(Ir-)Relevance of *ius cogens*? Legal Consequences of *ius cogens* in Russia's War of Aggression Against Ukraine

Felix Herbert*
Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany
herbert@mpil.de

Abstract

Russia's war of aggression against Ukraine violates several *ius cogens* norms. This article explores what role the legal consequences of *ius cogens* play in this case, and, conversely, what implications international practice in response to the war has for *ius cogens*. 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 other concerning state responsibility. The first

* Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. The author would like to thank Prof. Christian Marxsen and Charlotte Magnus for valuable suggestions and invaluable support.

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set should retain a limited role, so as not to invalidate a potential peace settlement (II.). Rather, the second set is crucial for protecting *ius cogens* norms against violations. It includes the obligations of non-recognition and non-assistance in situations created by serious *ius cogens* breaches, and the crystallising obligation to cooperate to end such breaches. This article analyses these obligations (III.), and concludes that, despite Russia's ongoing aggression, international practice responding to the war reinforces *ius cogens* (IV.).

Keywords

Ukraine – peremptory norms of general international law (*ius cogens*) – treaty invalidity – non-recognition – non-assistance – obligation to cooperate to end serious *ius cogens* breaches

I. *Ius cogens* at Stake, What Role for *ius cogens*?

Russia's full-fledged war against Ukraine, launched on 24 February 2022, violates several peremptory norms of general international law (*ius cogens*).[1] First, Russia's massive military invasion violates the prohibition of aggression,[2] whose *ius cogens* status the International Law Commission (ILC) recently affirmed.[3] Second, repeated violations of international humanitarian law (IHL) have been confirmed, with Russia responsible 'for the vast majority' of them.[4] The ILC concluded that the 'basic rules' of IHL are peremptory,[5] without, however, clarifying their scope.[6] It is sufficient here to point to the finding by the Independent International Commission of Inquiry on

1 The terms peremptory norms and *ius cogens* (norms) are used synonymously herein.

2 James 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 (2022), 4-30.

3 ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*)', (2022) A/77/10, Annex, lit. a. Given that the war amounts to aggression, the question does not arise whether the prohibition of force short of aggression also enjoys peremptory status, see discussion in Katie A. Johnston, 'Identifying the *Jus Cogens* Norm in the *Jus ad Bellum*', ICLQ 70 (2021), 29-57.

4 Independent International Commission of Inquiry on Ukraine (invested by HRC Res 49/1 of 4 March 2022, A/HRC/RES/49/1), 'Report', (2022) A/77/533, 2.

5 ILC, 'Draft conclusions *jus cogens*' (n. 3), Annex, lit. d.

6 ILC, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries', (2022) A/77/10, conclusion 23, commentary, para. 10.

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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.[7] Such egregiously inhumane acts violate the 'basic rules' of IHL. Besides, the prohibition of torture is generally accepted as a self-standing peremptory norm,[8] and the prohibition of gender-based violence enjoys increasing support as being peremptory as well.[9] 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 recognised as a peremptory norm by the ILC.[10] Thus, Russia's war against Ukraine violates several peremptory norms.

In this light, several states have highlighted the relevance of *ius cogens*,[11] which is supposed to protect fundamental values.[12] However, given Russia's ongoing aggression, one might be inclined to conclude that the war reveals the 'emptiness'[13] of *ius cogens*, a concept seemingly inadequate to provide any 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 desirable peace settlements.[14] This article counters both these critiques, claiming that *ius cogens* is neither empty nor harmful with regard to Russia's aggression. It argues that relevant options for a peaceful settlement remain available as they would not be invalidated by *ius cogens* (II.). Moreover, international practice in response to Russia's aggression actually strengthens the regime of *ius cogens* (III.).

To substantiate these claims, this article analyses the role of 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 conse-

7 Commission of Inquiry (n. 4), paras 38, 56, 60, 65.

8 ILC, 'Draft conclusions *jus cogens*' (n. 3), Annex, lit. g.

9 Mary Hansel, '"Magic" or Smoke and Mirrors? The Gendered Illusion of Jus Cogens' in: Dire Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens), Disquisitions and Disputations* (Leiden: Brill Nijhoff 2021), 471-508 (485-486).

10 ILC, 'Draft conclusions *jus cogens*' (n. 3), Annex, lit. h.

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

12 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 2.

13 As put by Arthur Mark Weisburd, 'The Emptiness of the Concept of *Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina', Mich. J. Int'l L. 17 (1995), 1-52.

14 Weisburd (n. 13), 40-49.

quences of *ius cogens* can be categorised into two distinct sets, which will 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 stipulate the invalidity of these legal acts.[15] These rules can be summarised as the '*rules on the invalidating effect of ius cogens*'. They 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.[16] By contrast, the second set of legal consequences addresses any conduct that violates peremptory norms.[17] This second set comprises the obligations of third states arising from serious breaches of peremptory norms, also referred to as '*aggravated state responsibility*'.[18] This regime includes the obligations not to recognise as lawful situations created by serious *ius cogens* breaches, not to render aid or assistance in maintaining such situations, and to cooperate through lawful means to end serious *ius cogens* breaches.[19] Since this second set of legal consequences is triggered by serious breaches, it may protect the fundamental values enshrined in peremptory norms precisely against such violations. Therefore, it can be characterised as giving rise to a thick concept of *ius cogens*. It is thick in the sense that it protects *ius cogens* norms not only against conflicting legal acts, but also against any violation. In contrast, the first set of legal consequences constitutes a thin concept of *ius cogens* inasmuch as it is only concerned with conflicting legal acts.

However, as a competing approach, it has been argued that a thick concept of *ius cogens* could also be achieved via the first set of legal consequences. Notably, the suggestion is to take up the existing power of *ius cogens* to invalidate conflicting legal acts and to expand this power so that it covers not only conflicting legal acts but also violations. This expansion is to be facilitated by a broader interpretation of the rules on the invalidating effect of *ius cogens*.[20] However, such an expansion is not convincing since it would lead to the invalidity of a peace treaty or Security Council resolution settling a war, as the analysis in section II. shows. Therefore, the preferable way to reach a

15 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusions 10-16.

16 Arts 53, 64, Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331.

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

18 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 19.

