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# HAGUE INTERNATIONAL TRIBUNALS
## International Court of Justice

# *Jus Cogens* after *Germany* v. *Italy*: Substantive and Procedural Rules Distinguished

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**Abstract**
In the case concerning *Jurisdictional Immunities of the State*, the ICJ held that rules of *jus cogens* did not automatically displace hierarchically lower rules of state immunity. The Court's decision was based on the rationale that there was no conflict between these rules as the former were substantive rules while the latter were procedural in character. The 'substantive–procedural' distinction has been heavily criticized in the literature. Much of the criticism seems to be motivated by the unwanted result of the distinction, namely de facto impunity for the most serious human rights violations. This paper takes a step back from the alleged antinomy of human rights and state immunity and broadens the picture by looking at the relationship between substantive and procedural rules more generally. It is shown that substantive rules of a *jus cogens* character generally leave procedural rules unaffected and, in particular, do not automatically override such rules. Substantive rules may, however, have a limited effect upon the interpretation and application of procedural rules. It is argued that the 'substantive–procedural' distinction is well established in international law and makes eminent sense even when substantive rules of *jus cogens* and procedural rules of immunity are involved.

**Key words**
hierarchy; human rights; ICJ; *jus cogens*; state immunity,

## 1. Introduction

In the case concerning *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening)*,[1] the International Court of Justice (ICJ) rejected the claim by Italy and Greece that state immunity could not be invoked in cases where rules endowed with a peremptory character had been breached. The two states had argued that a peremptory norm of general international law (*jus cogens*) automatically displaced any hierarchically lower rule of customary or treaty law that would hinder the

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1 *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012 (hereinafter *Jurisdictional Immunities of the State* case). The judgment and all other materials related to the ICJ are available on the Court's website at www.icj-cij.org.

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enforcement of the *jus cogens* rule. The rule on state immunity thus could not take precedence over a *jus cogens* rule forming part of the law of armed conflict.[2] The Court's contrary decision was based on the rationale that the argument of the two states depended 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 no such conflict existed because the two sets of rules addressed different matters.[3] The rules in question, assuming they possessed *jus cogens* character, were substantive rules of international law while the rules of state immunity were procedural in character.[4] The case was not the first time that the ICJ drew a distinction between substantive law, on the one hand, and law that is procedural in nature, on the other. In the *Arrest Warrant* case, the Court held that while 'jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.'[5]

The 'substantive–procedural' distinction has also found entrance into the jurisprudence of domestic courts called upon to decide the relationship between *jus cogens* and the rules on immunity.[6] When faced with the question whether domestic courts could uphold a plea of state immunity in cases of a violation of human rights norms with the character of *jus cogens*, the European Court of Human Rights accepted the restriction to the right of access to court by pointing out that the 'grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right'.[7] The 'substantive–procedural' distinction was advanced in the literature, in particular by Hazel Fox, who explained the lack of conflict between *jus cogens* and rules of immunity as follows:

> 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.[8]

The distinction between substantive rules of a *jus cogens* character and procedural rules has been criticized for its 'excessive formalism'.[9] It has been called 'overly

2 See *Jurisdictional Immunities of the State* case, *supra* note 1, para. 92. See also ibid., CR 2011/18, 13 September 2011, at 47–9, paras. 23–28 (Italy); ibid., CR 2011/19, 14 September 2011, at 36–8, paras. 97–106 (Greece).

3 On norm conflicts in general, see H. Kelsen, *Allgemeine Theorie der Normen* (1979), 86 and 99–102.

4 *Jurisdictional Immunities of the State* case, *supra* note 1, paras. 92–97.

5 See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep. 3, at 25, para. 60 (hereinafter *Arrest Warrant* case). See also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, [2006] ICJ Rep., 6 at 24, para. 34 (hereinafter *Armed Activities* case), where the Court referred to 'provisions relating to the jurisdiction of the Court' as 'procedural provisions'.

6 See, e.g., *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2007] 1 AC 270, paras. 44–45 (*per* Lord Hoffmann).

7 See *Al Adsani v. United Kingdom*, App. No. 35763/97, Merits, 21 November 2001, paras. 47–48; *Fogarty v. United Kingdom*, App. No. 37112/97, Merits, 21 November 2001, paras. 25–26; *McElhinney v. Ireland*, App. No. 31253/96, Merits, 21 November 2011, paras. 24–25.

8 H. Fox, *The Law of State Immunity* (2002), 525. This passage is also repeated in the 2nd edn. (2008), 151. See also L. M. Caplan, 'State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory', (2003) 97 AJIL 741, at 771–2.

9 L. McGregor, 'Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty', (2007) 18 EJIL 903, at 911.

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formalistic and detached from the reality of human rights protection',[10] a 'purely theoretical construct',[11] a 'purely doctrinal proposition',[12] 'misguided' and 'artificial',[13] 'illusory',[14] and 'unsatisfying'.[15] The distinction has been identified as one of the 'conflict avoidance techniques' resorted to by international and domestic courts to sidestep questions of normative hierarchy.[16] Many of the arguments and criticism seem to be motivated by the unwanted result of the 'substantive–procedural' distinction, namely de facto impunity for the most serious human rights violations, rather than by the distinction itself. This paper takes a step back from the alleged antinomy of substantive human rights norms of a *jus cogens* character and procedural rules of immunity and attempts to broaden the picture by looking at the relationship between substantive and procedural rules in international law more generally.

## 2. THE MEANING OF 'SUBSTANTIVE' AND 'PROCEDURAL' RULES

In the *Jurisdictional Immunities of the State* case, the ICJ, unlike the parties and individual judges,[17] did not distinguish between 'substantive rules' and 'procedural rules' but spoke of 'substantive law' or 'substantive rules', on the one hand,[18] and of law and rules which are 'procedural in nature' or 'procedural in character', on the other.[19] This indicates that the latter set of rules is not necessarily identical with, but is potentially broader than, procedural rules in the strict technical sense. As the term 'procedural rules' is employed in the general discussion, it will also be used in the present paper, but in the broader meaning of 'rules of a procedural character'.

Substantive rules, including substantive rules of *jus cogens*, determine – either directly or indirectly – whether a particular conduct or situation is lawful or unlawful.[20] These rules prescribe rights, obligations, and standards of conduct; determine legal status, title, and conditions; provide legal definitions; and establish international criminal and state responsibility. They include rules on attribution of conduct as well as rules for the drawing of baselines in the law of the sea.

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10 R. Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations', in E. de Wet and J. Vidma (eds.), *Hierarchy in International Law: The Place of Human Rights* (2012), 71 at 75. See also ibid., at 84 ('alluring legal formalism').

11 A. Orakhelashvili, 'Peremptory Norms as an Aspect of Constitutionalisation in the International Legal System', in M. Frishman and S. Muller (eds.), *The Dynamics of Constitutionalism in the Age of Globalisation* (2010), 153 at 165.

12 *Arrest Warrant* case, *supra* note 5, at 155, para. 28, and at 159, para. 33 (Judge Van den Wyngaert, Dissenting Opinion).

13 P. Wardle, '*Zhang v Zemin* (2008) 251 ALR 707', (2009) 15 *Australian International Law Journal* 277, at 279–80.

14 J. Besner and A. Attaran, 'Civil Liability in Canada's Courts for Torture Committed Abroad: The Unsatisfactory Interpretation of the State Immunity Act 1985 (Can)', (2008) 16 *Tort Law Review* 150, at 164. See also 'On Certainty', Comment by L. Bogliolo, 18 February 2012 ('illusionary'), available online at www.ejiltalk.org/on-certainty.

15 P. Di Ciaccio, 'A Torturers Manifesto? Impunity through Immunity in *Jones v. The Kingdom of Saudi Arabia*', (2008) 30 Syd. LR 551, at 557.

16 P. Webb, 'Human Rights and the Immunities of State Officials', in de Wet and Vidma , *supra* note 10, 114 at 147; and E. de Wet and J. Vidma, 'Conclusions', ibid., 300, at 308.

17 See *Jurisdictional Immunities of the State* case, *supra* note 1, paras. 294–296 (Judge Cançado Trindade, Dissenting Opinion).

18 *Jurisdictional Immunities of the State* case, *supra* note 1, paras. 58, 95, 100.

19 Ibid., paras. 58, 93. For use of the same terminology, see *Arrest Warrant* case, *supra* note 5, at 25, para. 60.

20 *Jurisdictional Immunities of the State* case, *supra* note 1, para. 58.

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It is not immediately obvious what the ICJ means by 'rules of a procedural nature'. One might get the impression from the *Jurisdictional Immunities of the State* case that the Court contrasts substantive rules with rules governing jurisdiction.[21] However, this would be too narrow an understanding. The distinction would become one between jurisdictional and non-jurisdictional rules whereby the latter were labelled 'substantive rules'. Rules on jurisdiction certainly are one example of procedural rules, and the one the Court was concerned with in the *Jurisdictional Immunities of the State* case, but these are not the only such rules.

