# Contents

## Part I  Jus Cogens: Quo Vadis?

1  **Jus Cogens and the Humanization and Fragmentation of International Law**  
Maarten den Heijer and Harmen van der Wilt  
1.1 Introduction  
1.2 The *Jus Cogens* Debate  
1.3 *Jus Cogens* and Human Rights  
1.4 *Jus Cogens* and the Quest for Hierarchy  
1.5 Conclusion  
References

2  **Sherlock Holmes and the Mystery of Jus Cogens**  
Dinah Shelton  
2.1 Introduction  
2.2 The Origins of *Jus Cogens*  
2.2.1 Natural Law  
2.2.2 Logical or Legal Necessity  
2.2.3 General Principles of Law  
2.2.4 Consent  
2.3 Functions of *Jus Cogens*  
2.3.1 Functions in the Law of Treaties  
2.3.2 Accountability  
2.3.3 Resolving Priorities Between Conflicting Norms  
2.3.4 Declaring Fundamental Values  
2.4 Conclusions  
References

3  **Understanding the *Jus Cogens* Debate: The Pervasive Influence of Legal Positivism and Legal Idealism**  
Ulf Linderfalk  
3.1 Introduction
### Contents

3.2 The Source of *Jus Cogens* Obligations ........................................... 56
  3.2.1 Legal Positivism ...................................................... 56
  3.2.2 Legal Idealism ...................................................... 58
3.3 The Role of Consent in the Creation and Modification of *Jus Cogens* Norms ...................................................... 62
  3.3.1 Legal Positivism ...................................................... 62
  3.3.2 Legal Idealism ...................................................... 64
3.4 Identifying *Jus Cogens* Norms .................................................... 65
  3.4.1 Legal Positivism ...................................................... 65
  3.4.2 Legal Idealism ...................................................... 68
3.5 The Scope of *Jus Cogens*: Delimiting the Concept ...................................... 69
  3.5.1 Legal Positivism ...................................................... 69
  3.5.2 Legal Idealism ...................................................... 71
3.6 The Function and Effects of the *Jus Cogens* Regime ...................................... 72
  3.6.1 Legal Positivism ...................................................... 73
  3.6.2 Legal Idealism ...................................................... 74
3.7 The Function of *Jus Cogens* in International Legal Discourse ...................................... 74
  3.7.1 The Meaning Potential of ‘*Jus Cogens*’ .................................... 75
  3.7.2 Legal Positivism and Legal Idealism ...................................... 78
3.8 Conclusions ................................................................. 80

References ................................................................. 81

4 *Jus Cogens* as a Social Construct Without Pedigree ........................................... 85
  Jean d’Aspremont

4.1 Introduction ................................................................. 86
  4.1.1 The Premises: Post-ontological Nonchalance ...................................... 86
  4.1.2 The Argument: A Social Construction Without Pedigree ...................................... 89
4.2 *Jus Cogens* as a Social Construct: Reasons for a Resounding Success ...................................... 91
  4.2.1 A More Systemic and Morally Cohesive International Legal Order ...................................... 92
  4.2.2 An Infinite World of Possibilities and Impossibilities: The Creative Pull of *Jus Cogens* ...................................... 93
4.3 *Jus Cogens* as a Construct Without Pedigree ...................................... 97
  4.3.1 The Pedigree of *Jus Cogens* Norms ...................................... 98
  4.3.2 The Pedigree of the *Jus Cogens* Mechanism and Avoidance-Techniques ...................................... 102
4.4 Concluding Observations: The Two-Faceted International Lawyer ...................................... 107

References ................................................................. 109
5 Audience and Authority—The Merit of the Doctrine of Jus Cogens

Alexander Orakhelashvili

5.1 Introduction

5.2 The Basis and Essence of Non-derogability from Jus Cogens

5.2.1 Non-derogability Under the Vienna Convention

5.2.2 Non-derogability and the Material Content of Jus Cogens Rules

5.2.3 ‘Community Recognition’ of Jus Cogens, Non-derogability, and the Sources of International Law