19 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 19.

20 Enzo Cannizzaro, 'A Higher Law for Treaties?' in: Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press 2011), 425-441 (426).

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thick concept of *ius cogens* lies in the second set of legal consequences, the regime of aggravated state responsibility, which is analysed in section III. This regime is reinforced by the broad international practice responding to the Russo-Ukrainian War. This practice especially contributes to a crystallisation of the customary obligation to cooperate to end serious *ius cogens* breaches, which adds an essential element for the protection of peremptory norms and the values they enshrine against violations.

II. The Invalidating Effect of *ius cogens* on Conflicting Legal Acts

The first set of legal consequences, regulating the power of *ius cogens* to invalidate conflicting legal acts, includes four rules of potential relevance. The first rule provides for the traditional legal effect of *ius cogens*: invalidating conflicting treaties.[21] *Prima facie*, this legal consequence seems relevant for the treaties Russia claims to have concluded on 21 February 2022, respectively, with the so-called Donetsk and Luhansk 'People's Republics', two ostensible entities in eastern Ukraine.[22] 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 international treaties. Still, treaty invalidity could become important regarding a potential Russo-Ukrainian peace treaty. A second legal effect in this set provides that customary rules do not come into existence if they would conflict with *ius cogens*.[23] This could be relevant for any regional custom Russia may try to establish, so as to translate its lingering claim to a 'sphere of influence'[24] into a unilateral right to military intervention. Third, unilateral acts that would create obligations conflicting with *ius cogens* do not create such effects.[25] This could apply to Russia's unilateral declarations recognising Donetsk and Luhansk as states, and to the declarations annexing these and other territories. Through these declarations, Russia seeks to deprive Ukraine of its sovereign rights over these territories. However, here again, *ius cogens* is not

21 This follows from customary international law (ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 10, para. 1), and from Art. 53 VCLT ('A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.').

22 On their lack of statehood, see Green, Henderson and Ruys (n. 2), 17-18.

23 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 14, para. 1.

24 Malcolm Jorgensen, *The Weaponisation of International Law in Ukraine*, Völkerrechtsblog, 15 March 2022, doi: 10.17176/20220315-120930-0.

25 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 15, para. 1.

necessary to preclude the intended legal effect, since unilateral declarations cannot create obligations for third states anyway. Fourth, decisions of international organisations, including Security Council resolutions, will not create obligations if they conflict with *ius cogens*.[26] This effect may be decisive for determining the validity of a Security Council resolution settling the conflict.

These four rules can be summarised as the rules on the invalidating effect of *ius cogens*. They resolve normative conflicts by invalidating legal acts that would otherwise derogate from a peremptory norm. The element common to these rules is that whether the respective legal act is invalid depends on the determination of a conflict with 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 (1.), whereas others propose a broader interpretation (2.). Given that the invalidity of the already existing legal acts in connection with Russia's aggression does not flow from *ius cogens*, the practical importance of the rules on the invalidating effect of *ius cogens* will lie in their impact on a potential peace settlement. In the interest of safeguarding the validity of such a settlement, this article will argue that among the two competing interpretations of conflict, the ordinary, narrow interpretation is correct and preferable.

1. The Ordinary, Narrow Interpretation of 'Conflict'

The ordinary understanding of (normative) conflict in the context of *ius cogens* is that it refers to a situation of coexistence of norms requiring, prohibiting or permitting materially inconsistent lines of conduct.[27] 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 militarily in state B at its discretion.[28] 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*

26 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 16.

27 Cannizzaro (n. 20), 427; Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press 2006), 136-137.

28 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', AJIL 74 (1980), 144-154.

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consent,[29] but it prohibits the use of force where such *ad hoc* consent is lacking.[30] 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. The example shows that the narrow interpretation of conflict usually takes an *ex ante* perspective, before any *ius cogens* violation occurred.[31]

The crucial question is what this implies for a potential peace treaty or Security Council resolution settling the war. While this ultimately depends on the specific content of such legal acts, some points can be highlighted. Though a permanent peace may be unattainable without Russia's military defeat, Ukraine may nonetheless, at some point, be willing to yield parts of its territory in a peace settlement, or may be willing to make concessions in terms of its constitutional order. Under the ordinary interpretation of conflict, a treaty or a Security Council resolution with such a content would not be invalidated by *ius cogens*. Neither a treaty in which Ukraine agreed to change its border, nor one in which Ukraine undertook to amend its constitution would lead to a different legal assessment of Russia's aggression.[32] That notwithstanding, such a treaty could be invalid under Art. 52 VCLT[33] (discussed below), which, however, would not be a case of the invalidating effect of *ius cogens*. Therefore, the rules on the invalidating effect of *ius cogens*, as per their ordinary, narrow interpretation, will most likely not pose a hurdle to a peace settlement.

2. A Broader Interpretation of 'Conflict'?

This conclusion seems unsatisfactory though, given that a treaty by which Ukraine gave up parts of its territory, concluded with a view to ending

29 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 (2020), 227-269.

30 Orakhelashvili (n. 27), 360.

31 Cannizzaro (n. 20), 426.

32 These examples are mentioned for the purpose of evaluating the role of *ius cogens*, without implying any verdict on the probability, desirability, or legitimacy of these scenarios.

33 'A treaty is void 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.' This reflects customary international law, see Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge: Cambridge University Press 2017), para. 113.

Russian aggression, is in clear tension with the purpose of the prohibition against acquiring territory by an unlawful use of force. Scholars have therefore proposed a broader interpretation of 'conflict', so as to include 'conflict by divergence', 'indirect conflict', or 'occasional collision'.[34] The invalidating effect would be expanded to legal acts that do not directly (in the ordinary sense) conflict with *ius cogens*, but would nonetheless contribute to a situation that is inconsistent with the purpose of a peremptory norm.[35] The principal argument in favour of this interpretation is that the fundamental values enshrined in peremptory norms ought to be protected against any legal act that produces results inconsistent with them.[36] For example, once force has been used in violation of the peremptory norm prohibiting it, treaties or Security Council resolutions yielding anything to the aggressor would produce results inconsistent with this prohibition, and therefore be invalid. This could, however, frustrate a peace settlement implemented by treaty or Security Council resolution.[37] Under the broad interpretation of 'conflict', such legal acts would be invalid.