Rules of a procedural nature or procedural rules are also not identical with the 'rules of procedure', i.e., the rules governing administrative and judicial proceedings. The latter comprise all rules and laws governing the methods and mechanics of the legal and administrative process, including the filing of documents, evidentiary standards as well as modes and burden of proof, and the conduct of hearings. These rules of procedure are sometimes also described as 'procedural law'.[22] The terms 'rules of procedure' and 'procedural law' describe a narrower concept than 'rules of a procedural character'. In particular, procedural rules are not limited to the rules set out in Chapter III of the ICJ Statute dealing with 'Procedure' and the corresponding rules in the Rules of Court.

Procedural rules must be distinguished from 'procedural obligations' (or 'procedural rights') in a treaty or in customary international law, such as the obligation to co-operate, inform, or negotiate, and obligations concerning data and information exchange and sharing, prior notification, and consultation. Rules setting out such procedural obligations are substantive in nature, as are the 'substantive obligations' to protect, prevent, preserve, provide, cease, refrain from, ensure, or abstain.[23]

Procedural rules could be defined negatively as all rules that do not bear upon the question whether or not a particular conduct is lawful or unlawful.[24] This may, however, be too broad and imprecise a definition. It is suggested that, in positive terms, procedural rules are rules governing the judicial and non-judicial interpretation, implementation, and enforcement of substantive rules. They are sometimes also referred to as 'adjective law'. Procedural rules are those which govern 'the putting into practice' of the substantive rules; they establish what must be done to make effective what has been prescribed. Procedural rules are made up of rules on the jurisdiction of courts and tribunals, including rules on the immunity from jurisdiction, rules on the admissibility of a claim or application, rules of procedure, and rules on the implementation of the international responsibility of states and international organizations. As such, they are closely linked to the question of remedies and reparation. They are, however, not identical with so-called 'secondary rules'; that is to say, 'the general conditions under international law for the state or an international organization to be considered responsible for wrongful actions or omissions, and

21 Cf. *Jurisdictional Immunities of the State* case, *supra* note 1, paras. 58, 93, 95.

22 Cf. D. M. Risinger, 'Substance and Procedure Revisited with Some Afterthoughts on the Constitutional Problems of Irrebuttable Presumptions', (1982) 30 *UCLA Law Review* 189, at 197.

23 As to the distinction between 'substantive obligations' and 'procedural obligations', see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2011, [2011] ICJ Rep. 14, at 47, paras. 67–158.

24 Cf. *Jurisdictional Immunities of the State* case, *supra* note 1, para. 93.

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the legal consequences which flow therefrom'.[25] In fact, the violation of procedural rules may, depending on the circumstances, give rise to 'secondary obligations'.

## 3. THE DICHOTOMY OF SUBSTANTIVE AND PROCEDURAL RULES IN INTERNATIONAL LAW

To most lawyers the distinction between substantive and procedural rules comes naturally. The Court of Appeal of Dakar quashing the indictment against Hissène Habré held that 'criminal justice . . . is built on two basic sets of rules: firstly, substantive rules which define crimes and fix their penalties and, secondly, procedural rules which determine jurisdiction, the institution of proceedings and the functioning of courts.'[26] The 'substantive–procedural' dichotomy is one of the most fundamental concepts of legal exposition in both domestic and international law.[27] Some authors, however, have called into question the distinction in international law because of its consequences for what they consider to be the overriding force of *jus cogens*. Alexander Orakhelashvili, one of the main protagonists of an all-encompassing superiority of *jus cogens*, writes that

> international law knows of no straightforward distinction between 'substantive' and 'procedural' norms. All international norms derive from the agreement of states or acceptance by the international community as a whole, and there are neither established criteria nor a recognized agency to split them into such categories.[28]

The distinction also met, perhaps not surprisingly, with stinging criticism from Judge Cançado Trindade, in whose value-centred view of international law there is little room for conceptual thinking.[29] The question whether a distinction can be drawn between substantive and procedural rules of international law has been answered differently by the states involved in the *Jurisdictional Immunities of the State* case. While Greece, as non-party intervener, argued that such a distinction 'has no logical or, still less, legal relevance',[30] both Italy and Germany based their argument on the distinction between procedural and substantive rules of international law.[31] Germany even argued that 'the entire edifice of international law rests on a clear distinction between substantive law, rules of conduct, on the one hand, and procedures for the enforcement of those rules, on the other.'[32]

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25 See International Law Commission, Report on the Work of its 53rd Session, UN Doc. A/56/10, (2001), at 31.

26 *Habré*, Senegal, Court of Appeal of Dakar, 20 July 2000, 125 ILR 569, at 573.

27 Contra G. Schwarzenberger, *International Law*, Vol. 1 (1957), 584, 611.

28 A. Orakhelashvili, 'State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong', (2007) 18 EJIL 955, at 968; Orakhelashvili, 'State Immunity and International Public Order Revisited', (2006) 49 GYIL 327, at 360; Orakhelashvili, *Peremptory Norms in International Law* (2006), 341. But see Orakhelashvili, 'Review of "Jurisdiction of International Tribunals" by C. E. Amerasinghe', (2003) 74 BYBIL 431, at 431, where he writes that '*jus cogens* . . . consists more probably of substantive norms'.

29 *Jurisdictional Immunities of the State* case, *supra* note 1, paras. 294–297 (Cançado Trindade, Dissenting Opinion).

30 *Jurisdictional Immunities of the State* case, *supra* note 1, Written Statement of the Hellenic Republic, 3 August 2011, para. 54; ibid., CR 2011/19, 14 September 2011, 37, para. 102.

31 *Jurisdictional Immunities of the State* case, *supra* note 1, Counter memorial of Italy, 22 December 2009, 54, para. 4.44; ibid., Reply of the Federal Republic of Germany, 5 October 2010, 21, para. 37.

32 *Jurisdictional Immunities of the State* case, *supra* note 1, Germany's Comments on the Greek Declaration of 3 August 2011, 26 August 2011, 10, para. 14.

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The ICJ, which based its decision on this distinction, did not perceive a need to justify it or even to put forward any criteria for the separation of substantive and procedural rules. No special criteria, apart from the general definition of these categories, seem to exist in domestic law either. The Court rather worked on the assumption that public international law, like domestic law, knows of the distinction. Speaking at the annual conference of the American Society of International Law in 1952, Willard B. Cowles said:

> I am disposed to believe that we can agree that a basic distinction exists in international law between substantive principles, standards, and rules, on the one hand, and the principles, standards, and rules related to remedies, procedures, and enforcement, on the other.[33]

Indeed, one could argue that the 'substantive–procedural' dichotomy is almost as timeless a legal construct as the dichotomy between right and wrong. Antonio Cassese called the distinction a 'proposition [that] is absolutely sound and must be subscribed to.'[34] The distinction is normally made for analytical or conceptual purposes in order to better understand the function and operation of legal rules.

International law knows of numerous conceptual dichotomies such as *jus cogens* and *jus dispositivum*, *jus strictum* and *jus aequum*,[35] primary and secondary obligations, direct and indirect obligations, obligations of result and obligations of conduct,[36] contractual and normative obligations, obligations *inter partes* and obligations *erga omnes*,[37] and the very distinction between substantive and procedural rules. The one distinction international law does not know of is that between private and public law. In each case, it is for the courts to determine in which category a certain rule falls. This may not always be easy. It was said that the 'line between procedural and substantive law is hazy.'[38] Some rules may straddle the divide and, depending on the circumstances, may be seen as either substantive or procedural in nature. For example, the obligation to negotiate under Articles 73(1) and 83(1) of the UN Convention on the Law of the Sea may be regarded as a substantive rule, while in other cases the obligation to resolve a dispute by negotiation may simply be a procedural prerequisite. Similarly, the rules on the exhaustion of local remedies,[39] most-favoured-nation treatment,[40] and estoppel[41] have been treated both as

33 W. B. Cowles, 'The Impact of International Law on the Individual', (1952) 46 *ASIL Proceedings* 71, at 78–9.

34 A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on *The Congo* v. *Belgium* Case', (2002) 13 EJIL 853, at 867.

35 See Schwarzenberger, *supra*, note 27, 52–4.

36 Cf. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the Indication of Provisional Measures, Order of 13 July 2006, [2006] ICJ Rep. 113, at 120, para. 32; ibid., Judgment of 20 April 2010, paras. 186–187.

37 See *Barcelona Traction, Light and Power Company, Limited* (*Belgium v. Spain*), Judgment of 5 February 1970, [1970] ICJ Rep. 3, at 32, para. 33.

38 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 at 91 (1938).

39 See J. R. Crawford and T. D. Grant, 'Local Remedies, Exhaustion of', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. 6 (2012), 895, at 903–4.

40 See R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), 253–6. See also the concurring and dissenting opinion of B. Stern in *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, 21 June 2011, paras. 25–38.

41 See, e.g., C. Brown, 'A Comparative and Critical Assessment of Estoppel in International Law', (1996) 50 *University of Miami Law Review* 369, at 403–4.

