning whether invalidation is properly understood as a consequence of a legal conflict – and especially where, as in these cases, the treaty is invalidated from the outset (i.e., it never existed).

Still, putting that to one side, how should we explain this outcome? To begin with, the legal conflict in these cases is a conflict between commensurables. Therefore, the relative weight of the two commensurables is relevant to the resolution of the conflict. The *jus cogens* rule, since it is weightier than the treaty, prevails over the treaty. So commensurability explains why the conflict is resolved in favour of *jus cogens* rules, which have an advantage in such cases because of their greater weight.

Furthermore, it is understandable why, as a matter of legal policy, the consequence for the defeated treaty is invalidity from the outset. This is the most drastic consequence, but this appears to be the legal policy that is adopted in such cases because of the seriousness of the conflict.

10.D.ii. Conflicts between individual treaty provisions and a *jus cogens* rule

In Chapter 8, we also considered real conflicts between individual treaty provisions and *jus cogens* rules. Two cases, both of which came before the ICJ, were examined – namely, the *Oil Platforms* case and the *Nicaragua* case. In both cases, there was an isolated provision of a treaty which came into conflict with the *jus cogens* prohibition of the unlawful use of force.[41] As was explained in Chapter 8, the conflict was also less serious, in particular

[41] Of course, this may be denied by writers, or even masked by the courts; but it follows from the understanding of legal conflict advanced in Part II.

because the treaty provisions in question only conflicted with *jus cogens* on certain occasions (i.e., the conflict was partial).

Again, what were the consequences of these conflicts? And how should we explain them? As before, these are conflicts between commensurables, hence their relative weight is relevant to the resolution of the conflict. And the *jus cogens* rule prevails over the treaty rule on account its greater weight.

However, in giving effect to this, it appears that (re-)interpretation of the defeated treaty provision is the preferred conflict-resolution method. We see this, for example, in the *Oil Platforms* case, where the ICJ held that the offending provision (Article XX(1)(d) of the 1955 Treaty) should be interpreted consistently with the rules of international law on the use of force:

> Moreover, under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 *(c)*). The Court cannot accept that Article XX, paragraph 1 *(d)*, of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force.[42]

And in a separate opinion, Judge Simma declared that he agreed with the ICJ's

> … understanding of the relationship between Article XX, paragraph 1 *(d)*, and the limits of general international law on unilateral use of force … The Court … thus accepts, and rightly so, the principle according to which the provisions of any treaty have to be interpreted and applied in the light of the

[42] *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) [2003] ICJ Rep 161, para 41.

> treaty law applicable between the parties as well as of the rules of general international law "surrounding" the treaty [per Article 31(3)(c) of the 1969 VCLT]. If these general rules of international law are of a peremptory nature, as they undeniably are in our case, then the principle of interpretation just mentioned turns into a legally insurmountable limit to permissible treaty interpretation.[43]

One reason why interpretation is chosen as the conflict-resolution method, rather than (say) disapplication or even invalidation, is that the conflict is less serious – mainly because it is only a partial or occasional conflict. And there may be other considerations that are relevant – e.g., the very fact that there is a credible interpretation of the treaty provision which resolves the conflict, and the fact that the treaty as a whole is pursuing ends which are generally lawful.

10.D.iii. Wrapping up on treaties

We have seen in these cases that the commensurability of the two conflicting standards or instruments is relevant in determining which standard prevails – and in these cases, it is the *jus cogens* rule on account of its greater weight.

We have also seen that the seriousness of the legal conflict may relevant in terms of the precise consequence that follows for the defeated standard or instrument. In the case of serious conflicts, invalidity follows; but in the case of far less serious conflicts, interpretation is used instead.

The above analysis is not meant to be comprehensive. For example, I have not examined the possibility that an isolated treaty provision may be invalidated while the

[43] Separate Opinion, para 9 (footnote omitted).

remainder of the treaty is left intact. This question has continued to attract interest.[44] But it is also theoretically involved, and requires detailed engagement with additional questions such as the severability of treaty provisions. Thus, for reasons of space, it cannot be explored here.