Against that background, the interpretation of Art. 53 VCLT in its context, and in the light of its object and purpose, as well as international practice 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 in the aftermath 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[38] requires that a peace settlement will always be feasible. The *ius contra bellum* permits treaties and Security Council resolutions altering the status of territory. It would be counterproductive if the unlawful use of force were allowed to affect this possibility.[39] The object and purpose of the provision in its context therefore

34 Cannizzaro (n. 20), 429-437.

35 Similarly, one of the unanimous peer reviewers claimed that the relevant question to determine a conflict was 'whether one rule of law *impedes* the operation of another rule of law' (emphasis added).

36 Cannizzaro (n. 20), 425-441; Orakhelashvili (n. 27), 136-139.

37 Weisburd (n. 13), 40-49.

38 Art. 1 para. 1 UN-Charter.

39 Similarly: Kirsten Schmalenbach and Alexander Prantl, *How to End an Illegal War?*, Völkerrechtsblog, 21 April 2022, doi: 10.17176/20220421-182037-0. Also see Art. 75 VCLT: 'The provisions of the [VCLT] are without prejudice to any obligation in relation to a treaty

support the narrow interpretation of 'conflict'. Third, practice of recent decades corroborates this interpretation, because treaties concluded in the aftermath of war were usually considered valid, notwithstanding Art. 53 VCLT. This includes the 1995 Dayton Agreement ending the Bosnian War, the 1999 Lusaka Ceasefire Agreement between Uganda and the Democratic Republic of the Congo (DRC), and Minsk II accepted by Russia and Ukraine in 2015.[40]

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 will invalidate the treaty. What constitutes such a causal link, however, is subject to some controversy.[41] Also, an invalid treaty can arguably be validated by a Security Council resolution.[42] For example, the International Court of Justice (ICJ) implicitly accepted the validity of the Lusaka Ceasefire Agreement, even though it authorised the presence of Ugandan troops on the territory of the DRC after Uganda's unlawful use of force.[43] This may be explained by a very strict test of causality, not met in this case, or by the fact that the Security Council called for a cease-fire agreement.[44] The potential implications of Art. 52 VCLT for a Russo-Ukrainian peace treaty, therefore, remain somewhat ambiguous.

In any case, the broader interpretation of 'conflict' (including in Art. 53 VCLT) should be dismissed. Sticking to the ordinary, narrow interpretation does not risk invalidating a potential peace settlement. Dismissing the broader interpretation of conflict, however, does not mean that a thick concept of *ius cogens* had to be given up, and that fundamental values would be left

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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.'.

40 Examples by Kirsten Schmalenbach, in: Sophie Schuberth, Philipp Eschenhagen, Erik Tuchtfeld and Isabel Lischewski, *#26 Völkervertragsrecht: Können Friedensverträge nichtig sein?*, Völkerrechtsblog, 7 April 2023, doi: 10.17176/20230407-190055-0; Serena Forlati, 'Coercion as a Ground Affecting the Validity of Peace Treaties' in: Enzo Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford: Oxford University Press 2011), 320-332 (322-327).

41 Olivier Corten, '1969 Vienna Convention Article 52' in: Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties, Volume II* (Oxford: Oxford University Press 2011), 1201 (paras 24-28); Kirsten Schmalenbach, 'Article 52' in: Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties, A Commentary* (Berlin: Springer 2012), 871 (paras 20-24).

42 Schmalenbach (n. 41), paras 48-50. Contrarily, see Corten (n. 41), para. 38.

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 104-105).

44 UNSC Res 1234 of 9 April 1999, S/RES/1234.

unprotected against violations. For one thing, Art. 52 VCLT may provide some protection in that respect. Moreover, an alternative and more appropriate way to facilitate a thick concept of *ius cogens* is offered by the regime of aggravated state responsibility. This regime sets forth those legal consequence of *ius cogens* specifically triggered by violations of *ius cogens* norms, rather than by legal acts conflicting with such norms. Those legal consequences are scrutinised below.

III. *Ius cogens* and Aggravated State Responsibility

Ius cogens is now widely recognised 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,[45] they create additional rights and obligations for third states. Regarding additional rights, *ius cogens* norms have *erga omnes* character,[46] meaning that all states are entitled to invoke the responsibility of the perpetrator.[47] Thus, any state has standing to invoke Russia's responsibility for breaching peremptory norms, and may claim cessation, and assurances and guarantees of non-repetition.[48] However, *ius cogens* does not provide courts with any additional basis for jurisdiction.[49] Regarding additional obligations, serious *ius cogens* breaches are said to 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 aggravated state responsibility require further clarification. After scrutinising the restriction of these obligations to cases of serious *ius cogens* breaches (1.), the subsequent sections analyse the obligations of non-recognition and non-assistance (2.), and that of cooperation to end the breach (3.).

45 Christian Tams, 'Do Serious Breaches Give Rise to Any Specific Obligations of the Responsible State?', EJIL 25 (2002), 1161-1180.

46 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 17, para. 1.

47 ILC, 'Draft conclusions *jus cogens*' (n. 3), para. 2.

48 In detail: ILC, 'Draft conclusions *jus cogens*, with commentaries' (n. 6), conclusion 19, commentary, paras 6-8; Iain Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations Under Peremptory Norms of General International Law"', EJIL 13 (2002), 1201-1220 (1205-1207).

49 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).

1. The Threshold of Seriousness of the *ius cogens* Breach

According to the ILC, the obligations of aggravated state responsibility are triggered only by 'serious' *ius cogens* breaches.[50] A breach is serious if it amounts to a gross or systematic failure by the perpetrator to fulfil the obligation.[51] A systematic failure refers to an 'organised and deliberate' violation, whereas gross refers to 'the intensity of the violation or its effects'.[52] Determining factors for both include 'the intent to violate the norm; the scope and number of individual violations; and the gravity […] for the victims'.[53] While delineating this threshold may be difficult,[54] 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 (organised 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,[56] and gives rise to aggravated state responsibility.[57]

However, the threshold of seriousness raises doubts as to the requirement as such, because it seems implausible that *ius cogens* obligations and the fundamental values they embody could be breached in a non-serious way.[58] Also, absent a centralised authority to determine the seriousness of a breach,[59] states will need to make their individual assessments.[60] The distinction between serious and non-serious breaches thus adds 'an extra level of

50 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 19 – therefore called *aggravated* state responsibility.

