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PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (IUS COGENS) AND RUSSIA'S AGGRESSION AGAINST UKRAINE[1]

Abstract

Russia's war against Ukraine violates several ius cogens norms, especially the prohibition of aggression (I.). Though ius cogens is said to protect fundamental values of the international community, it is not immediately apparent how it provides protection against an aggressor state. The article therefore analyses the implications of ius cogens for Ukraine, Russia, and the international community. The legal consequences of ius cogens can be divided in two sets, one concerning the invalidating effect of ius cogens on conflicting legal acts, the second concerning state responsibility. The first set raises the pivotal question under what circumstances a potential Russo-Ukrainian peace settlement would be invalid (II.). The second set of legal consequences engages the international community by conferring obligations on all states in relation to the war (III.). This includes the obligations of non-recognition and non-assistance in situations created by serious ius cogens breaches, and the obligation to cooperate to end such breaches. While the customary status and content of these obligations is not fully settled, state practice in response to the war contributes to crystallizing and clarifying these obligations to some extent. Therefore, despite Russia's ongoing aggression, international practice responding to the war reinforces ius cogens (IV.).

Key Words

Ukraine, Russian Aggression, Peremptory Norms of General International Law (Ius Cogens), Treaty Invalidity, Non-recognition, Non-assistance, Obligation to Cooperate to End Serious Ius Cogens Breaches

[1] This contribution is a revised and updated version of the article "(Ir-)Relevance of *ius cogens*? Legal Consequences of *ius cogens* in Russia's War of Aggression Against Ukraine", originally published in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 83, no. 3 (2023): 461–87, https://doi.org/10.17104/0044-2348-2023-3-461.

I. (Ir-)Relevance of *ius cogens*?

Russia's full-fledged war against Ukraine, launched on February 24, 2022, violates several peremptory norms of general international law (*ius cogens*).[2] First, Russia's massive military invasion violates the prohibition of aggression,[3] whose *ius cogens* status the International Law Commission (ILC) affirmed in its 2022 conclusions on *ius cogens*.[4] Second, repeated violations of international humanitarian law (IHL) have been confirmed, with Russia responsible "for the vast majority" of them.[5] The ILC concluded that the "basic rules" of IHL are peremptory,[6] without, however, clarifying their scope.[7] It is sufficient here to point to the finding by the Independent International Commission of Inquiry on Ukraine that Russia has committed numerous war crimes: indiscriminate use of explosive weapons in populated areas, deliberate targeting of civilians trying to flee, summary executions, torture, ill-treatment, sexual and gender-based violence, unlawful confinement and detention in inhumane conditions, forced deportations, and others.[8] Such egregiously inhumane acts violate the "basic rules" of IHL. Besides, the prohibition of torture is generally accepted as a self-standing peremptory norm,[9] and the prohibition of gender-based violence enjoys increasing support as being peremptory as well.[10] Finally, by subjugating Ukrainians in Russian-occupied territories to dictatorial rule, and illegally postulating new "states" in eastern Ukraine, Russia violates the right to self-determination, which is also recognized as a peremptory norm by the ILC.[11] Thus, Russia violates several *ius cogens* norms.

[2] The terms peremptory norms and *ius cogens* (norms) are used synonymously herein.

[3] James A. Green, Christian Henderson, and Tom Ruys, "Russia's attack on Ukraine and the *jus ad bellum*," *Journal on the Use of Force and International Law* 9, no. 1 (2022): 4–30, https://doi.org/10.1080/20531702.2022.2056803.

[4] ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)* (17 May 2022), UN Doc. A/77/10, para. 43: Annex, lit. a.

[5] Independent International Commission of Inquiry on Ukraine, *Report of the Independent International Commission of Inquiry on Ukraine* (18 October 2022), UN Doc. A/77/533, 2.

[6] ILC, *Draft conclusions on jus cogens*, Annex, lit. d.

[7] ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries* (22-27 July 2022), UN Doc. A/77/10, para. 44: conclusion 23, commentary, para. 10.

[8] Independent International Commission of Inquiry on Ukraine, *Report*, paras 38, 56, 60, 65.

[9] ILC, *Draft conclusions on jus cogens*, Annex, lit. g.

[10] Mary H. Hansel, "'Magic' or Smoke and Mirrors? The Gendered Illusion of Jus Cogens," in *Peremptory Norms of General International Law (Jus Cogens), Disquisitions and Disputations*, ed. Dire Tladi (Leiden: Brill Nijhoff, 2021), 485–6.

[11] ILC, *Draft conclusions on jus cogens*, Annex, lit. h.

Several states have therefore highlighted the relevance of *ius cogens*,[12] which is supposed to protect fundamental values.[13] However, given Russia's ongoing aggression, one might be inclined to conclude that the war reveals the "emptiness"[14] of *ius cogens*, a concept seemingly inadequate to provide protection. Critics go even further in claiming that *ius cogens* would do more harm than good in the context of war, because *ius cogens* would invalidate potential peace settlements.[15] This article counters both these critiques, claiming that *ius cogens* is neither empty nor harmful with regard to Russia's aggression. It argues that options for a peaceful settlement would not be invalidated by *ius cogens* (II.). Moreover, international practice in response to Russia's aggression actually strengthens certain aspects of *ius cogens* (III.).

To substantiate these claims, the article analyses the legal consequences of *ius cogens* in the context of Russia's aggression. Additionally, taking the converse perspective, this article examines how international practice responding to the war influences *ius cogens*. The bulk of legal consequences of *ius cogens* can be categorized into two distinct sets, which structure the subsequent analysis. Both sets are pertinent in the Russo-Ukrainian War.

The first set is concerned with legal acts that conflict with *ius cogens* norms, and consists of those rules that prescribe the invalidity of such legal acts.[16] They can be summarized as the *rules on the invalidating effect of ius cogens*. These rules correspond to the classical function of *ius cogens* to solve normative conflicts, first set out in the Vienna Convention on the Law of Treaties (VCLT) with regard to treaties conflicting with peremptory norms.[17] In addition to treaty invalidity, the first set of legal consequences of *ius cogens* also comprises a rule according to which decisions of international organizations, including Security Council resolutions, will not create obligations if they conflict with *ius cogens*.[18] *Prima facie*, the invalidating effect seems relevant for the treaties Russia claims to have concluded on February

[12] E.g. in the General Assembly's Sixth Committee: Austria (UN Doc. A/C.6/77/SR.22, para. 33); Norway, also on behalf of Denmark, Finland, Iceland, and Sweden (UN Doc. A/C.6/77/SR.21, para. 54); Slovakia (UN Doc. A/C.6/77/SR.22, para. 94).

[13] ILC, *Draft conclusions on jus cogens*, conclusion 2.

[14] Arthur Mark Weisburd, "The Emptiness of the Concept of *Jus Cogens*, as illustrated by the War in Bosnia-Herzegovina," *Michigan Journal of International Law* 17 (1995): 1–52.

[15] Weisburd, "The Emptiness of *Jus Cogens*," 40–9.

[16] ILC, *Draft conclusions on jus cogens*, conclusions 10–16.

[17] Art. 53 Vienna Convention on the Law of Treaties (VCLT) of 23 May 1969, 1155 UNTS 331: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." This reflects customary international law, see ILC, *Draft conclusions on jus cogens*, conclusion 10, para. 1.

[18] ILC, *Draft conclusions on jus cogens*, conclusion 16.

21, 2022, respectively, with the so-called Donetsk and Luhansk "People's Republics."[19] However, these acts are invalid regardless of *ius cogens*: Since Russia concluded them with non-existent "states", they simply lack a contracting party to be treaties.[20] Rather, one central and challenging question raised by this set of legal consequences is under what circumstances a potential legal act to settle the war (e.g. a peace treaty or Security Council resolution) would be invalidated by *ius cogens* – this is discussed in section II.

By contrast, the second set of legal consequences addresses *conduct* that violates peremptory norms.[21] This second set, referred to as *aggravated state responsibility*, comprises the obligations of third states arising from serious breaches of peremptory norms – analyzed in section III. This regime includes the obligations not to recognize as lawful situations created by a serious *ius cogens* breach, not to render aid or assistance in maintaining such situations, and to cooperate to end serious *ius cogens* breaches.[22] Since this second set of legal consequences is triggered by serious breaches, it is crucial for protecting the fundamental values enshrined in peremptory norms precisely against such violations. The article argues that the regime of aggravated state responsibility is reinforced by state practice responding to the Russo-Ukrainian War: Such practice contributes to clarifying the obligations of aggravated state responsibility, and to crystallizing the customary status of the obligation to cooperate to end serious *ius cogens* breaches. This obligation adds an essential element for the protection of peremptory norms and the values they enshrine against violations.

II. The invalidating effect of *ius cogens* – impediment on the way to peace?

The pivotal question to by analyzed in this section is what implications the rules on the invalidating effect of *ius cogens* have for a potential Russo-Ukrainian peace treaty or a Security Council resolution. Though a permanent peace may be unattainable without Russia's military defeat,[23] Ukraine may nonetheless, at some point, be willing to concede parts of its territory in a peace settlement, or may be willing to make concessions in terms of its constitutional order. This article argues that such a treaty or resolution would not be invalid. This is not to

[19] On their lack of statehood, see Hiroyuki Banzai, "Impacts on Jus Cogens: Impact on the Law of State Responsibility and Law of Treaties," in *Global Impact of the Ukraine Conflict, Perspectives from International Law*, ed. Shuichi Furuya, Hitomi Takemura, and Kuniko Ozaki (Singapore: Springer Nature, 2023), 43; Green, Henderson, and Ruys, "Russia's attack on Ukraine and the *jus ad bellum*," 17–8.

[20] Banzai, "Impacts on Jus Cogens: Impact on the Law of State Responsibility and Law of Treaties," 43.

[21] See distinction in Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge: Cambridge University Press, 2017), 185

[22] ILC, *Draft conclusions on jus cogens*, conclusion 19.

[23] However, some Western officials doubt that the war can be ended without territorial concessions by Ukraine, see Maksym Vishchyk and Jeremy Pizzi, "Compromises on Territory, Legal Order, and World Peace: The Fate of International Law Lies on Ukraine's Borders," *Just Security*, 6 October 2023, https://www.justsecurity.org/89216/compromises-on-territory-legal-order-and-world-peace-the-fate-of-international-law-lies-on-ukraines-borders/.

say that territorial concessions to an aggressor would be politically desirable or an effective tool to attain stability and a permanent peace with Russia. The article is not meant to make a political assessment of these delicate questions, or of the expedience of using a treaty to end war.[24] The argument is merely that *ius cogens* does not take territorial concessions as a possible element of a peace settlement out of the toolbox of Ukraine and the international community.

When it comes to treaties concluded in the aftermath of an unlawful use of force, however, two rules prescribing the invalidity of legal acts need to be discerned. On the one hand, a treaty (or Security Council resolution) might be invalid due to a conflict with a peremptory norm (1.). On the other hand, as recognized in Art. 52 VCLT and customary international law,[25] a treaty may be invalid "if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations" (2.). The latter is not a legal consequence of *ius cogens*, but closely connected thereto, and should therefore be included in the analysis. The Article argues that neither rule would necessarily invalidate territorial concessions.