5.2.4 Which Particular Source of Law?

5.3 Objective Treaty Obligations and Their Relation to Jus Cogens

5.3.1 A Preliminary Issue: The Nature and Basis of Erga Omnes Obligations

5.3.2 Obligations Erga Omnes and Obligations Erga Omnes Partes

5.3.3 Handling the Incidences of Erga Omnes Obligations in the ICJ Jurisprudence

5.3.4 The Structure of the Rules and Obligations Under the 1949 Geneva Conventions

5.3.5 The Erga Omnes Partes Obligations Proper

5.4 The Application of Jus Cogens to Contested Areas

5.4.1 The Effect-Focused Rationale of Jus Cogens

5.4.2 The Effect of Jus Cogens on the Immunities of States and Their Officials

5.4.2.1 General Aspects

5.4.2.2 The Alleged Difference Between Criminal and Civil Proceedings

5.4.2.3 Derogation from Jus Cogens Through the Claiming and Granting of State Immunity

5.4.2.4 State Practice in Balance

5.4.2.5 The Outcome on Immunities

5.5 Conclusion

References

6 Genesis, Function and Identification of Jus Cogens Norms

Stefan Kadelbach

6.1 Introduction

6.2 Genesis and Present Shape

6.2.1 Jus Cogens as a Theoretical Concept

6.2.2 State Practice
6.2.3 International Courts and Tribunals .............................................. 153
  6.2.3.1 Judgments Based on General
          International Law ....................................................... 153
  6.2.3.2 Judgments Based on Human Rights ................................. 156
  6.2.3.3 International Criminal Tribunals ................................. 159
  6.2.3.4 Interim Conclusion: Function
          and Identification of *Jus Cogens*
          in Court Practice ..................................................... 161

6.3 Original and Derivative Functions of *Jus Cogens* ......................... 161
  6.3.1 Functions in Positive Law ................................................ 161
    6.3.1.1 Nullifying Effect .............................................. 161
    6.3.1.2 Enhanced Responsibility
            and *Erga Omnes* Effects ......................................... 162
    6.3.1.3 The Relationship with International
            Criminal Law ....................................................... 163
    6.3.1.4 Procedural Law .................................................. 164
    6.3.1.5 *Jus Cogens* and Domestic Law ................................ 164
  6.3.2 The Function of *Jus Cogens* as a Legal Argument ....................... 165

6.4 The Identification of *Jus Cogens* Norms .................................. 166
  6.4.1 Method ........................................................................ 166
  6.4.2 Examples ...................................................................... 168

6.5 *Jus Cogens* and the Problem of Universal Validity ......................... 169

References ................................................................................ 170

7 *Jus Cogens* as the ‘Highest Law’? Peremptory Norms
    and Legal Hierarchies ............................................................... 173
    Thomas Kleinlein
  7.1 Introduction ........................................................................ 174
  7.2 Concepts of Legal Hierarchy .................................................. 176
    7.2.1 Structural Hierarchy: Hierarchy According
          to the Conditions of Law-Making ..................................... 177
    7.2.2 Substantial Hierarchy: Hierarchy According
          to Derogatory Power ...................................................... 177
    7.2.3 Logical Hierarchy: Hierarchy as Different
          Levels of Language ....................................................... 178
    7.2.4 Axiological Hierarchy: Hierarchy Based
          on the Importance of Contents ......................................... 179
  7.3 The Special Status of *Jus Cogens* .......................................... 180
    7.3.1 *Jus Cogens* and the Distinction Between Primary
          and Secondary Rules ..................................................... 180
    7.3.2 Invalidity ..................................................................... 181
      7.3.2.1 Invalidity of Treaties and the Concepts
              of Hierarchy ........................................................... 181
      7.3.2.2 *Jus Cogens* and Resolutions of the Security
              Council of the United Nations .................................... 185
7.3.2.3  *Jus Cogens* and the Invalidity of Customary International Law .............. 187

7.3.3  Non-derogability ........................................... 189

7.3.3.1  Non-derogability and Exceptions ...................... 189

7.3.3.2  Non-derogability, *Jus Cogens* and Obligations *Erga Omnes* .......... 191

7.3.3.3  Non-derogability, *Jus Cogens* and the UN Charter ................. 193

7.3.4  Qualified Law-Making Procedure for *Jus Cogens* .................. 194

7.3.5  Recognition of Moral Paramountcy .......................... 197

7.3.5.1  The Problem of Defining a Threshold ................. 197

7.3.5.2  In Search of Indications for Recognised Moral Paramountcy .......... 199

7.3.5.3  Axiological Hierarchy, *Jus Cogens*, Obligations *Erga Omnes* and the UN Charter ........................................... 200

7.3.6  Further Attributes Defining the Special Status of *Jus Cogens* .......... 202

7.4  Conclusion .......................................................... 205

References .............................................................. 206

8  In Quest of the Practical Value of *Jus Cogens* Norms ............... 211

Elizabeth Santalla Vargas

8.1  Introduction .......................................................... 212

8.2  On the Customary Law Nature of *Jus Cogens* .................. 213

8.3  On the Use and Misuse of the Normative Value of *Jus Cogens* in International Adjudication .......... 218

8.4  *Jus Cogens* Effects Beyond Treaty Law ........................ 223

8.5  The Potential of *Jus Cogens Superveniens* ...................... 229

8.5.1  The Inter-temporal Law Doctrine and *Jus Cogens* Norms .......... 231

8.5.2  *Jus Cogens* and the Question of Separability of Treaty Provisions ........ 233