The aim of the above analysis has been to explore the consequences of conflicts between treaty rules and *jus cogens* rules. We started with the familiar cases – namely, conflict-situations where it is supposed that an entire treaty is conflicting with a *jus cogens* rule. But then we moved on to more problematic cases involving conflicts between isolated treaty provisions and *jus cogens* rules. And by examining these latter cases, we saw that the consequences of conflicts with *jus cogens* vary. Since that was the central aim of the analysis of treaty rules (and indeed of this chapter as a whole), it is enough that we limited ourselves to a group of cases in which that variation could indeed be seen. We have demonstrated what we set out to prove.

---

[44] For example, in the context of conflicts under Article 53 VCLT, Article 44(5) VCLT appears to reject the possibility that an isolated treaty provision could be severed and invalidated; rather the entire treaty would be invalidated.

Interestingly, during the drafting history of the VCLT, Waldock expressly expressly contemplated that there might be cases of more minor inconsistency with *jus cogens*, in which case the offending treaty provision may be severed and invalidated. In relation to a draft Article 13, entitled 'Treaties void for illegality', Waldock wrote:

> If a provision, the object or execution of which infringes a general rule or principle of international law having the character of *jus cogens*, is not essentially connected with the principal objects of the treaty and is clearly severable from the remainder of the treaty, only that provision shall be void.

See (1963) YILC II 52-53. But the ILC, in its final commentary to its 1966 Draft Articles on the Law of Treaties, stated:

> Some members were of the opinion that it was undesirable to prescribe that the whole treaty should be brought to the ground in cases where only one part – and that a small part – of the treaty was in conflict with a rule of *jus cogens*. The Commission, however, took the view that rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid. In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction.

See (1966) YILC II 239.

Chapter 11. The Defeasibility of *Jus Cogens*

It is now time to bring the discussion in this study full circle. We began in Part I by thinking about *jus cogens* itself – in particular, where it came from, and what it was. The time has come to revisit those questions.

In Chapter 9, a range of conflict-resolution methods relevant to the *jus cogens* context were discussed – namely, interpretation, disapplication, and (with certain caveats) invalidity. These methods were all evident in Chapter 10. We examined certain conflicts between treaties and *jus cogens* rules, where we saw invalidity and interpretation at work. In the case of conflicts between customary immunity rules and *jus cogens* crimes, we saw disapplication at work. The consequences of conflicts with *jus cogens* vary.

But one feature, perhaps, is most striking about some of the conflict-situations which we considered. These were cases involving conflicts between a *jus cogens* crime and the customary rule of personal immunity. What these cases demonstrate is that, sometimes, the *jus cogens* rule does not prevail. Rather, the *jus cogens* rule loses – and, for the purposes of the instant case or fact-situation, is disapplied.

Put another way, *jus cogens* rules are defeasible. As explained in Part I of the study, *jus cogens* rules are existing legal rules which have acquired greater weight through a certain type of law-making process. But this weight, which is social facts-based, is finite. Moreover, it counts for nothing in cases where the conflict is between incommensurables. These last two remarks should be clarified further.

11.A. Commensurability, finite weight and *jus cogens*

The weight of *jus cogens* rules comes into play only in conflict-situations involving commensurables. But the weight of *jus cogens* depends on social facts (see Part I of the

study), and these social facts are finite.[1] So it is conceivable that there may be conflict-situations (between commensurables) where, in spite of its weightiness, the *jus cogens* rule is defeated by another rule, or perhaps a constellation of rules, with superior overall weight.

Since this claim cannot be explored further here, I do not wish to take a firm position on it. The claim is speculative. Still, as I mentioned in Part I, legal rules have different weights, and it would seem that there is no reason in principle why a rule cannot be as weighty, or weightier, than a *jus cogens* rule. What defines a *jus cogens* rule is that the rule has acquired greater weight through a certain type of law-making process – namely, the rule is believed by certain legal officials to be morally paramount.