51 ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', (2001) ILCYB, Vol. II, Part Two, 31 (ARSIWA), Art. 40; ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 19, paras 1 and 3.

52 ILC, 'ARSIWA' (n. 51), Art. 40, para. 8.

53 ILC, 'ARSIWA' (n. 51), Art. 40, para. 8.

54 Discussed in Costelloe (n. 17), 187-190.

55 Costelloe (n. 17), 187-190.

56 Similarly: Cesáreo Gutiérrez-Espada, 'De la guerra en Ucrania', Anuario Español de Derecho Internacional 39 (2023), 81-100 (89).

57 This was also emphasized by Colombia (A/ES-11/PV.3, 2) and Cyprus (A/ES-11/PV.13, 14).

58 See discussion in Dire Tladi, 'Fifth report on peremptory norms of general international law (*jus cogens*)', (2022) A/CN.4/747, para. 183. Also see Paola Gaeta, 'The Character of the Breach' in: James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press 2010), 421-426 (425-426); Sévrine Knuchel, *Jus Cogens: Identification and Enforcement of Peremptory Norms* (Zürich: Schulthess 2015), 183 (para. 349), suggesting that any breach be serious.

59 A determination by the Security Council or General Assembly is neither necessary nor binding: ILC, 'ARSIWA' (n. 51), Art. 40, commentary, para. 9.

60 Costelloe (n. 17), 212; Sten Verhoeven, *Norms of Jus Cogens in International Law, a Positivist and Constitutionalist Approach* (Leuven: KU Leuven 2011), 260.

subjectivity', which jeopardises the thrust of the obligations.[61] *De lege ferenda*, the requirement of seriousness should therefore be abandoned, as several states also suggested.[62] In contrast, the ILC justified the threshold as avoiding a trivialisation of the obligations.[63] However, the varying intensity of *ius cogens* breaches can be accounted for, e. g. by varying the required level of cooperation.

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 recognise as lawful a situation created by a [serious *ius cogens* breach], nor render aid or assistance in maintaining that situation'.[64] The ILC reaffirmed this as conclusion 19 para. 2 in its work on *ius cogens*.[65] Russia's occupation of Ukrainian territory is a 'situation' created by serious *ius cogens* breaches. What acts are thus prohibited as recognising this situation as lawful, or as rendering aid or assistance in maintaining it? 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 emphasised that territorial acquisitions brought about by the use of force, or through the denial of self-determination, were invalid and must not be recognised.[66] While this is widely accepted as customary international law,[67] it is unclear whether the obligation of non-recognition applies to

61 Christine Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press 1993), 333; Verhoeven (n. 60), 260.

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

63 ILC, 'ARSIWA' (n. 51), Art. 40, commentary, para. 7; Costelloe (n. 17), 187.

64 ILC, 'ARSIWA' (n. 51), Art. 41, para. 2, in conjunction with Art. 40.

65 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 19, para. 2.

66 ILC, 'ARSIWA' (n. 51), Art. 41, commentary, paras 5-6.

67 Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press 2011), 326-332; 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: Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (Leiden:

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all peremptory norms.[68] 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[69] recognise the situation as lawful.[70] It is difficult to determine which conduct implies recognition as lawful. Rather than by a general definition, whether conduct implies recognition as lawful 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.[71] Contrarily, while it has been argued that Germany suspending approval of the Nord Stream 2 gas pipeline 'could be seen as an example of third States implementing their duties not to recognise unlawful situations',[72] this is not required by the obligation of non-recognition: Continuing trade with the perpetrator does not in itself imply recognition of the situation resulting from the breach. However, where the situation created by the breach comprises the (invalid) creation of a new legal entity, non-recognition prohibits any and all relations with this new entity.[73] The Democratic People's Republic of Korea (DPRK) and Syria, by recognising Donetsk and Luhansk as states,[74] violated the obligation of non-recognition.

Martinus Nijhoff 2006), 127-166 (142-144); Costelloe (n. 17), 194-204; Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation' in: James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press 2010), 677-686 (684); Diane Desierto, *Non-Recognition*, EJIL:Talk!, 22 February 2022; Christian Marxsen, 'The Crimea Crisis, an International Law Perspective', HJIL 74 (2014), 367-391 (390); Santiago Villalpando, *L'émergence de la communauté internationale dans la responsabilité des Etats* (Paris: Presses Universitaires de France 2005), 386-387.

68 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: Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order, Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff 2006), 99-125 (125).

69 Talmon (n. 68), 108-114.

70 Costelloe (n. 17), 193-204; Rana Moustafa Essawy, *Is There a Legal Duty to Cooperate in Implementing Western Sanctions on Russia?*, EJIL:Talk!, 25 April 2022.

71 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 123-124).

72 Desierto (n. 67).

73 ICJ, *Namibia Opinion* (n. 71), para. 124; Christakis (n. 67), 146-160.

74 <https://aljazeera.com/news/2022/7/13/n-korea-recognises-breakaway-of-russias-proxies-in-east-ukraine>.

Humanitarian considerations limit the obligation of non-recognition. As formulated by the ICJ in its *Legal Consequences for States of the Continued Presence of South Africa in Namibia* opinion, and taken up by 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 recognised.[75] This exception does not extend to all private rights; the rights concerned must be balanced against the importance of withholding recognition.[76] Thus, legal acts issued by the *de facto* authorities governing territories such as Donetsk and Luhansk are not to be recognised, 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 whether it poses a hurdle that could be counterproductive to future conflict resolution.[77] As discussed, a Russo-Ukrainian peace settlement might involve permanent territorial changes. How would the obligation not to recognise as lawful the situation created by Russia's aggression affect such a settlement? Such a settlement should remain possible notwithstanding 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 recognised as legal'.[78] This was meant to protect the principle that territory could not be legally acquired by force against developments whereby such acquisition would gradually consolidate and over time become recognised as lawful.[79] Arguably, this rationale would not be affected by a peace settlement redrawing Ukrainian borders, because the legalisation of Russian *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 so as to ensure that peaceful settlement, even if implying recognition of a situation created by *ius cogens* breaches, would remain possible.[80]

75 ICJ, *Namibia Opinion* (n. 71), para. 125; ILC, 'Draft conclusions *ius cogens*, with commentaries' (n. 6), conclusion 19, commentary, para. 15.

