

---

# Enhancing the Rhetoric of Jus Cogens

Hélène Ruiz Fabri\*

## Abstract

Recent years have seen increasing references to jus cogens in the case law of several international and even domestic courts. Despite significant discussion in the literature, it remains difficult to identify the real consequences of this trend. The chapter on jus cogens in Antonio Cassese's last book looks for operative means of enhancing jus cogens. The three proposed paths are not necessarily realistic, but to what extent do they need to be? The hypothesis here is that perhaps it is the act of reflection that sustains the notion of jus cogens – and therefore keeps jus cogens itself alive and able to perform its rhetorical function.

There is only one thing in the world worse than being talked about, and that is not being talked about.

Oscar Wilde, *The Picture of Dorian Gray* (1913), at 16

I did not know Antonio Cassese well at a personal level. Like most of us, however, I knew his work and I knew his commitment to international law – not just any international law but an international law based on human values. As a man and a jurist I would say that he was both idealistic and realistic, and driven by humanism.

In this regard, his final book *Realizing Utopia* is perfectly fitting. In his acute and accurate review of the volume,<sup>1</sup> Marco Milanovic emphasizes notably that Nino Cassese always sought to set his ideas in motion, to translate them into action – that was his idealistic side – but he did this through a controlled activism – that was his realistic side.<sup>2</sup> In many respects, he displayed the dedication of a believer while his actions were those of a policy-maker. International law had to be improved for the good of humanity. But the challenge for even a determined activist like Nino Cassese – as it remains for us – was to draw a line of equilibrium between what is desirable and what is feasible. It

\* Professor, Dean of the Sorbonne Law School (University Paris 1 – Panthéon Sorbonne), Director of Joint Institute of Comparative Law (UMR 8103 CNRS/Paris 1). Email: [Helene.Ruiz-Fabri@univ-paris1.fr](mailto:Helene.Ruiz-Fabri@univ-paris1.fr).

<sup>1</sup> See in this issue, at 1033.

<sup>2</sup> As Marco Milanovic writes, 'the subject of the book – that of idealistic reform tempered by considerations of practicality and realism – can fairly be said to have defined Cassese himself'.

is for this reason that I have chosen to comment on the chapter on *jus cogens*, ‘For an Enhanced Role of *Jus Cogens*’, which remains such a controversial topic.

## 1 Ambivalence

I approached the task in an ambivalent state of mind. On the one hand, I belong to that group of ‘victims’ of the charming power (the ‘magic’<sup>3</sup>) of *jus cogens*, not least because it naturally meets a ‘moral intuition’.<sup>4</sup> I have always been fascinated by the concept and its outcomes in positive law, so much so that I take every opportunity to impress this charming power on my students. It is like responding to an unrelenting hope that international law can be put in order; that it can be driven by values other than the mere satisfaction of selfish (albeit collective) interests, supported and promoted by pure power relationships.<sup>5</sup> This hope is also related to the idea that law should always be concerned with justice and that a hierarchy of norms helps to nurture this connection. The idea of a hierarchy (of norms) is linked in turn with the idea of safeguarding via primacy what is most important, a supposedly universal, common core of human values. In Cassese’s chapter *jus cogens* is understood as closely related to a rather clearly established set of values, incorporating basic human rights.

On the other hand, I am not an unreflecting victim of the charming power of *jus cogens*. In fact, in my teaching I mainly focus on its limits and its very meagre outcomes; the concept thus provides a counterpoint for stressing the unchanging features of the Westphalian international law. This more sceptical vision may be influenced by the fact that I was, some 10 years ago, the *rapporteur* of a working group in the French Ministry of Foreign Affairs. This group endeavoured to convince the government that France should ratify the Vienna Convention on the Law of Treaties. (In the end, it may be recalled, France voted against the Vienna Convention, mainly due to *jus cogens*; it did not sign the Convention,<sup>6</sup> and of course never ratified it. France’s legal advisor at the time was known to have said, ‘When I hear of *jus cogens* I reach for my revolver’.) The report issued by the working group aimed to show that the fears raised by *jus cogens* – instability of treaties, unpredictable developments which would, for example, threaten French nuclear policy, and so on – were unjustified and could be overcome in view of what *jus cogens* had become, or not become, over the preceding three decades.<sup>7</sup> As the French saying goes, what was feared to be a time bomb – *jus cogens* – was in fact a damp squib.