11.B. Incommensurability and its implications for *jus cogens*

It is worth reiterating one of the more striking features of conflicts with *jus cogens*. As we have seen in the previous chapter, when a legal conflict arises between rules which are incommensurable, then the weight of each of the rules is no longer relevant. If one of these rules is *jus cogens*, then its weight – its very status as *jus cogens* – is no longer relevant in resolving the conflict.

What we are uncovering, then, is the modesty of *jus cogens*. Jus cogens rules in international law are weighty but also defeasible. This claim about the defeasibility of *jus cogens* may be thought to be radical. This is because it contradicts the mainstream[2] understanding of *jus cogens* adopted by international lawyers – namely, that *jus cogens* rules

[1] Various theorists, such as Andrei Marmor and Joseph Raz, also suggest that there is reason to think that the weight of legal rules is finite. For instance, Raz states: 'The fact that a given right can be … overridden by another legal right, shows nothing except that it is not an absolute right which defeats all contrary considerations. But legal rules rarely, if ever, have absolute force. In general they are liable to be overridden by contrary legal considerations where such exist, and where the law gives them greater force'; see Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994) 257.

[2] And probably universal. I have not come across the suggestion, explicit or implicit, that *jus cogens* rules are defeasible.

are absolute and imperative in all circumstances.[3] For example, Ian Seiderman states that a *jus cogens* rule 'may not be trumped by another rule of international law that is not itself *jus cogens*'.[4] However, my claim follows from the analysis supplied in the preceding chapters of the study.

In this way, the analytical framework employed in this study – namely, a framework based on the idea of legal conflict – has been doubly useful. First, it has allowed us to unpack the idea of legal conflict, and explore the different ways in which conflicts with *jus cogens* arise and their differing consequences. Second, by adopting this analytical framework, we have also been compelled to reconsider our views about the very character of *jus cogens* itself.

11.C. Objecting to defeasibility: the discourse surrounding *jus cogens*

An obvious objection to my claim that *jus cogens* rules are defeasible is that this does not mirror the discourse surrounding *jus cogens*, which (as we have seen) treats *jus cogens* rules as being 'absolute'. In the *Germany v Italy* case before the ICJ, Germany argued that '*jus cogens* rules *always* prevail over any inconsistent rule of international law'.[5]

The objection is not persuasive, however. That discourse surrounding *jus cogens* is but one element of the international legal practice on *jus cogens*. Other elements of the practice include, for example, the actual ways in which *jus cogens* rules are interpreted and applied. A theory of *jus cogens* must of course seek to explain the international legal practice

[3] Eg Gerald Fitzmaurice stated that *jus cogens* rules 'are mandatory and imperative in any circumstances', in (1958) YILC II 40.

[4] Ian D Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia 2001) 36.

[5] *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Merits) [2012], Judgment of 3 February 2012, para 92 (emphasis added). The ICJ itself did not expressly affirm or deny Germany's statement; rather, it simply denied that any inconsistency was present in the case.

on *jus cogens*, including the discourse surrounding *jus cogens*, but this does not mean that we are required to take that discourse at *face value*.

With that in mind, I am indeed able to provide an explanation of the discourse surrounding *jus cogens*. Rather than taking that discourse at face value, the various statements that are made about *jus cogens* rules – that they are absolute, that they always prevail in cases of conflict, and so on – are best understood as rhetoric. We should take such statements into account, but we should not take them at face value.

This is familiar to any theoretical work. For instance, we see a similar approach adopted by legal positivists who seek to explain adjudication (i.e., how judges decide cases). Legal positivists will argue that judges often make law when deciding cases. Legal positivists will insist upon that argument, even if the judges themselves claim to the contrary – in fact, even if there is pervasive rhetoric to the contrary in legal practice. Legal positivists will argue that this element of the practice should not be taken at face value – that judges do indeed sometimes make law, and that this necessarily follows from certain more basic theoretical commitments about law which should be accepted.[6] This bears some similarity to the approach adopted in this study, whereby the very character of *jus cogens* is re-understood partly on the basis of a more promising theory of legal conflict.