8.6  Concluding Remarks .................................................. 236

References .............................................................. 237

9  Constitutional Conversations in the Anthropocene: In Search of Environmental *Jus Cogens* Norms ............... 241

Louis J. Kotzé

9.1  Introduction .......................................................... 242

9.2  The Potential Value of *Jus Cogens* Norms: A Brief Appraisal ........... 246

9.3  Environmental *Jus Cogens*: Where Are We at? .................. 248

9.3.1  Normative Superiority and Conflict Resolution .................. 248

9.3.2  Environmental Damage, Overexploitation and International Crimes .... 249
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.3.3 Common Interest of the International Community</td>
<td>250</td>
</tr>
<tr>
<td>9.3.4 Judicial Development of Environmental <em>Jus Cogens</em></td>
<td>251</td>
</tr>
<tr>
<td>9.4 Conceptual and Practical Obstacles to the Emergence</td>
<td>252</td>
</tr>
<tr>
<td>of Environmental <em>Jus Cogens</em> Norms</td>
<td></td>
</tr>
<tr>
<td>9.5 Thinking into the Future: Potentialities for Imagining</td>
<td>256</td>
</tr>
<tr>
<td>Environmental <em>Jus Cogens</em> Norms</td>
<td></td>
</tr>
<tr>
<td>9.5.1 The Anthropocene as a Cognitive Framework</td>
<td>257</td>
</tr>
<tr>
<td>9.5.2 Extending Existing <em>Jus Cogens</em> Norms into the Environmental</td>
<td>260</td>
</tr>
<tr>
<td>Domain</td>
<td></td>
</tr>
<tr>
<td>9.5.3 From Customary International Law to Environmental</td>
<td>266</td>
</tr>
<tr>
<td><em>Jus Cogens</em>?</td>
<td></td>
</tr>
<tr>
<td>9.6 Conclusion</td>
<td>268</td>
</tr>
<tr>
<td>References</td>
<td>268</td>
</tr>
<tr>
<td>10 Non-refoulement as Custom and <em>Jus Cogens</em>? Putting</td>
<td>273</td>
</tr>
<tr>
<td>the Prohibition to the Test</td>
<td></td>
</tr>
<tr>
<td>Cathryn Costello and Michelle Foster</td>
<td></td>
</tr>
<tr>
<td>10.1 Introduction</td>
<td>274</td>
</tr>
<tr>
<td>10.2 Understanding and Identifying <em>Jus Cogens</em></td>
<td>276</td>
</tr>
<tr>
<td>10.2.1 ‘Custom Plus’</td>
<td>279</td>
</tr>
<tr>
<td>10.2.2 Understanding Non-derogability</td>
<td>280</td>
</tr>
<tr>
<td>10.3 <em>Non-refoulement</em> as Customary International Law</td>
<td>282</td>
</tr>
<tr>
<td>10.3.1 Non-refoulement in Contemporary Treaty Law</td>
<td>283</td>
</tr>
<tr>
<td>10.3.2 <em>Opinio Juris</em></td>
<td>286</td>
</tr>
<tr>
<td>10.3.2.1 General Assembly Resolutions and the Recognition of Non-refoulement</td>
<td>287</td>
</tr>
<tr>
<td>10.3.2.2 Executive Committee of the UNHCR</td>
<td>290</td>
</tr>
<tr>
<td>10.3.2.3 Contrary Indications?</td>
<td>291</td>
</tr>
<tr>
<td>10.3.3 State Practice</td>
<td>297</td>
</tr>
<tr>
<td>10.3.4 Subsidiary Means for the Determination</td>
<td>303</td>
</tr>
<tr>
<td>of Customary International Law</td>
<td></td>
</tr>
<tr>
<td>10.3.5 The Scope of the Customary International Law Norm of Non-refoulement</td>
<td>305</td>
</tr>
<tr>
<td>10.4 The Customary Norm of <em>Non-refoulement</em> as <em>Jus Cogens</em></td>
<td>306</td>
</tr>
<tr>
<td>10.5 What Difference Does <em>Jus Cogens</em> Character Make?</td>
<td>310</td>
</tr>
<tr>
<td>10.5.1 Non-derogability</td>
<td>310</td>
</tr>
<tr>
<td>10.5.2 <em>Jus Cogens</em> and the Law of Treaties</td>
<td>312</td>
</tr>
<tr>
<td>10.5.2.1 Treaty-based Exceptions to Non-refoulement—Article 33(2) of the Refugee Convention</td>
<td>312</td>
</tr>
<tr>
<td>10.5.2.2 Other Treaties</td>
<td>314</td>
</tr>
<tr>
<td>10.5.3 State Responsibility</td>
<td>315</td>
</tr>
<tr>
<td>10.5.4 Constraining the UN Security Council</td>
<td>317</td>
</tr>
<tr>
<td>10.6 Does a Risk of a <em>Jus Cogens</em> Violation Create an Obligation</td>
<td>319</td>
</tr>
<tr>
<td>of Non-refoulement?</td>
<td></td>
</tr>
</tbody>
</table>
10.6.1 *Jus Cogens* and Positive Duties—Hierarchy Without Consequences .............................. 320
10.6.2 *Jus Cogens* Prohibitions and the Duty of Non-refoulement—A Brief Investigation .......... 321
10.6.2.1 Return to Face Torture .............................. 321
10.6.2.2 Return to Face Genocidal Violence .......... 322
10.7 Conclusions ........................................... 323
References .................................................. 324