1. Invalidity due to a conflict with *ius cogens*

The element common to the rules on the invalidating effect of *ius cogens* is that the invalidity of a legal act (treaty, resolution, etc.) depends on the determination of a conflict between the legal act in question and a peremptory norm. *Conflict* is therefore a key notion to understand the invalidating effect of *ius cogens*. However, scholars propose competing interpretations of this notion: one is the ordinary, narrow understanding of conflict, whereas others propose a broader interpretation.

The ordinary understanding of (normative) conflict in the context of *ius cogens* refers to a situation of coexistence of norms requiring, prohibiting or permitting materially inconsistent lines of conduct.[26] Put differently, the coexisting norms lead to different assessments of the lawfulness of the same conduct. The textbook example on the peremptory prohibition of the use of force is a treaty purporting to grant state A the right to intervene mili-

[24] While one can observe a "demise" of peace treaties, the last decades still witnessed wars ended by treaties, see Tanisha M. Fazal, "The Demise of Peace Treaties in Interstate War," *International Organization* 67, no. 4 (2013): 695–724, https://doi.org/10.1017/S0020818313000246.

[25] Yoram Dinstein, *War, Aggression and Self-Defence*, 6. ed. (Cambridge: Cambridge University Press, 2017), para. 113.

[26] Enzo Cannizzaro, "A higher law for treaties?," in *The Law of Treaties beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford: Oxford University Press, 2011), 427; Alexander Orakhelashvili, *Peremptory norms in international law*, Oxford monographs in international law, (Oxford: Oxford University Press, 2006), 136–7.

tarily in state B at its discretion.[27] This fictitious treaty would permit armed intervention regardless of B's *ad hoc* consent. The peremptory prohibition of the use of force permits armed intervention upon *ad hoc* consent,[28] but it prohibits the use of force where such *ad hoc* consent is lacking.[29] The legal assessment under the peremptory norm (A's intervention in B without *ad hoc* consent would be unlawful) and under the fictitious treaty (A's intervention in B without *ad hoc* consent would be lawful) are incompatible. By virtue of the rules on the invalidating effect of *ius cogens*, the peremptory norm prevails, whereas the treaty is invalid.

Under this ordinary interpretation of conflict, a peace settlement entailing Ukrainian concessions would be valid. For example, a treaty or Security Council Resolution obligating Ukraine to amend its constitutions would not be invalid under the ordinary interpretation of conflict. In essence, this is due to the fact that neither of these instruments would convey a different legal assessment on Russia's unlawful use of force. Therefore, no conflict in the sense of the rules on the invalidating effect of *ius cogens* arises.

Applying the ordinary interpretation of conflict to a treaty by which Ukraine made territorial concessions is more challenging though. This is due to the prohibition against acquiring territory by an unlawful use of force, which may be characterized as forming part of the peremptory prohibition of the use of force, or might qualify as a distinct peremptory norm.[30] Recognizing territorial annexation through a treaty would seem to undermine this prohibition. And yet, a treaty concluded during or after an unlawful use of force by which the victim makes territorial concessions to the perpetrator does not convey a different verdict of un/lawfulness on the preceding use of force. The title to territory would be transferred by the treaty, not by the use of force. Thus, in the narrow, ordinary sense, no conflict arises.

This could however lead to what one might perceive as an unduly limited use of the peremptory character of the prohibition involved. Scholars have therefore proposed a broader interpretation of "conflict," so as to include "conflict by divergence," "indirect conflict," or "occasional collision."[31] The invalidating effect would be expanded to legal acts that do not directly conflict with *ius cogens* but would nonetheless contribute to a situation that is inconsistent with the purpose of a peremptory norm. The principal argument in favor of this

[27] For a historical precedent, see the 1921 Russo-Persian Treaty of Friendship, W. Michael Reisman, "Termination of the USSR's Treaty Right of Intervention in Iran," *American Journal of International Law* 74 (1980): 144–54.

[28] Federica Paddeu, "Military assistance on request and general reasons against force: consent as a defence to the prohibition of force," *Journal on the Use of Force and International Law* 7, no. 2 (2020): 227–69, https://doi.org/10.1080/20531702.2020.1805963.

[29] Orakhelashvili, *Peremptory norms*, 360. Cf. Svenja Raube, *Die antizipierte Einladung zur militärischen Gewaltanwendung im Völkerrecht* (Baden-Baden: Nomos 2023).

[30] Ingrid Brunk and Monica Hakimi, "The Prohibition of Annexations and The Foundations of Modern International Law," *American Journal of International Law* (pre-publication manuscript) (2024): 1–70, https://doi.org/10.1017/ajil.2024.26.

[31] Cannizzaro, "A higher law for treaties?," 429–37.

interpretation is that the fundamental values enshrined in peremptory norms ought to be protected against any legal act that produces results inconsistent with them.[32] For example, once force has been used in violation of the peremptory norm prohibiting it, legal acts conceding anything to the perpetrator would produce results inconsistent with this prohibition, and therefore be invalid. Thus, under the broad interpretation of "conflict", territorial concessions through a treaty or Security Council resolution could be invalid.[33]

However, the interpretation of Art. 53 VCLT in its context and in the light of its object and purpose speak against the broader interpretation of conflict. First, the broad interpretation blurs the distinction between the substance of a treaty conflicting with a peremptory norm (Art. 53), and the circumstances of conclusion of the treaty involving the unlawful use of force (Art. 52). If any treaty concluded during or after of an unlawful use of force falls under Art. 53, Art. 52 becomes obsolete. Second, in terms of object and purpose, maintaining rather than invalidating peace treaties will better safeguard the fundamental values embodied in *ius cogens* norms. International law's overarching object and purpose of maintaining international peace[34] requires that a peace settlement will always be feasible. In peacetime, treaties and Security Council resolutions may alter the status of territory. Allowing an unlawful use of force to affect this possibility would in itself be concession to the perpetrator. The object and purpose and context therefore support the ordinary, narrow interpretation of "conflict" in the rules on the invalidating effect of *ius cogens*. This interpretation should therefore be retained.

2. Invalidity of a treaty procured by the use of force, Art. 52 VCLT

What remains to be assessed then is the effect of Art. 52 VCLT on a possible peace treaty. If there is a causal link between Russia's aggression and the conclusion of a treaty benefitting Russia, Art. 52 VCLT invalidates the treaty. What constitutes such a causal link ("has been procured by") is controversial.[35] The fact that without a war, no peace treaty would have been concluded, cannot in itself satisfy the causality requirement.[36] Vishchyk and Pizzi argue that Ukrainian concessions would be invalid under Art. 52 VCLT if "the conclusion of a treaty will primarily be the result of the use of force", making Ukraine "unable to resist the pressure to become a party to a treaty."[37] Both whether the treaty is *primarily* the result of the use of

[32] Orakhelashvili, *Peremptory norms*, 136–9.

[33] Weisburd, "The Emptiness of *Jus Cogens*," 40–9.

[34] Art. 1, para. 1 UN-Charter.

[35] Olivier Corten, "1969 Vienna Convention Article 52," in *The Vienna Conventions on the Law of Treaties*, ed. Olivier Corten and Pierre Klein (Oxford: Oxford University Press, 2011), 1201 (paras 24–8); Kirsten Schmalenbach, "Article 52," in *Vienna Convention on the Law of Treaties, A Commentary*, ed. Oliver Dörr and Kirsten Schmalenbach (Berlin: Springer 2012), 871 (paras 20–4).

[36] Schmalenbach, "Article 52," paras 2 and 24.

[37] Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

The object and purpose of Art. 52 VCLT may further guide the interpretation of the causality requirement. One aim of the rule is to guarantee stability,[38] assuming that a treaty imposed by force is inapt to provide stability: The aggressor may be incentivized to resort to further force to attain more concessions; the victim may also be incentivized to resort to force to repel its concessions.[39] However, what incentives a peace treaty may create is highly context-dependent. For example, an unlawful use of force might still be perceived as legitimate such that a peace treaty legalizing the outcome of the use of force may more effectively enable a permanent peace than denying the validity of legitimate concessions.[40] An argument based on the incentives a peace treaty would create is therefore error-prone, and of limited use for interpreting Art. 52 VCLT.

In addition to guaranteeing stability, Art. 52 VCLT aims to protect the principle of free consent, and to prevent an aggressor from harvesting the fruits of aggression.[41] Arguably, post-war concessions can be freely made in certain circumstance, and are compatible with the principle of free consent. Yet, they would be incompatible with the aim of barring the aggressor from profits. This consideration would necessitate the invalidity of any concession.[42] However, state practice suggests that certain concessions can validly be made notwithstanding Art. 52 VCLT. First, the 1999 Lusaka Ceasefire Agreement between Uganda and the DRC was implicitly accepted as valid by the ICJ, even though the agreement authorized the presence of Ugandan troops on the territory of the DRC after Uganda's unlawful use of force.[43] Second, Ukraine accepted certain concessions in 2015 already in Minsk II, including to modify its constitutional order. These examples show that treaties can validly make certain concessions to an aggressor.[44]

Furthermore, regardless of the invalidating effect of Art. 52 VCLT, a treaty profiting an

[38] Serena Forlati, "Coercion as a Ground Affecting the Validity of Peace Treaties," in *The Law of Treaties Beyond the Vienna Convention*, ed. Enzo Cannizzaro (Oxford: Oxford University Press, 2011), 321.

[39] Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

[40] Russian claims to Ukrainian territory are by no means legitimate – yet, an adequate interpretation should also account for other conceivable cases.

[41] Schmalenbach, "Article 52," para. 23.

[42] Schmalenbach, "Article 52," para. 24.

[43] ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), judgment of 19 December 2005, ICJ Reports 2005, 168 (paras 104–5).

[44] Examples by Kirsten Schmalenbach, "#26 Völkervertragsrecht: Können Friedensverträge nichtig sein?," interview by Sophie Schuberth et al., *Völkerrechtspodcast*, April 7, 2023, https://voelkerrechtsblog.org/de/26-voelkervertragsrecht-koennen-friedensvertraege-nichtig-sein/; Kirsten Schmalenbach and Alexander Prantl, "How to End an Illegal War?," *Völkerrechtsblog*, 21 April 2022, https://voelkerrechtsblog.org/de/how-to-end-an-illegal-war/; Forlati, "Coercion as a Ground Affecting the Validity of Peace Treaties," 322–30 (with further examples).

aggressor can arguably be validated by a Security Council resolution.[45] For example, the ICJ accepting the validity of the Lusaka Ceasefire Agreement may be based a very strict test of causality, not met in this case, but may also be due to the fact that the Security Council had adopted a resolution approving of the agreement.[46] The Security Council would only be precluded from overriding the effect of Art. 52 VCLT if that rule was itself a peremptory norm, which is hardly the case.[47]

While the objectives of Art. 52 VCLT are important, other considerations may outweigh these objectives. This should guide the interpretation of Art. 52 VCLT, which, however, remains ambiguous. Neither the rules on the invalidating effect of *ius cogens* nor the customary rule codified in Art. 52 VCLT necessarily preclude the conclusion of a valid peace treaty. These rules do not take concessions out of the toolbox of Ukraine and the international community as potential elements of peace settlement. Otherwise, the aggressor would be permitted to limit the legal powers of the victim and the international community.