<sup>3</sup> Bianchi, ‘Human Rights and the Magic of *Jus cogens*’, 19 *EJIL* (2008) 491.

<sup>4</sup> *Ibid.*, at 492.

<sup>5</sup> Andrea Bianchi puts it nicely when writing, ‘All our students who approach the study of international law ... want to believe in the redeeming force of human rights and universal justice for a better world’, in ‘On certainty’, *EJIL Talk*, 16 Feb. 2012, available at: [www.ejiltalk.org/on-certainty/](http://www.ejiltalk.org/on-certainty/).

<sup>6</sup> Deleau, ‘Les positions françaises à la Conférence de Vienne sur le droit des traités’, XIV *Annuaire français de droit international* (1969) 7, at 14ff.

<sup>7</sup> Ruiz Fabri, ‘La France et la Convention de Vienne sur le droit des traités’, in G. Cahin, E. Lagrange, F. Poirat, and S. Szurek (eds), *La France et le droit international* (2007), at 137–167.

At the end of the day, a rather sceptical vision of *jus cogens* emerges, between the rock of conservative visions and the hard place of idealistic visions, both disconnected from reality in their own ways. This is precisely why I was interested in the proposals put forward by Nino Cassese in this chapter. My initial reaction after reading the chapter was to propose a comment entitled 'From utopia to disillusion, the fate of *jus cogens* and back again'. But I quickly concluded that this approach would be unfair, not only to Nino Cassese's ideas, but also to my own agnosticism on the matter – an agnosticism that comes from the feeling that almost all arguments which can be made in relation to *jus cogens* are reversible,<sup>8</sup> knowing also that whilst *jus cogens* is implicitly related to the idea of progress it is difficult to take a stand against it. That is to say, taking a reluctant position in relation to *jus cogens* is regarded as conservative – reflecting an outdated international law the flaws of which have already been uncovered.<sup>9</sup> My agnosticism is also fed by the acknowledgement that, although *jus cogens* has spread in many areas beyond the law of treaties, the only traceable positive outcome that may be seen is that of naming norms. In fact, although it is almost impossible to assert that *jus cogens* has had no impact,<sup>10</sup> this impact is difficult to assess and the positive outcomes have not sufficed to prevail over the controversial aspects of the concept, which have remained more or less unchanged over time. In this context, it makes little sense to comment on Nino's chapter by adding a more or less extensive doctrinal assessment of the same long list of arguments about *jus cogens*.<sup>11</sup> I thus chose to approach the chapter as an object, to look for its nature and function, with a question: what is the use of this chapter?

## 2 Discourses

A first and obvious answer is that a chapter on *jus cogens* is a must. How could a book devoted to building a realistic utopia for international law not have a chapter dealing with *jus cogens*? If international lawyers were asked to name the most utopian notion in international law, *jus cogens* would most likely be at the top of the list<sup>12</sup> – perhaps together with the idea of international community. And it is not only a utopian notion, but a notion which has already contributed to or reflected major changes in international law by expressly linking ethics and moral values to positive law. Even if Nino had wanted to avoid the topic – and I do not think he did<sup>13</sup> – he could not have done so. Therefore he had to give it content, with the challenge being to find something new

<sup>8</sup> Sorel, 'Sécurité collective et réversibilité des normes impératives', in M. Arcari and L. Balmond (eds), *La sécurité collective entre légalité et défis à la légalité* (2008), at 15–24.

<sup>9</sup> We are at a stage when it is difficult to ascertain whether *jus cogens* is efficient or not, has or has not had a deterrent effect.