76 Christakis (n. 67), 160-164; Costelloe (n. 17), 204-206.

77 Stuart Casey-Maslen, *Jus ad Bellum* (Oxford: Hart 2020), 128; Weisburd (n. 13), 42-43.

78 UNGA Res 2625 (XXV) of 24 October 1970, A/RES/2625(XXV), Annex.

79 Dawidowicz (n. 67), 677-678.

80 Talmon (n. 68), 123.

Second, (positivist) *ius cogens* scholarship widely distinguishes primary *ius cogens* norms from secondary norms pertaining to *ius cogens*.[81] Whereas the prohibition of aggression is a (primary) *ius cogens* norm, norms pertaining to it, such as the obligation of non-recognition, are categorised 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.[82] 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 would not be invalid.[83] 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.[84] However, this would require that the international community of states as a whole accepts and recognises this obligation as peremptory,[85] 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.[86]

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, regardless of a prior serious *ius cogens* breach. Otherwise, the perpetrator would be permitted to limit the legal powers of the victim and the international community.

81 Ulf Linderfalk, 'The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law', Nord. J. Int'l L. 82 (2013), 369-389 (374-377).

82 Linderfalk (n. 81), 383-384.

83 Jure Vidmar, 'The Use of Force and Defences in the Law of State Responsibility', Jean Monnet Working Paper (05/2015), 24.

84 E. g. Rana Moustafa Essawy, 'The Responsibility Not to Veto Revisited Under the Theory of "Consequential *Jus Cogens*"', Global Responsibility to Protect 12 (2020), 299-335.

85 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 4.

86 Arguably, a UNSC Res 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: Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary, Volume II* (3rd edn, Oxford: Oxford University Press 2012), paras 38, 68.

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.[87] 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*.[88] 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 Art. 16 ARSIWA. 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.[89]

What amounts to aid or assistance though is notoriously vague.[90] Providing military equipment, logistical or financial support to the perpetrator may be among the prohibited conduct.[91] Thus, by allowing Russian armed forces to use its territory,[92] Belarus breaches the obligation of non-assistance, as has been deplored by the United Nations (UN) General Assembly.[93] Iran supplied Russia with missiles and drones for deployment against Ukraine.[94] 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

87 ICJ, *Namibia Opinion* (n. 71), 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: James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press 2010), 687-694 (690-692); Villalpando (n. 67), 389.

88 Talmon (n. 68), 114.

89 Costelloe (n. 17), 207; Jørgensen, 'Non-Assistance' (n. 87), 692; Orakhelashvili (n. 27), 282-283.

90 Costelloe (n. 17), 211. The ILC did not specify the content of the obligation, see ILC, 'Draft conclusions *jus cogens*, with commentaries' (n. 6), conclusion 19, commentary, paras 12-16.

91 Costelloe (n. 17), 207.

92 <https://foreignpolicy.com/2022/02/24/russia-ukraine-war-belarus-chernobyl-lukashenko/>.

93 UNGA Res ES-11/1 of 2 March 2022, A/RES/ES-11/1.

94 <https://www.armscontrol.org/act/2022-11/news/iran-supplies-arms-russia>.

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called upon China not to supply weapons to Russia.[95] However, given that Russia's occupation of Crimea since 2014 already amounted to a situation created by a serious *ius cogens* breach (namely aggression),[96] the obligation of non-assistance applied since then. Staggeringly, between 2015 and 2020, European states permitted the export to Russia of weapons amounting to €346 m.[97] 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.[98]

This heterogeneous state practice provides no guidance to clarify which measures amount to illegal assistance. Also, the obligation of non-assistance, just like that of non-recognition, does not require states to isolate the perpetrator; states may continue cooperating with the perpetrator in unrelated fields.[99] To revisit an example already mentioned in the context of the obligation of non-recognition: While Germany withheld commissioning Nord Stream 2, it remains unclear whether the remote contribution Germany could have made to Russia's war effort by commissioning the pipeline would have violated the obligation of non-assistance.[100] Thus, while the obligation of non-assistance bears great 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.[101] When the ILC first adopted the obligation as Art. 41 para. 1

95 <https://www.politico.eu/article/very-big-mistake-nato-chief-jens-stoltenberg-cautions-china-over-russia-weapons-supply-ukraine-war/>.

96 Marxsen (n. 67), 390-391; Desierto (n. 67).

97 <https://investigate-europe.eu/en/2022/eu-states-exported-weapons-to-russia/>.

98 <https://www.reuters.com/markets/commodities/rising-flow-russian-oil-products-china-india-middle-east-russell-2023-02-16/>.

99 Jørgensen, 'Non-Assistance' (n. 87), 691.

100 Answering in the affirmative: Desierto (n. 67).

101 Nina Jørgensen, 'The Obligation of Cooperation' in: James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (Oxford: Oxford University Press 2010), 695-701 (699-700).