III. *Ius cogens* and aggravated state responsibility

Ius cogens is now widely recognized as engendering effects that extend also to the law of state responsibility. While *ius cogens* violations do not trigger obligations for the perpetrator beyond those triggered by violations of non-peremptory norms,[48] they create additional rights and obligations for third states, thereby elevating *ius cogens* breaches to a concern of the entire international community. Regarding additional rights, *ius cogens* norms have *erga omnes* character, meaning that all states are entitled to invoke the responsibility of the perpetrator.[49] Thus, any state has standing to invoke Russia's responsibility for breaching peremptory norms, and may claim cessation, and assurances and guarantees of non-repeti-

[45] Stuart S. Malawer, "Imposed Treaties and International Law," *California Western International Law Journal* 7, no. 1 (1977): 165; Schmalenbach, "Article 52," paras 48–50. Also see Art. 75 VCLT: "The provisions of the [VCLT] are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the [UN-Charter] with reference to that State's aggression." Cf. Corten, "1969 Vienna Convention Article 52," para. 38.

[46] UNSC Res 1234 of April 9, 1999, UN Doc. S/RES/1234.

[47] Forlati, "Coercion as a Ground Affecting the Validity of Peace Treaties," 331–2. Cf. Enrico Milano, "Security Council Action in the Balkans: Reviewing the Legality of Kosovo's Territorial Status," *European Journal of International Law* 15, no. 5 (2003): 1018. Milano argues that Art. 52 VCLT was peremptory due to the peremptory character of the prohibition of the use of force. However, the peremptory character of a norm cannot be deduced from the peremptory character of another.

[48] Christian J. Tams, "Do serious breaches give rise to any specific obligations of the responsible state?," *European Journal of International Law* 25, no. 5 (2002): 1161–80.

[49] ILC, *Draft conclusions on jus cogens*, conclusion 17.

tion.[50] However, *ius cogens* does not provide courts with any additional basis for jurisdiction.[51]

Regarding additional obligations, serious *ius cogens* breaches entail obligations of non-recognition and non-assistance vis-à-vis the situation created by the breach, and an obligation to cooperate through lawful means to end the breach. However, the legal status and content of these obligations of the regime of aggravated state responsibility require further clarification. After scrutinizing the restriction of the obligations to cases of serious *ius cogens* breaches (1.), this section analyzes the obligations of non-recognition and non-assistance (2.), and that of cooperation to end the breach (3.) with regard to their implications for Russia's aggression against Ukraine.

1. The threshold of seriousness of the *ius cogens* breach

The obligations of aggravated state responsibility are triggered only by "serious" *ius cogens* breaches.[52] A breach is serious if it amounts to a gross or systematic failure by the perpetrator to fulfil the obligation.[53] A systematic failure refers to an "organized and deliberate" violation, whereas gross refers to "the intensity of the violation or its effects". Determining factors for both include "the intent to violate the norm; the scope and number of individual violations; and the gravity […] for the victims."[54] While delineating this threshold may be difficult, Russia's war is a clear-cut case of serious breaches, the violations being both gross (egregious intensity, scale, and number of victims) *and* systematic (organized on a large scale; intent). The ILC also asserted that aggression, given its stringent requirements, would always be serious.[55] Thus, Russia's war meets the threshold of seriousness, giving rise to aggravated state responsibility.[56]

A determination by a relevant authority of the existence of a serious *ius cogens* breach is not required for the obligations of aggravated state responsibility to be triggered. This is the view of the ILC,[57] and finds support in the ICJ's *Wall Opinion* where the Court did not precondition the obligations of aggravated state responsibility on a prior authoritative deter-

[50] ILC, *Draft conclusions jus cogens, with commentaries*, conclusion 19, commentary, paras 6–8; Iain Scobbie, "The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law'," *European Journal of International Law* 13, no. 5 (2002): 1205–7, https://doi.org/10.1093/ejil/13.5.1201.

[51] ICJ, *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, ICJ Reports 2006, 6 (para. 64).

[52] ILC, *Draft conclusions on jus cogens*, conclusion 19.

[53] ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), ILCYB, Vol. II, Part Two, 31 (ARSIWA), Art. 40; ILC, *Draft conclusions on jus cogens*, conclusion 19, paras 1 and 3.

[54] ILC, *ARSIWA, with commentaries*, Art. 40, para. 8.

[55] ILC, *ARSIWA, with commentaries*, Art. 40, para. 8.

[56] Colombia (UN Doc. A/ES-11/PV.3, 2) and Cyprus (UN Doc. A/ES-11/PV.13, 14) also emphasized this.

[57] ILC, *ARSIWA, with commentaries*, Art. 40, commentary, para. 9.

mination of a serious *ius cogens* breach.[58] On the one hand, this "self-executory"[59] character of the regime of aggravated state responsibility is crucial when a potentially relevant body is unable to determine the existence of a serious *ius cogens* breach – as is the case with Russian veto power in the Security Council.

On the other hand, the lack of an authoritative determination is also a weakness of the regime. States will need to make their individual assessment whether a breach is serious,[60] thus adding "an extra level of subjectivity," which jeopardizes the thrust of the obligations.[61] Further, it seems implausible that *ius cogens* norms could be breached in non-serious ways,[62] and normatively disappointing if third states can remain indifferent to "non-serious" *ius cogens* breaches.[63] These aspects cast doubt on the requirement of seriousness. *De lege ferenda*, this requirement should therefore be abandoned, as several states also suggested.[64] In contrast, the ILC justified the threshold as avoiding a trivialization of the obligations.[65] However, the varying intensity of *ius cogens* breaches can be accounted for, e.g., by varying the required level of cooperation.

[58] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, ICJ Reports 2004, 136 (para. 159). Not in contradiction to this, but with a somewhat different approach, see ICJ, 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, ICJ Reports 1971, 16 (paras 117–9).

[59] Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

[60] Robert P. Barnidge Jr., "Questioning the Legitimacy of *Jus Cogens* in the Global Legal Order," *Israel Yearbook on Human Rights* 38 (2008): 216, https://doi.org/10.1163/9789047427049_009; Costelloe, *Legal Consequences of Peremptory Norms*, 187–90 and 212; Sten Verhoeven, *Norms of jus cogens in International law, a positivist and constitutionalist approach* (Leuven: Katholieke Universiteit Leuven, 2011), 216.

[61] Christine Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1993), 333; Verhoeven, *Norms of jus cogens in International law*, 260.

[62] Sévrine Knuchel, *Jus cogens: Identification and Enforcement of Peremptory norms* (Zürich: Schulthess, 2015), 183 (para. 349); Eliav Lieblich, "Whataboutism in International Law," *Harvard International Law Journal* 65, no. 2 (2024): 45 (fn. 135); Krzysztof Niewęgłowski, "Normative aspects of *jus cogens* identification in Vienna Convention on the Law of Treaties," *Zeszyty Prawnicze* 78, no. 2 (2023): 12, https://doi.org/10.31268/ZPBAS.2023.26. See discussion in ILC, *Fifth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur* (24 January 2022), UN Doc. A/CN.4/747, para. 183.

[63] Paola Gaeta, "The character of the breach," in *The Law of International Responsibility*, ed. James Crawford, Alain Pellet, and Simon Olleson (Oxford: Oxford University Press, 2010), 425–6; Vladyslav Lanovoy, *Complicity and its limits in the law of international responsibility* (Oxford: Hart, 2016), 112.

[64] Brazil (UN Doc. A/C.6/73/SR.25, para. 40), Colombia (UN Doc. A/CN.4/748, 84), Egypt (UN Doc. A/C.6/73/SR.25, para. 37), Mozambique (UN Doc. A/C.6/73/SR.28, para. 3), Poland (UN Doc. A/CN.4/748, 88), South Africa (UN Doc. A/C.6/74/SR.27, para. 47), Togo (UN Doc. A/C.6/74/SR.26, para. 28).

[65] ILC, *ARSIWA, with commentaries*, Art. 40, commentary, para. 7.

2. Obligations of non-recognition and non-assistance

According to Art. 41, para. 2 of the ILC's 2001 Articles on State Responsibility (ARSIWA), "no state shall recognize as lawful a situation created by a [serious *ius cogens* breach], nor render aid or assistance in maintaining that situation."[66] The ILC reaffirmed this as conclusion 19, para. 2 in its work on *ius cogens*.[67] Both obligations are characterized as negative obligations, requiring states to refrain from certain acts.[68] Whereas non-recognition as lawful operates on a legal level (a), not to render aid or assistance extends to factual support (b).

a) Non-recognition as lawful of the situation created by a serious *ius cogens* breach

In 2001, the ILC emphasized that territorial acquisitions brought about by the use of force, or through the denial of self-determination, were invalid and must not be recognized.[69] While this is widely accepted as customary international law,[70] it is unclear whether the obligation of non-recognition applies to all peremptory norms.[71] The following analysis therefore focusses on Russia's claim to rights over Ukrainian territories, trying first to clarify what the obligation entails and second, how it affects a peace settlement.

The obligation of non-recognition does not prohibit *per se* all interaction with the state perpetrating serious *ius cogens* breaches, but only acts that explicitly or implicitly recognize

[66] ILC, *ARSIWA, with commentaries*, Art. 41, para. 2, in conjunction with Art. 40.

[67] ILC, *Draft conclusions on jus cogens*, conclusion 19, para. 2.

[68] ILC, *Draft conclusions jus cogens, with commentaries*, conclusion 19, commentary, para. 12 ("the duties of non-recognition and non-assistance are negative duties") – in contrast to the duty to cooperate, which is characterized as a positive obligation, requiring states to actively take measures towards ending the breach.

[69] ILC, *ARSIWA, with commentaries*, Art. 41, commentary, paras 5–6.

[70] Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011), 326–32; Théodore Christakis, "L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales," in *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, ed. Christian Tomuschat and Jean-Marc Thouvenin (Leiden: Martinus Nijhoff, 2006), 142–4; Costelloe, *Legal Consequences of Peremptory Norms*, 194–204; Martin Dawidowicz, "The obligation of non-recognition of an unlawful situation," in *The Law of International Responsibility*, ed. James Crawford, Alain Pellet, and Simon Olleson (Oxford: Oxford University Press, 2010), 684; Diane Desierto, "Non-Recognition," *EJIL:Talk!*, 22 February 2022, ejiltalk.org/non-recognition/; Christian Marxsen, "The Crimea Crisis from an International Law Perspective," *Kyiv-Mohyla Law and Politics Journal* 2 (2016): 33–4, https://doi.org/10.18523/kmlpj88177.2016-2.13-36; Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États* (Paris: Presses Universitaires de France, 2005), 386–7.