<sup>10</sup> Pellet, 'Conclusions', in C. Tomuschat and J.-M. Thouvenin, *The Fundamental Rules of the International Legal Order: jus cogens and Obligations Erga Omnes* (2006), at 419.

<sup>11</sup> Most of the views I could express about *jus cogens* have been put forward by Andrea Bianchi in his excellent article, *supra* note 3.

<sup>12</sup> M. Koskeniemi, *From Apology to Utopia* (2006), at 322–324.

<sup>13</sup> But he did not intend, at first, to write it himself.

where so much has already been written. Indeed, this chapter falls into a vast range of literature on *jus cogens*. As Bianchi has accurately pointed out, ‘before its sanctioning by judicial decisions in the 1990s, *jus cogens* had been largely developed by international legal scholarship’.<sup>14</sup> It could be added that the judicial sanctioning has not extinguished the ability of *jus cogens* to be a source of controversy.

To put it briefly – and setting aside the original attempts to remove the moral dimension from *jus cogens*<sup>15</sup> – four sets of authors can be identified among international lawyers. A first, albeit very small, group is openly opposed to the notion of *jus cogens*. Authors who adopt this position belong to a very conservative breed and do not believe in international law at all. Not inconsistently, they find *jus cogens* dangerous and/or absurd.<sup>16</sup> Such ideas could be considered almost ridiculous, except that they could be politically influential.

A second group is sceptical. The discourse of authors in this group focuses on the shortcomings and limits of *jus cogens*, with two main lines of argument: the first underlines that *jus cogens* does not fit in with the main characteristics of the international legal system and cannot therefore be developed. It is argued that even if the expression ‘*jus cogens*’ is used, it is legally of no use because there is no specific legal outcome.<sup>17</sup> The second line of thought considers that the use of *jus cogens* raises more questions than it answers and could, at the end of the day, do more harm than good, notably because, in their enthusiasm, its promoters could overlook some problematic implications.<sup>18</sup>

A third group is clearly in favour of *jus cogens*, although its members assume this position from different starting points. This discourse seeks to overcome the difficulties entailed by the concept while trying not to underestimate them.<sup>19</sup> Finally, some are so much in favour of *jus cogens* that they would like to see it nearly everywhere in international law.<sup>20</sup>

In any event, it is fascinating how far some people, mainly academics, are willing to engage in very sophisticated and technical arguments about *jus cogens*, as if it were possible to overcome the questions which have remained unanswered from the very beginning. Notably, questions remain as to who is entitled to identify norms

<sup>14</sup> Bianchi, *supra* note 3, at 493.

<sup>15</sup> R. Kolb, *Théorie du jus cogens international. Essai de relecture du concept* (2001).

<sup>16</sup> Glennon, ‘De l’absurdité du droit impératif (*Jus cogens*)’, *RGDIP* (2006) 529.

<sup>17</sup> J. Combacau and S. Sur, *Droit international public* (2008), at 159–161; Combacau, ‘Le droit international: bric-à-brac ou système?’, *Archives de Philosophie de Droit* (1986) 85; R. Rivier, *Droit impératif et juridiction internationale*, Thesis Université Paris 2, multigraph. (2001).

<sup>18</sup> Linderfalk, ‘The Effect of *Jus cogens*: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’, 18 *EJIL* (2007) 853; Stephan, ‘The Political Economy of *Jus cogens*’, 44 *Vanderbilt J Transnat’lL* (2011) 1073.

<sup>19</sup> Bianchi, *supra* note 3; Paulus, ‘*Jus cogens* in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal’, 74 *Nordic J Int’lL* (2005) 297; Cassese, ‘For an Enhanced Role of *Jus cogens*’, in A. Cassese (ed.), *Realizing Utopia: the Future of International Law* (2012), at 158–171.