[6] In particular, these theoretical commitments centre on the basic thesis of the legal positivism itself – namely, that the existence and content of law ultimately depends on social facts. Since social facts are finite, they will run out – and thus, so will the settled law. As a result, a judge will sometimes be required to decide a case where the settled law has run out, and in rendering her decision the judge will be making new law. Thus, for legal positivists, judicial law-making is a necessary by-product of the basic thesis of legal positivism – and even if judicial rhetoric may (if taken at face value) often suggest otherwise.

Concluding Remarks

In this study, I have suggested that our understanding of *jus cogens* in international law needs to be transformed. Jus cogens rules are not 'imperative in all circumstances' – in the sense that they always prevail in conflicts with rules of ordinary international law. Rather, *jus cogens* is defeasible or overridable. Specifically, *jus cogens* rules can be overridden by countervailing *legal* considerations. There may of course be occasions where *jus cogens* is defeasible for other reasons – e.g., we might say that the reason to obey *jus cogens* is subject to being overridden by countervailing *moral* considerations. But this is hardly controversial. It is the fact that *jus cogens* rules can be overridden by other *legal* considerations that marks a real break from the existing thinking.

The defeasibility of *jus cogens* is indicated, above all, by the phenomenon of incommensurability and the role that it plays in conflict-situations. With incommensurability, we are trying to give expression to the idea that there are occasions where, when faced with two conflicting choices, we cannot make a decision on the basis that one choice is better (more important, weightier) than the other. The two choices cannot be measured on the same scale. Choices like these arise in all walks of life, and in the context of law and legal conflicts as well. As a result, there are situations where the weight of *jus cogens* (as discussed in Part I) is not relevant to how the conflict is resolved. We saw this played out in Parts III and IV.

The analysis also has practical implications in terms of the way in which we identify *jus cogens* rules. For instance, Akande and Shah state:

> … there is an obligation on states to prevent genocide but as the International Court of Justice has recently pointed out that obligation is one to 'act within the limits permitted by international law' to prevent genocide. In other words this rule, which is ancillary to the prohibition of genocide (a peremptory

> norm), does not override other rules and is therefore not itself a peremptory norm.[1]

This approach is not persuasive. It is wrong to identify *jus cogens* rules on the basis of whether they override other rules. That approach is circular. And as we have seen, *jus cogens* rules do not always prevail over conflicting rules.

The analytical framework employed in this study, if credible, can be applied to other areas of international law where conflicts with *jus cogens* rule may arise. In Parts III and IV, I focused on certain areas of law principally for reasons of space. This allowed for more careful consideration of the theoretical foundations of the argument in Parts I and II. Indeed, focusing on certain chosen areas was all that was necessary to establish the basic argument about the different types of conflict-situations involving *jus cogens*, and (in some cases) the defeasibility of *jus cogens*.

Of course, the argument can be fleshed out with more examples in the future. In the context of immunity rules, for example, we might consider the question of civil claims against the State, or State officials, for alleged violations of *jus cogens* rules. In the treaty context, we might consider the problem of reservations to treaties which conflict with *jus cogens*, or the problem of conflicts between *jus cogens* rules and treaty-based instruments such as the resolutions of international organisations (most notably, UN Security Council resolutions).

And what about conflicts between *jus cogens* rules themselves? Although this study has focused on conflicts between *jus cogens* rules and rules of ordinary international law, there is no reason why the framework cannot be used to analyse conflicts between rules of *jus cogens* status.

---

[1] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili' (2011) 22 European Journal of International Law 857, 859-860 (footnote omitted).

It is clear, then, that this study is only a first step. As regards the operation of *jus cogens* rules in international law, and indeed the broader theoretical problem of legal conflicts, we have only scratched the surface. There is much still to be explored.