[71] Stefan 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 *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, ed. Christian Tomuschat and Jean-Marc Thouvenin (Leiden: Martinus Nijhoff, 2006), 125.

the situation as lawful.[72] It is difficult to determine which conduct implies recognition as lawful. This needs to be assessed on a case by case basis, taking all relevant circumstances into account. For example, states are not obligated to suspend diplomatic or consular relations with the perpetrator, as long as it is made clear that these do not imply recognition of the illegal situation as lawful.[73] Likewise, continuing trade with the perpetrator does not in itself imply recognition of the situation resulting from the breach. However, this is different where a new legal entity is (invalidly) created. In such situations, non-recognition prohibits any and all relations with this new entity.[74] The DPRK and Syria, by recognizing Donetsk and Luhansk as states,[75] clearly violated the obligation of non-recognition. Similarly, in cases of a state illegally annexing territory, states must ensure that their relations with that state do not relate to the territory concerned.[76] However, given the negative character of the obligation, there is no duty to actively declare non-recognition.[77]

Humanitarian considerations limit the obligation of non-recognition. According to the ICJ and the ILC, non-recognition should not disadvantage the inhabitants of an affected territory. Hence, acts related to the civilian population, such as registration of births, deaths and marriages, ought to be recognized.[78] This exception does not extend to all private rights; the rights concerned must be balanced against the importance of withholding recognition.[79]

[72] ILC, *ARSIWA, with commentaries*, Art. 41, commentary, para. 5; Costelloe, *Legal Consequences of Peremptory Norms*, 193–204; Rana Moustafa Essawy, "Is There a Legal Duty to Cooperate in Implementing Western Sanctions on Russia?," *EJIL:Talk!*, 25 April 2022, ejiltalk.org/is-there-a-legal-duty-to-cooperate-in-implementing-western-sanctions-on-russia/; Talmon, "The duty not to recognize as lawful," 108–14.

[73] ICJ, 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, ICJ Reports 1971, 16 (paras 123–4).

[74] Christakis, "L'obligation de non-reconnaissance," 146–60.

[75] "Ukraine cuts N Korea ties over recognition of separatist regions," Al Jazeera, accessed July 8, 2024 https://aljazeera.com/news/2022/7/13/n-korea-recognises-breakaway-of-russias-proxies-in-east-ukraine.

[76] ICJ, 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, ICJ Reports 1971, 16 (paras 121–4); Valentina Azarova, "An Illegal Territorial Regime? On the Occupation and Annexation of Crimea as a Matter of International Law," in *The Use of Force against Ukraine and International Law*, ed. Sergey Sayapin and Evhen Tsybulenko (The Hague: T.M.C. Asser, 2018), 54; Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

[77] Similarly: Aust, *Complicity*, 331. Contrarily, see Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

[78] ICJ, 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, ICJ Reports 1971, 16 (para. 125); ILC, *Draft conclusions jus cogens, with commentaries*, conclusion 19, commentary, para. 15.

[79] Christakis, "L'obligation de non-reconnaissance," 160–4; Costelloe, *Legal Consequences of Peremptory Norms*, 204–6.

Thus, legal acts issued by the *de facto* authorities governing territories such as Donetsk and Luhansk are not to be recognized, save to the extent that this is necessary and proportionate to protect these territories' inhabitants.

Aside from the difficulty of specifying which conduct may imply recognition as lawful in each instance, the crux with the obligation of non-recognition seems to be how it affects future conflict resolution.[80] In particular, Vishchyk and Pizzi argue that under the obligation of non-recognition, states are prohibited from accepting any territorial concession by Ukraine, including those agreed in a peace treaty.[81] However, accepting such a settlement would be compatible with the obligation of non-recognition for two reasons. First, because of the object and purpose of the obligation: Originally, the rule stipulated *inter alia* in the Friendly Relations Declaration (FRD) was that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal."[82] This was meant to protect the principle that territory could not be legally acquired by force against developments whereby a factual acquisition would gradually consolidate and over time become recognized as lawful.[83] Arguably, this rationale would not be affected by a peace settlement redrawing Ukrainian borders, because the legalization of *de facto* control would be effectuated by that agreement, not by the use of force or by gradual consolidation. Corroborating this object and purpose, the FRD insists that the obligation of non-recognition shall not be construed as affecting "the powers of the Security Council under the Charter"; Art. 59 ARSIWA similarly safeguards Art. 41 ARSIWA. These clauses were included precisely so as to ensure that peaceful settlement, even if implying recognition of a situation created by *ius cogens* breaches, would remain possible.[84]

Second, (positivist) *ius cogens* scholarship widely distinguishes primary *ius cogens* norms from secondary norms pertaining to *ius cogens*.[85] Whereas the prohibition of aggression is a (primary) *ius cogens* norm, norms pertaining to it, such as the obligation of non-recognition, are categorized as secondary norms. These secondary norms may, in principle, also acquire *ius cogens* status, but they do not attain this status simply by virtue of being connected to primary *ius cogens* norms.[86] This distinction between primary *ius cogens* norms and secondary norms pertaining to *ius cogens* is relevant for the prospect of a treaty or Security Council resolution to end the war: Even if the treaty or resolution violated the obligation of non-recognition, they

[80] Stuart Casey-Maslen, *Jus ad Bellum, The Law on Inter-State Use of Fore* (Oxford: Hart, 2020), 128; Weisburd, "The Emptiness of *Jus Cogens*," 42–3.

[81] Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

[82] UNGA Res 2625 (XXV) of October 24, 1970, UN Doc. A/RES/2625(XXV), Annex.

[83] Dawidowicz, "The obligation of non-recognition of an unlawful situation," 677–8.

[84] Talmon, "The duty not to recognize as lawful," 123.

[85] Ulf Linderfalk, "The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law," *Nordic Journal of International Law* 82 (2013): 374–7.

[86] Linderfalk, "The Source of Jus Cogens Obligations," 383–4.

would not be invalid.[87] Invalidity will not follow from a violation of a (non-peremptory) secondary norm; invalidity would only ensue if the instrument was in "conflict" with a primary *ius cogens* norm. Some have argued that the obligation of non-recognition is itself a primary *ius cogens* norm.[88] However, this would require that the international community of states as a whole accepts and recognizes this obligation as peremptory,[89] which is hardly the case. Thus, as long as no other ground for invalidity is involved, a treaty or resolution may create *lex specialis* or *lex posterior* to the non-peremptory obligation of non-recognition.[90]

Therefore, the obligation of non-recognition does not impede a peaceful settlement by treaty or Security Council resolution. These means to alter the status of territory will remain at the disposal of relevant states and the international community, regardless of a prior serious *ius cogens* breach.

b) Non-assistance in maintaining the situation created by a serious *ius cogens* breach

The obligation not to aid or assist prohibits any factual contribution to maintaining the situation created by the serious *ius cogens* breach. It is widely accepted as customary international law.[91] Whereas non-recognition prohibits any conduct that implies recognition of the situation as lawful, non-assistance covers conduct that contributes to maintaining the *fait accompli*.[92] While this relates non-assistance to the obligation of cooperation, which also operates on a factual, rather than legal level, the obligation to cooperate is aimed at ending *the breach*, whereas non-assistance relates to maintaining *the situation* the breach created. Assistance in maintaining the breach itself is prohibited by the rule of customary international

[87] Jure Vidmar, "The Use of Force and Defences in the Law of State Responsibility," *Jean Monnet Working Paper* (05/2015): 24, https://ssrn.com/abstract=2796224.

[88] E.g. Rana Moustafa Essawy, "The Responsibility Not to Veto Revisited under the Theory of 'Consequential Jus Cogens'," *Global Responsibility to Protect* 12, no. 3 (2020): 299–335, https://doi.org/10.1163/1875-984x-20200002.

[89] ILC, *Draft conclusions on jus cogens*, conclusion 4.

[90] Arguably, a UNSC Resolution would also prevail over the customary rule by virtue of Art. 103 UN-Charter, see Johann Ruben Leiæ and Andreas Paulus, "Ch.XVI Miscellaneous Provisions, Article 103," in *The Charter of the United Nations: A Commentary, Volume II*, ed. Bruno Simma et al. (2012), paras 38, 68.

[91] ICJ, *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, ICJ Reports 1971, 16 (para. 119); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, ICJ Reports 2004, 136 (para. 159); Nina H. B. Jørgensen, "The obligation of non-assistance to the responsible state," in *The Law of International Responsibility*, ed. James Crawford, Alain Pellet, and Simon Olleson (Oxford: Oxford University Press, 2010), 690–2; Villalpando, *L'émergence de la communauté internationale dans la responsabilité des États*, 389.

[92] Talmon, "The duty not to recognize as lawful," 114.

law codified in Art. 16 ARSIWA.[93] The obligation of non-assistance has an important effect by broadening the temporal reach to conduct after the breach, and the range of acts from which states must refrain, well beyond the ordinary Art. 16 ARSIWA-obligation not to assist in the breach itself.[94]

The obligation of non-assistance complements the obligation of non-recognition and corresponds to it in two respects. First, like non-recognition, non-assistance does not oblige states to isolate the perpetrator; states may continue cooperating with the perpetrator in unrelated fields.[95] Second, non-assistance is also characterized as a negative obligation. Nevertheless, it has been suggested that a state might be obligated to maintain countermeasures once imposed, because weakening or lifting them might "significantly facilitate and encourage the aggressor."[96] However, given that states are not obliged to take countermeasures even under the positive duty to cooperate,[97] they can hardly be obligated to maintain them. This would turn a negative into a positive duty and could dissuade states from taking countermeasures in the first place, as it is often unpredictable for how long states would have to maintain them.

What amounts to assistance though is notoriously vague and context-specific and was not specified by the ILC. Providing military equipment, logistical or financial support to the perpetrator is among the prohibited conduct.[98] Thus, by allowing Russian armed forces to use it territory,[99] Belarus breaches the obligation of non-assistance, as has been deplored by the General Assembly.[100] Likewise in violation of the obligation, Iran supplied Russia with missiles and drones for deployment against Ukraine.[101] Other states similarly implicated are the DPRK, which is said to supply Russia with artillery shells, and China, which is said to have contributed non-lethal military equipment. States of the Global North have repeatedly called upon China not to supply weapons to Russia.[102] However, given that Russia's occupation of Crimea since

[93] ILC, *ARSIWA, with commentaries*, Art. 16, commentary, para. 7.

[94] Costelloe, *Legal Consequences of Peremptory Norms*, 207; Jørgensen, "The obligation of non-assistance," 692; Orakhelashvili, *Peremptory norms*, 282–3.

[95] Jørgensen, "The obligation of non-assistance," 691.

[96] Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

[97] See section III.3. below.

[98] Costelloe, *Legal Consequences of Peremptory Norms*, 207–11.

[99] "Lukashenko Is Letting Putin Use Belarus to Attack Ukraine," Foreign Policy, accessed July 8, 2024, https://foreignpolicy.com/2022/02/24/russia-ukraine-war-belarus-chernobyl-lukashenko/.

[100] UNGA Res ES-11/1 of March 18, 2022, UN Doc. A/RES/ES-11/1.

[101] Gabriela Rosa Hernández, "Iran Supplies Arms to Russia," Arms Control Association, accessed July 8, 2024, https://www.armscontrol.org/act/2022-11/news/iran-supplies-arms-russia.

[102] "'Very big mistake': NATO chief cautions China over supplying weapons to Russia," Politico, accessed July 8, 2024, https://www.politico.eu/article/very-big-mistake-nato-chief-jens-stoltenberg-cautions-china-over-russia-weapons-supply-ukraine-war/.