<sup>20</sup> A. Cancado Trindade can be considered an activist in favour of *jus cogens*. Beside his own writings see M. Milanovic and A. Bianchi in *EJIL Talk*, available at: [www.ejiltalk.org/on-certainty/](http://www.ejiltalk.org/on-certainty/) and [www.ejiltalk.org/judging-judges-a-statistical-exercise/](http://www.ejiltalk.org/judging-judges-a-statistical-exercise/).

of *jus cogens*, and through what kind of normative process these norms appear. Nino Cassese's chapter does not avoid these questions, but nor does it devote much space to entering the controversy. Rather, it settles for the answers which are, in his view, the most suitable and operative for his purpose: an enhanced role for *jus cogens*. Thus, the chapter assumes that

the existence of a string of overarching legal principles is no longer contested by any international legal subject. In addition, there is also a large measure of agreement on the fact that some principles have acquired this special status. Furthermore, there has so far been no objection to the notion that *jus cogens* has or may have an impact on certain areas of international law other than treaty-making.<sup>21</sup>

All this is merely stated and is not argued at length. The box is no longer empty,<sup>22</sup> thanks to those courts and other bodies that have not hesitated to identify some rules as *jus cogens*.<sup>23</sup> Therefore Nino Cassese's purpose is already a step beyond making the car leave the garage more often.<sup>24</sup> He considers only those issues on which disagreement could, in his view, remain:

(i) how to determine the birth and force of a peremptory norm; (ii) the extent to which such a norm may have a direct or indirect impact on the domestic legal order, thereby piercing the shield of state sovereignty; and (iii) the international judicial remedies available in case of dispute on the existence and scope of a peremptory norm.<sup>25</sup>

### 3 Telos

Cassese's reason for arguing (or rather not arguing) in this manner lies in the underlying *telos* an enhanced role for *jus cogens*. This assertion – the need for an enhanced role for *jus cogens* – presupposes an existing role for the concept and the need for it to be developed. In other words, Cassese assumes that this is indeed a desirable course of action. From its very title the chapter appears to present a political agenda,<sup>26</sup> with Nino Cassese's act of faith lying in his belief that law can bring about change in the world.

The three paths proposed by Cassese to enhance the role of *jus cogens* are conceived as operative ways of responding to the three remaining controversial aspects that he identifies. Thus, with regard to the determination of the existence of a peremptory norm, he considers that 'an authoritative determination requires being endowed with judicial powers'.

<sup>21</sup> Cassese, *supra* note 19, at 163.

<sup>22</sup> G. Abi-Saab used the metaphor of the empty box in an optimistic way, considering that, however, 'the category (of *jus cogens*) was still useful; for without the box, it cannot be filled': see Abi-Saab, 'The Uses of Article 19', 10 *EJIL* (1999) 339, at 341.

<sup>23</sup> Cassese, *supra* note 19, at 161–163.

<sup>24</sup> Following the well-known metaphor drawn by I. Brownlie in 'Comments', in A. Cassese and J.H.H. Weiler (eds), *Change and Stability in International Law-Making* (1988), at 110.

<sup>25</sup> Cassese, *supra* note 19, at 163.

<sup>26</sup> Which could therefore encounter other political agendas. It is not new that *jus cogens* can be subject to legal strategies. One should, e.g., keep in mind the discourse developed by the USSR, following the Vienna Conference, and arguing for the possibility of regional *jus cogens*. This, of course, implied the possibility of regional dissidence, with the risk of the subversion of universal by regional *jus cogens*.

In fact, his reasoning is then devoted to showing that reliance on international judges is the only way to obtain positive outcomes, because only such judges have a wide-angled perspective which allows them to assess whether a norm which meets the requirements for consideration as a general rule or principle protects a value ‘fully congruous with the universal goals or values upheld by’ international society and at the same time has ‘the same prominence ... as those enshrined in other, undisputed peremptory norms’.<sup>27</sup>