ARSIWA in 2001,[102] it commented that this article 'may reflect the progressive development of international law'.[103] Around two decades later, the ILC restated the obligation as conclusion 19 para. 1 of its work on *ius cogens*,[104] 'now recognised under international law'.[105] Hence, the decisive question is whether the rule had crystallised as customary international law since 2001,[106] *i.e.* found sufficient support in international practice and *opinio iuris*.[107] This article therefore studies relevant practice and *opinio iuris* since 2001, using primarily the evidence invoked by the ILC. This study shows that prior to 2022, relevant practice remained inconsistent (a). However, practice in response to Russia's war indicates a crystallisation of some elements of the obligation to cooperate, also accompanied by *opinio iuris* (b). This section closes 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 UN 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.[108] Of those 18 resolutions, nine stem from well before 2001 (1965-1991), hence cannot support a crystallisation of the obligation after 2001. Four resolutions respond to Russia's war in Ukraine,[109] analysed in section III. 3. b. The remaining five resolutions[110]

102 ILC, 'ARSIWA' (n. 51) Art. 41, para. 1, in conjunction with Art. 40.

103 ILC, 'ARSIWA' (n. 51), Art. 41, commentary, para. 3.

104 ILC, 'Draft conclusions *jus cogens*' (n. 3), conclusion 19, para. 1.

105 ILC, 'Draft conclusions *jus cogens*, with commentaries' (n. 6), conclusion 19, commentary, para. 2.

106 On the customary nature of the rules governing legal consequences of *ius cogens*, see Linderfalk (n. 81), 378-384.

107 ILC, 'Draft conclusions on identification of customary international law, with commentaries', (2018) A/73/10, conclusion 2.

108 ILC, 'Draft conclusions *jus cogens*, with commentaries' (n. 6), conclusion 19, commentary, para. 9.

109 UNGA Res ES-11/1 (n. 93); UNGA Res ES-11/2 of 24 March 2022, A/RES/ES-11/2; UNGA Res ES-11/3 of 7 April 2022, A/RES/ES-11/3; HRC Res 49/1 (n. 4).

110 HRC Res S-17/1 of 23 August 2011 ('Situation of human rights in the Syrian Arab Republic'), A/HRC/S-17/2: 33 to 4, 9 abstentions; UNSC Res 2334 (2016) of 23 December 2016 (Israel), S/RES/2334(2016): 14 to 0, 1 abstention; HRC Res 39/2 of 27 September 2018 ('Situation of human rights of Rohingya Muslims and other minorities in Myanmar'), A/HRC/

evidence a tentative practice at best: they were adopted by the HRC and the Security Council (bodies with limited membership), which cannot evidence a general practice.[111] HRC Res S-33/1 was adopted with a narrow majority, two further resolutions received many abstentions, and only two resolutions (UNSC Res 2334 (2016); HRC Res 49/28) received overwhelming support.[112]

More importantly, several serious *ius cogens* breaches since 2001 were not met with cooperation towards ending them.[113] One case in point is the 2003 war of aggression waged (primarily) by the Unites States (US) against Iraq, which also amounts to a serious *ius cogens* breach.[114] Yet, rather than cooperating towards ending the war, the international response supported further US involvement in Iraq.[115] 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.[116] The 2014 UN General Assembly 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.[117] Some states, however, recognised Crimea's alleged accession to Russia.[118] Later resolutions more clearly condemned Russia, but still received less than half as many affirmative votes as the resolutions adopted since 2022.[119] Thus, though some relevant practice prior to 2022 supports the obligation to cooperate, this practice remained inconsistent.

RES/39/2: 35 to 3, 7 abstentions; HRC Res S-33/1 of 17 December 2021 ('Situation of human rights in Ethiopia'), A/HRC/S-33/2: 21 to 15, 11 abstentions; HRC Res 49/28 of 1 April 2022 ('Right of the Palestinian people to self-determination'), A/HRC/RES/49/28: 41 to 3, 3 abstentions.

111 ILC, 'Draft conclusions custom, with commentaries' (n. 107), conclusion 4, para. 1: 'general practice […] refers primarily to the practice of States'. To be general, relevant practice must be 'sufficiently widespread and representative, as well as consistent', see ILC, 'Draft conclusions custom, with commentaries' (n. 107), conclusion 8, para. 1.

112 See n. 110.

113 Also see 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 Español de Derecho Internacional 39 (2023), 149-208 (160-171).

114 Robert Kolb, *The International Law of State Responsibility* (Cheltenham: Edward Elgar 2017), 58-59.

115 See, e. g. UNSC Res 1483 of 22 May 2003, S/RES/1483.

116 Kolb (n. 114), 59.

117 UNGA Res 68/262 of 27 March 2014, A/RES/68/262.

118 Marxsen (n. 67), 391.

119 For example: UNGA Res 73/194 of 17 December 2018, A/RES/73/194 (66 to 19, 72 abstentions); UNGA Res 74/17 of 9 December 2019, A/RES/74/17 (63 to 19, 66 abstentions); UNGA Res 75/29 of 7 December 2020, A/RES/75/29 (63 to 17, 62 abstentions); UNGA Res 76/70 of 9 December 2021, A/RES/76/70 (62 to 22, 55 abstentions).

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 sceptical vis-à-vis the obligation being *lex lata*.[120] One conclusion that can be drawn, however, is that while the ILC envisions the obligation to cooperate as entailing both institutionalised and non-institutionalised forms of cooperation,[121] the evidence more strongly emphasises institutionalised cooperation, primarily within the UN.[122]

b) Crystallisation 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 crystallisation, consolidation, and clarification. This will be substantiated next, distinguishing between non-institutionalised and institutionalised cooperation. As regards the first, a clear divide can be observed. States from the Global North have provided military assistance to Ukraine 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,[123] with some states potentially undermining the sanctions.[124] Therefore, there is no widespread and representative practice for this form of non-institutionalised cooperation.[125]

120 Helmut Philipp Aust, 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility' in: Dire Tladi (ed.), *Peremptory Norms of General International Law (Jus Cogens), Disquisitions and Disputations* (Leiden: Brill Nijhoff 2021), 227-255 (253-254); Rebecca Barber, 'Cooperating Through the General Assembly to End Serious Breaches of Peremptory Norms', ICLQ 71 (2022), 1-35 (15-19); Costelloe (n. 17), 212; Kolb (n. 114), 58-59. Contrarily, see Verhoeven (n. 60), 260-262.

121 ILC, 'Draft conclusions *jus cogens*, with commentaries' (n. 6), conclusion 19, commentary, paras 7-11.

122 Similarly, limited though to breaches of the right to self-determination, 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).

123 Kristen E. Eichensehr, 'Contemporary Practice of the United States Relating to International Law', AJIL 116 (2022), 593-652 (614, 648-649); Yueyao Zhang, *Summoning Solidarity Through Sanctions, Time For More Business and Less Rhetoric*, Völkerrechtsblog, 8 June 2022, doi: 10.17176/20220608-134400-0.