2014 already amounted to a situation created by a serious *ius cogens* breach (namely aggression),[103] the obligation of non-assistance applied since then. Staggeringly, between 2015 and 2020, European states permitted the export to Russia of weapons amounting to €346m.[104] China, India, Saudi Arabia, and the United Arab Emirates increased their imports of Russian oil and gas since the 2022 invasion, making a relevant financial contribution to Russia's war.[105]

The heterogenous state practice provides little guidance to clarify which measures amount to unlawful assistance. It suggests that aiding or assisting cannot be a merely factual test. Rather, a normative element of proportion or proximity of the contribution may be decisive.[106] While the obligation of non-assistance bears potential in cutting off the perpetrator from support in maintaining the illegal situation, the content of the obligation needs further clarification to give it effect.

3. Obligation to cooperate to end serious *ius cogens* breaches

A promising tool to enforce *ius cogens* norms is the obligation of all states to cooperate through lawful means to bring serious *ius cogens* breaches to an end (hereinafter: obligation to cooperate). Not only would any state breaching *ius cogens* face the opposition of the international community, but all states would need to make an active effort to ending such breaches.

However, the customary status of this obligation to cooperate is contentious.[107] When the ILC first adopted the obligation as Art. 41, para. 1 ARSIWA in 2001,[108] it commented that this article "may reflect the progressive development of international law."[109] Around two decades later, the ILC restated the obligation as conclusion 19, para. 1 of its work on *ius co-*

[103] Marxsen, "The Crimea Crisis from an International Law Perspective," 28; Desierto, "Non-Recognition."

[104] "EU member states exported weapons to Russia after the 2014 embargo," Investigate Europe, accessed July 8, 2024, https://www.investigate-europe.eu/en/posts/eu-states-exported-weapons-to-russia.

[105] Clyde Russell, "Rising flow of Russian oil products to China, India and the Middle East," Reuters, accessed July 8, 2024, https://www.reuters.com/markets/commodities/rising-flow-russian-oil-products-china-india-middle-east-russell-2023-02-16/.

[106] To align it with Art. 16 ARSIWA, the obligation of non-assistance could be limited to "cases where the aid or assistance given is clearly linked" to the situation created by the serious *ius cogens* breach, makes a "significant" contribution, or is given with an intent to making such a contribution, see ILC, *ARSIWA, with commentaries*, Art. 16, commentary, para. 5. While Lanovoy, *Complicity*, 117, argues that "the degree of the required link or contribution can be lower" for the obligation of non-assistance, this still implies that some normative element delineates the obligation.

[107] Jørgensen, "The obligation of cooperation," 699–700.

[108] ILC, *ARSIWA, with commentaries*, Art. 41, para. 1, in conjunction with Art. 40.

[109] ILC, *ARSIWA, with commentaries*, Art. 41, commentary, para. 3.

gens,[110] "now recognized under international law."[111] Hence, the decisive question is whether the rule had crystallized as customary international law since 2001,[112] *i.e*., found sufficient support in international practice and *opinio iuris*.[113] This article will therefore study relevant practice and *opinio iuris* since 2001, using primarily the evidence invoked by the ILC. This will show that prior to 2022, relevant practice remained inconsistent (a). However, practice in response to Russia's war indicates a crystallization of some elements of the obligation to cooperate, also accompanied by *opinio iuris* (b). This section will close with a *de lege ferenda* perspective, discussing what use the obligation may be for protecting *ius cogens* (c).

a) Inconsistent international practice prior to 2022

The evidence of international practice offered in the ILC's commentary to conclusion 19 is scarce. The ILC cites cases in which resolutions (number of cited resolutions in brackets) by the General Assembly (12), Security Council (1), or Human Rights Council (HRC) (5) responded to serious *ius cogens* breaches by condemning them, calling for their cessation, or establishing accountability mechanisms to address them.[114] Of those 18 resolutions, nine stem from well before 2001 (1965-91), hence cannot support a crystallization of the obligation after 2001. Four resolutions respond to Russia's war in Ukraine,[115] analyzed in section III.3.b. The remaining five resolutions and the support they received evidence a tentative practice at best.[116] They were adopted by the HRC and the Security Council (bodies with limited membership), which cannot evidence a general practice.[117]

Moreover, some serious *ius cogens* breaches since 2001 were not met with cooperation towards ending them.[118] The 2003 aggression waged (primarily) by the US against

[110] ILC, *Draft conclusions on jus cogens*, conclusion 19, para. 1.

[111] ILC, *Draft conclusions jus cogens, with commentaries*, conclusion 19, commentary, para. 2.

[112] On the customary nature of the rules governing legal consequences of *ius cogens*, see Linderfalk, "The Source of Jus Cogens Obligations," 378–84.

[113] ILC, *Draft conclusions on identification of customary international law, with commentaries* (2018), UN Doc. A/73/10, para. 66: conclusion 2.

[114] ILC, *Draft conclusions jus cogens, with commentaries*, conclusion 19, commentary, para. 9.

[115] UNGA Res ES-11/1; UNGA Res ES-11/2 of March 24, 2022, UN Doc. A/RES/ES-11/2; UNGA Res ES-11/3 of April 7, 2022, UN Doc. A/RES/ES-11/3; HRC Res 49/1.

[116] HRC Res S-17/1 of August 22, 2011, UN Doc. A/HRC/S-17/2: 33 to 4, 9 abstentions; UNSC Res 2334 of December 23, 2016, UN Doc. S/RES/2334(2016): 14 to 0, 1 abstention; HRC Res 39/2 of September 27, 2018, UN Doc. A/HRC/RES/39/2: 35 to 3, 7 abstentions; HRC Res S-33/1 of December 17, 2021, UN Doc. A/HRC/S-33/2: 21 to 15, 11 abstentions; HRC Res 49/28 of April 11, 2022, UN Doc. A/HRC/RES/49/28: 41 to 3, 3 abstentions.

[117] See ILC, *Draft conclusions custom, with commentaries*, conclusion 4, para. 1 and conclusion 8, para. 1.

[118] Jaume Ferrer Lloret, "The "Particular Consequences" of Serious Violations of *Jus Cogens* Norms in the ILC Draft of 2022: progressive development of International Law?," *Anuario Espanol de Derecho Internacional* 39 (2023), 160–71.

Iraq also amounted to a serious *ius cogens* breach.[119] Yet, rather than cooperating towards ending the war, the international response supported further US involvement in Iraq.[120] A somewhat more ambiguous example is Russia's 2014 invasion of Crimea, which already amounted to a serious *ius cogens* breach. The international community's response to the 2014 invasion was more restrained than since the 2022 invasion.[121] The 2014 UNGA Resolution on the "Territorial integrity of Ukraine" implies a condemnation of Russia's annexation of Crimea, and with 100 to 11 votes (58 abstentions), it received reasonable support.[122] Some states, however, recognized Crimea's alleged accession to Russia.[123] Later resolutions more clearly condemned Russia, but still received less than half as many affirmative votes as the resolutions adopted since 2022.[124] Thus, though some relevant practice prior to 2022 supports the obligation to cooperate, this practice remained inconsistent.

Therefore, the evidence cited by the ILC, and international practice between 2001 and 2022, provide only limited support for a customary obligation of all states to cooperate to end serious *ius cogens* breaches. Accordingly, scholars remained skeptical vis-à-vis the obligation's customary status.[125] One conclusion that can be drawn, however, is that while the ILC envisions the obligation to cooperate as entailing both institutionalized and non-institutionalized forms of cooperation,[126] the evidence more strongly emphasizes institutionalized cooperation, primarily within the UN.[127]

[119] Robert Kolb, *The International Law of State Responsibility* (Cheltenham: Edward Elgar, 2017), 58–9.

[120] See, e.g., UNSC Res 1483 of May 22, 2003, UN Doc. S/RES/1483.

[121] Kolb, *The International Law of State Responsibility*, 59.

[122] UNGA Res 68/262 of March 27, 2014, UN Doc. A/RES/68/262.

[123] Christian Marxsen, "The Crimea Crisis, An International Law Perspective," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 74 (2014), 391.

[124] E.g. UNGA Res 73/194 of January 23, 2019, UN Doc. A/RES/73/194 (66 to 19, 72 abstentions); UNGA Res 74/17 of December 13, 2019, UN Doc. A/RES/74/17 (63 to 19, 66 abstentions); UNGA Res 75/29 of December 14, 2020, UN Doc. A/RES/75/29 (63 to 17, 62 abstentions); UNGA Res 76/70 of December 16, 2021, UN Doc. A/RES/76/70 (62 to 22, 55 abstentions).

[125] Helmut Philipp Aust, "Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility," in *Peremptory Norms of General International Law (Jus Cogens), Disquisitions and Disputations*, ed. Dire Tladi (Leiden: Brill Nijhoff, 2021), 253–4; Rebecca J Barber, "Cooperating through the General Assembly to end serious breaches of peremptory norms," *International and Comparative Law Quarterly* 71 (January 2022): 15–9; Costelloe, *Legal Consequences of Peremptory Norms*, 212; Kolb, *The International Law of State Responsibility*, 58–9. Contrarily, see Verhoeven, *Norms of jus cogens in International law*, 260–2.

[126] ILC, *Draft conclusions jus cogens, with commentaries*, conclusion 19, commentary, paras 7–11.

[127] Similarly, see: ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, advisory opinion of 25 February 2019, ICJ Reports 2019, 95 (para. 182).

b) Crystallization in international practice in response to Russia's 2022 aggression

Although the status of the obligation to cooperate was unclear before 2022, the broad international response to Russia's aggression has contributed to its crystallization, consolidation and clarification. This is substantiated next, distinguishing between non-institutionalized and institutionalized cooperation. As regards the first, a clear divide can be observed. States from the Global North have provided military assistance to Ukraine[128] and implemented far-reaching sanctions against Russia. By contrast, states from the Global South, broadly speaking, have adopted no, or significantly less far-reaching sanctions,[129] with some states potentially undermining the sanctions.[130] Therefore, there is no widespread and representative practice for non-institutionalized cooperation.[131]

The picture emerging from institutionalized cooperation, however, is more promising. The General Assembly convened an Emergency Special Session and adopted six resolutions, many with overwhelming support, that clearly condemned Russia as the aggressor.[132] HRC Resolution 49/1 ("Situation of human rights in Ukraine stemming from the Russian Aggression") was also adopted with a clear majority.[133] This by far exceeds the support received by many resolutions discussed above. While states voting against these resolutions or abstaining tend to be states from the Global South, many Global South states still voted in favor of relevant resolutions. Therefore, one may plausibly claim that there is a widespread and also representative practice to support UN resolutions condemning Russia's war.

A survey of *opinio iuris* is also necessary to claim the emergence of customary international law.[134] This is facilitated by the fact that many states responded to the ILC's work on *ius cogens*. Most states explicitly or implicitly approved of the obligation to cooperate in

[128] Examples in Svitlana Andreichenko, "Supplying Ukraine With Weapons Due to the Russian Aggression: Legal Justification," *Graz Law Working Paper* No. 06-2023 (16 March 2023): 3, https://doi.org/10.2139/ssrn.4390454.