Bibliography

Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 American Journal of International Law 407

Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 European Journal of International Law 815

Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts: A Rejoinder to Alexander Orakhelashvili' (2011) 22 European Journal of International Law 857

Carlos E Alchourrón, 'Conflicts of Norms and the Revision of Normative Systems' (1991) 10 Law and Philosophy 413

L Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law' (1981) 172 Recueil des Cours de l'Académie de Droit International 219

Robert Alexy, *A Theory of Constitutional Rights* (OUP 2009)

Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2007)

NW Barber, *The Constitutional State* (OUP 2010)

M Cherif Bassiouni (ed), *International Criminal Law: Volume I: Sources, Subjects, and Contents* (3rd edn, Martinus Nijhoff Publishers 2008)

Peter Baumann and Monika Betzler (eds), *Practical Conflicts: New Philosophical Essays* (CUP 2004)

Louis René Beres, 'Prosecuting Iraqi Crimes against Israel during the Gulf War: Jerusalem's Rights under International Law' (1992) 9 Arizona Journal of International and Comparative Law 337

Samantha Besson and John Tasioulas, *The Philosophy of International Law* (OUP 2010)

Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 George Washington International Law Review 573

Alan Boyle and Christine Chinkin, *The Making of International Law* (OUP 2007)

Bob Brouwer, et al (eds), *Coherence and Conflict in Law: Proceedings of the 3rd Benelux-Scandinavian Symposium in Legal Theory* (Kluwer Law and Taxation Publishers 1992)

Eugenio Bulygin et al (eds), *Man, Law and Modern Forms of Life* (D Reidel 1985)

Michael Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 Nordic Journal of International Law 211

Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP 1999)

Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003)

Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008)

Antonio Cassese, 'The Italian Court of Cassation Misapprehends the Notion of War Crimes: The *Lozano* Case' (2008) 6 Journal of International Criminal Justice 1077

Antonio Cassese, '*When May Senior State Officials Be Tried for International Crimes? Some Comments on the* Congo v. Belgium *Case*' (2002) 13 European Journal of International Law 853

Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (OUP 2002)

Antonio Cassese and Joseph HH Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988)

Damian Chalmers et al, *European Union Law: Cases and Materials* (2nd edn CUP 2010)

Ruth Chang (ed), *Incommensurability, Incomparability, and Practical Reason* (Harvard University Press 1997)

Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004)

Commentator, 'The Spanish Indictment of High-Ranking Rwandan Officials' (2008) 6 Journal of International Criminal Justice 1003

Sean Coyle, 'Apropos of *A Treatise of Legal Philosophy and General Jurisprudence*: Volume 1' (2009) 22 Ratio Juris 155

Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (2nd edn CUP 2010)

W Czapliński and G Danilenko, 'Conflicts of Norms in International Law' (1990) 21 Netherlands Yearbook of International Law 3

Gennady M Danilenko, 'International *Jus Cogens*: Issues of Law-Making' (1991) 2 European Journal of International Law 42

GM Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993)

Julie Dickson, 'Methodology in Jurisprudence: A Critical Survey' (2004) 10 Legal Theory 117

Yoram Dinstein, *War, Aggression and Self-Defence* (3rd edn, CUP 2001)

Antony Duff, 'Theories of Criminal Law' at <http://plato.stanford.edu/entries/criminal-law/> accessed 14 March 2012

Ronald Dworkin, *Law's Empire* (Hart Publishing 1998)

Ronald Dworkin, *Taking Rights Seriously* (new edn, Gerald Duckworth & Co 1996)

Douglas E Edlin (ed), *Common Law Theory* (CUP 2007)

Abdullatif AO Elhag, Joost APJ Breuker and Bob W Brouwer, 'On the Formal Analysis of Normative Conflicts' (JURIX 1999) 35

Timothy AO Endicott, *Vagueness in Law* (OUP 2000)

Jasper Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2011) 21 European Journal of International Law 853

Hazel Fox, *The Law of State Immunity* (2nd edn, OUP 2008)

Hazel Fox, 'The Pinochet Case No.3' (1999) 8 International and Comparative Law Quarterly 687