Regarding the impact a peremptory norm may have on domestic legal orders, Cassese’s reasoning is that it is both necessary and consistent and that the only efficient means of ensuring such direct or indirect impact is by creating a constitutional rule. This would presuppose that states have sufficient confidence in the idea of *jus cogens* norms to rely on them, and thus leads almost logically to the third path, which argues that the means are available for resolving disputes regarding *jus cogens*. For this purpose, the answer lies, once again, in the hands of judges, namely the International Court of Justice, which should have compulsory jurisdiction to adjudicate on such disputes for, in Cassese’s words, it would provide ‘an authoritative third party determination of *jus cogens* [constituting] a welcome safeguard against any abuse’.<sup>28</sup> This proposition is in no way subversive if one recalls that this was precisely the rationale behind including Article 66 in the Vienna Convention on the Law of Treaties as a counterpart to the acceptability of Articles 53 and 64.<sup>29</sup>

In fact, the first and third paths are substantially linked as they each concern the role assigned to the international judge. This very striking and strong stance unveils an important aspect of the political agenda underlying this chapter. Nino Cassese’s propositions consist in bypassing ordinary policy in favour of using expert bodies to achieve change. He very reasonably relies on his own experience of having shifted from the role of academic to that of international expert and international judge, and of having identified in this last function the most dynamic part of the international system, or at least that part of the system that is least affected by inertia and most capable of mobilization.

It is important not to misunderstand this way of reading the situation. It is not pretending that there is or should be a politicization of international courts, but rather it merely acknowledges the political role of judges and Cassese’s confidence in that role, knowing that this acknowledgement is not only justified by the moral idea of doing the right thing but that it also supports the claim for power which automatically comes together with any political role.

## 4 Stance

Cassese’s stance in favour of the judge’s role is probably the most important part of his reasoning. This intuition comes from the puzzling initial impression that, although the three explored paths claim to be operative, they appear to be only marginally realistic

<sup>27</sup> Cassese, *supra* note 19, at 166.

<sup>28</sup> *Ibid.*, at 169.

<sup>29</sup> Ruiz Fabri, ‘Article 66’, in O. Corten and P. Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011), at 1513.



when we consider international law as it stands today. For example, is it feasible to expect states to modify their constitutions in order to ensure the domestic impact of *jus cogens* or unreservedly to accept the compulsory jurisdiction of the ICJ? Obviously not, and although we can be sure that Nino Cassese knew this perfectly well, he nevertheless persisted. The temptation may then be to label the chapter as mere rhetoric, in the everyday sense of the word, meaning that it is pure discourse: words. But it is also possible seriously to consider this intuitive qualification: Nino Cassese is using rhetoric as defined by Aristotle as ‘a combination of the science of logic and of the ethical branch of politics’,<sup>30</sup> with the use of all available means of persuasion in order to inform, persuade, or motivate particular audiences in specific situations. Aristotle held that there were three persuasive means of appeal to an audience: *logos* (reasoned discourse or ‘the argument’), *pathos* (appeal to the audience’s sympathies and imagination to create identification with the writer’s point of view), and *ethos* (which includes not only ‘moral competence’ but also expertise and knowledge). While this can be only a very brief and approximate recollection of the Aristotelian concept of rhetoric, it offers an interesting lens through which to read this chapter.

The most interesting question posed by the chapter may well be: to whom is it written? Who is to be persuaded? Of course, states and government officials must be included in the target audience, as they are in a position to take action in some respects, for example, by initiating a constitutional amendment, but also because ‘[s]tatism remains a fundamental organizing frame for international law, in as much as the latter remains tied to the realities of a power-political order’.<sup>31</sup> An appeal to states in order to persuade them and gain their support in implementing *jus cogens* is inevitable. International lawyers also belong, almost naturally, to the audience. Have they not long been the ‘magicians’<sup>32</sup> who fed the *jus cogens* discourse? Yet if one considers that the means of persuasion that an author chooses depends on the targeted audience, then the obvious audience for this chapter is the judges themselves, a category broadly understood as encompassing all those who belong to international organs entitled to deliver third-party determinations. Are they not the ones who have filled the box, to return to Abi-Saab’s metaphor? In fact, a great many of Cassese’s arguments are oriented towards the role of judge, a role which must be put in context to understand why he states that judges are in a ‘better position’<sup>33</sup> than anyone else and refers to their persuasiveness, implying that they themselves perform a rhetorical function for the sake of *jus cogens* or, more importantly, for the sake of the values that in his view *jus cogens* embodies. In a way, the chapter may be considered to be a link in a rhetorical chain.