124 Essawy, *Duty to Cooperate* (n. 70).

125 Similarly, see Pearce Clancy, 'Neutral Arms Transfer and the Russian Invasion of Ukraine', ICLQ 72 (2023), 527-543 (543); Essawy, 'Veto' (n. 84), 329-330; Zhang (n. 123).

The picture emerging from institutionalised 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.[126] HRC Resolution 49/1 ('Situation of human rights in Ukraine stemming from the Russian Aggression') was also adopted with a clear majority.[127] 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 favour 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 cristallisation of customary international law.[128] 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 draft conclusion 19.[129] 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.[130] Altogether, only four states outrightly denied the rule's *lex lata* status.[131] Such a small number of states cannot prevent a customary rule from emerging.[132] Some states in favour of conclusion 19 still cautioned that cooperation should not undermine existing institutions, most notably the UN collective security

126 UNGA Res ES-11/1 (n. 93): 141 to 5, 35 abstentions; UNGA Res ES-11/2 (n. 109): 140 to 5, 38 abstentions; UNGA Res ES-11/3 (n. 109): 93 to 24, 58 abstentions; UNGA Res ES-11/4 of 12 October 2022, A/RES/ES-11/4: 143 to 5, 35 abstentions; UNGA Res ES-11/5 of 14 November 2022, A/RES/ES-11/5: 94 to 14, 73 abstentions; UNGA Res ES-11/6 of 23 February 2023, A/RES/ES-11/6: 141 to 7, 32 abstentions.

127 HRC Res 49/1 (n. 4): 32 to 2, 13 abstentions.

128 ILC, 'Draft conclusions custom, with commentaries' (n. 107), conclusion 9.

129 Algeria (A/C.6/77/SR.25, para. 14); Brazil (A/C.6/73/SR.25, para. 40); Colombia (A/CN.4/748, 84); Cuba (A/C.6/74/SR.25, para. 21); Cyprus (A/C.6/77/SR.24, para. 40); Czech Republic (A/CN.4/748, 6-7); Egypt (A/C.6/73/SR.25, para. 37); Ireland (A/C.6/77/SR.23, para. 17); Italy (A/CN.4/748, 86: 'Italy finds [conclusion 19] acceptable' – for a contrary interpretation, see Zhang [n. 123]); New Zealand (A/C.6/77/SR.25, para. 71); Nicaragua (A/C.6/74/SR.23, para. 73); Norway, also on behalf of Denmark, Finland, Iceland, and Sweden (A/C.6/77/SR.21, para. 59); Peru (A/C.6/77/SR.23, para. 42); Poland (A/C.6/77/SR.23, para. 10); Sierra Leone (A/C.6/77/SR.23, para. 28); South Africa (A/C.6/74/SR.27, para. 47); Spain (A/C.6/77/SR.24, para. 16); Sudan (A/C.6/73/SR.28, para. 13); Togo (A/C.6/74/SR.26, para. 28).

130 Australia (A/CN.4/748, 84); Japan (A/C.6/77/SR.25, para. 12; A/CN.4/748, 87); Netherlands (A/CN.4/748, 87). For different interpretations see Clancy (n. 125), 541; Zhang (n. 123).

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

132 ILC, 'Draft conclusions custom, with commentaries' (n. 107), conclusion 15, commentary, paras 1-2.

system.[133] Again, therefore, a preference for institutionalised cooperation becomes apparent,[134] which aligns with the more widespread and representative practice in that regard.

Therefore, international practice in response to Russia's war, and *opinio iuris*, corroborate the customary status of the obligation to cooperate within international organisations through lawful means to end serious *ius cogens* breaches.

c) *De lege ferenda*: How to Specify the Content of the Obligation to Make It Useful?

This conclusion leaves open the possibility of future specification of the obligation; the level and kind of engagement expected of states remain ambiguous.[135] It is therefore worth discussing how the obligation should be shaped, *de lege ferenda*, so as to make it useful. The obligation should operate as a 'collective enforcement mechanism' for peremptory norms and the values they protect.[136] This article argues that an obligation entailing non-institutionalised cooperation would not be useful to this end, whereas the consolidating obligation to cooperate within international organisations provides an authoritative argument and useful normative standard for states to contribute to a common response.

A first shortcoming of the obligation to cooperate in non-institutionalised forms is its lack of specificity. According to the ILC, states may take a very broad range of measures, the only requirements being that a measure be lawful, and that it must be one of cooperation to end the breach.[137] The obligation is one of conduct, not of result.[138] 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

133 France (A/C.6/55/SR.15, para. 9: 'might encourage States to resort to possibly excessive countermeasure'); Mexico (A/C.6/56/SR.14, para. 12: 'invited abuse of countermeasures and ignored the system of collective security'); The Netherlands (A/CN.4/515, 58). Similarly: Essawy, *Duty to Cooperate* (n. 70).

134 Similarly: Essawy, 'Veto' (n. 84), 329-330.

135 Cameroon (A/C.6/77/SR.23, para. 56); Barber, 'Cooperating' (n. 120), 19; Clancy (n. 125), 540-543; Costelloe (n. 17), 214; Jørgensen, 'Cooperation' (n. 101), 697; Villalpando (n. 67), 385.

136 Costelloe (n. 17), 187; Orakhelashvili (n. 27), 283.

137 ILC, 'Draft conclusions *jus cogens*, with commentaries' (n. 6), conclusion 19, commentary, paras 7, 10.

138 Costelloe (n. 17), 214.

other states (here: those of the Global South)? They may have a different view on the appropriateness of the sanctions,[139] or may lack economic or political power to adopt them.[140] Given such reasonable constraints, the obligation to cooperate cannot oblige states to join such *ad hoc* coalitions. Then, if they lack coordination, measures by the *ad hoc* coalition may even impair a consented effort with broader support, and weaken the overall response.[141] Still, the need to coordinate for a broad response should not dissuade states from taking measures that promise to better induce compliance, even when implemented with less support.[142] These aspects point towards a risk of escalation: Rather than catalysing cooperation, the obligation could facilitate coercive behaviour,[143] and exacerbate confrontation between different groups of states with competing visions of an appropriate response.[144] Therefore, non-institutionalised cooperation would not be a useful element of the obligation to cooperate.[145]

With respect to institutionalised cooperation, the ILC highlighted that serious *ius cogens* breaches 'are likely to be addressed by the competent international organisations, including the Security Council and the General Assembly. In the case of aggression, the Security Council is given a specific role by the [UN-Charter].'[146] 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.[147] This is widely supported in practice, as one state or another will

139 Jørgensen, 'Cooperation' (n. 101), 697.

140 Rebecca Barber, 'What Does the "Responsibility to Protect" Require of States in Ukraine?', JIPK 25 (2022), 155-177 (176), argues that 'Different things will be required of different States'.