Hazel Fox, 'The Resolution of the Institute of International Law on the Immunities of Heads of State and Government' (2002) 51 International and Comparative Law Quarterly 119

Å Frändberg and M Van Hoecke (eds), *The Structure of Law: Proceedings of the 2nd Benelux-Scandinavian Symposium in Legal Theory* (Iustus Förlag 1987)

Lon L Fuller, *The Morality of Law* (Rev'd edn, Yale University Press 1969)

Jean Galbraith, 'The Pace of International Criminal Justice' (2009) 31 Michigan Journal of International Law 79

John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 American Journal of Jurisprudence 199

John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (OUP 2007)

Robert P George, 'Does the "Incommensurability Thesis" Imperil Common Sense Moral Judgments?' (1992) 37 American Journal of Jurisprudence 185

Lou Goble, 'Normative Conflicts and the Logic of Ought' (2009) 43 Noûs 450

Martin P Golding and William A Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell Publishing 2005)

Carlos E González, 'The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms' (2001) 80 Oregon Law Review 447

Leslie Green, 'Legal Obligation and Authority', *The Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/entries/legal-obligation/> accessed 25 May 2012

D W Greig, 'Reflections on the Role of Consent' (1989) 12 Australian Year Book of International Law 125

Jaap Hage, 'Jörgensen's Dilemma' <http://ivr-enc.info/index.php?title=Jörgensen's_Dilemma> accessed 20 June 2012

H Hamner Hill, 'A Functional Taxonomy of Normative Conflict' (1987) 6 Law and Philosophy 227

Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Finnish Lawyers' Publishing Company 1988)

HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983)

HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (OUP 1982)

HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, OUP 2008)

HLA Hart, *The Concept of Law* (2nd edn, OUP 1994)

Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963)

Wilfrid Hodges, *Logic* (2nd edn, Penguin Books 2001)

André de Hoogh, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the Responsibility of States* (Kluwer Law International 1996)

C Wilfrid Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401

Jørgen Jørgensen, 'Imperatives and Logic' (1937) 7 Erkenntnis 288

Nina HB Jørgensen, *The Responsibility of States for International Crimes* (OUP 2003)

Hans Kelsen, *General Theory of Law and State* (The Lawbook Exchange 2009)

Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange 2009)

Jan Klabbers, *Treaty Conflict and the European Union* (CUP 2009)

Robert Kolb, 'The Formal Source of *Ius Cogens* in Public International Law' (1998) 53 Austrian Journal of Public and International Law 69

Robert Kolb, *Théorie du* Ius Cogens *International: Essai de relecture du concept* (Presses Universitaires de France 2001)

Barteld Kooi and Allard Tamminga, 'Moral Conflicts between Groups of Agents' (2008) 37 Journal of Philosophical Logic 1

Stephen Körner (ed), *Practical Reason* (Yale University Press 1974)

Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the ILC (2006) A/CN.4/L.682

Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006)

Ulf Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853

Vaughan Lowe, 'Do general rules of international law exist?' (1983) 9 Review of International Studies 207

Vaughan Lowe, *International Law* (OUP 2007)

Neil MacCormick, *HLA Hart* (Edward Arnold 1981)

Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Hart Publishing 2005)

Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012)

Lord McNair, *The Law of Treaties* (Clarendon Press 1961)

Theodor Meron, 'On a Hierarchy of International Human Rights' (1986) 80 American Journal of International Law 1

Linda Meyer (ed), *Rules and Reasoning: Essays in Honour of Fred Schauer* (Hart Publishing 1999)

Marko Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law' (2010) 14 Journal of Conflict and Security Law 459

Hermann Mosler, 'The International Society as a Legal Community' (1974) 140 Recueil des Cours 1

Stephen Munzer, 'Validity and Legal Conflicts' (1973) 82 Yale Law Journal

Rafael Nieto-Navia, 'International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law' 12-13 <www.iccnow.org/documents/WritingColombiaEng.pdf> accessed 23 August 2012

Eric Oberheim and Paul Hoyningen-Huene, 'The Incommensurability of Scientific Theories' (2009), at <http://plato.stanford.edu/entires/incommensurability/> accessed 6 May 2012