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substantive and as procedural rules. The fact that, depending on the circumstances, one and the same rule may qualify as a substantive or a procedural rule does not call into question the general 'substantive–procedural' dichotomy.

## 4. Differences between substantive and procedural rules

It has been said that the distinction between substantive and procedural rules is purely theoretical and 'irrelevant'.[42] While it is true that both, being based on the consent of states, are equally binding and that their violation may, depending on the circumstances, give rise to international legal responsibility,[43] there are important differences between the two set of rules. Procedural rules may vary depending on the forum while substantive rules will usually be the same in every forum. The critical time at which international responsibility arises will differ according to whether, for example, the local-remedies rule qualifies as a substantive rule or as a procedural rule. If the rule is a substantive one, international responsibility will arise only after all local remedies have been exhausted, whereas international responsibility is incurred immediately on the commission of an internationally wrongful act if the rule is procedural in nature. In that case, exhaustion of local remedies is only a requirement for the admissibility of a claim.[44] How a rule is characterized will affect the question whether it is to be treated as a preliminary objection (if it is procedural) or considered as part of the merits (if it is substantive) in proceedings before an international tribunal. Often, procedural rules will be invoked to prevent a court from proceeding to an examination of the substantive rules which are claimed to have been violated.

As far as the temporal effects of changes in the law are concerned, a distinction must be drawn between procedural rules and substantive rules.[45] Rules which are procedural in nature are not subject to the principle that laws should not have retroactive effect. This principle only applies to substantive rules which determine matters of legality as well as state and individual criminal responsibility.[46] That substantive rules, including those of a *jus cogens* character, do not apply retroactively is shown by Articles 64 and 71(2) of the Vienna Convention on the Law of Treaties (VCLT), which provides that, as a rule, the termination of a treaty, which becomes void and terminates because of the emergence of a new peremptory norm of general international law, does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination. Procedural rules, on the other hand, are to be applied in accordance with their specific scope and

42 See Schwarzenberger, *supra* note 35, at 611.
43 Cf. *Jurisdictional Immunities of the State* case, *supra* note 1, paras. 136, 137.
44 See International Law Commission, 'Second Report on Diplomatic Protection by Mr. J. Dugard, Special Rapporteur', UN Doc. A/CN.4/514, 28 February 2001, 16, para. 33.
45 ECJ, Case C-17/10, *Toshiba Corporation and Others*, Opinion of Advocate-General Kokott, delivered on 8 September 2011, para. 42, with further references to the ECJ's case law.
46 *Jurisdictional Immunities of the State* case, *supra* note 1, para. 93.

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content, either at the time that a court is seized,[47] or at the time when the court is to deliver its decision.[48] The Supreme Court of Poland held in *Natoniewski* v. *Federal Republic of Germany* with regard to the procedural rules of immunity:

> In the realm of procedural law, the basic inter-temporal rule is different: a proceeding initiated under the new law takes place according to that law .... Therefore, the assessment of whether the State enjoyed immunity should be determined according to the rules of international law in force at the time of [the] Court's decision on admissibility in the present case and not at the time when the tort alleged by the Plaintiff occurred.[49]

Substantive rules, on the other hand, are to be applied in line with the rules on the inter-temporal application of law. The legality of conduct has to be assessed according to the substantive rules in force at the time of the conduct in question.

## 5. The relationship between substantive rules of *jus cogens* and procedural rules

### 5.1. No conflict between the two sets of rules

Substantive and procedural rules are not *ejusdem generis*; that is, they are not of the same kind. The two sets of rules address different matters.[50] They have different contents and therefore do not impose incompatible obligations.[51] While the former address the question of the lawfulness of a situation or conduct, the latter deal with rule interpretation, implementation, and enforcement. There may be indirect and occasional *collisions* between the two, but there is no logical *conflict* between substantive rules and rules of a procedural character.[52] This is true for both the relationship between ordinary substantive and procedural rules and for the relationship between substantive rules of a *jus cogens* character and procedural rules. A *jus cogens* rule is one from which no derogation is permitted,[53] but the application of a procedural rule does not amount to derogation from substantive rules of *jus cogens*. A procedural rule may hinder the application or enforcement of the *jus cogens* rule, but it does not derogate from its content. The application of procedural rules, in general, also does not amount to recognizing as lawful a situation created

47 Cf. *Jurisdictional Immunities of the State* case, *supra* note 1, Counter memorial of Italy, 22 December 2009, paras. 1.16 and 6.10; ibid., Rejoinder of Italy, para. 4.2. See also ibid., CR 2011/17, 12 September 2011, 34, para. 28 (C. Tomuschat for Germany).

48 Cf. *Jurisdictional Immunities of the State* case, *supra* note 1, Reply of the Federal Republic of Germany, 5 October 2010, para. 37.

49 Supreme Court of Poland, *Natoniewski v. Federal Republic of Germany*, Decision of 29 October 2010, (2010) 30 *Polish Yearbook of International Law* 299, at 301. See also the decision of Jerusalem District Court in *Palestinian National Authority v. Dayan*, Civil Case (Jerusalem) 2538/00, 30 March 2003, referred to in *Palestinian National Authority v. Dayan*, Appeal decision, PLA 4060/03, 17 July 2007; ILDC 784 (IL 2007), F3.

50 *Jurisdictional Immunities of the State* case, *supra* note 1, para. 93.

51 Cf. also A. Zimmermann, 'Sovereign Immunity and Violations of International *Jus Cogens* – Some Critical Remarks', (1995) 16 Mich. JIL 433, at 438 (considering that the prohibition of torture and immunity involve 'two different sets of rules which do not interact with each other').

52 E. Cannizzaro, 'A Higher Law for Treaties?', in Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), 425, at 434, 439.

53 Cf. 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 I.L.M. 679, Art. 53.

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by the breach of a substantive rule of *jus cogens*, or rendering aid and assistance in maintaining that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).[54] As the ICJ pointed out in the *Jurisdictional Immunities of the State* case, there is nothing inherent in the concept of *jus cogens* as such which would require the modification or would 'displace' the application of procedural rules.[55]

While there is no conflict between substantive and procedural rules, there may be a conflict between a procedural rule of a *jus cogens* character and an ordinary procedural rule. In the *Armed Activities* case, the ICJ noted that no peremptory norm of general international law 'presently' exists requiring a state to consent to the jurisdiction of the Court, thus leaving open the possibility of such procedural rules of *jus cogens* emerging in the future.[56] Lord Hoffmann in the *Jones* case also examined whether the *jus cogens* prohibition of torture had generated an ancillary procedural rule of a *jus cogens* character which entitled or perhaps required states to assume civil jurisdiction over other states in cases in which torture was alleged, but could not establish such a rule.[57] There thus seems to be room for the development of procedural rules of a *jus cogens* character which could override ordinary procedural rules. However, even if one assumed, as some do,[58] that the right of access to justice has already acquired the status of *jus cogens*, such a right would not automatically entitle individuals to obtain a judicial remedy and thus would not automatically overrule existing procedural rules of immunity.

### 5.2. Procedural rules unaffected by substantive rules of *jus cogens*

Substantive rules of a *jus cogens* character generally leave procedural rules unaffected and, in particular, do not automatically override such rules even if, in the eyes of some commentators, they may prevent the concept of *jus cogens* from achieving its full potential. The following procedural rules may serve as examples.

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54 *Jurisdictional Immunities of the State* case, *supra* note 1, para. 93. See also *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2007] 1 AC 270, para. 44 (*per* Lord Hoffmann). Contra A. Orakhelashvili, 'State Immunity and International Public Order Revisited', (2006) 49 GYIL 327, at 362.

55 *Jurisdictional Immunities of the State* case, *supra* note 1, para. 95.

56 *Armed Activities* case, supra note 5, at 33, para. 69.

57 *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2007] 1 AC 270, paras. 45 et seq. (*per* Lord Hoffmann). See also *R. (on the application of Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, [2008] EWHC 2048 (Admin), para. 171. Critical of such ancillary peremptory procedural rules is also S. Knuchel, 'State Immunity and the Promise of *Jus Cogens*', (2011) 9 *Northwestern Journal of International Human Rights Law* 149, at 160–2. Contra K. Bartsch and B. Elberling, '*Jus Cogens* v. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision', (2003) 4 *German Law Journal* 477, at 485–9.

58 See Special Tribunal for Lebanon, *In the Matter of El Sayed*, Case No. CH/PRES/2010/01, Order of the President Assigning Matter to Pre-Trial Judge, 15 April 2012, paras. 28–29, where President Cassese considered the right of access to justice as having *jus cogens* character. Contra de Wet and Vidma, 'Conclusions', *supra* note 16, 300 at 308 (right to access to court not having *jus cogens* status).