141 Chinkin (n. 61), 333.

142 Arguing that third-party countermeasures are not *required* by the obligation to cooperate is without prejudice to whether they may be lawful.

143 Chinkin (n. 61), 332-333. Similarly: Pierre-Marie Dupuy, 'The Deficiencies of the Law of State Responsibility Relating to Breaches of "Obligations Owed to the International Community as a Whole": Suggestions for Avoiding the Obsolescense of Aggravated Responsibility' in: Antonio Cassese (ed.), *Realizing Utopia, The Future of International Law* (Oxford: Oxford University Press 2012), 210-226 (217).

144 Brazil (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.'.

145 For a contrary view, see Ferrer Lloret (n. 113), 179-180; Gutiérrez-Espada (n. 56), 94-95.

146 ILC, 'ARSIWA' (n. 51), Art. 40, commentary, para. 9.

147 See ILC, 'ARSIWA' (n. 51), Art. 41, commentary, para. 11: 'it is hardly conceivable that a state would not have notice of […] a serious breach by another State'.

always turn to the Security Council (or other relevant body) in cases of *ius cogens* breaches.[148] 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,[149] which lends credibility to 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.[150] Cooperation should then require states to exercise this discretion with a view to ending the breach.[151] The concept of due diligence helps to flesh out this obligation by introducing a standard of reasonableness.[152] 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 behaviour, especially for the P5.[153] One argument is that any Security Council resolution will *per se* be a reasonable response to *ius cogens* breaches;[154] especially one supported by

148 E. g. letter dated 28 February 2014 from the Permanent Representative of Ukraine to the UN Addressed to the President of the Security Council, S/2014/136.

149 See statements in S/PV.8974 (23 February 2022), and S/PV.8979 (25 February 2022).

150 Nico Krisch, 'Ch.VII Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Introduction to Chapter VII: The General Framework' in: Bruno Simma et al. (eds), *The Charter of the United Nations: A Commentary, Volume II* (3rd edn, Oxford: Oxford University Press 2012), paras 38, 47, 54.

151 ILC, 'Draft conclusions *jus cogens*, with commentaries' (n. 6), conclusion 19, commentary, para. 11.

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

153 Barber, 'Cooperating' (n. 120), 22; Florent Beurret, *Limiting the Veto in the Face of Jus Cogens Violations: Russia's Latest (Ab)use of the Veto*, OpinioJuris, 6 May 2022; Costelloe (n. 17), 220-221; Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge: Cambridge University Press 2020), 172-174. Also see Japan (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.'.

154 Barber, 'Cooperating' (n. 120), 22.

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at least nine members.[155] 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 legitimacy, and in that way be (more) effective.[156] What is reasonable will depend on the circumstances of the case, which makes it hard to justify why a specific exercise of a veto (or any other vote against a resolution) violated the obligation to cooperate. In any case, there is no practice on ascribing invalidity to votes cast in violation of the obligation.[157] 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.[158] 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.[159] The obligation to cooperate cannot, presently, 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. Then, the obligation may at least exert pressure on such a state to provide justification ('vote in favour or explain'),[160] and it provides a standard by which to measure the earnestness of that explanation.

The fourth stage is reached when a resolution is eventually adopted. Then, the obligation to cooperate should entail an obligation to implement the resolution, and provide any aid the UN or states may need to that end. This

155 Trahan, (n. 153), 174.

156 Also see Barber, 'Cooperating' (n. 120), 25-34; Clancy (n. 125), 542.

157 On the practice, 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.

158 UNSC Draft Res of 25 February 2022, S/2022/155; UNSC Draft Res of 30 September 2022, S/2022/720.

159 Christina Binder, 'Uniting for Peace Resolution (1950)' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2017).

160 There is some relevant practice: UNGA Res 76/262 of 26 April 2022 ('Standing mandate for a General Assembly debate when a veto is cast in the Security Council'), A/RES/76/262; code of conduct signed by 107 states (including France, UK): Annex I to the Letter dated 14 December 2015 from the Permanent Representative of Liechtenstein, A/70/621-S/2015/978 (pledging 'to not vote against a credible draft resolution before the Security Council on timely and decisive action to end the commission of genocide, crimes against humanity or war crimes'). Also see Daniel Moeckli and Raffael Fasel, 'A Duty to Give Reasons in the Security Council, Making Voting Transparent', International Organizations Law Review 14 (2017), 13-86.

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 institutional framework in which it operates. The obligation can neither compensate for inadequacies of the UN system, nor 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'.[161] Still, at the various stages of the working of the UN, the obligation to cooperate can decisively shape what is 'said and done'.

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 large-scale 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 in cases of violations of peremptory norms, the rules on the invalidating effect of *ius cogens* play a limited role – even where these violations are accompanied by certain legal acts seeking to legalise the effects of the violations ('treaties' with the occupied territories, unilateral declarations of recognition and annexation). 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

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

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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 crystallisation of the customary status of the obligation, and helps clarify its content, with a focus on cooperation within the framework of relevant international organisations.

Therefore, on a practical level, the Russo-Ukrainian War and its wider context attest to the reinforced relevance of *ius cogens*, rather than to its emptiness. On a conceptual level, a thick concept of *ius cogens* is increasingly taking shape, which protects fundamental values not only against attempts of derogation through conflicting legal acts, but also against violations by actions on the ground. The regime of aggravated state responsibility – in particular the obligation to cooperate to end serious *ius cogens* breaches which further crystallised in the context of the war – contributes to this thick concept of *ius cogens*.

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