Alexander Orakhelashvili, 'Changing *Jus Cogens* through State Practice? – the Case of the Prohibition of the Use of Force and its Exceptions' 6 <ssrn.com/abstract=2084829> accessed 24 August 2012

Alexander Orakhelashvili, 'Peremptory Norms as an Aspect of Constitutionalisation in the International Legal System' 2 <ssrn.com/abstract=1286926> accessed 24 August 2012

Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006)

Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing Ltd 2011)

Stanley L Paulson and Bonnie Litschewski Paulson (eds), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Clarendon Press 1998)

Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003)

Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1989) 12 Australian Year Book of International Law 22

Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1995)

Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 823

Joseph Raz, *Practical Reason and Norms* (new edn, OUP 1999)

Joseph Raz, 'Reasons: explanatory and normative', at <http://www.princeton.edu/~msmith/mycourses/Raz-Reasons-Explanatory-Normative-draft.pdf> accessed 23 November 2009

Joseph Raz, *The Authority of Law: Essays in Law and Morality* (2nd edn, OUP 2009)

Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (2nd edn, Clarendon Press 1980)

Joseph Raz, *The Morality of Freedom* (OUP 1986)

George W Rainbolt, *The Concept of Rights* (Springer 2006)

Anthea Roberts and Sandesh Sivakumaran, 'Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law' (2012) 37 Yale Journal of International Law 107

Alf Ross, *On Law and Justice* (The Lawbook Exchange 2004)

Christos L Rozakis, *The Concept of JUS COGENS in the Law of Treaties* (North-Holland Publishing Company 1976)

Frederick Schauer, 'Instrumental Commensurability' (1998) 146 University of Pennsylvania Law Review 1215

Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press 1991)

Georg Schwarzenberger, 'International *Jus Cogens*?' (1965) 43 Texas Law Review 455

Iain Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"' (2002) 13 European Journal of International Law 1201

Ian D Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia 2001)

Malcolm N Shaw, *International Law* (6th edn, CUP 2008)

Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100 American Journal of International Law 291

Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1981) 172 Recueil des Cours 217

Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 European Journal of International Law 33

Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984)

Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag 1974)

Christian J Tams, *Enforcing Obligations* Erga Omnes *in International Law* (CUP 2005)

Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order:* Jus Cogens *and Obligations* Erga Omnes (Martinus Nijhoff 2006)

Kimberley N Trapp and Alex Mills, 'Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of Germany v Italy' (2012) 1 Cambridge Journal of International and Comparative Law 153

Tullio Treves, 'Customary International Law', *The Max Planck Encyclopedia of Public International Law* (OUP 2008) <www.mpepil.com> accessed 24 August 2012

Antonios Tzanakopoulos, *Disobeying the Security Council: Countermeasures against Wrongful Sanctions* (OUP 2011)

Antonios Tzanakopoulos, 'Human Rights and United Nations Security Council Measures', in Erika de Wet and Jure Vidmar (eds), *Norm Conflicts in Public International Law: The Place of Human Rights* (forthcoming) <http://ssrn.com/abstract=1677477>

Alfred Verdoss, 'Forbidden Treaties in International Law' (1937) 31 American Journal of International Law 571

Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theroy' (2006) 17 European Journal of International Law 395

Jeremy Waldron, 'Fake Incommensurability: A Response to Professor Schauer' (1994) 45 Hastings Law Journal 813

Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (CUP 1993)

Ota Weinberger (ed), *Essays in Legal and Moral Philosophy* (Reidel 1973)

Mark Weisburd, 'The Emptiness of the Concept of *Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina' (1995) 17 Michigan Journal of International Law 1

Leif Wenar, 'Rights', <plato.stanford.edu/entries/rights/> accessed 20 July 2012

Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer-Verlag 2003)

Andreas Zimmermann, 'Sovereign Immunity and the Violations of International *Jus Cogens*: Some Critical Remarks' (1995) 16 Michigan Journal of International Law 433