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*5.2.1. Rules governing the establishment and composition of a court or tribunal*

Rules governing the establishment and composition of courts or arbitral tribunals are procedural in nature. Even in cases of a violation of *jus cogens* such rules cannot be dispensed with. In the *Interpretation of the Peace Treaties* case, the ICJ held that the violation of an obligation involves international responsibility, but it cannot alter the conditions for the appointment of arbitrators.[59] Rules on the appointment of judges and arbitrators, their disqualification and dispensation from sitting, the appointment of ad hoc judges and quorum requirements apply irrespective of whether or not the dispute concerns a substantive rule of *jus cogens*. For example, the required quorum of nine judges constituting the ICJ bench cannot be reduced even in cases of a request for the indication of provisional measures to prevent an impending genocide or other serious breaches of *jus cogens*.[60] If the required quorum is not met, the President will have to adjourn the sitting until a quorum is obtained.[61] In such a case, all the President can do is call upon the parties in non-binding form to act in such a way as will enable any order the Court makes when it is finally quorate to have its appropriate effect.[62]

*5.2.2. Rules concerning the jurisdiction of a court or tribunal*

Rules which determine the scope and extent of jurisdiction of a court or tribunal (*ratione personae*, *ratione materiae*, or *ratione temporis)*, and when that jurisdiction, in respect of particular conduct, may be exercised, are rules of a procedural nature.[63] These rules are not automatically repealed just because a claim involves a peremptory norm of general international law. Substantive rules of a *jus cogens* character, for example, cannot establish access to the ICJ in contravention of Article 35(1) of the ICJ Statute. It has been shown by the *Legality of the Use of Force* cases that the Court is not open to a state not party to the Statute even if the case involves the violation of a substantive rule of *jus cogens* such as genocide.[64] Even the International Criminal Tribunal for the former Yugoslavia (ICTY) which, in the present author's view, has attached far too wide-ranging consequences to the concept of *jus cogens*, held that potential victims of torture could initiate proceedings before a competent international judicial body only 'if they had *locus standi*'.[65] Rules of a *jus cogens* nature also cannot confer upon the Court jurisdiction which it does not otherwise possess. As the Court recalled in the *Armed Activities* case:

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59 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Advisory Opinion of 18 July 1950 [1950] ICJ Rep. 221, at 229.

60 See Statute of the International Court of Justice, Art. 25(1) and (3), Art. 41; ICJ Rules of Court, Art. 74(2) and (3).

61 P. Palchetti, 'Article 25', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2006), 429, at 436 MN 18.

62 ICJ Rules of Court, Art. 74(4).

63 See *Armed Activities* case, *supra* note 5, at 24, para. 34; *Jurisdictional Immunities of the State* case, supra note 1, para. 95.

64 See, e.g., *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Preliminary Objections, Judgment of 15 December 2004, [2004] ICJ Rep. 720, at 754 para. 89, where the Court determined the question whether it was open to Serbia and Montenegro independently of any consideration of the *jus cogens* norm allegedly violated.

65 ICTY, *Prosecutor v. Furundzija*, Judgement, Case No. IT-95–17/1-T, T. Ch., 10 December 1998, para. 155. For *locus standi* being a question of jurisdiction, see *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at 107 (Judge Oda, Separate Opinion).

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> the mere fact that . . . peremptory norms of general international law (*jus cogens*) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties.[66]

The fact that a dispute relates to non-compliance with the prohibition of genocide cannot, of itself, provide a basis for the jurisdiction of the Court to entertain that dispute. The status of the substantive obligation to desist from acts of genocide in the Genocide Convention has no impact upon the jurisdictional mandate of the Court in resolving disputes arising out of the Convention. Each treaty provision addresses different things.[67]

These considerations do not only apply to the jurisdiction of courts in inter-state disputes but also, *mutatis mutandis*, to the jurisdiction of international criminal tribunals and human rights courts which have been established to deal with serious violations of *jus cogens*. If the *jus cogens* nature of the violated norm automatically established jurisdiction, the detailed provisions on jurisdiction in the statutes of these courts would be superfluous.[68] For example, the fact that a 17-year-old person committed the crime of genocide cannot establish the jurisdiction of the International Criminal Court (ICC) in contravention of the procedural rule that excludes the court's jurisdiction over persons under 18.[69] Probably not even proponents of a strict normative hierarchy with *jus cogens* at its apex would call into question this procedural bar to the ICC's jurisdiction. This rule, however, could easily be rephrased as a rule of personal immunity of under-18-year-olds, which demonstrates that rules of *jus cogens* do not automatically displace rules of immunity.

The *jus cogens* nature of a substantive rule also does not automatically invalidate an otherwise valid reservation to the jurisdiction of a court or tribunal. In the *Armed Activities* case, the ICJ was faced with a plea by the Democratic Republic of the Congo that the *jus cogens* status of the prohibition of genocide should have the effect of invalidating Rwanda's reservation to its jurisdiction based on Article IX of the Genocide Convention. The Court rejected the plea, stating that 'Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention.'[70] Instead, the Court held that the reservation only excludes a particular method of settling disputes under the Genocide Convention. In other words, a reservation to the Court's jurisdiction establishing a procedural bar remains intact even if enforcement of a substantive obligation of a *jus cogens* character is

66 *Armed Activities* case, *supra* note 5, at 52, para. 125. See also ibid., at 32, para. 64.

67 Z. Douglas, 'The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation off the Rails', (2011) 2 *Journal of International Dispute Settlement* 97, at 103.

68 See 1998 Rome Statute of the ICC, 2187 UNTS 90, Arts. 11–13. See also the new Art 15*bis* concerning the exercise of jurisdiction over the *jus cogens* crime of aggression.

69 See Rome Statute of the ICC, *supra* note 68, Art. 26. See also M. Happold, 'The Age of Criminal Responsibility for International Crimes under International Law', in K. Arts and V. Popovski (eds.), *International Criminal Accountability and the Rights of Children* (2006), 69, at 77, who considers the age-exclusion provision in Art. 26 to be 'procedural rather than substantive in nature'. Contra S. C. Grover, *Child Soldier Victims of Genocidal Forcible Transfer* (2012), 76–9, who considers it a substantive rule of international criminal law.

70 *Armed Activities* case, *supra* note 5, at 32, para. 67.

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thereby rendered unavailable. This reasoning may also be applied to Article 66(a) VCLT, which confers on the ICJ jurisdiction over disputes concerning the validity of treaties allegedly conflicting with *jus cogens*. As such, Article 66(a) constitutes a classic compromissory clause. A large number of states have made reservations to this provision,[71] thereby indicating that this procedural rule concerning the ICJ's jurisdiction is not part of, and is unaffected by, the substantive legal regime of *jus cogens*.[72]

The rules governing jurisdictional immunities, including state immunity as well as the functional and personal immunity of state officials, are also procedural in nature.[73] Thus, the Appeals Chamber of the Special Court for Sierra Leone held: 'The question of sovereign immunity is a procedural question.'[74] The violation of a rule of *jus cogens* thus does not automatically deprive the wrongdoing state or its officials of their immunity under customary international law. In the *Arrest Warrant* case, the ICJ held that there was no exception to the immunity *ratione personae* of state officials even in cases of war crimes and crimes against humanity,[75] which are generally accepted as having the character of *jus cogens*. That the *jus cogens* status of a crime does not automatically displace procedural rules on immunity is also confirmed by the fact that, in Article 27(2) of the Rome Statute of the ICC, the parties felt it necessary to make an express provision that 'immunities or special *procedural* rules which may attach to the official capacity of a person ... shall not bar the court from exercising its jurisdiction over such a person.'[76] This provision would not have been necessary if the procedural bar of immunity had been removed by virtue of the *jus cogens* status of the crimes concerned. Article 27(2) of the Statute constitutes a treaty-based waiver of immunity. As such, it applies only to officials of state parties to the Rome Statute. With regard to officials of non-party states the procedural customary international-law rules on immunity remain unaffected, as is shown by Article 98(1) of the Rome Statute, which expressly acknowledges the 'state or diplomatic immunity of a person or property of a third state' from the jurisdiction of the judicial and administrative authorities of state parties in

71 See 'Multilateral Treaties Deposited with the Secretary General', Vienna Convention on the Law of Treaties, Status as of 19 May 2012, available online at www.treaties.un.org.

72 Cf. also G. Gaja, '*Jus Cogens* Beyond the Vienna Convention', (1981-III) 172 RdC 271, at 284.

73 *Jurisdictional Immunities of the State* case, *supra* note 1, para. 58; ibid., Counter-memorial of Italy, 22 December 2009, paras. 1.16, 4.44 and 6.10; ibid., Rejoinder of Italy, para. 4.2. See also *Arrest Warrant* case, *supra* note 5, at 25, para. 60. Germany, probably for tactical reasons, argued that rules governing immunity 'have the nature of substantive rules of international law' so that the Court would have had to apply the immunity rules in force at the time of events in 1943–45 (*Jurisdictional Immunities of the State* case, *supra* note 1, Memorial of the Federal Republic of Germany, 12 June 2009, para. 92). For immunity as a procedural rule, see also 'Preliminary Report on Immunity of State Officials from Foreign Criminal Jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur', UN Doc. A/CN.4/601, 29 May 2008, 32, para. 66; 38, n. 157; 52, para. 102.