Each of us knows that, beyond formalistic or theoretical arguments, judges nowadays are in the best position to bring about changes in the law, particularly given the

<sup>30</sup> Aristotle, *Rhetoric* (trans. W. Rhys Roberts, 2010), I, chap 4: 1359b.

<sup>31</sup> Bhuta, ‘The Role International Actors Other than States can Play in the New World Order’, in Cassese (ed.), *supra* note 19, at 61.

<sup>32</sup> Bianchi, *supra* note 3, at 508.

<sup>33</sup> Cassese, *supra* note 19, at 166.

possibility that several courts will copy each other's reasoning in their case law. The debate surrounding the fragmentation of international law and its link with the multiplication, sometimes called proliferation, of international courts can also be interpreted as an acknowledgement of this individual and above all collective power of the courts. Of course, it remains true that the power to state the law should be handled with caution. This is all the more true given that, although anyone may aspire to state the law, it is not the case that everyone can expect that their statement of the law will not be treated merely as a subjective opinion concerning the law as it stands. To identify those genuinely entitled to act in this capacity, it is necessary to proceed upstream, beyond *jurisdictio*, to identify the authorizing entity and hence detect 'the presence of a community governed by the rule of law "behind" the court', since 'it is this community that provides the basis for the legitimacy of the institution and invests it with the "public" element contained in the idea of legal obligation'.<sup>34</sup> And yet the international judicial function has not been freed from the legislative and executive powers, as happens in a national system where the classical theory of separation of powers is implemented and in which all authority therefore flows from the same source (sovereignty). The judicial function in the international sphere has emerged as a third party alongside states and derives its power from the act that created the organ. It can function only within this framework. Nevertheless, not only does this not mean that the question of sharing and balancing power cannot arise and that judges cannot state the law against states,<sup>35</sup> but there are two elements which can be added, in two steps: first, courts have the ability to create a dialogue which will result in an argued decision; and, secondly, this dialogue extends to several circles of interested actors.

With regard to the first element, what must be considered is the fact that judges are bound to issue decisions ('the duty to answer'<sup>36</sup>), whereas political organs can dodge or equivocate. This must be seen in relation to the characteristics of judicial decisions. It is all about taking sides in a controversy, i.e., a situation of uncertainty. A judicial decision closes an exchange of arguments, and therefore takes place within a process which ends with a last argument that explains why the process has concluded in the way that it has. The judge, being 'a judge and not a monarch ... the solution he gives is compelling not due to its own authority but due to the discourse – or the route – which leads to it ['state' the law] ... [and] this discourse is the closure of procedures, in which all the actors have contributed with their own discourse'.<sup>37</sup> In other words, judges operate under discursive constraints within which they must work to convince their addressees. 'How to convince? In the most humdrum way: by reducing the unknown to the known', the hypothesis being that a legal system works so that it is not used.

<sup>34</sup> Ascensio, 'La notion de juridiction internationale en question', in SFDI, *La juridictionnalisation du droit international* (2003), at 180.

<sup>35</sup> See the question of war crimes in internal conflicts: ICTY, Appeal Chamber, 2 Oct. 1995, *Prosecutor v. Dusko Tadić a/k/a 'Dule'*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, at para. 137.

<sup>36</sup> Moor, 'Dire le droit', in P. Moor (ed.), *De l'argumentation dans les sciences de la société*, special issue of 35 *Revue européenne des sciences sociales* (1997) 33.

<sup>37</sup> *Ibid.*, at 48.



In other words, the legal subjects have to know legal answers before the legal system gives them, so that, having anticipated the answers, they have already adapted their behaviour to them. This is what is known as the security and predictability of the law. In this context, judges tend to make their decisions in such a way that a reasonable party would reach the same conclusion, and for this purpose the legal system provides categories such as rules, case law, precedents, and so on. In fact, it is common knowledge that the new can only very rarely be reduced wholly to the known, which thus indicates a margin for manoeuvre.