[129] Yueyao Zhang, "Summoning Solidarity Through Sanctions, Time For More Business and Less Rhetoric," *Völkerrechtsblog*, 08 June 2022, https://voelkerrechtsblog.org/summoning-solidarity-through-sanctions/.

[130] Essawy, "Is There a Legal Duty to Cooperate in Implementing Western Sanctions on Russia?".

[131] Pearce Clancy, "Neutral arms transfer and the Russian invasion of Ukraine," *International and Comparative Law Quarterly* 72 (2023): 543, https://doi.org/10.1017/S0020589323000064; Essawy, "The Responsibility Not to Veto Revisited," 329–30; Quoc Tan Trung Nguyen, "The practice of non-recognition and economic sanctions: The case study of Ukraine, Manchuria and South Africa," *Journal of Conflict & Security Law* 29 (2024): 90, https://doi.org/10.1093/jcsl/krad012; Zhang, "Summoning Solidarity Through Sanctions." Cf. Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

[132] UNGA Res ES-11/1: 141 to 5, 35 abstentions; UNGA Res ES-11/2: 140 to 5, 38 abstentions; UNGA Res ES-11/3: 93 to 24, 58 abstentions; UNGA Res ES-11/4 of October 12, 2022, UN Doc. A/RES/ES-11/4: 143 to 5, 35 abstentions; UNGA Res ES-11/5 of November 14, 2022, UN Doc. A/RES/ES-11/5: 94 to 14, 73 abstentions; UNGA Res ES-11/6 of February 23, 2023, UN Doc. A/RES/ES-11/6: 141 to 7, 32 abstentions.

[133] HRC Res 49/1: 32 to 2, 13 abstentions.

[134] ILC, *Draft conclusions custom, with commentaries*, conclusion 9.

draft conclusion 19. A few statements remained ambiguous, e.g. urging the ILC to add more practice in the commentary, without rejecting the customary nature of the obligation.[135] Altogether, only four states outrightly denied the rule's *lex lata* status.[136] Such a small number of states cannot prevent a customary rule from emerging.[137] Some states in favor of conclusion 19 still cautioned that cooperation should not undermine existing institutions, most notably the UN collective security system.[138] Again, therefore, a preference for institutionalized cooperation becomes apparent,[139] which aligns with the more widespread and representative practice in that regard.

c) *De lege ferenda*: How to specify the content of the obligation to make it useful?

Therefore, international practice in response to Russia's war, and *opinio iuris*, corroborate the customary status of the obligation to cooperate, through lawful means within the UN framework, to end serious *ius cogens* breaches. However, for want of uniform state practice in that respect, the obligation to cooperate does not entail a duty to join (counter-)measures taken outside of the UN.[140]

This conclusion leaves open the possibility of future specification and expansion of the obligation. The level and kind of engagement expected of states remain ambiguous.[141] It is therefore worth discussing how the obligation should be shaped, *de lege ferenda*, to make it useful. The obligation should operate as a collective enforcement mechanism for peremptory norms and the values they protect.[142] An obligation entailing non-institutionalized cooperation would not be useful to this end, whereas the obligation to cooperate within the United Nations provides a useful normative standard for states to contribute to enforcement.

[135] Also see Felix Herbert, "The ILC's Function beyond Codification and Progressive Development: Catalysing Customary International Lawmaking," *Max Planck Yearbook of United Nations Law* 27 (2024), forthcoming.

[136] Israel (UN Doc. A/C.6/74/SR.24, para. 19), Russia (UN Doc. A/C.6/77/SR.23, para. 96; A/CN.4/748, 88); United Kingdom (UN Doc. A/C.6/77/SR.23, para. 89), United States (UN Doc. A/C.6/77/SR.22, para. 6).

[137] ILC, *Draft conclusions custom, with commentaries*, conclusion 15, commentary, paras 1–2.

[138] France (UN Doc. A/C.6/55/SR.15, para. 9: "might encourage States to resort to possibly excessive countermeasure"); Mexico (UN Doc. A/C.6/56/SR.14, para. 12: "invited abuse of countermeasures and ignored the system of collective security"); The Netherlands (UN Doc. A/CN.4/515, 58).

[139] Similarly: Essawy, "The Responsibility Not to Veto Revisited," 329–30.

[140] Similarly: Chin Leng Lim and Ryan Martínez Mitchell, "Neutral Rights and Collectice Countermeasures for *erga omnes* Violations," *International and Comparative Law Quarterly* 72, no. 2 (2023): 361, https://doi.org/10.1017/s0020589323000076.

[141] Also highlighted by Cameroon (UN Doc. A/C.6/77/SR.23, para. 56); Andreichenko, "Supplying Ukraine With Weapons," 16.

[142] Costelloe, *Legal Consequences of Peremptory Norms*, 187; Orakhelashvili, *Peremptory norms*, 283.

According to the ILC, states may take a very broad range of measures, which must be lawful,[143] and qualify as cooperation to end the breach.[144] The obligation is one of conduct, not of result.[145] Thus, there will always be multiple ways to respond to a breach. If several states, e.g. in an *ad hoc* coalition, decided that certain sanctions against the perpetrator are appropriate (see states of the Global North sanctioning Russia), how would that affect other states (here: those of the Global South)? They may doubt the appropriateness of sanctions,[146] or may lack economic power to adopt them.[147] Given such constraints, the obligation to cooperate cannot oblige states to join such sanctions. Additionally, if measures are coordinated among a group of states but opposed by another, a risk of escalation arises: Rather than catalysing cooperation, the obligation could facilitate coercive behavior,[148] and exacerbate confrontation between the opposing groups of states.[149] Therefore, an obligation to join non-UN-based sanctions would not be useful.[150]

With respect to institutionalized cooperation, the ILC highlighted that serious *ius cogens* breaches "are likely to be addressed by […] the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the [UN-Charter]."[151] The question remains what it means for a state to be under the obligation to cooperate in this framework. This article proposes four paradigmatic stages of cooperation as elements of the obligation.

The first stage is to set the agenda. Here, cooperation may oblige states to bring any (presumptive) *ius cogens* breach to the attention of a competent organ.[152] This is widely supported in practice, as one state or another will always turn to the Security Council (or other

[143] Therefore, the obligation to cooperate cannot justify a conduct otherwise unlawful under international law. This is without prejudice to the controversies over third-party countermeasures, see Andreichenko, "Supplying Ukraine With Weapons," 15–7.

[144] ILC, *Draft conclusions jus cogens, with commentaries*, conclusion 19, commentary, paras 7, 10.

[145] Costelloe, *Legal Consequences of Peremptory Norms*, 214.

[146] Jørgensen, "The obligation of cooperation," 697.

[147] Rebecca Barber, "What Does the 'Responsibility to Protect' Require of States in Ukraine?," *Journal of International Peacekeeping* 25, no. 2 (2022): 176, https://doi.org/10.1163/18754112-25020005, argues that "Different things will be required of different States."

[148] Chinkin, *Third Parties in International Law*, 332–3.

[149] Brazil (UN Doc. A/C.6/77/SR.22, para. 84: "cooperation […] should be effected through multilateral institutions and be focused on the peaceful – not coercive – settlement of disputes.").

[150] Cf. Ferrer Lloret, "Consequences of Serious Violations of *Jus Cogens*," 179–80; Cesáreo Gutiérrez-Espada, "De la guerra en Ucrania," *Anuario Español de Derecho Internacional* 39 (2023): 94–5, https://doi.org/10.15581/010.39.81-99.

[151] ILC, *ARSIWA, with commentaries*, Art. 40, commentary, para. 9.

[152] ILC, *ARSIWA, with commentaries*, Art. 41, commentary, para. 11.

relevant body) in cases of *ius cogens* breaches.[153] It is unclear, however, whether states presently engage in this practice with a sense of being obligated to do so (*opinio iuris*).

The second stage, once a competent body is seized of the matter, is to deliberate with a view first to qualifying the situation as a *ius cogens* breach, and second to finding an appropriate response. Most states in the Security Council condemned Russia's aggression,[154] which supports qualifying it as a serious *ius cogens* breach. In terms of finding an appropriate response, the Security Council and its members are afforded some (albeit not unfettered) discretion.[155] Cooperation should then require states to exercise this discretion with a view to ending the breach.[156] The concept of due diligence helps to flesh out this obligation by introducing a standard of reasonableness.[157] Even if it is debatable what a reasonable response may be in a specific case, the obligation to cooperate would contribute two elements: First, the aim of any response must be to end the breach. Second, it provides a normative standard by which to assess any proposed response, namely by how reasonably it can be expected to contribute to this end. This shows that the obligation may serve an important discursive function.

The third stage pertains to the outcome of such deliberations, which usually is a draft resolution to be voted on. Scholars disagree whether the obligation to cooperate prescribes a certain voting behavior, especially for the P5.[158] Some argue that any Security Council resolution will *per se* be a reasonable response;[159] especially if supported by at least nine members.[160] However, the practice compiled by the ILC shows that it was often the General Assembly or the HRC that responded to *ius cogens* breaches. While the Security Council has stronger means at its disposals (Chapter VII), a General Assembly resolution may enjoy broader

[153] E.g. Letter from the Permanent Representative of Ukraine to the UN, February 28, 2014, UN Doc. S/2014/136.

[154] See statements in UN Doc. S/PV.8974 (23 February 2022), and UN Doc. S/PV.8979 (25 February 2022).

[155] Nico Krisch, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Introduction to Chapter VII: The General Framework," in *The Charter of the United Nations: A Commentary, Volume II*, ed. Bruno Simma et al. (2012), paras 38, 47, 54.

[156] ILC, *Draft conclusions jus cogens, with commentaries*, conclusion 19, commentary, para. 11.

[157] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgement of 26 February 2007, ICJ Reports 2007, 43 (para. 430).

[158] Barber, "Cooperating through the UNGA to end serious breaches," 22; Florent Beurret, "Limiting the Veto in the Face of Jus Cogens Violations: Russia's Latest (Ab)use of the Veto," *Opinio Juris*, 06 May 2022, opiniojuris.org/2022/05/06/limiting-the-veto-in-the-face-of-jus-cogens-violations-russias-latest-abuse-of-the-veto/; Costelloe, *Legal Consequences of Peremptory Norms*, 220–1; Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge: Cambridge University Press, 2020), 172–4. Also see Japan (UN Doc. A/CN.4/748, 87): "the obligation to cooperate […] should include the obligation to refrain from using the veto when a serious breach of *jus cogens* obligations is at stake."

[159] Barber, "Cooperating through the UNGA to end serious breaches," 22.

[160] Trahan, *Existing Legal Limits to Security Council Veto Power*, 174.

legitimacy, and in that way be more effective.[161] What is reasonable will depend on the circumstances of the case, which makes it hard to justify why a specific vote violated the obligation to cooperate. In any case, there is no practice on ascribing invalidity to votes cast in violation of the obligation.[162] Hence, the violation would have no effect at this stage, in particular where a veto is exercised – as Russia did against relevant Security Council draft resolutions.[163] The issue may then be considered by the General Assembly, which, however, cannot take Chapter VII measures, even when acting under the Uniting for Peace Resolution.[164] The obligation to cooperate cannot surmount these institutional constraints. Generally speaking, it is in the nature of negotiating that multiple outcomes are conceivable. Thus, a state can usually claim that by its assessment, a different resolution would be more appropriate. The whole point of voting is defeated if states were obligated to vote one way.[165] Still, the obligation at least exerts pressure on states to provide justification ("vote in favor or explain"),[166] and provides a standard by which to measure the earnestness of that explanation.