74 *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, SCSL-03–01-I-059, Appeals Chamber, 31 May 2004, para. 27.

75 *Arrest Warrant* case, *supra* note 5, at 24, para. 58. See also *Jurisdictional Immunities of the State* case, *supra* note 1, at 38, para. 95.

76 Emphasis added.

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surrender proceedings.[77] This is so even though the ICC's jurisdiction is only for *jus cogens* crimes.[78]

Substantive rules of *jus cogens* can neither establish nor expand otherwise non-existing jurisdiction, nor can they nullify existing jurisdiction. In *Phoenix Action, Ltd* v. *The Czech Republic*, an ICSID Tribunal stated that 'nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs.'[79] This *obiter dictum*, however, should not be interpreted as precluding arbitration in cases of violations of *jus cogens*. The rules on jurisdiction in bilateral and multilateral investment treaties are rules which are procedural in nature.[80] The violation of any substantive rule of *jus cogens* has to be dealt with by the tribunal at the merits stage when considering conflicting substantive rights and obligations resulting from human rights law and investment protection treaties.

*5.2.3. Rules on the admissibility of a claim or application*

Rules on the admissibility of a claim, counterclaim, or application, such as the rules on capacity to act, nationality of claims, the exhaustion of local remedies, and other preliminary procedures before commencing proceedings,[81] as well as time limits, litispendence, and *res judicata*, also qualify as rules of a procedural nature. As such, they are independent of substantive rules of *jus cogens*. The fact that the prohibition of torture constitutes a norm of *jus cogens*,[82] for example, cannot override the procedural requirement that any application under the European Convention on Human Rights alleging an act of torture by a high contracting party must be brought within a period of six months from the date on which the final decision on the matter was taken by the organs of the high contracting party.[83] The same is true for limitation periods. A procedural time bar for bringing a claim is not invalidated, for example, in cases of torture.[84] That a claim concerns the violation by a state of a norm of *jus cogens* also does not dispense with the requirement that the state bringing the claim must be duly represented or, if the claim is brought by way of

77 Contra the widely criticized Decisions of the ICC's Pre-Trial Chamber I Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-139, 12 December 2011 and ICC-02/05-01/09-140, 13 December 2011, respectively. For a critique of the decisions, see D. Akande, 'ICC Issues Detailed Decision on Bashir's Immunity (. . .At long Last . . .) But Gets the Law Wrong', EJIL Talk!, 15 December 2011, available online at www.ejiltalk.org.

78 See R. Zaman, 'Playing the Ace? Jus Cogens Crimes and Functional Immunity in National Courts', (2010) 17 *Australian International Law Journal*, 53, at 70.

79 ICSID, *Phoenix Action, Ltd. v. The Czech Republic*, Case No. ARB/06/5, Award of 15 April 2009, para. 78.

80 Cf. D. William, 'Jurisdiction and Admissibility', in P. Muchlinksi, F. Ortino, and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008), 868, at 870–918.

81 On the exhaustion of local remedies as a procedural rule, see International Law Commission, *supra* note 44, at 32–3, para. 66. See also *Barcelona Traction, Light and Power Company, Limited* case, *supra* note 37, at 143–4, 149 (Judge Tanaka, Separate Opinion).

82 See, e.g., ICTY, *Prosecutor v. Furundzija*, *supra* note 65, paras. 153–157, with further references.

83 See Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, Art. 35(1).

84 Contra ICTY, *Prosecutor v. Furundzija*, *supra* note 65, para. 157.

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diplomatic protection, that the injured person has the claimant state's nationality and has exhausted local remedies.[85]

The principle of complementarity,[86] according to which the ICC can only act if national law-enforcement authorities are either unable or unwilling to carry out an investigation or prosecution, is translated in Article 17(1)(a) and (b) of the Rome Statute into a condition of admissibility.[87] As such, it is a procedural rule which is unaffected by the *jus cogens* nature of the crimes subject to the court's jurisdiction. For example, if a state informs the Prosecutor that it is investigating persons within its jurisdiction with respect to the crimes referred to in Article 5 of the Rome Statute, the Prosecutor must, as a rule, defer to the state's investigation.[88] The other issue of admissibility set out in Article 17(1)(c) of the Rome Statute, which prohibits trial in the event of double jeopardy or *res judicata*, also qualifies as a procedural rule unaffected by the *jus cogens* character of the substantive rules in question.

*5.2.4. Rules dealing with other objections of a preliminary character*

The indispensable third-party rule or *Monetary Gold* principle, according to which the ICJ will not adjudicate on a case where it would be required, as a necessary prerequisite, to adjudicate on the rights or responsibilities of a non-consenting and absent third state, may also be considered a procedural rule which is not overridden by any substantive rule of *jus cogens*. As the Court held in the *East Timor* case:

> Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[89]

The obligation invoked in that case was the obligation to respect the right of the people of East Timor to self-determination.[90] The right of a people to self-determination (at least in the colonial context) is widely regarded as *jus cogens*.[91] Referring to its judgment in the *East Timor* case, the Court thus ruled that the same applies to the relationship between peremptory norms of general international law and the establishment of the Court's jurisdiction: the *jus cogens* character of a norm and the rule of consent to jurisdiction are two different things.[92]

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85 See ILC Draft Articles on Diplomatic Protection, Arts. 3, 14, 15. For the text of the Articles, see UNGA Resolution 62/67, 6 December 2007, annex (UN Doc. A/RES/62/67, 8 January 2008). See also section 2.e, *infra*.

86 See Rome Statue of the ICC, Preamble, para. 10; Art. 1.

87 See Rome Statute of the ICC, Arts. 17 and 20(3). On complementarity as a condition of admissibility, see, e.g., J. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 102–58.

88 See Rome Statute of the ICC, Art. 18(2).

89 *East Timor* case, *supra* note 65, at 102, para. 28.

90 Ibid., 92, para. 1.

91 See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971 [1971] ICJ Rep., 16, at 89–90 (Judge Ammoun, Separate Opinion); *Armed Activities* case, *supra* note 5, at 89, para. 10 (Judge ad hoc Dugard, Separate Opinion). See also *Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep., 136, at 200, para. 159, where the Court attached consequences to the violation of the right of the Palestinian people to self-determination that are usually reserved for serious breaches of obligations under peremptory norms of general international law.

92 *Armed Activities* case, *supra* note 5, at 32, para. 64.

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The *jus cogens* nature of the crimes subject to the jurisdiction of the ICC also leaves unimpaired the procedural rule in Article 16 of the Statute on the deferral of investigations or prosecutions by virtue of a decision of the UN Security Council. The Security Council thus may request the Court not to commence or proceed with any investigation or prosecution of a *jus cogens* crime for a (renewable) period of 12 months.

*5.2.5. Rules on the implementation of international responsibility*

Procedural rules are not limited to the judicial enforcement of substantive rules but also include the rules on the implementation of the international responsibility of a state as set out in Part III of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts. Some of these rules operate at the same time as rules on admissibility when raised before an international court or tribunal, but are of a more fundamental character.[93] The requirements for the invocation of responsibility, such as notice of claim (Article 43 ARSIWA), nationality of claims, and exhaustion of local remedies (Article 44),[94] and loss of right to invoke responsibility (Article 45), are, as a rule, not dispensed with in cases of violations of a substantive rule of a *jus cogens* character. For example, even in cases of torture and other serious violations of human rights norms of a *jus cogens* character, states other than the state of the victim's nationality may not invoke the responsibility of the wrongdoing state.[95] Invocation of responsibility is, however, but one means for the protection of human rights. Other procedures for the protection of human rights are not necessarily restricted by the nationality requirement.[96]

The rules on countermeasures are also unaffected by the *jus cogens* character of the obligation violated. According to Article 49 ARSIWA only the 'injured state' may take countermeasures in order to induce the wrongdoing state to comply with its obligations. A right of third states to take countermeasures cannot be derived simply from the *jus cogens* quality of the violated norm, but instead has to be established on the basis of state practice bearing evidence of the necessary *opinio juris*.[97]

*5.2.6. Other rules of a procedural nature*

International courts and tribunals quite frequently apply, or at least refer to, the *non ultra petita* rule; that is, the rule that a party may not be awarded more than it has actually asked for. The rule is closely linked to the rules of procedure governing

93 See ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA), Commentary on Art. 44, UN Doc. A/56/10, 2001, 305, para. 1.

94 There is no indication either in the ILC's Articles or in its Commentary that these requirements were to be limited to cases of diplomatic protection.

95 See also E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-Fashioning Tradition?', (2004) 35 *Netherlands Yearbook of International Law* 85, at 103–8; I. Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"', (2002) 13 EJIL 1201, at 1215–17. Contra A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 518.

96 Cf. ILC Draft Articles on Diplomatic Protection, Art. 17. See also 'Seventh Report on Diplomatic Protection by John Dugard, Special Rapporteur', UN Doc. A/CN.4/567, 7 March 2006, 34–6.