But – and this brings us to the second element – any judge also knows that ‘he speaks not only after but also before other judges’,<sup>38</sup> and that the addressees include not only the parties to the proceedings, possible third parties, and a potential appeal instance, but also more broadly the interested community, and even public opinion.<sup>39</sup> In closing a debate, the judicial decision also constitutes a step in a debate, where its potential authority results from another trend, namely ‘proceduralization as a way of legitimising decisions’.<sup>40</sup> Looking at the procedure – the standard of fair trial – as preparation for a decision allows an analogy between a trial and political government, inasmuch as both belong to the art of good decision-making. The technical definition of a fair trial as acknowledgement of the existence of a debate, the admissibility of taking part in the debate and doing so on an equal basis can be transposed to political decision-making all the more easily now that political decision-making increasingly incorporates an expert dimension within a technocratic approach which does not appear to be far removed from the usual technical nature of the legal discourse. The idea that a trial must be fair in order to allow the best possible decision to be made implies that such decision is the best possible deliberated decision; it follows that any such decision must be made according to a deliberative process including the procedural means improved in trials. The counterpoint is that, just as the political field is modelled on the trial, there exists a trend to shape trials on the model of the public sphere. This trend clearly translates into positive law through the increasing availability of trials not only to those who are defending a direct interest but also to those who have something to say.<sup>41</sup> The increasingly widespread use of *amicus* briefs is significant in this context.

Moreover, no judicial decision is made in isolation. One positive outcome of the debate on fragmentation is that courts listen to each other, and it has become clear that an analytical framework built on the idea of conflicts is not necessarily the most fruitful. Interestingly, this statement brings us to a further reflection concerning *jus cogens*, which is that translating the hierarchical dimension of *jus cogens* into an expectation that the corresponding rule takes formal precedence over another rule

<sup>38</sup> *Ibid.*, at 47.

<sup>39</sup> Frydman, ‘Perelman’, in L. Cadet (ed.), *Dictionnaire de la Justice* (2004), at 978.

<sup>40</sup> Frison-Roche, ‘L’émergence d’une conception commune du procès équitable: évaluation critique’, in M. Delmas-Marty, H. Muir Watt, and H. Ruiz Fabri (eds), *Droit commun et droit comparé – Actes des premières Rencontres de l’UMR de droit comparé* (2002), at 157.

<sup>41</sup> *Ibid.*, at 159–160.

(conflict approach) leads to a large extent to deadlock,<sup>42</sup> and that ‘what matters most is ... the modalities of implementation of the underlying value, which ought to be given precedence at the interpretive level’.<sup>43</sup> The underlying logic is one of dissemination through interpretation, and this logic is consistent with both the creative margin of judges and the presupposition that judges do not make the law, they simply state it. The circle is complete.

It is in this context that Nino Cassese’s confidence in the ability of judges to increase *jus cogens* may be explained. Whatever one’s opinion may be, Nino Cassese’s approach is consistent with both his ideas and his practical experience. Behind his reasoning there emerges a kind of Hansel and Gretel strategy for *jus cogens* which, by following the trail of pebbles left behind in the international arena, should allow it to find its way ... not back to the garage.

<sup>42</sup> Probably especially when it results in trying to subvert all legal categories – such as the distinction between procedural and substantive (see ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 Feb. 2012, available at: [www.icj-cij.org/docket/index.php?p1=3&p2=2&case=143&code=ai&p3=4](http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=143&code=ai&p3=4)) or consent to jurisdiction (see ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 Feb. 2006 and the Separate Opinion of Judge *ad hoc* John Dugard, available at: [www.icj-cij.org/docket/index.php?p1=3&p2=3&k=19&case=126&code=crw&p3=4](http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=19&case=126&code=crw&p3=4)).

<sup>43</sup> Bianchi, *supra* note 3, at 504.