At the fourth stage, once a resolution is adopted, the obligation to cooperate should entail an obligation to implement the resolution. This aspect of the obligation to cooperate is corroborated by the obligations in Art. 2, para. 5 and Arts 25, 49 UN-Charter.

The foregoing analysis shows that the obligation to cooperate is permeated by the strengths and weaknesses inherent to the UN framework – it cannot compensate for inadequacies of this system, or for enforcement deficits of international law at large. As Crawford admitted, the obligation to cooperate "can only do so much to redress the breach of peremptory norms: when all is said and done, the political will to enforce international law must be present."[167] Still, at the various stages of the working of the UN, the obligation to cooperate can decisively shape what is "said and done."

[161] Barber, "Cooperating through the UNGA to end serious breaches," 25–34; Clancy, "Neutral arms transfer and the Russian invasion of Ukraine," 542.

[162] See Anne Peters, "The War in Ukraine and the Curtailment of the Veto in the Security Council," *Revue Européenne du Droit* 5 (2023), 87–93. An argument similar to that presented in III.2.a) applies: Even if the obligation to cooperate translated into an obligation not to veto, this obligation is not peremptory. Hence, there is no rule prescribing invalidity.

[163] E.g. UNSC Draft Res of February 25, 2022, UN Doc. S/2022/155.

[164] Christina Binder, "Uniting for Peace Resolution (1950)," in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (May 2017).

[165] This also speaks against the claim that a vote cast against a resolution which supports Ukraine would violate the obligation not to aid or assist Russia in maintaining the situation created by its serious *ius cogens* breaches – see however Vishchyk and Pizzi, "Compromises on Territory, Legal Order, and World Peace."

[166] Daniel Moeckli and Raffael N. Fasel, "A duty to give reasons in the Security Council, making voting transparent," *International Organizations Law Review* 14, no. 1 (2017): 13–86, https://doi.org/10.1163/15723747-2017001.

[167] James Crawford, *State Responsibility, The General Part* (Cambridge: Cambridge University Press, 2013), 389.

IV. Conclusions: the reinforced relevance of *ius cogens*

As claimed in the introduction, the concept of *ius cogens* is neither irrelevant nor counterproductive when faced with serious violations of peremptory norms and the values they seek to protect – such as in the case of Russia's aggression against Ukraine. Section II. has shown that the rules on the invalidating effect of *ius cogens* do not invalidate a possible peace treaty. This could be changed by a broader interpretation of the key notion of conflict. However, in the interest of preserving the validity of potential peace treaties or Security Council resolutions settling a war, this novel interpretation should be dismissed. When sticking to the ordinary, narrow interpretation of conflict, *ius cogens* will not invalidate such instruments, and thus pose no hurdle to a peaceful resolution of the conflict.

Moreover, rejecting the broader interpretation of conflict would not imply that the fundamental values enshrined in peremptory norms are left unprotected against violations. As shown in section III., the regime of aggravated state responsibility plays an important role in regulating states' responses to serious *ius cogens* breaches, such as those perpetrated by Russia. The regime can serve as an important enforcement mechanism within the international legal system, even when it cannot surmount structural deficits inherent to that system. However, the Russo-Ukrainian War does not only attest to the relevance of the existing third states obligations in cases of serious *ius cogens* breaches. In the case of the obligation to cooperate, the broad international practice in response to the war even contributes to a reinforcement of *ius cogens*, because this practice contributed to the crystallization of the customary status of the obligation, and helps clarify its content, with a focus on cooperation within the framework of relevant international organizations.

Therefore, Russia's war of aggression against Ukraine and its wider context attest to the reinforced relevance of *ius cogens*, rather than to its emptiness. *Ius cogens* protects fundamental values not only against attempts of derogation through conflicting legal acts, but also against violations by actions on the ground. The reinforced regime of aggravated state responsibility contributes to this function of *ius cogens*.

Bibliography

1. Andreichenko, Svitlana. "Supplying Ukraine with Weapons Due to the Russian Aggression: Legal Justification." *Graz Law Working Paper* No. 06-2023 (16 March 2023). https://doi.org/10.2139/ssrn.4390454.
2. Aust, Helmut Philipp. *Complicity and the Law of State Responsibility.* Cambridge: Cambridge University Press, 2011. doi:10.1017/CBO9780511862632.
3. Aust, Helmut Philipp. "Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility." Chap. 9 In *Peremptory Norms of General International Law (Jus Cogens), Disquisitions and Disputations*, edited by Dire Tladi, 227-55. Leiden: Brill Nijhoff, 2021.

4. Azarova, Valentina. “An Illegal Territorial Regime? On the Occupation and Annexation of Crimea as a Matter of International Law.” Chap. 3 In *The Use of Force against Ukraine and International Law*, edited by Sergey Sayapin and Evhen Tsybulenko, 41-72. The Hague: T.M.C. Asser, 2018.
5. Banzai, Hiroyuki. “Impacts on Jus Cogens: Impact on the Law of State Responsibility and Law of Treaties.” Chap. 2 In *Global Impact of the Ukraine Conflict, Perspectives from International Law*, edited by Shuichi Furuya, Hitomi Takemura and Kuniko Ozaki, 25-47. Singapore: Springer Nature, 2023.
6. Barber, Rebecca. “What Does the ‘Responsibility to Protect’ Require of States in Ukraine?”. *Journal of International Peacekeeping* 25, no. 2 (2022): 155-77. https://doi.org/10.1163/18754112-25020005.
7. Barber, Rebecca J. “Cooperating through the General Assembly to End Serious Breaches of Peremptory Norms.” *International and Comparative Law Quarterly* 71 (January 2022): 1-35.
8. Barnidge Jr., Robert P. “Questioning the Legitimacy of *Jus Cogens* in the Global Legal Order.” *Israel Yearbook on Human Rights* 38 (2008): 199-225. https://doi.org/10.1163/9789047427049_009.
9. Beurret, Florent, "Limiting the Veto in the Face of Jus Cogens Violations: Russia’s Latest (Ab)Use of the Veto," *Opinio Juris*, 06 May 2022, opiniojuris.org/2022/05/06/limiting-the-veto-in-the-face-of-jus-cogens-violations-russias-latest-abuse-of-the-veto/.
10. Binder, Christina. “Uniting for Peace Resolution (1950).” In *Max Planck Encyclopedia of Public International Law*, edited by Rüdiger Wolfrum, May 2017.
11. Brunk, Ingrid, and Monica Hakimi. “The Prohibition of Annexations and the Foundations of Modern International Law.” *American Journal of International Law* (pre-publication manuscript) (2024): 1-70. https://doi.org/10.1017/ajil.2024.26.
12. Cannizzaro, Enzo. “A Higher Law for Treaties?”. Chap. 25 In *The Law of Treaties Beyond the Vienna Convention*, edited by Enzo Cannizzaro, 425-41. Oxford: Oxford University Press, 2011.
13. Casey-Maslen, Stuart. *Jus Ad Bellum, the Law on Inter-State Use of Fore.* Oxford: Hart, 2020.
14. Chinkin, Christine. *Third Parties in International Law.* Oxford: Clarendon Press, 1993.
15. Christakis, Théodore. “L’obligation De Non-Reconnaissance Des Situations Créées Par Le Recours Illicite À La Force Ou D'autres Actes Enfreignant Des Règles Fondamentales.” Chap. 7 In *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, edited by Christian Tomuschat and Jean-Marc Thouvenin, 127-66. Leiden: Martinus Nijhoff, 2006.
16. Clancy, Pearce. “Neutral Arms Transfer and the Russian Invasion of Ukraine.” *International and Comparative Law Quarterly* 72 (2023): 527–43. https://doi.org/10.1017/S0020589323000064.
17. Corten, Olivier. “1969 Vienna Convention Article 52.” In *The Vienna Conventions on the Law of Treaties*, edited by Olivier Corten and Pierre Klein. Oxford: Oxford University Press, 2011.
18. Costelloe, Daniel. *Legal Consequences of Peremptory Norms in International Law.* Cambridge: Cambridge University Press, 2017.
19. Crawford, James. *State Responsibility, the General Part.* Cambridge: Cambridge University Press, 2013. doi:10.1017/cbo9781139033060.

20. Dawidowicz, Martin. “The Obligation of Non-Recognition of an Unlawful Situation.” Chap. 46 In *The Law of International Responsibility*, edited by James Crawford, Alain Pellet and Simon Olleson, 677-86. Oxford: Oxford University Press, 2010.
21. Desierto, Diane, "Non-Recognition," *EJIL:Talk!*, 22 February 2022, ejiltalk.org/non-recognition/.
22. Dinstein, Yoram. *War, Aggression and Self-Defence.* 6. ed. Cambridge: Cambridge University Press, 2017.
23. Essawy, Rana Moustafa, "Is There a Legal Duty to Cooperate in Implementing Western Sanctions on Russia?," *EJIL:Talk!*, 25 April 2022, ejiltalk.org/is-there-a-legal-duty-to-cooperate-in-implementing-western-sanctions-on-russia/.
24. Essawy, Rana Moustafa. “The Responsibility Not to Veto Revisited under the Theory of ‘Consequential Jus Cogens’.” *Global Responsibility to Protect* 12, no. 3 (2020): 299-335. https://doi.org/10.1163/1875-984x-20200002.
25. "Eu Member States Exported Weapons to Russia after the 2014 Embargo." Investigate Europe, accessed July 8, 2024, https://www.investigate-europe.eu/en/posts/eu-states-exported-weapons-to-russia.
26. Fazal, Tanisha M. “The Demise of Peace Treaties in Interstate War.” *International Organization* 67, no. 4 (2013): 695-724. https://doi.org/10.1017/S0020818313000246.
27. Ferrer Lloret, Jaume. “The “Particular Consequences” of Serious Violations of *Jus Cogens* Norms in the Ilc Draft of 2022: Progressive Development of International Law?”. *Anuario Espanol de Derecho Internacional* 39 (2023): 149-208.
28. Forlati, Serena. “Coercion as a Ground Affecting the Validity of Peace Treaties.” Chap. 19 In *The Law of Treaties Beyond the Vienna Convention*, edited by Enzo Cannizzaro, 320-32. Oxford: Oxford University Press, 2011.
29. Gaeta, Paola. “The Character of the Breach.” Chap. 31 In *The Law of International Responsibility*, edited by James Crawford, Alain Pellet and Simon Olleson, 421-26. Oxford: Oxford University Press, 2010.
30. Green, James A., Christian Henderson, and Tom Ruys. “Russia’s Attack on Ukraine and the *Jus Ad Bellum*.” *Journal on the Use of Force and International Law* 9, no. 1 (2022): 4-30. https://doi.org/10.1080/20531702.2022.2056803.
31. Gutiérrez-Espada, Cesáreo. “De La Guerra En Ucrania.” *Anuario Español de Derecho Internacional* 39 (2023): 81-99. https://doi.org/10.15581/010.39.81-99.
32. Hansel, Mary H. “‘Magic’ or Smoke and Mirrors? The Gendered Illusion of Jus Cogens.” Chap. 18 In *Peremptory Norms of General International Law (Jus Cogens), Disquisitions and Disputations*, edited by Dire Tladi, 471-508. Leiden: Brill Nijhoff, 2021.
33. Herbert, Felix. “The Ilc’s Function Beyond Codification and Progressive Development: Catalysing Customary International Lawmaking.” *Max Planck Yearbook of United Nations Law* 27 (2024): (forthcoming).
34. "Iran Supplies Arms to Russia." Arms Control Association, accessed July 8, 2024, https://www.armscontrol.org/act/2022-11/news/iran-supplies-arms-russia.
35. ILC. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries.* (2001).