97 C. Hillgruber, 'The Right of Third States to Take Countermeasures', in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2006), 265, at 293

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the final submissions of the parties.[98] Even in cases of a violation of *jus cogens*, the claim made by the injured state or other states imposes a limit upon the form and quantum of reparation that can be awarded. The fact that the obligation violated arises under a peremptory norm of general international law does not allow the Court to go beyond the claim of the injured state in order to satisfy the interests of the international community. For example, if the victim of an act of aggression claims compensation rather than restitution, it is not for the Court to second-guess the claimant's decision and award restitution.[99] However, the *non ultra petita* rule does not mean that courts are bound to the submissions of the parties and that they must accept either of the submissions. In the case of two states disputing the spoils of a joint act of aggression, the Court is free to hold that the illegally seized territory in question belongs to neither of them. The courts are also not prevented from addressing in their reasoning legal points not raised by the parties, but which they consider relevant for their decision.[100] Thus, a court must find that a treaty which conflicts with a norm of *jus cogens* is void, even if both parties rely on it.[101] This follows from the maxim *jura novit curia*, which requires the court both to know and to apply the law, whatever the parties say. It is not due to any special *jus cogens* limits of the *non ultra petita* rule.[102]

There are numerous other procedural rules which are not dispensed with even in cases of the most serious violations of norms of *jus cogens*, even though they may prove an obstacle to the effective enforcement of *jus cogens* norms, such as the prohibition of trials *in absentia* in Article 63 of the Rome Statute, the principle that whoever asserts must prove, the double-criminality rule, and the rule of speciality governing the operation of extradition treaties.[103] The latter provides that the requesting state is not allowed to prosecute or sentence the person extradited for an offence committed prior to his surrender other than that for which he was extradited, unless it is an extraditable offence based on the same set of facts disclosed in the extradition request.[104] For example, a person extradited for theft cannot be tried for genocide or other serious international crimes. The *jus cogens* nature of the crime does not displace the procedural rule of speciality.

98 Cf. 'Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum', UN Doc. A/CN.4/507/Add.2, 10 July 2000, 10, para. 245.

99 Contra A. Orakhelashvili, 'Review of "Jurisdiction of International Tribunals"', *supra* note 28, at 432.

100 *Arrest Warrant* case, *supra* note 5, 19, para. 43; and ibid., 66–67 (Judges Higgins, Kooijmans, and Buergenthal, Joint Separate Opinion).

101 See the Separate Opinion of Judge Schücking in the *Oscar Chinn* case: 'It is an essential principle of any court, whether national or international, that the judges may only recognize legal rules which they hold to be valid', *Oscar Chinn* case, Judgment of 12 December 1934, PCIJ Rep Series [A/B], No. 63, 64 at 149. See also A. Verdross, 'Forbidden Treaties in International Law', (1937) 31 AJIL 571, at 577; J. Verzjil, 'La validité et la nullité des actes juridiques internationaux', (1935) 15 RDI 284, at 321–2.

102 Contra A. Orakhelashvili, 'The International Court and Its "Freedom to Select the Ground upon Which It Will Base Its Judgment"', (2007) 56 ICLQ 171, at 179, n. 26.

103 For the procedural nature of these rules, see L. S. Sunga, *The Emerging System of International Criminal Law* (1997), 258.

104 See Y. Dinstein, 'Some Reflections on Extradition', (1993) 36 GYIL 46, at 54.

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### 5.3. Effect of substantive rules of *jus cogens* on procedural rules

While substantive rules of *jus cogens* do not automatically override procedural rules, they may, depending on the circumstance, have a certain (limited) effect upon their interpretation and application. International courts and tribunals will usually take into account rules of *jus cogens* when applying procedural rules which allow for some discretion in their application. Thus, the involvement of a norm of *jus cogens* in a dispute before the ICJ, such as the prohibition of genocide, may lead the Court to decide *proprio motu* that the circumstances of the case 'require' the indication of provisional measures.[105] In addition, substantive rules of *jus cogens* may impact upon the interpretation of the requirements of procedural rules, as the following examples show.

#### *5.3.1. Rules on* locus standi

In international law, as in domestic law, the old tag applies: 'No interest, no action'.[106] In a case concerning a breach of an international obligation in a bilateral relationship, usually only the injured state has a legal interest in bringing an action. This is different in cases of violations of substantive rules of a *jus cogens* character. These rules may allow the courts to find a legal interest on the part of states other than the injured state as a precondition for instituting legal proceedings or intervening in a pending case. The ICJ has not yet had a chance to rule on the question of whether all states have *jus standi* to raise violations of substantive rules of *jus cogens*.[107] The predominant view in the literature is in favour of such a *jus standi* in cases of violations of obligations *erga omnes*.[108] This is confirmed by Article 48(1)(b) ARSIWA, which allows all states to invoke the responsibility of a wrongdoing state if the 'obligation breached is owed to the international community as a whole'. It is generally accepted that rules of a *jus cogens* character give rise to obligations *erga omnes* (but the equation does not work the other way round).[109] In case of a violation of an obligation arising under a peremptory norm of general international law, all states have a legal interest in seeing the obligation performed. This was confirmed by the German Bundesverfassungsgericht which held in the *East German Expropriation Case* that *jus cogens* rules 'are rules of law which are firmly rooted in the opinio juris

105 See ICJ Rules of Court, Art. 75(1). See also ITLOS, *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Provisional Measures, ITLOS Reports 1998, 24 at 61 (Judge Laing, Separate Opinion), who suggested as one of the criteria to be taken into account when deciding on the prescription of provisional measures 'the magnitude of the underlying global public order value, e.g., such possibly *jus cogens* values as global peace and security or environmental protection'.

106 See *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1962] ICJ Rep. 319, at 455 (Judge Winiarski, Dissenting Opinion).

107 For an overview of the Court's jurisprudence, see, e.g., A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (2001), 364–79; C. Tams, *Enforcing Obligations* Erga Omnes *in International Law* (2005), 162–92; M. Payandeh, *Internationales Gemeinschaftsrecht* (2010), 395–9.

108 See, e.g., B. Simma, 'From Bilateralism to Community Interest in International Law', (1994-VI) 250 RdC 217, at 296–7; C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', (1999) 281 RdC 1, at 82–3; Payandeh (n. 105), 401, with further references.

109 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the ILC, UN Doc. A/CN.4/682, 13 April 2006, 204, para. 404. See also Bundesverfassungsgericht, Decision of the 4th Chamber of the Second Senate of 12 December 2000, 2 BvR 1290/99, *Neue Juristische Wochenschrift* 2001, 1848, at 1849.

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of the community of states ... and the observance of which all members of the community of states may require.'[110] The *jus cogens* character of the substantive rule thus results in the procedural condition of *locus standi* being automatically fulfilled for all states.

*5.3.2. Rules on loss of the right to invoke responsibility*

The procedural rules in Articles 45 and 48(3) ARSIWA provide that the injured state and any other state entitled to invoke the responsibility of another state may lose their right to invoke responsibility by the state (1) validly waiving the claim or, (2) by reason of its conduct, validly acquiescing in the lapse of the claim. These rules are akin to Article 45 of the Vienna Convention on the Law of Treaties (VCLT), which provides for the loss of right by a state to invoke a ground for invalidating, terminating, withdrawing from, or suspending the operation of a treaty in case of express agreement or acquiescence that the treaty continue to be operational. One might argue that international law excludes, or should exclude, waiver and acquiescence in case of claims arising out of a breach of *jus cogens*. Where peremptory norms are concerned, the community interest in seeing such breaches remedied should prevail over the interests of the individual states.[111] The fact that Article 48(3) ARSIWA subjects the invocation of responsibility by states other than the injured state to the condition in Article 45 ARSIWA shows, however, that waiver and acquiescence are not generally excluded in cases of violation of obligations 'owed to the international community as a whole',[112] including obligations arising under *jus cogens*. But the requirements and consequences of such waivers and acquiescence may differ in cases of violations of substantive rules of *jus cogens*.

*5.3.2.1. Waiver of claim.* According to Article 45(a) ARSIWA, the injured state may not invoke the responsibility of the wrongdoing state if it 'has validly waived the claim'.[113] The same is true of other states entitled to invoke responsibility.[114] Waiver may be express or implied.[115] For example, inaction on the part of the injured state to demand reparation has been treated as analogous to a waiver of the claim.[116] The concept of waiver is a manifestation of the general principle of consent in relation to rights and obligations at the disposal of a state. At least two different kinds of waiver must be distinguished. The ILC, in its commentary, stated that the provision deals with the case where an injured state has waived either the breach itself, or its consequences in terms of responsibility.[117]

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110 Bundesverfassungsgericht, Decision of the Second Senate of 26 October 2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1 at 27 (translation by the author).

111 Cf. C. Tams, 'Waiver, Acquiescence and Extinctive Prescription', in J. Crawford et al. (eds.), *The Law of International Responsibility* (2010), 1035 at 1042.