11 Improving Compliance: *Jus Cogens* and International Economic Law ........................................ 329
Thomas Cottier
11.1 Introduction ............................................ 330
11.2 A Close Relationship ...................................... 334
11.3 International Trade Regulation ......................... 336
11.3.1 The Linkage to Process and Production Methods (PPMs) ........................................ 336
11.3.2 Protection of Labour Standards ...................... 339
11.3.2.1 Core labour Standards and *Jus Cogens* ...................... 339
11.3.2.2 Objections Raised ..................................... 340
11.3.2.3 Flanking Policies ................................. 341
11.3.3 Protection of Human Rights ........................... 342
11.4 Investment Protection and Corporate Social Responsibility ................................. 344
11.4.1 Host States ............................................. 344
11.4.2 Home States ............................................. 345
11.5 Financial and Monetary Law ................................ 347
11.6 Respect for *Jus Cogens* as a Matter of Common Concern ................................. 347
11.6.1 Most Fundamental Precepts of International Justice ................................. 347
11.6.2 The Emerging Principle of Common Concern ................................. 349
11.6.2.1 In General ............................................. 349
11.6.2.2 Lessons from International Economic Law ................................. 350
11.6.2.3 Towards an Obligation to Act against Violations of *Jus Cogens* ..................... 351
11.7 Conclusions ............................................. 353
References .................................................. 354

12 *Jus Cogens* in International Investment Law and Arbitration ........................................ 357
Valentina Vadi
12.1 Introduction ............................................. 358
12.2 The Interplay Between *Jus Cogens* and International Investment Law in Theory ................. 362
12.2.1 Conflict of Norms ....................................... 362
12.2.2 *Jura Novit Curia* ....................................... 363
12.2.3 *Jus Cogens* and Transnational Public Policy ................................. 366
12.3 The Interplay Between *Jus Cogens* and International Investment Law in Investment Treaty Arbitration ................................. 370
12.3.1 *Jus Cogens* Arguments Put Forward by the Investors ........................................... 371
12.3.2 *Jus Cogens* Arguments Put forward by the Host States .................................... 372
12.3.3 The Interplay between *Jus Cogens* and International Public Order ....................... 377
12.4 Critical Assessment .................................................. 380
12.5 Conclusions .................................................... 382
References ..................................................... 385

Part II Dutch Practice in International Law

‘Dutch Practice in International Law’: An Introductory Note .................. 391

13 Immunities of International Organizations Before Domestic Courts: Reflections on the Collective Labour Case Against the European Patent Organization ............................................. 393
Cedric Ryngaert
13.1 Introduction .................................................. 394
13.2 The Collective Labour Dispute Involving the European Patent Organization Before Dutch Courts .............................................. 397
13.3 Immunity from Jurisdiction: Some Reflections ........................................ 398
13.3.1 The ‘Additional Circumstances’ Test ........................................ 399
13.3.2 The Standard of Manifest Deficiency .................................... 402
13.3.3 The Normative Relationship Between Immunity Agreements and Human Rights ............................................. 403
13.4 Immunity from Enforcement ........................................ 404
13.5 Concluding Observations ........................................ 406
References ..................................................... 408

14 Judicial Review on the Island of Saint Martin: An Example for The Kingdom of the Netherlands? ............................................. 409
Roel Schutgens and Joost Sillen
14.1 Introduction .................................................. 410
14.2 Animal Fights .................................................. 412
14.2.1 Judicial Review Against Fundamental Social Rights .................................... 412
14.2.2 Possibility of Judicial Scrutiny of Animal Fight Licenses ............................................. 415
14.3 Life Imprisonment .................................................. 416
14.4 Conclusion .................................................... 419
References ..................................................... 420

15 Between Pretence and Practice: The Dutch Response to Recommendations of International Human Rights Bodies .......... 421
Jasper Krommendijk
15.1 Introduction .................................................. 422
15.2 The Netherlands and International Human Rights Criticism ............................................. 424
Netherlands Yearbook of International Law 2015
Jus Cogens: Quo Vadis?
den Heijer, M.; van der Wilt, H. (Eds.)
2016, XV, 471 p., Hardcover
A product of T.M.C. Asser Press