36. ILC. *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens).* (17 May 2022).
37. ILC. *Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (Jus Cogens), with Commentaries.* (22-27 July 2022).
38. ILC. *Draft Conclusions on Identification of Customary International Law, with Commentaries.* (2018).
39. ILC. *Fifth Report on Peremptory Norms of General International Law (Jus Cogens) by Dire Tladi, Special Rapporteur.* (24 January 2022).
40. Independent International Commission of Inquiry on Ukraine. *Report of the Independent International Commission of Inquiry on Ukraine.* (18 October 2022).
41. Jørgensen, Nina H. B. "The Obligation of Cooperation." Chap. 48 In *The Law of International Responsibility*, edited by James Crawford, Alain Pellet and Simon Olleson, 695-701. Oxford: Oxford University Press, 2010.
42. Jørgensen, Nina H. B. "The Obligation of Non-Assistance to the Responsible State." Chap. 47 In *The Law of International Responsibility*, edited by James Crawford, Alain Pellet and Simon Olleson, 687-94. Oxford: Oxford University Press, 2010.
43. Knuchel, Sévrine. *Jus Cogens: Identification and Enforcement of Peremptory Norms.* Zürich: Schulthess, 2015.
44. Kolb, Robert. *The International Law of State Responsibility.* Cheltenham: Edward Elgar, 2017.
45. Krisch, Nico. "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Introduction to Chapter Vii: The General Framework." In *The Charter of the United Nations: A Commentary, Volume Ii*, edited by Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf, 2012.
46. Lanovoy, Vladyslav. *Complicity and Its Limits in the Law of International Responsibility.* Oxford: Hart, 2016. doi:10.5040/9781782259398.
47. Leiæ, Johann Ruben, and Andreas Paulus. "Ch.Xvi Miscellaneous Provisions, Article 103." In *The Charter of the United Nations: A Commentary, Volume Ii*, edited by Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf, 2012.
48. Lieblich, Eliav. "Whataboutism in International Law." *Harvard International Law Journal* 65, no. 2 (2024): 1-54.
49. Lim, Chin Leng, and Ryan Martínez Mitchell. "Neutral Rights and Collectice Countermeasures for *Erga Omnes* Violations." *International and Comparative Law Quarterly* 72, no. 2 (2023): 361-91. https://doi.org/10.1017/s0020589323000076.
50. Linderfalk, Ulf. "The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law." *Nordic Journal of International Law* 82 (2013): 369-89.
51. "Lukashenko Is Letting Putin Use Belarus to Attack Ukraine." Foreign Policy, accessed July 8, 2024, https://foreignpolicy.com/2022/02/24/russia-ukraine-war-belarus-chernobyl-lukashenko/.
52. Malawer, Stuart S. "Imposed Treaties and International Law." *California Western International Law Journal* 7, no. 1 (1977): 1-178.

53. Marxsen, Christian. “The Crimea Crisis from an International Law Perspective.” *Kyiv-Mohyla Law and Politics Journal* 2 (2016): 13-36. https://doi.org/10.18523/kmlpj88177.2016-2.13-36.
54. Marxsen, Christian. “The Crimea Crisis, an International Law Perspective.” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 74 (2014): 367-91.
55. Milano, Enrico. “Security Council Action in the Balkans: Reviewing the Legality of Kosovo’s Territorial Status.” *European Journal of International Law* 15, no. 5 (2003): 999–1022.
56. Moeckli, Daniel, and Raffael N. Fasel. “A Duty to Give Reasons in the Security Council, Making Voting Transparent.” *International Organizations Law Review* 14, no. 1 (2017): 13-86. https://doi.org/10.1163/15723747-2017001.
57. Nguyen, Quoc Tan Trung. “The Practice of Non-Recognition and Economic Sanctions: The Case Study of Ukraine, Manchuria and South Africa.” *Journal of Conflict & Security Law* 29 (2024): 73–95. https://doi.org/10.1093/jcsl/krad012.
58. Niewęgłowski, Krzysztof. “Normative Aspects of *Jus Cogens* Identification in Vienna Convention on the Law of Treaties.” *Zeszyty Prawnicze* 78, no. 2 (2023): 9-24. https://doi.org/10.31268/ZPBAS.2023.26.
59. Orakhelashvili, Alexander. *Peremptory Norms in International Law.* Oxford Monographs in International Law. Oxford: Oxford University Press, 2006.
60. Paddeu, Federica. “Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force.” *Journal on the Use of Force and International Law* 7, no. 2 (2020): 227-69. https://doi.org/10.1080/20531702.2020.1805963.
61. Peters, Anne. “The War in Ukraine and the Curtailment of the Veto in the Security Council.” *Revue Européenne du Droit* 5 (2023): 87-93.
62. Raube, Svenja. *Die Antizipierte Einladung Zur Militärischen Gewaltanwendung Im Völkerrecht.* Baden-Baden: Nomos 2023.
63. Reisman, W. Michael. “Termination of the Ussr’s Treaty Right of Intervention in Iran.” *American Journal of International Law* 74 (1980).
64. "Rising Flow of Russian Oil Products to China, India and the Middle East." Reuters, accessed July 8, 2024, https://www.reuters.com/markets/commodities/rising-flow-russian-oil-products-china-india-middle-east-russell-2023-02-16/.
65. Schmalenbach, Kirsten. "#26 Völkervertragsrecht: Können Friedensverträge Nichtig Sein?" By Sophie Schuberth, Philipp Eschenhagen, Erik Tuchtfeld and Isabel Lischewski. *Völkerrechtspodcast*. April 7, 2023. https://voelkerrechtsblog.org/de/26-voelkervertragsrecht-koennen-friedensvertraege-nichtig-sein/.
66. Schmalenbach, Kirsten. “Article 52.” In *Vienna Convention on the Law of Treaties, a Commentary*, edited by Oliver Dörr and Kirsten Schmalenbach. Berlin: Springer 2012.
67. Schmalenbach, Kirsten, and Alexander Prantl, "How to End an Illegal War?," *Völkerrechtsblog*, 21 April 2022, https://voelkerrechtsblog.org/de/how-to-end-an-illegal-war/.
68. Scobbie, Iain. “The Invocation of Responsibility for the Breach of ‘Obligations under Peremptory Norms of General International Law’.” *European Journal of International Law* 13, no. 5 (2002): 1201-20. https://doi.org/10.1093/ejil/13.5.1201.

69. Talmon, Stefan. “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?”. Chap. 6 In *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes*, edited by Christian Tomuschat and Jean-Marc Thouvenin, 99-125. Leiden: Martinus Nijhoff, 2006.
70. Tams, Christian J. “Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?”. *European Journal of International Law* 25, no. 5 (2002): 1161–80.
71. Trahan, Jennifer. *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes.* Cambridge: Cambridge University Press, 2020. doi:10.1017/9781108765251.
72. "Ukraine Cuts N Korea Ties over Recognition of Separatist Regions." Al Jazeera, accessed July 8, 2024 https://aljazeera.com/news/2022/7/13/n-korea-recognises-breakaway-of-russias-proxies-in-east-ukraine.
73. Verhoeven, Sten. *Norms of Jus Cogens in International Law, a Positivist and Constitutionalist Approach.* Leuven: Katholieke Universiteit Leuven, 2011.
74. "‘Very Big Mistake’: Nato Chief Cautions China over Supplying Weapons to Russia." Politico, accessed July 8, 2024, https://www.politico.eu/article/very-big-mistake-nato-chief-jens-stoltenberg-cautions-china-over-russia-weapons-supply-ukraine-war/.
75. Vidmar, Jure. “The Use of Force and Defences in the Law of State Responsibility.” *Jean Monnet Working Paper* (05/2015). https://ssrn.com/abstract=2796224.
76. Villalpando, Santiago. *L’émergence De La Communauté Internationale Dans La Responsabilité Des États.* Paris: Presses Universitaires de France, 2005.
77. Vishchyk, Maksym, and Jeremy Pizzi, "Compromises on Territory, Legal Order, and World Peace: The Fate of International Law Lies on Ukraine’s Borders," *Just Security*, 6 October 2023, https://www.justsecurity.org/89216/compromises-on-territory-legal-order-and-world-peace-the-fate-of-international-law-lies-on-ukraines-borders/.
78. Weisburd, Arthur Mark. “The Emptiness of the Concept of *Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina.” *Michigan Journal of International Law* 17 (1995): 1-52.
79. Zhang, Yueyao, "Summoning Solidarity through Sanctions, Time for More Business and Less Rhetoric," *Völkerrechtsblog*, 08 June 2022, https://voelkerrechtsblog.org/summoning-solidarity-through-sanctions/.

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ІМПЕРАТИВНІ НОРМИ ЗАГАЛЬНОГО МІЖНАРОДНОГО ПРАВА (IUS COGENS) ТА АГРЕСІЯ РОСІЇ ПРОТИ УКРАЇНИ

Анотація

Війна Росії проти України порушує кілька норм ius cogens, особливо заборону агресії (I.). Хоча ius cogens захищає фундаментальні цінності міжнародного співтовариства, не одразу зрозуміло, яким чином воно забезпечує захист від держави-агресора. Тому в статті проаналізовано наслідки ius cogens для України, Росії та міжнародної спільноти. Правові наслідки ius cogens можна розділити на дві групи: перша стосується недійсності суперечливих правових актів, друга - відповідальності держав. Перша група піднімає ключове питання, за яких обставин потенційне російсько-українське мирне врегулювання буде недійсним (II.). Друга група правових наслідків залучає міжнародну спільноту, накладаючи на всі держави зобов'язання щодо війни (III.). Сюди входять зобов'язання невизнання і ненадання допомоги в ситуаціях, створених серйозними порушеннями ius cogens, а також зобов'язання співпрацювати з метою припинення таких порушень. Хоча звичаєвий статус і зміст цих зобов'язань не є остаточно врегульованим, державна практика реагування на війну певною мірою сприяє кристалізації та проясненню цих зобов'язань. Тому, незважаючи на триваючу агресію Росії, міжнародна практика реагування на війну посилює ius cogens (IV.).

Ключові слова

Україна, російська агресія, імперативні норми загального міжнародного права (ius cogens), недійсність договорів, невизнання, ненадання допомоги, зобов'язання співпрацювати з метою припинення серйозних порушень ius cogens