112 ILC ARSIWA, *supra* note 93, Art 48(1)(b).

113 The waiver of a claim against the wrongdoing state must be distinguished from the waiver of a right.

114 ILC ARSIWA, *supra* note 93, Arts. 48(3), 45(a).

115 In case of implicit waiver there may be an overlap with the concept of acquiescence.

116 Cf. 'State Responsibility: Comments and Observations Received from Governments', UN Doc. A/CN.4/515, 19 March 2001, 72 (United Kingdom).

117 ILC ARSIWA, *supra* note 93, Commentary on Art, 45, UN Doc. A/56/10, 2001, 307, para. 2.

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No waiver of the breach itself is possible in cases of breach of an obligation arising under *jus cogens*. States cannot validly consent to the breach of such an obligation in advance or even at the time it is occurring; they also cannot give their consent *ex post facto* in the form of a waiver. For example, it is not within the power of the state attacked to consent, either prior or subsequent, to an act of aggression or to waive any breach of the prohibition of the use of force. No such waiver would be 'valid' in terms of Article 45(a) ARSIWA. Under Article 26 ARSIWA the general grounds of justification of a breach of an international obligation do not apply to a breach of an obligation arising under *jus cogens*. In particular, the consent of the injured state cannot justify the violation of a peremptory norm of general international law.[118] This is in line with Article 45 VCLT. In the same way that states cannot undo the breach of a norm of *jus cogens*, they also cannot, by reason of express or tacit consent, validate a treaty which is void because of a conflict with *jus cogens*. This becomes clear from the chapeau of Article 45 VCLT, which excludes *jus cogens* violations from the application of the provision.[119]

The situation is different with regard to a waiver of the consequences of the breach in terms of responsibility. The waiver of the right to claim cessation, reparation, or assurances and guarantees of non-repetition is not generally excluded. For example, in a peace treaty the victim of an act of aggression may choose not to ask for full reparation of all damage suffered as a result of the act of aggression. Such conduct may amount to an implicit waiver of any further claims arising from the act of aggression. But any valid waiver requires knowledge of the claim at the time of the conclusion of the treaty. Under international law, states are '*entitled*' to invoke responsibility,[120] but they are *not obliged* to do so, even in case of a breach of *jus cogens*. Rules of *jus cogens* prescribe a certain conduct; they do not establish an obligation to claim reparation. In the *East German Expropriation Case* the German Bundesverfassungsgericht assumed for the sake of argument that the large-scale expropriations without compensation of German-owned private property in the eastern part of Germany by the Soviet occupying power between 1945 and 1949 constituted a serious violation of peremptory norms of general international law. The Court found that in the Two-Plus-Four Treaty of 12 September 1990 leading to the unification of the two Germanies, the Federal Republic of Germany 'has impliedly waived the right to any claims for compensation under public international law' against the Soviet Union. Despite the potential violation of norms of *jus cogens*, the Court found: 'The waiver is not precluded by any peremptory norms of general

118 Cf. Bundesverfassungsgericht, Decision of the Second Senate of 26 October 2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1 at 35 (translation by the author).

119 The loss of right by way of express agreement or acquiescence only occurs with regard to Arts. 46–50 and Arts. 60–2 but not with regard to Arts. 53 and 64, which deal with treaties conflicting with *jus cogens*. See also 1966 YILC Vol. 2, 240, para. 5.

120 See ILC ARSIWA, *supra* note 93, Arts. 42, 48(1). In this context, it is of interest to note that the proposed Draft Article 4 of the ILC Articles on Diplomatic Protection, which, in case of an injury resulting from a grave breach of a *jus cogens* norm, provided for a duty of the state of nationality to grant diplomatic protection, was dropped from the final Articles on Diplomatic Protection; see 2000 YILC Vol. 2/2, 77–9.

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international law.'[121] The Court, however, was only concerned with a waiver of the right to claim compensation or, more generally, reparation. The injured state cannot validly waive the right to request cessation of a continuing internationally wrongful act as this will usually amount to an implicit waiver of the breach itself, which is excluded in cases of a violation of *jus cogens*. Thus, the victim of an ongoing act of aggression cannot validly renounce the right to demand that the attacker cease the armed attack. If it does so anyway, it will not be bound by such a waiver.

While waiver of the consequences of the breach in terms of responsibility is not generally excluded, there are two limitations with respect to violations of *jus cogens*. First, waiver by the injured state does not entail a loss of the right to invoke responsibility on the part of any other state entitled to do so under Article 48(1) ARSIWA.[122] If the injured state, however, decides not to claim reparation, other states cannot do more than claim cessation of the internationally wrongful act and, if circumstances so require, appropriate assurances and guarantees of non-repetition.[123] In particular, other states cannot demand reparation to be made to themselves, claiming that they are thereby advancing the interest of the injured state or the beneficiaries of the obligation breached. Waivers by other states entitled to invoke responsibility have no effect on the rights of the injured state.[124]

Second, waiver of the consequences of the breach in terms of responsibility is subject to the constraints of Article 41 ARSIWA. According to paragraph 1 of this provision, states shall 'co-operate' to bring to an end through lawful means any serious breach of *jus cogens*. Behind this duty of co-operation is the consideration that it is urgently necessary to create a situation that, while safeguarding the interests of both sides, does actually mitigate the breach of *jus cogens* as much as possible.[125] Depending on the circumstances, this may even require a partial waiver of the right to claim reparation. For example, the victim of an act of aggression may waive claims for compensation of war damage in order to regain parts of its territory illegally seized by the aggressor. The limits of any such waiver are established by paragraph 2 of Article 41 ARSIWA, which provides that no state shall recognize as lawful a situation created by a serious breach of *jus cogens*, nor render aid or assistance in maintaining that situation. To the extent that a waiver of the right to claim reparation violates these duties or otherwise frustrates the realization and purpose of the *jus cogens* rule in question, it will be invalid in terms of Article 45(a) ARSIWA.[126] Thus, the victim of an act of aggression cannot validly waive its right to claim restitution of territory annexed by the aggressor as this would ultimately amount to recognition as lawful

121 Bundesverfassungsgericht, Decision of the Second Senate of 26 October 2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1 at 32 (translation by the author).

122 Cf. ILC ARSIWA, Commentary on Art. 45, UN Doc. A/56/10, 2001, 308, para. 4.

123 See ILC ARSIWA, Commentary on Art. 48, UN Doc. A/56/10, 2001, 323, para. 12. See also 'Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur, Addendum', UN Doc. A/CN.4/507/Add.2, 10 July 2000, 13, para. 251.

124 See ILC ARSIWA, Commentary on Art. 45, UN Doc. A/56/10, 2001, 307, para. 1.

125 Cf. Bundesverfassungsgericht, Decision of the Second Senate of 26 October 2004, 2 BvR 955/00, 1038/01, BVerfGE 112, 1 at 36 (translation by the author).

126 Cf. I. Feichtner, 'Waiver', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. 10 (2012), 747, at 749 MN 14.

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of the territorial acquisition resulting from a violation of *jus cogens*.[127] But the victim may trade restitution for some other form of reparation, without thereby necessarily implying any recognition of the situation as lawful.

*5.3.2.2. Acquiescence in lapse of the claim by unreasonable delay.* According to Article 45(a) ARSIWA, the injured state may not invoke the responsibility of the wrongdoing state if it has, by reason of its conduct, 'validly acquiesced in the lapse of the claim'. The same is true of other states entitled to invoke responsibility.[128] Acquiescence may be expressed through silence or inaction in situations in which different conduct might be expected. The state thereby tacitly conveys its consent that a previously existing claim for cessation, reparation, or assurances and guarantees of non-repetition no longer exists.

Unreasonable delay in giving notice of the claim to the respondent state may give rise to acquiescence in the lapse of the claim. This is sometimes referred to as extinctive prescription or the doctrine of forfeiture of claims.[129] The International Court of Justice endorsed this procedural rule in *Certain Phosphate Lands in Nauru* when it held:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[130]

One of the main justifications of the rule is to protect the respondent state against any prejudice resulting from the lapse of time, such as the inability to establish the facts and obtain evidence for its defence and difficulties in determining the content of the law at a certain time in the past, especially in situations where the law has changed during the interval.[131] The rule is an expression of the principle of procedural fairness.[132] Mere lapse of time, however, is not enough. There must be prejudice against the respondent state. The rule does not apply where the respondent state was always aware of the claim and was in a position to collect and preserve evidence relating to it.

Acquiescence in the lapse of the claim in general and extinctive prescription in particular are not excluded in cases of a breach of *jus cogens*. It is true that, according to Article 45(b) VCLT, acquiescence does not lead to loss of right to invoke a conflict

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127 See also the Definition of Aggression, Art. 5(3) of which provides that 'no territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful' (UN Doc. A/RES/3314 (XXIX), 14 December 1974), and Principle 1, para. 10 of the Declaration of Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations (UN Doc. A/RES/2625 (XXV), 24 October 1970).

128 ILC ARSIWA, *supra* note 93, Arts. 48(3), 45(b). For the meaning of recognition 'as lawful', see text at note 142 *infra*.

129 Schwarzenberger, *supra* note 27 565–70. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, CR 93/29, 8 July 1993, 48 (D. W. Bowett for Libya).

130 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 1992, 240 at 253–4, para. 32.

131 Ibid., paras. 31, 36.

132 See L. Oppenheim, *International Law*, Vol. 1 (ed. H. Lauterpacht, 1955), 349–50.

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with *jus cogens* as grounds for invalidating a treaty. One might thus argue that acquiescence through unreasonable delay in giving notice of a claim equally cannot deprive states of their right to invoke responsibility for violations of *jus cogens*. There is, however, a marked difference between the two provisions. In the case of Article 45(b) VCLT, what is at issue is acquiescence 'in the validity of the treaty', while in the case of Article 45(b) ARSIWA, the issue is acquiescence 'in the lapse of the claim' against the responsible state. Acquiescence cannot validate a treaty which is invalid because of its conflict with *jus cogens*.[133] Acquiescence in the lapse of the claim, on the other hand, only means that the state concerned is precluded from bringing a claim. As pointed out above, states are, as a rule, under no obligation to bring such a claim, even in cases of a violation of a norm of *jus cogens*. Both the injured state and other states concerned are free to decide whether or not to invoke responsibility. Undue delay in giving notice of a claim does not make the wrongful conduct giving rise to the claim lawful; it only precludes the states concerned from bringing the claim. The procedural rule thus does not affect the substantive rule in any way. If both the injured state and other states concerned do not give notice of a claim within a reasonable period of time, it seems a question of procedural fairness to protect the respondent state against unduly delayed claims for violations of *jus cogens*. The fact that the norm allegedly violated is one of *jus cogens* does not mean that the respondent state must always have had notice of the claim and that therefore there cannot be any prejudice on its part. This is particularly true in the many situations where either the facts or the law, including the *jus cogens* status of a norm, or both will be uncertain.

The same limitations, however, apply to acquiescence in the lapse of the claim as set out above with regard to waiver of the consequences of the breach in terms of responsibility. First, acquiescence by the injured state does not entail a loss of the right to invoke responsibility on the part of other states entitled to do so under Article 48(1) ARSIWA, but may limit the other states' right to claim reparation. Acquiescence by other states entitled to invoke responsibility, on the other hand, has no effect on the rights of the injured state.[134] Second, acquiescence in the lapse of the claim is subject to the constraints of Article 41 ARSIWA.

### *5.3.3. Rules on estoppel*

The concept of estoppel in international law means different things to different people.[135] As it was so aptly put by Christopher Brown: 'In its current form, "all the king's horses and all the king's men" cannot possibly make sense of it.'[136] In its broadest interpretation, the concept of estoppel prevents states from acting inconsistently to the detriment of others.[137] In this sense it is identical with the civil-law maxim *non licet venire contra factum proprium*, according to which no one may set

133 See Vienna Convention of the Law of Treaties, *supra* note 53, Art 53.
134 See ILC ARSIWA, Commentary on Art. 45, UN Doc. A/56/10, 2001, 307, para. 1.
135 There is also a certain overlap between the concepts of waiver, acquiescence, and estoppel.
136 C. Brown, 'A Comparative and Critical Assessment of Estoppel in International Law', (1996) 50 *University of Miami Law Review* 369, at 412.
137 M. L. Wagner, 'Jurisdiction by Estoppel in the International Court of Justice', (1986) 74 CLR 1777, at 1777.

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himself in contradiction to his own previous conduct. The concept of estoppel is not limited to the implementation of state responsibility. A state may be estopped or precluded by previous contradictory conduct from exercising a right, invoking responsibility, or instituting legal proceedings. Assuming for the sake of argument that there is room for such a broad notion of estoppel in international law,[138] one may ask whether it also applies in cases of a breach of *jus cogens*. In the *Gabčíkovo Nagymaros Project* case, Judge Weeramantry questioned the 'appropriateness of the use of *inter partes* legal principles, such as estoppel, for the resolution of problems with an *erga omnes* connotation'.[139] He stated:

> We have entered an era of international law in which international law subserves not only the interests of individual states, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating states, international law will need to look beyond procedural rules [such as estoppel] fashioned for purely *inter partes* litigation. When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate.[140]

For Judge Weeramantry a litigant cannot rely on the other litigant's prior contradictory conduct if obligations *erga omnes* are involved. Considering that norms of jus cogens give rise to obligations *erga omnes*, the same reasoning could be applied to the relationship between *jus cogens* and estoppel. It is widely accepted that a state is not estopped from invoking the responsibility of another state, for example, for torture and other violations of human rights of a *jus cogens* character because of its own practice of torture and human rights violations.[141] This, however, is not due to any general modification of the procedural rules of estoppel by substantive rules of *jus cogens*, but rather the result of Article 41(2) ARSIWA, which requires all states – and the same is true for international courts and tribunals – not to recognize 'as lawful' a situation created by a serious breach of *jus cogens*. A situation that is not to be recognized 'as lawful' is to be treated as not producing any legal effects.[142] There is thus no legally relevant contradictory conduct to be taken into account when applying the concept of estoppel.

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138 For a restrictive notion of estoppel, see T. Cottier and J. P. Müller, 'Estoppel', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. 3 (2012), 671–7.

139 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at 88 (Judge Weeramantry, Separate Opinion). Judge Weeramantry had adopted the broad notion of estoppel; see ibid., at 116–18.

140 Ibid., at 118.

141 See, e.g., K. Doehring, 'Zum Rechtsinstitut der Verwirkung im Völkerrecht', in K.-H. Böckstiegel et al. (eds.), *Völkerrecht, Recht der internationalen Organisationen, Weltwirtschaftsrecht: Festschrift für Ignaz Seidl-Hohenveldern* (1988), 51 at 57, 59.

142 See S. Talmon, 'The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?', in C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order* (2005), 99, at 114–16.

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## 6. Conclusion

International law is like an intricate tapestry which is woven of countless threads. Each thread in itself may be important and deserve close attention. The pictorial design, however, only emerges if the tapestry is looked at as a whole. The focus on just one of these threads – the question of immunity for serious violations of human rights and humanitarian law – has led to a distorted and blurred picture. The criticism or outright denial of the 'substantive–procedural' distinction in international law has been motivated more by the desired result of holding the violators of *jus cogens* accountable than by any substantive argument against the distinction itself. Thus, Alexander Orakhelashvili writes that 'the so-called distinction between "substantive" and "procedural" norms which prevents the relevant *jus cogens* norms from operating as norms must be rejected as necessarily leading to impunity.'[143] Taking a broader look at the tapestry, however, shows that the 'substantive–procedural' distinction is well represented in the picture and makes eminent sense even when substantive rules of *jus cogens* are involved.

The distinction has been called an 'inadequate and unpersuasive conceptualization' that is missing 'the values'.[144] But it is one thing to argue that the values of the international community have materialized in the concept of *jus cogens*; it is another to hold that rules of *jus cogens* override all other rules of the international legal system.[145] No (convincing) argument has so far been deployed as to why and how *jus cogens* should overcome the 'substantive–procedural' divide and where the actual conflict between substantive and procedural rules lies. Any wider normative implications of the concept of *jus cogens* cannot simply be deduced out of the concept itself but have to be reflected in the *opinio juris* of states as evidenced by their practice.[146] In this respect, the approach of the proponents of an all-encompassing superiority of rules of *jus cogens* is reminiscent of that of the 'constitutionalist' school in international law which reaches its results by way of (more or less) logical deduction from self-conceived premises. Any such approach, however, sacrifices conceptual thinking and the sources of international law on the altar of an indeterminate 'logic of values',[147] and ultimately leads to progressive academic and judicial development of international law by false logic. The criticism of the 'substantive–procedural' distinction in international law as too formalistic and technical may be answered by noting that law, by its very nature, is formalistic and technical. These traits contribute to clarity, certainty, and predictability – also 'values' not to be discarded lightly.

143 A. Orakhelashvili, 'State Immunity and International Public Order Revisited', (2006) 49 GYIL 327, at 361.
144 *Jurisdictional Immunities of the State* case, *supra* note 1, para. 294 (Judge Cançado Trindade, Dissenting Opinion).
145 But see A. Bianchi, 'Human Rights and the Magic of *Jus Cogens*', (2008) 19 EJIL 491, at 495 ('rules can be hierarchically ordered on the basis of their underlying values').
146 See Ontario Court of Appeal, *Bouzari v. Iran*, 30 June 2004, 243 D.L.R. (4th) 406, para. 90.
147 On the 'logic of values', see C. Schmitt, 'Die Tyrannei der Werte', in S. Buve (ed.), *Säkularisation und Utopie, Erbracher Studien, Ernst Forsthoff zum 65. Geburtstag* (1967), 37, at 60.

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